ORDINANCE NO. 505

A SPECIAL ORDINANCE TO AUTHORIZE THE SALE OF VARIOUS LOTS OFFERED AT PUBLIC AUCTION.

WHEREAS, the City Council has classified the property which is the subject of this Ordinance as available for sale; and,

WHEREAS, an independent appraisal has determined the fair market value of the parcels as of the 7th day of December, 1982 in the manner following:

Legal Description	Appraised Value
Lot 2A Blk 224	$18,500
Lot 4A Blk 224	$19,000
Lot 3A Blk 221	$29,000
Lot 8 Blk A	$21,500

WHEREAS, the City Council has established the appraised value as the minimum amount the City would accept for sale of the property; and,

WHEREAS, an auction was held and an earnest money deposit has been received for the purchase of the property described above.

NOW THEREFORE BE IT ORDAINED by the City Council of the City of Petersburg, Alaska as follows:

Section 1. Classification. This Ordinance is of a temporary and impermanent nature and shall therefore not be codified in the Municipal Code of the City of Petersburg, Alaska.

Section 2. Purpose. The purpose of this Ordinance is to authorize the sale of lots offered at public auction on the 26th day of January, 1983.

Section 3. Substantive Provisions.

A. It is hereby determined that the property which is the subject of this Ordinance is NOT required for municipal purposes.

B. The City Council hereby authorizes the sale of the following described property to the person and/or authorized agents indicated in this section:

Legal Description	Successful Bidder	Purchase Price
Lot 2A Blk 224	The Mill, Inc	$19,000
Lot 4A Blk 224	Joe Herrera	19,500
Lot 3A Blk 221	Jim Welch	29,100
Lot 8 Blk A	Peter Litsheim	21,600

Example 3: Land Disposal by Outcry Auction

Example 3: Land Disposal by Outcry Auction

C. The earnest money deposits received shall be applied toward the purchase price and the balance of the purchase price shall be due and payable within one hundred and eighty (180) days from the date of passage of this Ordinance.

D. Construction of improvements within four (4) years of the date of this Ordinance shall be required as a condition to the conveyance as described in Section 16.12.090 of the Petersburg Municipal Code.

E. Excluded from the purchase price of Lot 3A of Block 221 is the extension of "O"(Odin) Street and the extension of water service to that parcel. The owner of said parcel shall be liable for an assessment if said improvements are constructed by the City; or the owner may contract with a private contractor for the construction of said improvements according to City of Petersburg's Standard Specifications for Construction.

F. The Mayor and city Clerk are hereby authorized to execute deeds and other documents required to complete these purchase transactions upon execution and compliance with all terms and conditions of this Ordinance.

Section 4. Severability. If any provision of this Ordinance or any application thereof to any person or circumstance is held invalid, the remainder of this Ordinance and the application to other person or circumstance shall not be affected thereby.

Section 5. Effective Date. This Ordinance shall become effective three days after passage excluding the day of enactment.

PASSED and APPROVED by the City Council of the City of Petersburg, Alaska this 7th day of March, 1983.

Don Koenings
Mayor

Attest:

Patricia L. Gartland
City Clerk

APPENDICES

Part Two
Appendices

APPENDIX ONE

Alaska Native Claims Settlement Act (As amended by the Alaska National Interest Lands Conservation Act)

Section 14(c)

14(c)(1)
Upon receipt of interim conveyance or patent, whichever comes earlier, . . . "The village corporations shall first convey to any Native or non-Native occupant, without consideration, title to the surface estate in the tract occupied as of December 18, 1971, as a primary place of residence, or as a primary place of business, or as a subsistence campsite, or as a headquarters for reindeer husbandry;"

14(c)(2)
Upon receipt of interim conveyance or patent, whichever comes earlier, . . . "The village corporation shall then convey to the occupant, either without consideration or upon payment of an amount not in excess of fair market value, determined as of the date of initial occupancy and without regard to any improvements thereon, title to the surface estate in any tract occupied as of December 18, 1971 by a nonprofit organization;"

14(c)(3)
Upon receipt of interim conveyance or patent, whichever comes earlier, . . . "The village corporation shall then convey to any Municipal Corporation in the Native village or to the State in trust for any Municipal Corporation established in the Native village in the future, title to the remaining surface estate of the improved land on which the Native village is located and as much additional land as is necessary for community expansion, and appropriate rights-of-way for public use, and other foreseeable community needs: Provided, that the amount of lands to be transferred to the Municipal Corporation or in trust shall be no less than 1,280 acres unless the Village Corporation and the Municipal Corporation or the State in trust can agree in writing on an amount which is less than one thousand two hundred and eighty acres:
Provided further, that any net revenues derived from the sale of surface resources harvested or extracted from lands reconveyed pursuant to this subsection shall be paid to the Village Corporation by the Municipal Corporation or the State in trust: Provided, however, the word 'sale', as used in the preceding sentence, shall not include the utilization of surface resources for governmental purposes by the Municipal Corporation of the State in trust, nor shall it include the issuance of free use permits or other authorization for such purposes;"

14(c)(4)
Upon receipt of interim conveyance or patent, whichever comes earlier, . . . "The Village Corporation shall convey to the Federal Government, State or to the appropriate Municipal Corporation title to the surface estate for airport sites, airway beacons, and other navigation aids as such existed on December 18, 1971, together with such additional acreage and/or easements as are necessary to provide related governmental services and to insure safe approaches to airport runways as such airport sites, runways, and other facilities existing as of December 18, 1971;"

Appendix One

APPENDIX TWO

Materials Prepared for the City of Aleknagik under a Legal Assistance Grant Administered by the Department of Community and Regional Affairs (DCRA)

Optional added title page information:

Appendix 2A: Letter from Timothy E. Troll, Beatty, Robbins & Morgan, P.B., to
John Gliva, DCRS, March 6, 1987
Appendix 2B: Municipal Land Acquisition and Disposal in Alaska by Timothy E. Troll
Appendix 2C: Sample Land Disposal Ordinance

Appendix Two

BEATY, ROBBINS & MORGAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
1400 WEST BENSON BLVD., SUITE
ANCHORAGE, ALASKA 99503

J. MICHAEL ROBBINS
ROGER H. BEATY
JAMES W. MORGAN
TIMOTHY E. TROLL

TELEPHONE
(907) 276-2700

March 6, 1987

John Gliva
State of Alaska
Department of Regional Affairs
949 E. 36th Avenue, Suite 407
Anchorage, Alaska 99508

Dear John:

I am enclosing copies of all of the materials that I have prepared for the City of Aleknagik under the Legal Assistance Grant. Also enclosed find my memorandum regarding some of the pertinent legal issues surrounding municipal land conveyances. I believe the memorandum addresses most of the issues I outlined in my letter to you of October 22, 1986. However, I would like to briefly provide a summary of my opinions with respect to each of the questions raised in that letter:

1. What legal inferences or conclusions can be made from the replacement of a very restrictive (former A.S. 29.48.250) with a broad grant of authority (new A.S. 29.35.090)?

It is clear the Title 29 Committee and the Legislature intended to give municipalities the broadest latitude possible for managing their own land. Generally, when a law is repealed as was A.S. 29.48.250 the common law (court developed) rules that once applied to the situation are revived. At common law, the courts recognized that municipalities held property in both a "governmental" and in a "private" capacity. A municipality could not convey property held in its governmental capacity without authorization from state law. A municipality, however, could convey property held in its private capacity without restriction. Although the new A.S. 29.35.090 does not specifically grant authority to municipalities to convey property held in a governmental capacity, I believe the courts would construe this provision to grant the authority because by constitution and state statute powers granted to municipalities in Alaska are construed liberally. The common law distinction remains important because if a municipality conveys property clearly dedicated or used for a governmental purpose it must make specific findings that the purpose has been abandoned before the property can be conveyed. It is also important because property

held in a governmental capacity may be donated or conveyed for less than fair market value only when the property will continue to be used for a public purpose. The same consideration may not apply to property held in a private capacity.

You should be aware that a dedication to public use can be made by someone other than the municipality. A situation encountered in rural Alaska is a conveyance of property from the federal townsite trustee to the municipality of property dedicated to "municipal reserve." Such property may be considered received as dedicated property which cannot be reconveyed unless there is a finding the property is not needed for municipal purposes. The distinction may also be important for transfers under §14(c)(3). A municipality, when considering selections under §14(c)(3) will often be selecting property that may be needed for some public purpose. For example, in Aleknagik I believe some land was selected for potential bridge sites and public beaches. A conveyance under §14(c)(3) can probably be considered a dedication to a specific public use. However, a city is not obligated to use the land for the purpose selected. However, before the property can be used for any other purpose it must be found that the original purpose has been abandoned or circumstances have changed such that the original purpose no longer makes sense in the context of the community. Village corporations may try to impose reversionary clauses on cities to require property conveyed under §14(c)(3) to revert to the possession of the corporation if the purpose for which it was selected is abandoned. Such clauses may be valid and cities should not accept property under such conditions.

The common law distinction between proprietary and governmental property is perhaps most important in the context of the "public purpose" provision of the Alaska constitution. That provision provides that "public land" can only be conveyed for "a public purpose." It is an open question whether land held in the proprietary capacity of the city would be subject to this constitutional provision. I feel the argument can be made, and must be made, if municipalities are going to be in a position to convey property to private individuals or businesses. I do not believe the Alaska Supreme Court would use this provision to prohibit such conveyances; the court will either use the distinction between governmental and proprietary property to get around the provision or will broadly interpret the term "public purpose" to accommodate this need. If the court were to hold otherwise, the

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result would impose severe restrictions on the development of our rural communities.

2. To what extent must the former statutory restrictions of A.S. 29.48.260 be incorporated into municipal ordinances enacted under a new A.S. 29.35.090?

The prior restrictions of A.S. 29.48.160 no longer pose any problem for municipalities, with the possible exception that a municipality may not be able to convey some of its property for less than full value.

3. Can the city under A.S. 29.35.090 convey property for less than full value?

It is clear that a city can convey property for less than full value to another governmental organization or corporation when the property will be used for a public purpose that will benefit all or a significant portion of the members of the community. The prevailing view at common law is that a municipality cannot donate or convey property for less than fair value to a private individual, business or organization that will use that property to the exclusion of others. We have no cases in Alaska discussing whether the Alaska courts will permit a municipality to convey property to a private individual business or organization for less than fair market value. In the ordinance I drafted for Aleknagik, I specifically tracked the regulations governing conveyances for less than fair market value adopted for the Alaska Municipal Lands Trustee. It is certainly questionable whether a municipality can convey property to an individual who is going to use that property only for his personal residence. However, I believe that considering the general poverty level of most people living in our villages and the fact that a municipality may be the only organization with property available in the core community that conveyances for less than fair market value may be upheld. I would recommend, however, that property not be given away, but some consideration be paid for the conveyance. The best method would probably be to use some income factor to determine the price to be paid. Certainly a conveyance for less than fair market value should not be made unless there are findings that some larger and more important public purpose justifies the conveyance.

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4. Can municipality convey land noncompetitively and if so, when and under what conditions?

Yes, a municipality can convey land noncompetitively. However, a municipality does have an obligation to its citizens to obtain the best price available for the property it desires to convey. The recognized method for obtaining the best price available is to entertain bids for the property. Certainly if the primary purpose of the conveyance is to raise money for the city then a competitive process should always be used. If a city council determines that a competitive process is not appropriate then it should make specific findings justifying this decision. Absent fraud or an obvious abuse of discretion the courts are not likely to overturn a council's decision to sell land noncompetitively. Absent any specific findings, however, the court could determine the decision was arbitrary. I believe a council could determine that a competitive sale would not be in the interests of the members of the community if it believes, and the facts justify the belief, that a competitive sale would eliminate a significant portion of the residents of the community.

5. Can a municipality convey property to a federally recognized tribal organization?

I concur with the opinion of the Attorney General that a municipality can convey property to a tribal organization. A tribal organization would, in most cases, be a legitimate non-profit organization. The important question is whether the municipality could convey the property knowing it will be used only for tribal purposes to the exclusion of non-tribal members in the community. The problem arises, I believe, only if the property the city seeks to convey or the tribal organization desires to possess is property that was used or dedicated for a public purpose. If the tribal organization wants to obtain property by donation or for some consideration less than fair market value, then the conveyance should not be made without some restriction guaranteeing the property will continue to be used to benefit all of the people of the community. If the tribal organization were willing to purchase the property at fair market value, and the property in question was proprietary property, or public property no longer useful for a public purpose, it would not be a matter of concern whether the tribal organization used the property to the exclusion of non-tribal members. If a tribal organization desires to obtain land in order to build a facility

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that will be used to the exclusion of non-tribal members then it should be willing to pay the city fair market value for that property, or acquire the property from another source. The city may donate property but only if that property will be used for a public purpose.

6. Assuming the answer to number 5 is yes, what conditions, if any, must be placed on land conveyed to a tribal organization?

No conditions need be placed on property conveyed to a tribal organization if the tribal organization purchased the property from the city in a competitive sale or for fair market value. A restriction requiring the property to be used for the benefit of all members of the community should be attached to any conveyance when the conveyance to the tribal organization is for less than fair market value.

7. Can a city convey title to a trespasser?

A city can convey title to a trespasser but again the important consideration is whether the conveyance should be made for less than fair market value. A trespass itself confers no rights in the trespasser that the city must acknowledge. A claim of adverse possession cannot be made by a trespasser because adverse possession does not apply to municipal property. A conveyance to a trespasser should not be made for less than fair market value unless there are strong equitable reasons justifying a conveyance for less than fair market value. An equal protection problem may arise if the city grants a superior claim to a trespasser when the trespasser knew or should have known that he had no right to move onto the property in question. If there is some equitable reason or some public interest, such as clearing title to property, I would recommend that the only superior right a trespasser should have is an opportunity to match the highest price offered for the property by some other individual. A city could probably grant to a trespasser some form of an occupancy right that would expire when the trespasser's use of the property had been abandoned. This occupancy right could be granted by a permit or perhaps a lease.

8. What liability are municipal officials exposed to in land conveyance decisions?

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Any property conveyance is subject to being set aside by a court if the conveyance was not made in accordance with local ordinances, state statute or the federal or state constitution. After a certain undefined period of time has passed, however, a credible defense of laches may arise. Laches is a defense when the person challenging the conveyance has waited an unreasonable length of time in order to bring his action. Generally, municipal officials, in their personal capacity, when acting in good faith and exercising discretion as municipal officials, are not liable personally for a land conveyance decision made while acting as a decision-making body.

I would now like to review briefly the land disposal ordinance I drafted under the Grant. I believe it may be helpful to you to understand the reasoning behind the provisions of the ordinance and where the language in some of those provisions was obtained.

Section 1. Authority to Dispose.

This provision merely grants to the City the power to dispose of its property.

Section 2. Disposal by Ordinance.

Section A provides that any disposal must be authorized by ordinance. This accounts for the apparent law in Alaska that a conveyance of real property is similar to an appropriation of money. The Alaska Supreme Court has held that such appropriations may only be made by ordinance. Although the common law permits conveyance be resolution, I think the decision referenced in the research makes it advisable in Alaska to require that all conveyances be authorized by ordinance. Also Section A recognizes the distinction between property held by a municipality in its private capacity and its governmental capacity. I have drafted it such that when the city council is conveying "governmental" property, that is, property that was used or dedicated to a public use, it is subject to an ordinance procedure that is somewhat more restrictive. Under normal ordinance procedure, a public hearing can be held at the same meeting at which the ordinance is scheduled for passage. My experience has been that often public comments made at such a public hearing are not fully evaluated by a city council if the public hearing is held at the same meeting at which the ordinance is scheduled for passage. Often the pressure for passage

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outweighs any comments to the contrary made by the public. For these reasons I recommend the public hearing on the ordinance be scheduled some time between the meeting at which the ordinance is introduced and the meeting at which the ordinance is scheduled for passage. Under this scheme the council has the time and opportunity to fully consider any comments made by the public and also has an opportunity at the meeting at which the ordinance is scheduled for passage to address any concerns that were specifically raised at the public hearing. Such a procedure, I believe, is appropriate because the public should have a greater opportunity to challenge conveyances of property that have been dedicated for the use of the public.

Section B merely provides that a lease of space or a short term ground lease can be disposed under a less restrictive procedure. The reasoning here is that most space leases within a municipal building are for a public purpose, most commonly a clinic or a tribal government office. However, I would recommend that a lease of space to a private individual or business for a length of time greater than a year should go through a formal ordinance process. The provision regarding short term ground leases was intended primarily to accommodate limited needs. A common example is when a contractor may be in town to construct a project and may need a place from which to stage the project. Because the use of the property is so temporary and often the lease must be passed on a schedule to accommodate the contractor's needs, a less restrictive procedure seems appropriate.

Section 3. Form of Document of Conveyance.

This provision merely requires that the document of conveyance should be in a form that can be recorded. I would recommend that any documents be reviewed by an attorney and it may be helpful to contact the recording office to determine in what form deeds and contracts and leases must be in order to be recorded.

Section B is self-explanatory. It is my recommendation that any document of conveyance specifically refer to the ordinance authorizing the conveyance so that if a question arises the legislative history behind the conveyance can be easily traced.

Section C simply provides that when the city does convey a deed it will be a quit-claim deed. A quit-claim deed merely says that the city is conveying any interest which it has, and if it

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has no interest, it conveys no interest. The other form of deed is a warranty deed. A warranty deed guarantees the title of the property conveyed. If a city conveyed warranty deeds, it would have to defend the title in court if the title was ever challenged. Title in rural Alaska is often difficult to determine because of the various laws under which land rights have accrued. I think it would be unwise for a city to give anything greater than a quit-claim deed. If a purchaser is concerned about the quality of his title, he can always bear the costs of obtaining title insurance.

Section 4. Disposal for Fair Market Value.

This section provides that all sales of property should be for fair market value unless there is some specific reason to do otherwise. In the revised ordinance, I have included a definition under paragraph A of fair market value. This definition was taken from the Alaska Administrative Code.

Paragraph B provides that fair market value can be determined from an appraisal or in a place where a city assessor may exist by the city assessor. I have also provided a provision allowing the city council to use any other method it feels appropriate to determine fair market value. This provision is included primarily because appraisals may be expensive to obtain and, in an era of declining revenues, small cities may not be able to afford such appraisals. Also, it has been my experience that land values in rural communities are so uncertain that any value attached by an appraiser is no better than a value attached by a member of the city council. Often the price that a city council may set on a piece of property may be the beginning of the determination of what fair market value is in the community. I believe that a city council, whose members have lived in the community for all their lives, may be able to attach a value to city land that is as good as or better than any value that an appraiser may be able to attach. Certainly as the community progresses and more and more land transactions on the private market are conducted, the use of an appraiser may become more appropriate.

Paragraph C tracks language from former A.S. 29.48.260 which did exempt from the provisions of that statute conveyances to the United States, the State of Alaska or political subdivision. I have added non-profit corporations or recognized tribal authorities and I believe the common law would support a

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conveyance for less than fair market value to these kinds of organizations so long as the public in general will benefit from the conveyance. This does not mean that any transfer of property to a non-profit corporation or tribal authority must be beneficial for all people in the city. It only means that a conveyance for less than fair market value must be supported by a public purpose.

Paragraph D tracks language in the Alaska Administrative Code with respect to property that can be conveyed by the Alaska Municipal Lands Trustee. I have included the language "provided the claim existed prior to the date of passage of this ordinance" to accommodate the concerns raised at the meeting we had in Aleknagik. This provision should only be used when a person has a genuine claim and a real belief that he has a right to the property. It should not be used to convey property to a trespasser because a trespasser does not have a valid claim of equitable interest. A person who knew he had no right to move onto property, or could reasonably have determined that he had no right to move onto the property should be considered a trespasser and not granted a valid claim of equitable interest. Such equitable claims may arise because property lines were difficult to determine or someone reasonably believed he had authority, say from the Townsite Trustee, to move onto a piece of vacant property. An equitable situation may exist for someone who had always lived on a townsite lot but never went through the formal process of applying to the trustee. Any ordinance conveying property under this provision should clearly state what the council believes the equitable interest to be. I recommend that a city use the staggered ordinance procedure in Section 2 to give all members of the community an opportunity to challenge the council's determination that an equitable interest does exist.

Paragraph E also tracks language in the Alaska Administrative Code with respect to conveyances of property by the Alaska Municipal Lands Trustee. Of all the provisions in this proposed ordinance this is the provision I am least comfortable with. Simply because a resident seeks a parcel of property for the construction of a residence does not confer any legal right to have the conveyance for less than fair market value. It should be emphasized that this provision is only optional and a city should elect to use it only if there are other equitable considerations or overriding public reasons to justify such a conveyance. I have changed the language from that of the ordinance as originally introduced to simply allow the council to

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determine on a case by case basis what condition subsequent it will attach to a conveyance in order to insure that the property will be used as a primary place of residence.

I believe this provision should only be used when the council determines that the income level of most of the members of the community is such that they could not afford the property at its fair market value and that a corresponding public interest in developing the community, providing places for new residents or alleviating overcrowding should exist. The provision should only be used if the city is the only organization that can make the land available, and the pressure to make the land available is such that the city cannot reasonably wait a longer period of time for some other organization like the village corporation to come along and make land available. You will also notice that I changed the term "bona fide" to "domiciled." The reasons for this change become clear in Paragraph F.

Paragraph F defines the term "domiciled city resident" and this language also tracks language found in the Alaska Administrative Code with respect to transfers of land by the Alaska Municipal Lands Trustee. The term "domiciled" however, has a recognized legal meaning, which is "physical presence in the location with a subjective intent to remain." A city council could determine "subjective intent to remain" from such objective criteria as it may deem appropriate. The council could set the criteria and obtain the information from an application for lot purchases. The provisions of A.S. 15.05.020 relate to residency for purposes of voting; many of the standards set out in the statute are domiciliary standards.

It is important to recognize that prior restrictions on eligibility like "residency" remain potentially volatile sources for litigation. To the extent a residency requirement is attached, and the city council feels it must put some time period on residency, I would recommend a period of 30 days. The state currently uses a period of six months for eligibility to receive a permanent fund dividend and I would recommend that this six-month period be the upper end of any residency time period, unless a council finds some compelling reason to make the period longer. Again, in any ordinance authorizing the conveyance a council should make specific findings and refer to the facts justifying the residency requirement. The ordinance authorizing the conveyance should also set forth the purpose of the

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conveyance and it must be clear from the ordinance that the purpose of the conveyance and the residency requirement make sense together.

Often a city council's concern about conveying land to residents can be alleviated by post conveyance restrictions. Restrictions such as a "proving up" requirement or limiting lot sales to one per person will limit speculation in city property and will reduce the interest of non-residents in acquiring property within the community.

Section 5. Disposal Methods.

The disposal methods set forth under Section 5 are merely provided as examples. Paragraph D makes it clear the examples are not to be considered exclusive. This language tracks similar language found in the Anchorage Municipal Code regarding real property disposals.

Section 6. Exchange of Property.

This section was added after the meeting at Aleknagik simply to make it clear that a city may exchange property with another person or organization. If the property to be exchanged is going to be used by some organization for a public purpose, a fair market value determination would be superfluous because the public benefit is in the continued use of the property and not in the money to be obtained. I also provided that fair market value would not be necessary if the exchange resolves conflicts of title or secure public easements or rights-of-way for the city. I believe these are public interests that may be so overriding that a city could determine it need not incur the expense of determining fair market value because the conveyance should be made regardless of value.

My approach in developing this whole ordinance was to keep it as unrestrictive as possible. Prior to the enactment of A.S. 29.55.090 many municipalities had intricate ordinances regarding disposals of property in order to get around the restrictive provisions of the prior statute. Because those provisions no longer exist, an ordinance regarding disposal of municipal property should merely define the outer perimeters of the city's authority. The city council should have the widest latitude possible for managing city property. I believe this disposal ordinance allows a council to develop any procedure it

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feels is appropriate to fit a particular conveyance situation, rather than trying to fit a particular conveyance situation into the ordinance. By requiring all conveyances to be authorized by ordinance the public is assured adequate notice and an opportunity to complain about any particular conveyance. Each conveyance transaction should be carefully reviewed by the council and by the city attorney. This disposal ordinance allows the council to be as free or as restrictive as possible with any particular conveyance and the facts of each particular situation will dictate how free or how restrictive a council should be. My recommendation, and the policy I used at St. Marys, is to use a lease wherever possible, particularly when the property to be conveyed was to an outside business or commercial interest. A lease is preferable because the city retains ownership.

I want to convey to both you and Laura my appreciation for being selected for this project. I hope the material and information I have provided will be useful and please don't hesitate to contact me if you require additional information or advice.

Sincerely,

BEATY, ROBBINS & MORGAN, P. C.

Timothy E. Troll

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MUNICIPAL LAND ACQUISITION AND DISPOSAL IN ALASKA

Prepared by Timothy E. Troll
BEATY, ROBBINS & MORGAN, P.C.

1987

Through a Legal Assistance Grant to the City of Aleknagik
Administered by the State of Alaska Department of
Community and Regional Affairs, Municipal and Regional
Assistance Division

Revised and updated 2008.

State of Alaska
Department of Commerce, Community, and Economic Development
Division of Community & Regional Affairs

Appendix Two B

Table of Contents

MUNICIPAL LAND ACQUISITION AND DISPOSAL IN ALASKA

I. INTRODUCTION

Rarely do local governments have the opportunity to acquire at no cost large undeveloped tracts of land. In Alaska, municipalities have been the beneficiaries of several important pieces of legislation which provide for transfers of property to municipal ownership. The first such law was the State land grant program, which allowed municipalities to select State owned land within the municipal boundary[1]. More important for the future, however, are the Alaska Native Townsite Act (ANTA) and Section 14(c)(3) of the Alaska Native Claims Settlement Act (ANCSA).[2]

The possession of this undeveloped land creates a conveyance problem for local governments. If municipalities retain these conveyances for public use, local community development could be severely inhibited. It will be incumbent upon municipalities in the future to convey portions of municipal land holdings into private ownership. Municipalities, however, do not enjoy the same freedom in the real estate market as private individuals. A number of legal obstacles must be avoided in order to convey municipal property to private individuals; these obstacles multiply when municipal officials attempt to implement public policy through the vehicle of land disposal. This paper analyzes some of the more significant legal obstacles and highlights some common conveyance problems municipalities may face. Particular attention is given to the unique context of small rural municipalities.

II. ALASKA STATUTES 29.35.090

Municipalities as political subdivisions of the state derive only those powers granted by state government. Conveyances of property received by municipalities, regardless of the intent of the granting legislation, must comply with authority granted by state law.[3] The first legal obstacle is the nature of the power granted by the state. In Alaska this power is granted in AS § 29.35.010(8) which simply states that all municipalities have the power "to acquire, manage, control, use and dispose of real and personal property ...." The power to acquire and dispose of land is limited by AS § 29.35.090, which states: "The governing body shall by ordinance establish a formal procedure for acquisition and disposal of land and interests in land by the municipality." AS 29.35.090 is one of the significant changes enacted in the major revision of Title 29 passed by the Alaska legislature in 1985. [4] The predecessor to AS 29.35.090 strictly confined the municipal power to dispose of land[5]. The comprehensive nature of the change represents a complete reversal of the legislative attitude toward municipal land conveyance. The change also presents important questions of legal interpretation.

A. Legislative History of AS 29.35.090

The law on municipal land conveyances prior to the enactment of the Title 29 revision was found at AS 29.48.260. This statute limited municipalities to disposing land "no longer required for municipal purposes."[6] The governing body was also required to establish a formal procedure for the disposal of property that must include

"A number of legal obstacles must be avoided in order to convey municipal property to private individuals; these obstacles multiply when municipal officials attempt to implement public policy through the vehicle of land disposal."

"AS 29.35.090 completely sweeps aside all the restrictions of the prior law. However, because AS 29.35.090 is but one part of a major revision of the statutory law governing Alaska local governments, the legislative history surrounding this particular change is limited."

provisions for property appraisals by qualified appraisers, thirty days public notice prior to any conveyance, conveyance only by auction or sealed bid, and voter ratification of any conveyance of property valued at $25,000 or more.[7] Exceptions to these limitations were made for conveyances to other governments,[8] conveyances of property originally acquired from the state[9] and conveyances to persons who agreed to "operate a beneficial new industry" on the property conveyed.[10]

AS 29.35.090 completely sweeps aside all the restrictions of the prior law. However, because AS 29.35.090 is but one part of a major revision of the statutory law governing Alaska local governments, the legislative history surrounding this particular change is limited. In 1980 the state legislature established a committee to review the existing statutory law governing municipalities and to recommend appropriate changes.[11] One of the primary goals of the committee was to simplify procedures and to maximize local control over local affairs.[12] The committee considered the then existing statute governing municipal land disposal as creating "undue complexities" and recommended a simple requirement that municipalities establish a procedure by ordinance.[13] The committee particularly desired to eliminate the $25,000 value limit for voter ratification because it was unrealistic.[14]

Although the revisions to Title 29 recommended by the committee took several years to pass through the legislature,[15] AS 29.35.090 survived unchanged and apparently stirred little controversy or comment in legislative committees or on the floor of either house. It can therefore be assumed the legislature intended that local governments in Alaska should be as free as possible to decide for themselves how land should be acquired and disposed.

B. Interpretative Effect of a Comprehensive Change

The question raised is whether the sweeping nature of the change permits municipalities to dispose of property, with all the discretion and freedom a private person would have. The answer to this question will likely depend upon the weight the Alaska courts accord to the common law rules governing municipal property disposal. Courts generally construe a repeal of a statute as reviving the common law as it existed before the statute was enacted.[16] The repeal of the prior restrictive statute on municipal land disposal and its replacement with a broad grant of authority could therefore mean that governing bodies are not entirely free to dispose of property as they see fit but are now restricted to the extent those restrictions are found at common law.

III . COMMON LAW PRINCIPLES APPLICABLE TO MUNICIPAL PROPERTY

The common law power of a municipality to acquire and dispose of land is constructed on a distinction between land held in a proprietary capacity and land held in a governmental capacity.[17] The common law recognized that local governments acted in two different capacities, one which is governmental and the other which is private or corporate.[18] Powers incident to the former include the power to regulate, police and collect taxes; the latter include primarily the authority to provide public services such as water, sewer and harbors.[19] Land that was acquired or dedicated by a municipality to promote a governmental responsibility is

considered public land and must be used for the purposes for which it was devoted.[20] At common law "public land" could only be disposed if the municipality was granted specific authority to do so by the state.[21] However, land acquired and owned by the municipality for the purpose of promoting a distinctly corporate function is considered "private land" and can be disposed by the governing body without special authority from the state.[22] The theory is that the state grants a municipality the power to incorporate and by the terms of its creation a municipality possesses the same capacity to dispose of property that an individual has who possesses the authority to contract.[23]

The distinction between the two "capacities" of a local government is often academic and difficult to apply in particular situations.[24] It is unclear whether the Alaska courts have adopted this distinction between privately held and publicly held property for the purpose of determining the authority of a municipality to acquire and dispose property. Now that the former statutory restrictions imposed by statute have been removed the leading case in Alaska may be Seltenreich v. Town of Fairbanks decided in 1953.[25] In Seltenreich the U.S. District Court for Alaska drew heavily upon the governmental - proprietary distinction to determine whether the city government had properly conveyed a tract of land formerly used as an airport. Quoting extensively from secondary sources the court said:

> The general rule … is that property held in a governmental capacity, i.e. for a public use, cannot be sold without legislative authority … but is otherwise as to property held in a private capacity and not devoted to any special public use.[26]

The court stated that property held by a municipal corporation in its proprietary capacity ordinarily may be alienated without the consent of the legislature.[27] On appeal, the Ninth Circuit affirmed but considered the distinction between governmental and proprietary capacities unnecessary to its affirmation.[28] The Ninth Circuit drew upon statutory language providing that a city council could dispose of public property no longer required for municipal purposes to uphold the decision of the Fairbanks City Council to convey the airport property.[29]

The only other case found in Alaska touching upon the character in which a municipality may hold property is *Libby v. City of Dillingham.*[30] In Libby, the Alaska Supreme Court in dicta stated: "... the general rule is that municipalities may acquire and hold land only for a public purpose."[31] If, in this short statement, the Alaska Supreme Court has dismissed the common law distinction between holding land in a governmental capacity and holding land in a proprietary capacity significant implications may result.

These implications become apparent when considered in light of the legislative grants under which Alaskan local governments have acquired land.

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IV. MUNICIPAL LAND ACQUISITION IN ALASKA

Prior to the passage of ANCSA many municipalities acquired title to undeveloped property through the state land grant program. This program entitled municipalities to select up to ten percent of the vacant unappropriated state selected land within the municipal boundary.[32] The intent of the land grant program was to allow for public and private settlement and development of local land.[33] Although the land grant program remains available, most municipalities in the state incorporated shortly before or after the passage of ANCSA and do not have access to the program. Most of the land within the boundaries of municipalities incorporated since 1971 was selected by local village corporations under ANCSA and is no longer available for state selection under the Statehood Act for possible reconveyance to the municipality. For the vast number of municipal governments the acquisition of undeveloped land will come directly from the federal government pursuant to ANTA, or as the result of the federal obligation imposed by ANCSA on village corporations to reconvey certain land to municipal corporations.

A. Alaska Native Townsite Act

Although the Alaska Native Townsite Act was repealed in 1976,[34] it nevertheless remains a significant source of undeveloped land for municipalities. The ANTA permitted unincorporated Native communities to petition the federal government to survey their community and give deeds to residents of the community.[35] Provision was also made in the law to set aside land for such public uses as cemeteries.[36] After surveys were completed, municipalities were given title to property set aside in the plan of survey for municipal reserve; municipalities can also obtain title to all vacant lots in subdivided portions of townsites.[37] As a result of recent litigation, municipalities can also receive title to all unsubdivided portions of a townsite survey.[38]

Vacant lots, unsubdivided portions of townsite surveys and possibly even land designated for municipal reserve can be considered land transferred to the municipality to provide for future residential growth. Few municipalities, if any, consider this property to be obtained solely for governmental use.

B. Alaska Native Claims Settlement Act

Municipalities whose jurisdictions include land selected by an ANCSA village corporation are entitled under Section 14(c)(3) of that act to select land needed for community expansion, public rights-of-way and for "other foreseeable community needs."[39] Under the original Act, municipalities were entitled to "no less than 1280 acres."[40] The Act was amended by the Alaska Lands Act and now the amount of acreage received by a municipality is determined through negotiation between the municipality and the local village corporation, although the operative figure is still 1280 acres.[41] The intent of this provision is not to deprive the local village corporation of potential profitable uses for its property and arguably the only land that should be transferred to a municipality under Section14(c)(3) is land needed for public use. Most of the land to be selected under this provision should be to accommodate recognized public uses such as community buildings, rights-of-ways, cemeteries and waste disposal sites.[42] Whether a municipality could select land for future residential development, and whether

a village corporation could deny such a claim, are open questions.

Residential development is one of the few potential profit making opportunities available to a village corporation. However, because many people in Alaska's villages live on the margins of poverty few people may be able to afford lots sold for fair market value. Villagers often cannot compete with outside interests for valuable residential land. City governments concerned about the availability of land for local residents may seek to select land from the village corporation to fulfill this perceived community need, and such a selection would appear to be justified under the "community expansion" provision of Section 14(c)(3). Several partial 14(c)(3) reconveyances in rural villages have already been spurred by the need to provide land for federal public housing projects.[43] To date rural municipalities have shouldered the burden of providing land for residential development.

C. Other Sources of Undeveloped Land

Some municipalities have received land grants from other sources. The Railroad Townsite Act and the Presidential Townsite Act have benefited communities located on the Alaska Railroad or the highway system.[44] The provisions of these acts are similar to ANTA. A few communities that grew around missions and later incorporated received land from churches. Much of this land was deeded without restriction as to use.[45]

V. POSSIBLE LIMITATIONS IN ALASKA ON THE COMMON LAW OF MUNICIPAL PROPERTY DISPOSAL

Several limitations on the common law rules governing municipal land conveyances may exist in Alaska. Most of these potential limitations are found in the Alaska Constitution, the most important of which is the public purpose clause.

A. Public Purpose Clause of the Alaska Constitution

The public purpose clause of the Alaska Constitution is found at Article IX, Section 6 and is important because it specifically provides that "public property" may not be transferred "except for a public purpose." The Supreme Court said in Libby that all property acquired by the municipality is acquired for a public purpose and arguably this statement dismisses the common law distinction between private purpose and public purpose property.[46] The immediate hurdle such a rule presents is whether the general authority to dispose property granted by state statute is specific enough to allow for the disposal of property acquired for a public purpose.[47] Ordinarily a general power to sell property is not construed to authorize the sale of property held in a governmental capacity, although authorities differ on this question.[48] The rule is generally the opposite with respect to the authority to sell property held in a proprietary capacity.[49] In light of the Constitutional direction that municipal powers in Alaska are to be construed liberally, the courts in Alaska would probably consider the general grant of authority sufficient to dispose of municipal property regardless of its governmental or proprietary character.[50] However, even if the distinction is valid for the purpose of a general authority to dispose, a problem still exists if all municipal property can only be disposed for a public purpose. The language in *Libby* could be read to impose such a limitation. The question is important

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because, as discussed above, much of the undeveloped land, which may be acquired by municipalities, should be developed, subdivided and conveyed to private individuals or organizations for residential or commercial purposes. Results may differ depending upon whether the Court focuses on the "public" in public land or the "public" in public purpose of Article IX, Section 6.

The Alaska Supreme Court accords a very generous construction to the term "public purpose[51]"; a legislative determination that a public purpose is served has a strong presumption of legality.[52] The court has said on several occasions that it will not interfere with such a legislative finding unless it clearly appears the finding is arbitrary and without any reasonable basis in fact.[53] The court has also declined the invitation to define "public purpose" preferring to leave definitions to the particular facts presented by each case.[54] It is clear that not all members of the public need to benefit in order for a public purpose to be sustained; nor is a public purpose defeated simply because a private entity will realize a significant advantage.[55] However, a public purpose may not be recognized when that purpose is merely incidental.[56] It appears the Alaska courts may be using a sliding scale approach to the public purpose question. If the stated public purpose is a legitimate public purpose then the particular conveyance will be placed on the scale and a determination made in light of the facts of each case whether the public purpose is served significantly or merely incidentally.

Most municipal land conveyances are likely to satisfy the public purpose test. However, a conveyance of land to an individual which the individual will use to the exclusion of all others in the community is arguably not a conveyance for a public purpose. A conveyance of property to a corporation whose purpose is merely commercial is arguably not a conveyance for a public purpose. Each of these conveyances may promote the general purpose of community development, but the connection is only tangential and the Alaska court could void the conveyance. The Alaska legislature apparently recognized the private nature of such conveyances in the former law on municipal land disposal when it specifically recognized exceptions for conveyances of land acquired from the state and for land to be conveyed to a beneficial new industry.[57]

A municipality is arguably not the intended beneficiary of all the land transferred to it under ANTA or ANCSA. The municipality has an obligation to transfer some of this land into private ownership. The critical question is whether the public purpose clause will defeat such transfers into private ownership despite the apparent intent of ANTA or ANCSA. The answer is uncertain. Many rural communities suffer from depressed and cyclical economies and from housing shortages and overcrowding.[58]

For the immediate future municipal governments in many communities may be the only entity that can make land available for private residential or commercial development. The court may consider these surrounding facts to find a public purpose adequately served despite the fact a private individual is the primary beneficiary.

The alternative argument is that a public purpose inquiry is not relevant when the land at issue is held by the municipality for the purpose of accommodating private residential or commercial development. Such

land is arguably held in the proprietary capacity of the municipality and is not affected with the incidents of a trust to make the land "public land" for purposes of Article IX, Section 6. Unfortunately, the only case in Alaska that may support this reasoning is Seltenreich, which was decided prior to statehood.[59]

VI. CONSTITUTIONAL LIMITATIONS ON DISCRIMINATORY CONVEYANCES

Assuming the public purpose clause of the Alaska constitution will not prevent a conveyance of municipal property into private ownership, the equal protection clauses of the Alaska Constitution and the United States Constitution may still pose significant hurdles. Land is a finite resource and the demand for it is potentially infinite. As a practical matter, municipalities will often need to limit the number of people who can acquire municipal property. Restricting eligibility is an inherently discriminatory act creating a class of people who can receive a government benefit and a class of people who cannot. The creation of these two classes may be subject to analysis by the courts under the equal protection clauses of the two constitutions.[60]

Conveying land is fundamentally a resource allocation problem and the simplest legally acceptable means for conveying property is to permit the market system to determine eligibility. Property is simply conveyed to the individual offering the highest price. The prior provisions of Title 29 by requiring auctions or bids and fair market value as the basis for establishing price essentially allowed the market to determine who could acquire municipally disposed land.[61] Because the market system is competitive, it theoretically provides an equal opportunity to all who desire to acquire the particular resource. In reality, however, the market system allocates resources on the basis of wealth and can result in discrimination against the less fortunate members of society. Government intervention is often necessary to correct this inherent imbalance. And so, local governments in Alaska have implemented land disposal laws that compromise the competitive aspect of the market system in favor of some particular group. Such government supported favoritism incurs the risk of falling into the legal tar pit of equal protection.

Among the more popular limits placed upon eligibility to acquire municipal land is the restriction of local residency. Other restrictions imposed or considered by municipalities include sale procedures that favor low-income persons, non-landowners, long-time residents, heads of households and Alaska Natives.

An examination of these classifications under the microscope of equal protection must begin with an understanding of the context in which many of them are found: that context is rural Alaska. Alaska is predominately a rural state and most of its communities are small, relatively homogenous communities.[62] Many of these communities have populations that are predominately Alaska Native.[63] Many have a history in a particular location dating back thousands of years.

The justification for restricting eligibility to acquire municipal land can be varied. Most rural residents live at or below the poverty level and depend upon seasonal employment and a subsistence lifestyle.[64] If a municipality allows the market to determine who can purchase property a good possibility exists

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that much of the property sold could fall into the hands of wealthier people who have no real stake in the community. Many rural communities also have significant transient populations made up primarily of seasonal workers, government employees or teachers.[65] These temporary residents often hold the best paying positions in the community and tend to be financially better-off than most permanent residents.[66] A municipality that cannot limit its land conveyances to bonafide residents may preside over the demise of the community as land holdings become increasingly controlled by nonresidents. For communities that are primarily Native the consequences are particularly significant. Political control of the community may be at stake because relative wealth in rural areas tends to favor non-Natives.[67]

It has been and is likely to continue to be important for many rural municipalities to control who can acquire land from municipal holdings and to make land available on terms within the financial reach of local residents.

A. The Federal Equal Protection Standard

The Federal courts nearly always uphold legislative classifications distinguishing between persons who are similarly situated when the distinctions drawn do not involve a "suspect classification" like race[68] or restrict the exercise of a fundamental right like voting[69] or impinge upon a basic necessity of life like access to welfare or health care benefits.[70] If the distinctions drawn fall into one of these categories, the federal courts will apply a strict scrutiny standard and require a "compelling state interest" to justify the classification.[71] Also the distinction drawn must be necessary to accomplishing the goal.[72] However, if a classification falls outside the sphere of strict scrutiny, the federal courts will only require a rational relationship between the classification and the goal to be achieved.[73] The inquiry follows a two-tier analysis.[74]

B. The Alaska Equal Protection Standard

The standard of review for classifications under the equal protection clause of the Alaska constitution is a means-end test and is considerably more rigorous than the standard applied by the federal courts.[75] The Alaska standard was firmly established in State v. Erickson[76] and generally requires a determination 1) whether the classification is aimed at fulfilling a legitimate government purpose; 2) If so, whether the classification bears a fair and substantial relationship to the stated government purpose; and 3) whether the importance of the government purpose served by the classification outweighs the deprivation of any rights caused by the classification.[77] When fundamental federal rights or suspect categories are involved, the results of the Alaska test will be essentially the same as requiring a compelling state interest.[78] However, under the Alaska test, the rights involved need not be fundamental in order for a classification to fail; the classification is balanced against the "importance" of the right in question.[79] Also, of particular significance, the Alaska courts, unlike their federal counterparts, will not hypothesize a legitimate government goal in order to sustain a relationship between the classification and the goal. The Alaska courts will only look to the articulated goals of the legislation in question and determine whether the relationship between the classification and the articulated goal is rational. [80]

VII. CONSTITUTIONALITY OF CLASSIFICATIONS RESTRICTING ELIGIBILITY TO ACQUIRE MUNICIPAL PROPERTY

A. Residency

The history of Alaska has been marked by government policies granting residential preferences. These preferences have been the subject of considerable public attention and judicial scrutiny. Most residential preferences have not survived the close examination of the Alaska Supreme Court.[81] However, despite the number of Alaska cases discussing residency requirements; the law relating to their validity is far from settled. The Alaska equal protection standards under which a residency requirement will be examined are broad enough to allow a court to reach nearly any decision it desires.

Residency as a basis for eligibility to acquire a government benefit can be either "simple" or "durational." To the extent the law in question grants a benefit to a resident as opposed to a non-resident, without reference to any prior length of residency, it can be deemed a "simple" residency requirement. If, however, the law grants a benefit to individuals based upon prior length of residency it may be a "durational" residency requirement. The distinction can be critical: a durational requirement is more likely to invoke a strict scrutiny equal protection examination.

The first question to resolve, however, is whether any residency requirement attached to a municipal land conveyance can be valid. The leading case considering the constitutionality of a residency requirement in a municipal land conveyance is *Gilman v. Martin*[82] in which the Alaska Supreme Court struck down a land sale conducted by the Kenai Peninsula Borough.

The sale procedure adopted by the Borough incorporated a one year residency requirement to establish eligibility for land purchase.[83] The Borough also discounted the sale price five percent for each year of residency in the Borough up to a maximum fifty percent discount.[84] These preferences in the sale procedure were adapted from similar preferences granted to state residents in land sales conducted by the Alaska Department of Natural Resources.[85] The ordinance authorizing the land sale at issue in *Gilman* stated the purpose of the sale was to sell selected parcels to "adjoining property owners or to leaseholders so as to resolve existing controversies regarding access and title."[86] The court reviewed the classification (residency) in relation to the stated purpose of the sale (to resolve controversies regarding access and title) and held the sale violated the proscriptions of equal protection because the classification "did not bear a substantial relation to the purpose of the ordinance."[87]

The purpose of the sale was the initial focus of the court's inquiry. In *Gilman,* the Borough argued it could distinguish residents from non-residents because the intent of the initial grant of land from the state to the Borough was to permit residents to acquire land.[88] The court noted, however, this was not the stated purpose of the legislation and held the residency requirement bore no relationship to the purpose of resolving controversies regarding access and title because a majority of landowners within the Borough were non-residents.[89] Residents and non-residents had similar problems with access and title and were thus "similarly circumstanced." There was no rational reason to deny non-residents the benefits of the sale.[90]

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Appendix Two B

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The Court intimated in *Gilman* that its decision may have been different if the Borough had stated in its ordinance that the purpose of the sale was to benefit residents.[91] However, in a footnote the court quoted from Justice Brennan's concurring opinion in Zobel v. Williams[92] in which he stated that "discrimination on the basis of residence must be supported by a valid... interest independent of the discrimination itself." [93] In most cases it will likely be difficult to conceptually distinguish the validity of the interest from the validity of the discrimination. It is unclear how the court would have decided the case if the articulated purpose of the sale in Gilman was to benefit residents.

Municipalities are organized by and exist for the purpose of benefiting their residents, and a land sale limited to residents is probably not a violation of equal protection. Any person is entitled to become a resident and, once a resident, have equal access to the benefits provided by the municipality. The major equal protection problem likely to occur with a residency requirement is whether the length of time a person has lived inside the municipal boundary is used to determine whether a person is or is not a resident. Time can be used to test for the "bonafides" of residency, but the longer the length of time, the more a residency requirement will look like a durational qualification.[94]

At one time durational residency requirements triggered the "strict scrutiny" of the Alaska courts which realistically meant that any legislative classification based upon length of residency would not survive challenge.[95] When the Alaska Supreme court in *State v Erickson*[96] rejected the traditional "two-tier" equal protection test of the United States Supreme Court in favor of a single test, the stage was set for a reconsideration of durational residency requirements. In *Williams v. Zobel* the court held durational residency requirements would no longer be automatically subject to strict scrutiny, but would be measured against the *Erickson* standard.[97] The burden is placed on the government to demonstrate that any durational classification is related to a legitimate government objective.[98]

It is apparent from *Gilman* that the use of the Erickson standard will not materially change the result that most durational residency requirements will fail. In *Gilman* the court held the residency discount scheme based on length of residency did not rationally further any legitimate state purpose.[99] Durational residency requirements are always likely to fail because legitimate government purposes for establishing such requirements are rare, or will impinge upon the federally protected right to travel.[100]

Although the standards used by the court to determine the validity of a residency requirement limiting access to municipal land conveyances are broad enough to allow for almost any decision, there are certain steps a municipality can take to minimize the risk of judicial rejection.

First, a residency requirement should not make reference to prior length of residency. If a time reference is desirable it should remain short. A thirty day requirement will probably not be questioned; a longer requirement should be justifiable in the context of the community. The time reference should only be used to determine

who is a resident, not to distinguish among residents. A problem in many rural communities is that populations fluctuate with the seasons. The summer may draw a transient population of seasonal workers, and the winter is ushered in by the return of teachers. A requirement of physical presence in the community for a period longer than thirty days may be justified to eliminate these persons who are not true inhabitants of the community.

A simple residency requirement in which determinations of eligibility are based upon a person's domicile, without reference to prior length of residency, is probably the best course to follow. Domicile is often described as a "bonafide" residence; it contains an objective requirement of physical presence and a subjective intent requirement.[101] A simple residency requirement will likely increase the administrative burden of determining who is and who is not a resident, but this burden must be weighed against the possibility that a time reference will create a questionable durational requirement and increase the possibility the land conveyance will be challenged.

Second, cities should not become too preoccupied with pre-conveyance eligibility requirements because the same goal can often be achieved with post-conveyance restrictions. Contracts or deeds that require the construction of a habitable dwelling within a prescribed period or limiting sales to one lot per person reduce the likelihood of land speculation. Easier payment terms for low income persons will make it easier for most rural residents to purchase property. Options of first refusal allow the City to limit the amount of property owned in the community by non-residents. These post-conveyance restrictions are not clouded with the legal uncertainty of pre-conveyance eligibility requirements because they are elements of the bargain that do not preclude a person's option to participate.[102]

Third, each conveyance authorization should have a clear legislative history. The Alaska Supreme Court has made it clear under the Erickson equal protection standard that articulated reasons supporting a classification will provide the focus for judicial inquiry. The courts will no longer hypothesize conceivable legislative purposes or imaginable facts to sustain classifications.[103] If the legislative record does not reveal a legitimate purpose, or in the case of residency, does not reveal a legitimate purpose other than benefiting residents, the court may reject the conveyance. A governing body can create a legislative history by incorporating detailed findings into its resolutions or ordinances. The findings should set forth the local problems which the eligibility requirement addresses and the reasons the governing body believes the requirements selected will be effective. A record in the form of minutes or recorded testimony from public hearings can also help demonstrate that the findings are based upon reasonable perceptions of community needs.

Fourth, the relationship between the classification and the legislative purpose should be clear. If the primary purpose of a land sale is to raise money for the city or increase the local property tax base, residency becomes an irrelevant classification. If, as is the case in many rural communities, the city desires to make land available to relieve overcrowding in existing homes, residency has a clear relationship to purpose.

B. Other Eligibility Requirements

The analysis of any eligibility requirement for a government benefit will suffer the same equal protection analysis as residence. Restricting government benefits to low income people has always been recognized as a legitimate government purpose[104] and restricting a land conveyance or granting price relief to low income persons would probably be sustained. Conveying land to a local housing authority for the development of low income housing should also survive judicial scrutiny.[105] To the extent overcrowding is a legitimate community problem, a strong argument can be made that relieving overcrowding is an objective important enough to justify depriving persons who already have property from obtaining additional acreage.

C. Restricting Conveyances to Alaska Natives

Most rural communities are predominately populated by Alaska Natives and in recent years many of these communities have become concerned about the future of Native control and influence in their own communities.[106] A critical focus of this concern is land. If non-Natives are permitted to own land in the community the Native character of the village will diminish and Natives may potentially lose political control of the community.[107] This phenomenon is already apparent in many of the state's larger regional centers. The village is central to most of the Native cultures in the state and its loss may be tantamount to loss of the culture. To combat this trend some Native villages have been examining alternatives for preserving Native control, including restricting municipal land conveyances to Natives.[108]

Federal programs benefiting Natives generally survive equal protection scrutiny because the federal constitution endorses a "special relationship" between Natives and the Federal government.[109] This special relationship is political and not based on racial distinctions.[110] The Alaska constitution, however, does not recognize a similar relationship and the state attorney general has taken the position that a state classification favoring Alaska Natives cannot be sustained under the equal protection analysis of Alaska law.[111]

Following the attorney general's opinion, the Alaska Supreme Court issued a decision, *McDowell v. State*,[112] which cast further doubt on the ability of the state or its political subdivisions to make preferential land disposals to Alaska Natives. In *McDowell,* the court struck down a rural preference (which operated in practice as a Native preference) to take fish and game resources for subsistence purposes under Article VIII, Sections 2, 15 and 17 of the Alaska Constitution. Article VIII, Sections 17, the uniform application clause (discussed separately below), is directly relevant to land disposals by the state and municipalities. The court in *McDowell* noted that this section of the constitution may require even "more stringent review" of a [statute or ordinance] than does the equal protection clause in cases involving natural resources.[113] Thus, the bar against restricting municipal conveyances only to Alaska Natives is likely

set higher than originally contemplated by the attorney general.

D. Conveyance to a Tribal Organization

Most rural municipalities also have federally recognized tribal governments within their jurisdiction that serve the same Native population. Many of these tribal governments are organized under the Indian Reorganization Act[112] and are capable of receiving title to real property. An alternative to conveying property to Native individuals is a conveyance to the tribal government for reconveyance to tribal members. Again, the state attorney general has taken the position that such conveyances are prohibited by the Alaska constitution unless the conveyances contain restrictions to assure the property conveyed will be used for public purposes on a nondiscriminatory basis.[113] And again, the McDowell decision suggests that restricting municipal conveyances to grantees based upon their tribal status would likely run afoul of both the equal protection and uniform application clauses of the Alaska Constitution.

VIII. ALASKA CONSTITUTION, ARTICLE VIII, SECTION 17

Article VIII, Section 17 of the Alaska constitution may be the sleeper in the entire debate surrounding the Alaska equal protection standard and municipal land conveyances. The provision states: "Laws and regulations governing the use and disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation." The records of the Alaska Constitutional Convention provide no clue as to the precise meaning of the provision but the Alaska Supreme Court in *Gilman* intimated the provision may require that any restrictive classification attached to a municipal land conveyance may have to withstand "stringent review" under the equal protection clause of the Alaska Constitution.[114] Accordingly, any municipal land conveyance that is not made available equally to all residents of the state, certainly to all residents of the municipality, may have to be justified by a compelling interest, and the fit between the means and the interest served will have to be very close. As discussed above, the decision in *McDowell* strongly reinforces the foregoing analysis. Because disposals of municipal land necessarily implicate the uniform application clause, they face even more stringent review than ordinances that implicate the equal protection clause alone.

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IX. OTHER RESTRICTIONS GOVERNING MUNICIPAL LAND DISPOSALS

A. Conveyance Required by Ordinance

The current statutes require only that a formal procedure governing municipal land acquisition and disposal be adopted by ordinance.[115] At common law when general legislation is enacted by ordinance specific acts may be taken by resolution.[116] If a state requires land be sold pursuant to procedure established by ordinance, then a municipality can authorize individual sales by resolution.[117] However, this rule may not apply in Alaska. In *Thomas v. Bailey*[118] the Alaska Supreme Court held that a conveyance of land was an "appropriation" for the purpose of determining whether the state could be forced by initiative to make land available to the public.[119] The court, relying on the constitutional prohibition against using initiatives to force appropriations, held that the term "appropriations" did not refer exclusively to expenditures of money, but could include land particularly when, as in Alaska, land is a primary asset of the state treasury.[120]

Alaska statutes require municipal appropriations to be authorized by ordinance.[121] As such the *Daily* case is strong support for the proposition that each sale of land by a municipality must be authorized by ordinance. Sales approved by resolution or mere vote of the governing body may be voidable.

B. Conveyance for Fair Market Value

The general rule at common law is that a municipality has no power, unless conferred by constitution, statute, or charter to donate municipal money for private use to any individual or corporation having no connection with the municipality.[122] The rule also applies to conveyances of municipal property, except that donations of municipal property are generally allowed when the conveyance will further a public purpose and will promote the general public welfare.[123] Also, donations of property held in a governmental capacity have been upheld when the donation was made to another government or to a charitable institution and the property would continue to be used in a manner consistent with the public welfare.[124] Otherwise, it has been held that a municipality may not dispose of property without consideration.[125] However, donations have been upheld when made to satisfy an equitable claim, or claims founded in justice and supported by a moral obligation.[126]

The rule in Alaska is uncertain. Although the Court in *Gilman* could have addressed the issue whether the residency reduction offered by the Kenai Peninsual Borough constituted an unauthorized donation of the difference between the reduced price and fair market value, the issue was not presented.[127] The attorney general has taken the position that conveyances for less than fair market value are legal as long as there is some consideration, and the consideration is not so insignificant that the conveyance amounts to a gift.[128] The Alaska Supreme Court in *Wright v. City of Palmer* stated that it will generally defer to a legislative determination that a public purpose is served unless the particular act "amounted to the pledging of credit or the giving away of assets without any discernible benefit".[129]

Whether property conveyances can be made for less than fair market value is a concern to many rural municipalities. Such conveyances may often be necessary to clear title or to restore order to the community. The passage of ANCSA and the

lawsuits holding up transfers under ANTA may have stopped land conveyances, but they did not stop community growth and expansion. The result is that many people moved onto and built on land whose eventual ownership was uncertain.[130] Now that municipalities may acquire much of this property there is pressure to convey such property to the occupants at no cost. Also, as discussed above, municipal councils are also concerned that conveyances for fair market value will make property in the community too expensive for many people in the community to purchase. The result is that younger people who have grown up in and have strong family ties to the community may not be able to acquire land in the community upon which to build homes and raise families.

Although the Alaska courts have not spoken on the issue, a case can be made that conveyances for less than fair market value are legal. The Alaska constitution provides that municipal powers are to be construed liberally.[131] This provision was included to contravene the operation of the common law principle known as Dillon's rule, which essentially provides that a municipality has only those powers expressly granted by the legislature.[132] The proceedings of the Constitutional Convention indicate the delegates intended municipalities to have any power not expressly prohibited by the constitution or the legislature.[133] As such, the power to dispose property should include the power to convey it for less than fair market value for any purpose so long as all persons similarly situated are treated equally. Such a power would also be consistent with other statements of policy in the constitution favoring settlement of the land.[134] To the extent a conveyance for less than fair market value can only be made to further a public purpose, the court's liberal view of "public purpose" may be large enough to encompass the concern of municipalities to make land available to local residents at an affordable price.[135]

"Whether property conveyances can be made for less than fair market value is a concern to many rural municipalities. Such conveyances may often be necessary to clear title or to restore order to the community. The passage of ANCSA and the lawsuits holding up transfers under ANTA may have stopped land conveyances, but they did not stop community growth and expansion. The result is that many people moved onto and built on land whose eventual ownership was uncertain."

FOOTNOTES

[1] Alaska Stat. §§ 29.65.010 - 29.65.140 (1985) .

[2] Alaska Native Townsite Act, Act of May 25, 1926, 44 Stat. 629 [formerly codified at 43 U.S.G. S 733], repealed by the Federal Land Management Policy Act, Act of Oct. 21, 1976, 90 Stat. 2744, 43 U.S.C. 6 1701; Alaska Native Claims Settlement Act, 43 U.S.C. 6 1613(c) (3) (1971).

[3] E. McQuillin, Municipal Corporations S 28.37 (rev. 3rd ed. 1981).

[4] 1985 Alaska Sess. Laws 6 10 ch. 74.

[5] Alaska Stat. § 29.4860 (1972) *repealed by* 1985 Alaska Sess. Laws § 88 ch. 74.

[6] Alaska Stat. § 29.48.260 (a) (1972) *repealed by* 1985 Alaska Sess. Laws § 88 ch. 74.

[7] Alaska Stat. § 29.48.260 (b) (1972) *repealed by* 1985 Alaska Sess. Laws § 88 ch. 74.

[8] Alaska Stat. § 29.48.260 (c) (1972) *repealed by* 1985 Alaska Sess. Laws § 88 ch. 74.

[9] Alaska Stat. § 29.48.260 (d) (1972) *repealed by* 1985 Alaska Sess. Laws § 88 ch. 74.

[10] Alaska Stat. § 29.48.260 (e) (1972) *repealed by* 1985 Alaska Sess. Laws § 88 ch. 74.
For a general discussion of Alaska Stat. § 29.48.260 and its predecessors see Op. Atty. Gen. (Nov. 21, 1983).

[11] The committee was chaired by Senator Arliss Sturgelewski and was composed of various legislators and municipal officials.

[12] Letter from Gerald L. Sharp to Timothy E. Troll (December 8, 1986) (discussing goals of Title 29 Technical Revision Committee). Gerald L. Sharp served on the Title 29 Technical Revision Committee.

[13] The report of the Title 29 Technical Revision Committee to the general committee regarding the proposed change to the prior law that later became codified at Alaska Stat. § 29.35.090 (1985) states: "Since other laws, both federal and state, which provide land to municipalities contain conflicting requirements for use and disposal it is felt that this created undue complexities as it now reads. It is eliminated in favor of a simple requirement that a procedure be established by ordinance." Taken from *Drafted Changes Recommended by the Technical Committee, Dec. 6, 1980*. The only other legislative history found discussing Alaska Stat. § 29.35.090 (1985) states: "The governing body is required by ordinance to establish a formal procedure for acquisition and disposal of land. The provisions authorizing a municipality to acquire, hold and dispose of real property are deleted as unnecessary. The provisions dealing with the requirements which must be met in the formal procedure established for disposal of land have been eliminated to provide more flexibility. The provisions dealing with restricting land to agricultural use have been deleted." *Memorandum to Representative Goll, Chairman, Community and Regional Affairs Committee, from Tamara Brandt Cook, Deputy Director, Div. of Legal Services,* 15, 1985 at 29.

[14] Sharp, supra note 12.

[15] The original revision was introduced in the legislature in 1981 and finally became law in 1985.

[16] *See eg. Woods v. Woods*, 133 Cal. App. 3d 966, 184 Cal. Rptr. 471 (1982); Hennigh v. Hennigh, 309 P.2d 1022 (Mont. 1957); 2A Sands, Sutherland Statutory Construction, § 50.01 (19).

[17] *See generally* 10 E. McQuillin, *Municipal Corporations* §§ 28.01-28.49 (rev. 3rd ed. 1981); 2A C. Antieau, Municipal Corporation Law, §§ 20.00-20.44 (1984); 0. Reynolds, Handbook of Local Government Law 434-443 (1982); Annot., 47 A.L.R. 3d 19 (19); Annot., 141 A.L.R. 1447 (1973).

[18] *Seltenreich v. Town of Fairbanks*, 103 F. Supp. 319, 13 Alaska 582, 593 (1952) aff'd 211 F.2d 83, 14 Alaska 568 (9th. Cir. 1954).

[19] See *Seltenreich v. Town of Fairbanks*, supra at 13 Alaska 593-595.

[20] 10 E. McQuillin, Municipal Corporations §§ 28.37 (rev. 3rd ed. 1981).

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Pullen v. Oregon Industrial Dev. Corp.*, 240 Or. 583, 402 P.2d 240; 2A C. Antieau, Municipal Corporation Law, § 30.34 (1984). For some purposes it could be argued that drawing a distinction between governmental and proprietary property is irrelevant. All the power, property and offices of a municipality constitute a public trust to be administered by its governing body. 2 E. McQuillin, Municipal Corporations § 10.31 (rev. 3rd ed. 1981). A governing body exercises its powers only in the public interest. The power to convey property carries the same duty regardless of the classification of the particular parcel of property. Even

if the property to be conveyed can be characterized as proprietary, a governing body should not convey it without a determination that the property will not be needed for some public or governmental use. A similar examination must occur before governmental property can be considered abandoned and available for conveyance. See eg. Seltenreich v. Town of Fairbanks, 211 F.2d 83, 14 Alaska 568, 571 (9th. Cir. 1954).

[25] 103 F. Supp. 319, 13 Alaska 582, 593 (1952) *aff'd* 211 F.2d 83, 14 Alaska 568 (9th. Cir.1954).

[26] *Id.* at 595

[27] *Id.* at 596

[28] 14 Alaska 568, 571

[29] *Id.*

[30] 612 P.2d 33 (Alaska 1980)

[31] *Id.* at 40.

[32] Alaska Stat. 29.65.010-29.65.140 (1985). For a general survey of municipal land acquisition see Institute of Social and Economic Research, *Changing Ownership and Management of Alaska Lands* (October 1985).

[33] Alaska Stat. §§ 29.65.100 (1985) .

[34] Federal Land Management Policy Act, Act of Oct. 21, 1976, 90 Stat. 2744, 43 U.S.C. § 1701.

[35] *See* D. Case, *Alaska Natives and American Laws* 157 -168 (1984); Alaska Native Foundation, Village Land
Reconveyance Planning 195-200 (1986).

[36] Alaska Native Foundation, Village Land Reconveyance Planning at 199 (1986) .

[37] *Id.*

[38] *Aleknagik Natives, Ltd. v. United States*, No. A77-200 (D. Alaska March 19, 1985). The District Court held that vacant unsubdivided townsite lots were not available for village corporation selection under ANCSA. The result is that much of this vacant unsubdivided property will be deeded to municipalities. On appeal the Ninth Circuit affirmed the decision of the District Court. Aleknagik Natives, Ltd. v. United States, No. 85- 4116 (9th Cir. Jan. 12, 1987).

[39] 43 U.S.C. § 1613(c)(3) (1971).

[40] *Id.*

[41] Act of Dec. 2, 1980, P.L. 96-487 § 1405.

[42] *See* Alaska Native Foundation, *Village Land Reconveyance Planning* 69-71 (1986) .

[43] *Id.* at 81.

[44] *Id.* at 196.

[45] A specific example would be St. Mary's, Alaska. The United States deeded property to the Catholic Bishop to operate a school in St. Mary's. Upon incorporation of the City of St. Mary's in 1967 the Bishop reconveyed over one hundred acres to the new city.

[46] 612 P.2d at 40.

[47] 2A C. Antieau, *Municipal Corporation Law*, §§ 20.32 (1984).

[48] 10 E. McQuillin, *Municipal Corporations* §§ 28.40 (rev. 3d ed. 1981).

[49] *Id.*

[50] Alaska Const. Art. X, Sec. I provides: " A liberal construction shall be given to the powers of local government units." *See also* Alaska Stat. § 29.25.400.

[51] *See eg.* Suber v. Alaska State Bond Comm., 414 P.2d 546 (Alaska 1966); *Lien v. City of Ketchikan*, 383 P.2d 546 (Alaska 1966). Alaska Const. Art. IX, Sec. 6 provides: "No tax shall be levied, or appropriation of public money made, or public property transferred, nor shall the public credit be used, except for a public purpose."

[52] *Walker v. State Mtg. Ass'n.*, 414 P.2d 245 (Alaska 1966); *Suber v. Alaska State Bond* Comm., *supra note* [51];
DeArmond v. Alaska State Dev. Corp., 376 P.2d 717 (Alaska 1962).

[53] *See* cases cited at note 52.

[54] *Wright v. City of Palmer*, 468 P.2d 326 (1970).

[55] *Suber v. Alaska State Bond Comm.*, *supra* note 51.

[56] *See Wright v. City of Palmer*, *supra* 468 P.2d at 330; *accord* Allydon Realty Corp. v. Holyoke Housing Auth., 23 NE 2d. 665, 667 (Mass. 1939). Care should be taken to distinguish between the terms "public purpose" and "public use." The two terms are often used interchangeably, but "public use " is a more restrictive term. The discussion often arises in the context of eminent domain cases. A "public purpose" is often broad and can be satisfied if the

public will generally be served; a "public use" contemplates a continuing measure of local government control and possessory use. *See generally*, 2A C. Antieau, Municipal Corporation Law, §§ 20.02 (1984).

[57] Alaska Stat. § 29.48.260 (d), (e) (1972) *repealed by* 1985 Alaska Sess. Laws § 88 ch. 74.

[58] *See e.g. Ceñaliulriit Coastal Management Program, Conceptually Approved Draft* (Jan. 1984) ch. 3-1; Frank Orth & Associates, Inc. and Stephen R. Braund & Associates, Village Economies of the Lower Yukon (Dec. 15, 1983); Alaska Department of Community and Regional Affairs, Division of Community Planning, Problems and Possibilities for Service, *Government in the Alaska Unorganized Borough* (Sept. 1981) p. 16.

[59] *Seltenreich v. Town of Fairbanks*, 103 F. Supp. 319, 13 Alaska 582, 593 (1952) *aff'd* 211 F.2d 83, 14 Alaska 568 (9th. Cir. 1954). The legislative history surrounding Article IX, § 6 is scarce, but the minutes of the Alaska Constitutional Convention record the following conversation:

> SMITH: Mr. President, once again I don't have an amendment and I ask the question merely to get the Committee thinking into the record. Was it the intent of the Committee here to prohibit the sale of public property for other than public purposes? I see that you have here: "No tax shall be levied or appropriation of public money made or public property transferred, except for a public purpose." And, of course, in the resources article we make it possible to transfer property from the state public domain to private individuals. I simply wanted to either get this before Style and Drafting or get the Committee thinking on record. NERLAND: Mr. Smith, the committee took into consideration Section 9 of resources, and it was the feeling of the committee that the transfer of public property, when money was being received for it, would constitute a public purpose. It was not the intent of this Committee to interfere with the operation of your Section 9 in resources. 3 Proceeding of the Alaska Constitutional Convention at 2334.

[60] U.S. Const. amend. XIV, § 1; Alaska Const. art. 1, § 1.

[61] *See* Alaska Stat. 6 29.48.260 (d), (e) (1972) *repealed* by 1985 Alaska Sen. Laws § 88 ch. 74. [62] *See* T. Morehouse, G. McBeath and L. Leask, Alaska's Urban and Rural Governments 117-137(1984).

[63] *Id.*

[64] *See* authority cited *supra* note 58.

[65] *See* authority cited *supra* note 58.

[66] *See* authority cited *supra* note 58.

[67] *See* authority cited *supra* note 58; for discussion of political control in predominately Native communities *see* T. Berger, Village Journey 137-154 (1985) and T. Troll, *Local Government in Rural Alaska: Self Determination, Sovereignty and Second Class Cities,* Alaska Native News (Sept. 1985).

[68] *Bakke v. Regents of California*, 438 U.S. 265 (1978)(quota system for minority students held unconstitutional).

[69] *Dunn v. Blumstein*, 405 U.S. 330 (1972) (one year residency requirement to vote unconstitutional).

[70] *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974); Shapiro v. Thompson, 394 U.S. 618 (1969).

[71] S*ee Williams v. Zobel*, 619 P.2d 422, 440 (Alaska 1980) *reversed* Zobel v. Williams 457 U.S. 55 (1982) (Connor J. dissenting) (discussing the, Federal equal protection standard).

[72] *See e.g. Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976) (upholding law requiring retirement of uniformed police officers at age fifty).

[73] *See Williams v. Zobel*, 619 P.2d at 441.

[74] *Id.* at 440.

[75] *Irby-Northface v. Commonwealth Elec. Co.*, 557 P.2d. 557, 562 n. 3 (Alaska 1983) (Rabinowitz J. dissenting) (lowest level of scrutiny to be employed under Alaska's equal protection clause is more stringent than the minimum federal standard). For a thorough analysis of the Alaska equal protection standard and a comparison with the federal standard see M. Wise, *Equal Protection Analysis in Alaska*, 3 Alasla L. R. 1(1986).

[76] 574 P.2d. 1 (Alaska 1978). The new Alaska equal protection analysis was first announced and applied in *Isakson v. Rickey*, 550 P.2d 379 (Alaska 1976).

[77] *Id.* at 12.

[78] *Id.*

[79] See *Williams v. Zobel* 619 P.2d at 439 (Connor J. dissenting)
[80] *Id.* at 441.
[81] *See e.g. Williams v. Zobel*, 619 P.2d 422 (Alaska 1980) (durational residency requirement for tax exemptions held unconstitutional) *but see* Irby-Worthface v. Commonwealth Elec. Co., 557 P.2d. 557, 562 n. 3 (Alaska 1983) (Alaska resident bidder preference statute upheld)
[82] 662 P.2d 120 (Alaska 1983).
[83] *Id.* at 122.
[84] *Id.*
[85] *Id.* at 127.
[86] *Id.* at 126.
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.* at 126 n. 6.
[93] *Id.*
[94] *Zobel v. Williams* 457 U.S. 55, 70 (1982) (Brennan J. concurring) ("length of residence may, for example, be used to test the bona fides of citizenship-end allegiance and attachment may bear some rational relationship to a very limited number of legitimate state purposes.")
[95] *Williams v. Zobel*, 619 P.2d at 426.
[96] 574 P.2d at 10, *see also* Isakson v. Rickey 550 P.2d 359, 362-63 (Alaska 1976).
[97] 619 P.2d at 427.
[98] *Id.*
[99] 662 P.2d at 129. Shortly after the decision in *Gilman* the Attorney General concluded the state's lend disposal program was unconstitutional. Op. Atty. Gen. (Jan. 1, 1984) (effect of *Gilman* on state land disposal program.), *see also* Op. Atty. Gen. (July 15, 1985) (can the state give preferences to local residents in land disposals?).
[100] *Zobel v. Williams* 457 U.S. 55, 70 (Brennan J. concurring) ("But those instances in which length of residence could provide a legitimate basis for distinguishing one citizen from another are rare") The right to travel is primarily the federal interest in free interstate migration. The Alaska Supreme Court has demonstrated some reluctance to recognize the existence of such a constitutionally protected right to travel preferring to construe some of the U.S. Supreme Court decisions on durational residency requirements as applying to other constitutionally protected rights. *See* Williams v. Zobel, 619 P.2d at 425. Although the U.S. Supreme Court did not specifically reverse the Alaska Supreme Court's decision in *Williams v. Zobel* on a right to travel basis, the underlying implication was that a violation of a right to travel occurred. *See* 457 U.S. 55 (separate opinions of Brennan J. and O'Conner J.).
[101] *Hicklin v. Orebeck*, 565 P.2d 159, 171 (Alaska 1977). A good discussion of the domicile test can be found in Op. Atty. Gen., (August 28, 1979).
[102] A post conveyance restriction should, however, be supported by a legitimate government objective and should not amount to an unreasonable restraint upon alienation. Post conveyance restrictions are incorporated into some conveyances made to individuals by the Municipal Lands Trustee. Alaska Admin. Code tit. 19 S90.460 (4) (Sept. 1979).
[103] *Williams v. Zobel* 619 P.2d at 441(Connor J. concurring).
[104] *See* Suber v. Alaska State Bond Committee, 414 P.2d at 552 *citing* Carmichael v. Southern Coal & Coke Co., 301 US. 495, 515 (1937); Roe v. Kervick, 42 N.J. 191, 199 A.2d 834, 846 (1964).
[105] *See* Op. Atty. Gen., (May 28, 1981) and Op. Atty. Gen. (May 6, 1981) (Municipal conveyances to regional housing authorities).
[106] *See* T. Berger, Village Journey 137-154 (1985) and T. Troll, *Local Government in Rural Alaska: Self Determination, Sovereignty and Second Class Cities*, Alaska Native News (Sept. 1985).
[107] *See T.* Morehouse, G. McBeath and L. Leask, *Alaska's Urban and Rural Governments at* 162 (1984) and T. Troll, *Local Government in Rural Alaska: Self Determination, Sovereignty and Second Class Cities*, Alaska Native News (Sept. 1985), Alaska Native News (Sept. 1985).
[108] *See* Op. Atty. Gen., (May 1, 1984) (legality of conveyance of municipal property to a tribal organization); Op. Atty. Gen., (May 6, 1981)(legality of conveyance of municipality to

Federal government for reconveyance to individual natives).
[109] U.S. Const. art. I, § 8, cl. 3; art. II, § 2, cl. 2.
[110] *See* D. Case, *supra* note 35 at 3.
[111] *See* opinions cited at note 108 *supra*.
[112] 25 U.S.C. S 476 (1934). The Indian Reorganization Act was made fully applicable to Alaska in 1938. D. Case, *supra* note 35 at 373.
[113] Op. Atty. Gen., (May 1, 1984).
[114] 662 P.2d at 125.
[115] Alaska Stat. § 29.35.090 (1985)
[116] *Jewett v. Luau-Nyack Corp.*, 338 N.Y.S.2d 874 (Ct. App. 1972) cited in note 13, Municipality of Anchorage v. Frohne, 568 P. 2d 3, 6 (Alaska 1977).
[117] *Jewett v. Luau-Nyack Corp.*, 338 N.Y.S.2d 874 (Ct. App. 1972).
[118] 595 P.2d 1 (Alaska 1979).
[119] *Id.*at 9.
[120] *Id.*at 8.
[121] Alaska Stat. 6 29.25.010(4).
[122] *See generally* 10 E. McQuillin, Municipal Corporations § 28.43 (rev. 3d ed. 1981); 2A C. Antieau, Municipal Corporation Law, § 20.30 (1984).
[123] 10 E. McQuillin, Municipal Corporations 6 28.43.
[124] *Id.*
[125] *Id.*
[126] *See* 2 E. McQuillin, Municipal Corporations § 39.24.
[127] Phone conversation with Adrienne P. Fedor March 2, 1987 attorney representing appellants.
[128] Op. Atty. Gen (Nov. 21, 1983) (Municipal land disposal questions).
[129] 468 P.2d 331.
[130] The migration onto land whose ownership was unresolved particularly affected unsubdivided portions of Native townsites, see D. Case, *supra* note 35 at 159.
[131] Alaska Const. art X, § 1.
[132] V. Fischer, *Alaska's Constitutional Convention* 126-127 (1975).
[133] *Id.*
[134] Alaska Const. art VIII, § 1 provides: "It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest."
[135] *See* cases cited at note 51 *supra*. The conversation from the proceedings of the Alaska Constitutional convention cited *supra* note 59 would support the proposition that municipal property could be conveyed to private individuals for less than fair market value as long as "money was being received for it."

Appendix Two C
SAMPLE LAND DISPOSAL ORDINANCE

2C

BE IT ENACTED BY THE CITY COUNCIL FOR THE CITY OF ALEKNAGIK THAT CHAPTER 4.3 and 4.4 OF TITLE IV OF THE CODE OF ORDINANCES OF THE CITY OF ALEKNAGIK ARE HEREBY REPEALED AND REPLACED WITH THE FOLLOWING NEW SECTION 4.3:

Sections:

Section 1. Authority to Dispose.

The City may dispose of real property in any manner not prohibited by law.

Section 2. Disposal by Ordinance.

A. The City may dispose of real property or any interest in real property only by ordinance. An ordinance disposing property used or formally dedicated to public use may be approved only upon a finding by the City Council that the property is no longer used or useful for a public use. The City Council shall conduct a public hearing on the question whether the property is no longer used or useful for a public use. The ordinance approving the disposition may not be considered for passage at the same meeting at which the public hearing is held.

B. A lease of space within a municipal building or a short term ground lease of one year or less may be treated as a disposal of personal property subject to the provisions of Chapter 4.5 of this title.

Section 3. Form of Document of Conveyance.

A. The document of conveyance must be in a recordable form permitted by State Statute, and approved as to form by the City Attorney;

B. The document of conveyance must be signed by the Mayor or, in the Mayor's absence, the Vice Mayor, attested by the City

Clerk, and contain a specific reference to the Ordinance authorizing the conveyance.

C. All sales of real property shall be by quit claim deed.

Section 4. Disposal for Fair Market Value.

A. Except as provided in subsection B of this section, all disposals of City real property shall be for no less than the fair market value of the interest disposed. The City may accept in exchange for real property any consideration of sufficient value not prohibited by law. For the purposes of this title, "fair market value" means the price attributable to a parcel of property, including the value of any survey which identifies and describes the property, which a willing and knowledgeable buyer would pay and which a willing and knowledgeable seller would accept, with respect to that parcel.

B. Fair market value may be determined from an appraisal prepared by a qualified appraiser or the city assessor, or the City Council may determine the fair market value by any other means it deems appropriate.

C. The City may dispose of real property for less than fair market value to the United States, the State of Alaska or any political subdivision thereof, a non-profit corporation or association, or a recognized tribal authority, upon a finding by the City Council that the disposal will allow the use of the real property for a public purpose beneficial to the City.

D. The City may convey real property for less than fair market value to a person who has a valid claim of equitable interest in the property or in an improvement located upon the property, provided the claim existed prior to the date of passage of this ordinance.

Section 5. Disposal Methods

For disposals of real property under this chapter, the City Council may select any of the following disposal methods:

A. Direct negotiations with interested parties who seek to acquire real property owned by the City.

B. The City Council may invite sealed bids, specifying the time and place for receiving bids and the minimum acceptable bid. The City Council may offer real property for sale or lease

specifying that if no higher price is offered the land shall be conveyed pursuant to a pre-existing contract or lease at sale or lease at the minimum bid amount.

C. The City Council may invite proposals to purchase or lease real property for a fixed price. The invitation may specify the basis upon which proposals shall be evaluated, which may include but not be limited to the quality of the proposed development of the land and its benefit to the community, the qualifications and organization of the proposers, the value of the proposed improvement to the land and the rents or resale prices to be charged by the proposer.

D. City Council may dispose of real property by any other method not specifically prohibited by law.

Section 6. Exchange of Property

The City may exchange real property with any person for other property of equivalent fair market value. A determination of fair market value shall not be necessary if the exchange is with the United States, the State of Alaska or any political subdivision thereof, a non-profit corporation or association, or

a recognized tribal authority and the City Council finds the exchange will allow the use of the real property for a public purpose beneficial to the City. A determination of fair market value shall not be necessary if the exchange will resolve conflicts of title or secure for the City necessary public easements and rights of way.

PASSED AND APPROVED BY A DULY CONSTITUTED QUORUM OF THE CITY COUNCIL FOR THE CITY OF ALEKNAGIK THIS _____ DAY OF _____, 1987.

INTRODUCTION: _____
PUBLIC HEARING: _____

CITY OF ALEKNAGIK

_____
Mayor

ATTEST: _____
City Clerk

- 6 -

* The City may exchange property for less than fair market value upon a finding that other public benefits will be served by the exchange.

ORDINANCE 87-_____
AN ORDINANCE OF THE CITY OF ALEKNAGIK
AMENDING TITLE IV, CHAPTER 4.1
OF THE CODE OF ORDINANCES
FOR THE CITY OF ALEKNAGIK

BE IT ENACTED THAT TITLE IV, CHAPTER 4.1 OF THE CODE OF ORDINANCES FOR THE CITY OF ALEKNAGIK IS AMENDED AS FOLLOWS:

Section 3. Procedural Requirements

A. The City may acquire and hold real property by warranty or quit claim deed, easement, grant, permit, license, deed of trust, mortgage, contract of sale of real property, plat dedication, lease, tax deed, will, or any other lawful means of conveyance or grant. Real property shall be held in the name of "City of Aleknagik". Unless otherwise provided by law, all acquisitions of real property shall be approved by resolution of the City Council.

B. Upon authorization from a specific resolution of the City Council, the Mayor may act on [its] behalf of the City in the acquisition of real property or an interest in real property when [that] the property acquired for valuable consideration or is part of a program of grants under which the City may receive [only a limited amount of acreage] real

ORDINANCE 87- _____
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B. Upon authorization from a specific resolution of the City Council, the Mayor may act on [its] behalf of the City in the acquisition of real property or an interest in real property when [that] the property acquired for valuable consideration or is part of a program of grants under which the City may receive [only a limited amount of acreage] real

Section 5. Rights and Power of City. [Delete]

Section 6. Sites for Beneficial New Industries. - [Delete]

Section 7. Federal and State Aid. [Delete]

PASSED AND APPROVED BY A DULY CONSTITUTED QUORUM OF THE CITY COUNCIL FOR THE CITY OF ALEKNAGIK THIS _____ DAY OF _____, 1987.

INTRODUCTION: _____

PUBLIC HEARING: _____

CITY OF ALEKNAGIK

_____

Mayor

ATTEST: _____

City Clerk

a/q01/EV

ORDINANCE 87-_____
AN ORDINANCE OF THE CITY OF ALEKNAGIK
AMENDING TITLE IV, CHAPTER 4.2
OF THE CODE OF ORDINANCES
FOR THE CITY OF ALEKNAGIK

BE IT ENACTED THAT TITLE IV, CHAPTER 4.2 OF THE CODE OF ORDINANCES FOR THE CITY OF ALEKNAGIK IS AMENDED AS FOLLOWS:

Section 1. Eminent Domain

The City may exercise the powers of eminent domain and declaration of taking in the performance of a power or function of the City in accordance with the procedures set out in A.S.09.55.250 - 09.55.460. [Prior approval from the Department of Community and Regional Affairs is required as provided in AS.29.73.020.)

Section 2. Ordinance and Vote Required

The exercise of the power of eminent domain or declaration of taking shall be by ordinance which shall be submitted to the qualified voters at the next regularly scheduled general election or a special election called for that purpose. [A majority vote is required for approval of the ordinance. A majority of the votes on the question is required for approval of the ordinance.]

PASSED AND APPROVED BY A DULY CONSTITUTED QUORUM OF THE CITY COUNCIL FOR THE CITY OF ALEKNAGIK THIS ___ DAY OF _____, 1987.

INTRODUCTION: _____

PUBLIC HEARING: _____

CITY OF ALEKNAGIK

_____

Mayor

ATTEST: _____

City Clerk

ORDINANCE 87-_____
AN ORDINANCE OF THE CITY OF ALEKNAGIK
AMENDING TITLE IV, CHAPTER 4.5
OF THE CODE OF ORDINANCES
FOR THE CITY OF ALEKNAGIK

BE IT ENACTED BY THE CITY COUNCIL FOR THE CITY OF ALEKNAGIK THAT CHAPTER 4.5 OF TITLE IV OF THE CODE OF ORDINANCES OF THE CITY OF ALEKNAGIK SHALL BE REDESIGNATED CHAPTER 4.4 AND AMENDED AS FOLLOWS:

Section 1. Personal Property Disposition by Value.

B. Personal property valued at more than ONE THOUSAND DOLLARS ($1,000.00) [but less than TWENTY-FIVE THOUSAND DOLLARS ($25,000.00) shall be disposed of in the manner provided for land valued under TWENTY-FIVE THOUSAND DOLLARS ($25,000.00) as provided in Chapter 4.3 of this code] may be disposed of by any method provided for in Chapter 4.3, Section 5 of this code after approval by resolution of the City Council.

C. [Delete]

PASSED AND APPROVED BY A DULY CONSTITUTED QUORUM OF THE CITY COUNCIL FOR THE CITY OF ALEKNAGIK THIS _____ DAY OF _____, 1987.

INTRODUCTION: _____
PUBLIC HEARING: _____

CITY OF ALEKNAGIK

_____
Mayor

ATTEST: _____
City Clerk

A/Q04/ev

SAMPLE LAND CONTRACT, VERSION 1

CONTRACT FOR SALE OF LAND

THIS AGREEMENT is made between the CITY OF _____, a municipal corporation" hereinafter designated as City, and _____, hereinafter designated as Buyer.

WITNESS: The City agrees to sell and the Buyer agrees to purchase the following real property (land) on the terms and subject to the conditions specified in this agreement, and subject to any reservation restrictions and rights-of-way of record: [*insert property description]*

1. PURCHASE PRICE: Buyer agrees to pay a total purchase price of _____ Dollars ($), the money to be paid as follows: [*insert terms of payment*]

2. SPECIAL CONDITIONS: (a) Buyer agrees to construct and occupy a house on the land described above before the __ day of _____, 20___. If the Buyer does not construct and occupy a house on the land by the date specified, the agreement will be in default. Upon default of this provision, the City may exercise a right of reverter and repossess the land and any improvements on the land.

3. RIGHT OF FIRST REFUSAL: For seven years (7) after the date title is transferred from the City to Buyer, the City reserves the option to purchase the land together with all improvements if the Buyer chooses to sell during this period. Buyer will notify the City in writing of Buyer's intent to sell. The City will have thirty days (30) from date of Buyer's notification to exercise its option to purchase the land together with all improvements on the land. The fair market value of the land and all improvements on the land will be the price established for sale

as determined by an appraisal of a qualified appraiser or by agreement between the City and Buyer. City will also have the option to purchase the property by matching any price offered by any other person. Buyer will notify City of the price offered and City will have thirty (30) days to respond with an equivalent offer.

4. WAIVER: City may waive any condition or right in this agreement. All waivers must be in writing and approved by Resolution of the City Council. A waiver of one condition or right will not be a waiver of any other condition or right.

5. PREMATURE PAYMENTS: Buyer may at any time make payments in addition to any installment payments. However, additional payments are voluntary and will not excuse Buyer from making all payments on the date due.

6. POSSESSION: Buyer shall be entitled to occupy the land from the date of this agreement unless Buyer's interest in this agreement and the land is forfeited as provided in this agreement. City may at any time enter on the land, without entering any buildings on the land, and post Notices of Non-Responsibility as provided for in A.S. 34.35.065.

7. BUYER'S COVENANTS: Buyer agrees to pay any taxes and assessments on the property occurring after the date of this agreement; and Buyer agrees to hold the City harmless if there are any liens or other encumbrances against the property. Buyer agrees to pay any credit reporting fees, recording fees, title insurance, administrative costs or other fees incident to this agreement.

Buyer further covenants that the property will be used only by Buyer as a primary place of residence for a period of _____ years after deed is conveyed from City to Buyer. Any change of use during this period must be approved in writing by the City Council for City. Any change of use without said prior approval shall constitute a default under this agreement.

8. CITY'S COVENANTS: City makes no covenants or warranties and will convey to Buyer a statutory quitclaim deed upon final payment as detailed in this agreement.

LAND SALE CONTRACT
Page 3 of 7

9. CITY'S PRIVILEGES: If Buyer fails to pay any taxes or assessments, or other fees charged against the property, the City may pay said taxes, assessments or fees for the Buyer. Buyer agrees to repay the City on demand all sums paid by City together with interest at the rate of ___ percent per annum from the time City paid the taxes or assessments. Any sums paid by the City pursuant to this provision shall be secured by this agreement.

10. BUYER'S PRIVILEGES: In the event the City has failed to pay an obligation pertaining to the property, the Buyer may pay the obligation and upon satisfactory proof of said payment will be credited a like dollar amount on the purchase price agreed to in paragraph one.

11. DEFAULT: Time is of the essence to this agreement. Default will occur if Buyer fails to pay any sum when it becomes due under this agreement or fails to perform any other obligation required to be performed by Buyer.

12. LATE PAYMENTS: Acceptance by the City of any payment made by Buyer after the payment was due shall not constitute a waiver by the City of its right to the full and timely payment of subsequent payments due by Buyer or City's right to accelerate under this agreement.

13. ACCELERATION: If any payment is late, City may accelerate this agreement and demand payment of the remaining balance due on the purchase price set forth above in paragraph one.

14. NOTICE OF DEFAULT & DECLARATION OF FORFEITURE: If Buyer defaults, as defined above, the City may send to the Buyer a Notice of Default by certified mail, return receipt requested, at the buyer's address listed on this agreement. The notice shall contain a detailed statement of the default complained of. If Buyer fails to cure the default within thirty (30) days after the mailing of the Notice of Default, the City may forfeit and terminate the Buyer's interest in this agreement by sending to the Buyer by certified mail, return receipt requested, a Declaration of Forfeiture describing the default complained of and reciting the date upon which the Notice of Default was mailed to Buyer and at what address.

15. SURRENDER OF POSSESSION: If Buyer's interest is forfeited and terminated by the City, Buyer agrees to immediately surrender the possession of the property, together with all structures fixed to the property, to the City by removing all persons and personal property not belonging to the City from the boundaries of the property. In the event Buyer fails to surrender possession of the property, the City may remove all personal property belonging to Buyer to a place of storage, such removal and storage to be at the risk of the Buyer.

16. RETENTION OF PAYMENTS: In the event of a Declaration of Forfeiture by the City, all monies paid by the Buyer under this agreement may be retained by the City and applied as rent for the value of the use and occupancy of the property. Upon any resale of the property, City will deliver the value received for any structures on the property constructed by Buyer, less administrative costs of the sale.

No provisions of this agreement shall be construed as an election of any remedy which the City might have for breach of this agreement.

17. BINDING ON SUCCESSORS: The parties agree that the provisions of this agreement will apply to and bind the heirs, executors, administrators, assigns or any successor in interest of the parties. If the Buyer is more than one person, all obligations, promises, conditions, covenants and warranties are joint and several. The use of the singular herein shall include the plural.

18. NOTICES: Buyer may direct all notices, correspondence and payments to City at P.O. Box ___, _____ Alaska 99 ___, attention City Clerk. All notices required by this agreement may be sent to Buyer at the address below and said address shall constitute the location for any service upon Buyer. The Buyer may at any time instruct the City to send any notices, in particular, Notices of Default and Declaration of Forfeiture to Buyer at another address, provided such instructions are mailed to the City at the address above by certified mail, return receipt requested, or delivered in person to the City Clerk.

19. INTEGRATED AGREEMENT: This agreement as signed by the parties constitutes the entire agreement between them. Any

modifications or amendments to this agreement must be in writing and approved by resolution of the City Council for the City of _____.

20. AUTHORIZATION: This agreement is entered into by City pursuant to authorization of Ordinance _____ passed by the City Council for the City of _____ on _____.

DATED: _____ DATED: _____

CITY OF _____ ***BUYER***

_____ _____

Mayor
P.O. BOX 33
Aleknagik, Alaska 99555

ADDRESS:

_____
_____

STATE OF ALASKA)
) ss.
_____ Judicial District)

On this _____day of _____ 20 __, before me the undersigned Notary Public, personally appeared _____ _____ known to me to be the individual described in and who executed the foregoing instruments for the CITY OF as Mayor, and acknowledged to me that s/he understood the contents of the instrument, was duly authorized to sign the instrument and did sign the instrument as a free and voluntary act for the uses and purposes therein described.

WITNESS my hand and seal the day and year hereinabove written.

_____
Notary Public for Alaska
My Commission expires: _____

LAND SALE CONTRACT
Page 6 of 7

STATE OF ALASKA)
) ss.
____ Judicial District)

On this day of _____ 20__, before me the undersigned Notary Public personally appeared _____ _____known to me to be the individual described in and who executed the foregoing instruments as BUYER, and acknowledged to me that s/he understood the contents of the instrument was duly authorized to sign the instrument and did sign the instrument as a free and voluntary act for the uses and purposes therein described.

WITNESS my hand and seal the day and year hereinabove written.

_____
Notary Public for Alaska
My Commission expires: _____

SAMPLE INSTALLMENT LANGUAGE

1. PURCHASE PRICE: Buyer agrees to pay a total purchase price of _____ Dollars ($), the money to be paid as follows: _____ dollars ($) upon execution of this agreement the remainder to be paid over a period of _____ years at _____ percent interest per annum (%), in monthly installments of _____ dollars ($) beginning _____, 20__ and due on the ____ day of each month thereafter. The monthly installments shall continue until the entire indebtedness is fully paid, except that any remaining indebtedness, if not sooner paid, shall be due and payable on _____.

Appendix Two E

SAMPLE LAND CONTRACT, VERSION 2

CONTRACT FOR SALE OF LAND

THIS AGREEMENT is made between the City of Aleknagik hereinafter designated as "City" and _____ hereinafter designated as "Buyer".

WITNESS: The City agrees to sell and the Buyer agrees to purchase the following real property (land), together with all improvements, fixtures, and equipments, attached to or situated thereon, on the terms and subject to the conditions specified in this agreement and subject to any reservation, restrictions and rights of way of record:

1. Purchase Price: Buyer agrees to pay a total purchase price of _____ dollars ($_____), the money to be paid as follows:

2. Possession: Possession shall be given to buyers upon execution of this agreement.

3. Buyer's Cost: Buyer agrees to pay any of the following costs:

a. Any taxes and assessments on the property occurring after the date of this agreement;

b. Any credit reporting fees;

c. Any recording fees associated with the recording of this contract or the deed from City to Buyer;

d. Title Insurance.

4. City's Costs: City agrees to pay the following costs;

a. Any legal fees associated with the preparation of the deed from City to Buyer.

5. Binding On Successor: The parties agree that the terms of this contract will apply to and bind their heirs, executors, administrators, assigns, or any successor in interest of the parties. If the buyer is more than one person, all obligations, promises, conditions, covenants and warrantees are joint and several.

6. Deed: City shall convey to Buyer a Quit Claim Deed to the property described above upon final payment of the purchase described in paragraph one.

7. Right of First Refusal: Buyer grants to City the first option to purchase the property back from Buyer, together with all improvements thereon, should Buyer decide at a later date to sell the property.

Buyer shall submit to City any offer to sell the above described property and City shall have thirty (30) days from receipt of the offer to accept or reject the offer. Buyer shall also submit to City any offers to purchase the above described property and City shall have thirty (30) days from the receipt of said offer to respond with an equivalent offer acceptable to buyer. All acceptances or responses from City will expire thirty (30) days from the date of receipt of the offer unless the Buyer in writing extends the period. City may waive the right of first refusal, provided such waiver is in writing. Buyer shall mail all offers to City, pursuant to Section 9 regarding Notices.

The right of first refusal granted to City shall expire years from the date of this agreement or upon the sale of the above described property by Buyer.

8. Waiver: Waiver by City of any default in the performance by Buyer of any of the terms, covenants, or conditions contained in this agreement, shall not be deemed a continuing waiver of the same or any subsequent default. Any waiver of rights accruing under this agreement to the City or Buyer shall be in writing.

9. Notices: Any notices which are required of this agreement, or which either City or Buyer may serve upon the other, shall be in writing and shall be deemed served when

delivered personally or when deposited in the United States mail, postage prepaid, return receipt requested addressed to Buyer at_____ or addressed to City at P.O. Box 33, Aleknagik, AK 99555, attention City Clerk.

10. Default: Time is of the essence to this agreement. Default will occur if Buyer fails to pay any sum when it becomes due under this agreement or fails to perform any other covenant required to be performed by Buyer. Neither the extension of time of payment of any sum to be paid hereunder nor any waiver by City of rights to declare this contract forfeited for any breach thereof shall in any manner affect the right of City to cancel this contract and retain all sums paid thereunder as liquidated damages for default by Buyer.

Upon default, the City may declare the entire contract price, or the remaining balance, due and payable.

11. Integrated Agreement: This agreement as signed by the parties constitutes the entire agreement between them. Any modification or alteration of this agreement shall not be valid unless evidenced by a duly signed writing supported by consideration additional and independent from the consideration for this agreement.

12. Authorization: This agreement is entered into by the City pursuant to authority granted by Ordinance _____ passed and approved by the City Council for the City of Aleknagik on _____.

Dated: _____ Dated: _____

CITY OF ALEKNIGAK: LESSEE:

_____ _____

Mayor
P.O. Box 33
Aleknagik, AK 99555 ADDRESS:

_____
_____

STATE OF ALASKA)
) ss:
THIRD JUDICIAL DISTRICT)

On this _____ day of _____ 20__, before me the undersigned Notary Public, personally appeared _____ known to be to be the individual described in and who executed the foregoing instruments for the CITY OF ALEKNAGIK as Mayor, and acknowledged to me that s/he understood the contents of the instrument, was duly authorized to sign the instrument and did sign the instrument as a free and voluntary act for the uses and purposes therein described.

WITNESS my hand and seal the day and year hereinabove written.

_____
Notary Public for Alaska
My Commission expires: _____

STATE OF ALASKA)
) ss:
THIRD JUDICIAL DISTRICT)

On this _____ day of 20__, before me the undersigned Notary Public, personally appeared _____ known to be the individual described in and who executed the foregoing instruments as BUYER and acknowledged to me that s/he understood the contents of the instrument, was duly authorized to sign the instrument and did sign the instrument as a free and voluntary act for the uses and purposes therein described.

WITNESS my hand and seal the day and year hereinabove written.

_____
Notary Public for Alaska
My Commission expires: _____

Appendix Two F

Appendix Two G
SAMPLE PROPERTY LEASE

2g

LEASE CONTRACT

THIS lease, made this _____ day of _____, 20__ by and between the City of Aleknagik, a municipal corporation, hereinafter referred to as "City" and _____, herein called "Lessee".

City for and in consideration of the rent specified to be paid by Lessee, and the covenants and agreements made by the Lessee, hereby leases the following described property:

To have and to hold unto said Lessee on the following terms and conditions:

1. Term: The terms of this lease shall be _____ years beginning on the ___ day of _____, 19___, and ending on the ___ day of _____, 19___, except as otherwise provided herein.

2. Rental: Lessee agrees to pay City as rent for the above described property the sum of _____ dollars ($_____) for the full terms hereof which rental shall be paid in installments as follows: _____ dollars ($ _____) upon execution of this lease, and _____ dollars ($_____) on the ____ day of

each and every month until the termination of this lease, without delay, deduction or default.

3. Purposes: Said property shall be used for _____ _____ and for no other purpose whatsoever without the written consent of City.

4. Buildings and Improvement: Lessee may, at Lessee's sole cost and expense, make such changes, alterations or improvements (including the construction of buildings) as may be necessary to fit said premises for such use, and all buildings, fixtures and improvements of every kind or nature whatever installed by Lessee, shall remain the property of Lessee, who may remove the same upon the termination of the lease, provided, that such removal shall be done in such a manner as not to injure or damage the property; and provided further that should Lessee fail to remove said buildings, fixtures or improvements as above provided, City at its option may require Lessee to remove the same. In the event that said Lessee shall fail to remove said buildings, fixtures and improvements after receipt of notice from City, City may remove the same and dispose of the came as it sees fit, and Lessee agrees to sell, assign, transfer and set over to City all of Lessee's right, title and interest in and to said buildings, fixtures, improvements and any personal property not removed by Lessee, for the sum of one dollar ($1.00) Lessee further agrees that should City remove said buildings, fixtures and improvements as above provided, that Lessee will pay City upon

demand, the cost of such removal, plus the cost of transportation and disposition thereof.

5. Taxes: Lessee shall pay any taxes and assessments upon personal property, buildings, fixtures and improvements belonging to Lessee and located upon the property, and all leasehold and possessory interest, taxes levied or assessed by any property taxing authority.

6. Repairs and Maintenance: Lessee represents that Lessee has inspected and examined the property and accepts the property in its present conditions and agrees that City shall not be required to make any improvements or repairs whatsoever in or upon the property or any part thereof; Lessee agrees to make any and all improvements and repairs at Lessee's sole cost and expense, and agrees to keep said properties safe and in good order and condition at all times during the term hereof, and upon expiration of this lease, or any earlier termination thereof, the Lessee will quit and surrender possession of said premise as quietly and peaceably and in good order and condition as the same was at the commencement of this lease, reasonable wear, tear and damage by the elements excepted; Lessee further agrees to lease the property, free from all nuisance and dangerous and defective conditions.

7. Assignment and Mortgage: Neither the property nor any portion thereof shall be sublet, nor shall this lease, or any interest therein, be assigned, or mortgaged by Lessee, and any attempted assignment, subletting, or mortgaging shall be of

no force or effect, and shall confer no rights upon any assignee, sublessee, mortgagee or pledgee.

In the event that Lessee shall become incompetent, bankrupt, or insolvent, or should a guardian, trustee, or receiver be appointed to administer Lessee's busyness or affairs, neither this lease nor any interest herein shall become an asset of such guardian, trustee or receiver, and in the event of the appointment of any such guardian, trustee, or receiver this lease shall immediately terminate and end.

8. Liability: Lessee shall save City harmless from any loss, cost or damage that may arise out of or in connection with this lease or the use of the property by Lessee, or his agents, or employees, or any other person using the property; Lessee agrees to deliver to City upon the execution of this lease, two executed copies of a continuing public liability and property damage insurance policy, satisfactory to City, indemnifying and holding City harmless against any and all claims, in the amount of _____ dollars ($_____) for injury to anyone person, and _____ dollars ($_____) for property damage, and shall keep the same in force during the term of this lease;

10. Mechanics Liens: Lessee agrees that at least five *(5)* days before any construction work, labor or materials are done, used or expended by Lessee or on Lessee's behalf by any person, firm or corporation by any contractor, that Lessee will post and record, or cause to be posted and recorded as provided

by law a notice of non-responsibility on behalf of City, giving notice that City is not responsible for any work, labor or materials used or expended or t o be used or expended on the property.

11. Termination by City: City may terminate this lease at any time if it should be determined by its City Council that public necessity and convenience requires it t o do so, by serving upon Lessee in the manner herein provided a written notice of its election to so terminate, which notice shall be served at least _____(___) days prior to the date in said notice for such termination.

12. Default: In the event that Lessee shall be in default of any rent or in the performance of any of the terms or conditions herein agreed t o be kept and performed by Lessee, then in that event, City may terminate and end this lease, forthwith, and City may enter upon said premises and remove all persons and property therefrom, and Lessee shall not be entitled to any money paid hereunder or any part thereof; in the event City shall bring a legal action to enforce any of the terms hereof or to obtain possession of the property by reason of any default of Lessee, or otherwise, Lessee agrees to pay City all costs of such action, including attorney's fees plus the sum of _____ dollars ($_____).

13. Holding Over: In the event that Lessee shall hold over and remain in possession of the property with the written consent of the City Council such holding over shall be deemed

to be from month to month only, and upon all of the same rents, terms, covenants and conditions as contained herein.

14. Notices: Any notices which are required hereunder or which either City or Lessee may desire to serve upon the other, shall be writing and shall be deemed served when delivered personally, or when deposited in the United States mail, postage pre-paid, return receipt requested, addressed to Lessee at _____or addressed to City at P.O. Box 33, Aleknagik, AK 99555, attention Mayor.

15. Advance Rental: City acknowledges receipt of the sum of _____ dollars ($_____), which shall be credited by City to the last months installment of rent to become due hereunder.

16. Waiver: Waiver by City of any default in performance by Lessee of any of the terms, covenants, or conditions contained herein, shall not be deemed a continuing waiver of the same or any subsequent default herein,

17. Compliance With Laws: Lessee agrees to comply with all laws, ordinances, rules and regulations which may pertain or apply to the property or the use thereof.

18. City May Enter: Lessee agrees that City, its agents or employees, may enter upon the property at any time during the term or any extension hereof for the purposes of inspection, digging test holes, making surveys, taking measurements, and doing similar work necessary for the preparation of plans for the construction of buildings or

improvements on said premises, with the understanding that said work will be performed in such a manner as to cause minimal interference with the use of the property by a Lessee.

19. Successors In Interest: All of the terms, covenants and conditions contained herein shall continue, and bind all successors in interest of Lessee herein.

20. Authority: This lease is entered into by the City pursuant to authority granted by Ordinance _____ passed and approved by the City Council of Aleknagik on _____.

Dated: _____ Dated: _____

CITY OF ALEKNIGAK: LESSEE:

_____ _____

Mayor
P.O, Box 33
Aleknagik, AK 99555

_____
ADDRESS:

_____
_____

STATE OF ALASKA)
) ss:
THIRD JUDICIAL DISTRICT)

On this _____ day of _____19___, before me the undersigned Notary Public, personally appeared _____ known to be to be the individual described in and who executed the foregoing instruments for the CITY OF ALEKNAGIK as Mayor, and acknowledged to me that s/he understood the contents of the instrument, was duly authorized to sign the instrument and did sign the instrument as a free and voluntary act for the uses and purposes therein described.

WITNESS my hand and seal the day and year hereinabove written.

_____
Notary Public for Alaska
My Commission expires: _____

Appendix Two G

STATE OF ALASKA)
) ss:
THIRD ZUDICIAL DISTRICT)

On this _____ day of _____ 19___, before me the undersigned Notary Public, personally appeared _____ known to be to be the individual described in and who executed the foregoing instruments as LESSEE, and acknowledged to me that s/he understood the contents of the instrument, was duly authorized to sign the instrument and did sign the instrument as a free and voluntary act for the uses and purposes therein described.

WITNESS my hand and seal the day and year hereinabove written.

_____
Notary Public for Alaska
My Commission expires: _____

SAMPLE QUITCLAIM DEED

QUITCLAIM DEED

_____

THE GRANTOR, City of _____, a municipal corporation in the State of Alaska, pursuant to authorization of Ordinance _____ approved by the City Council on _____, 20___, for the sum of _____ and other valuable consideration, conveys and quitclaims to _____, all interest which it has, if any, the following described property:

Dated:

CITY OF _____

_____

Mayor

STATE OF ALASKA)
) ss.
_____Judicial District.)

THIS IS TO CERTIFY that on this the ____ day of _____ 20__ before me the undersigned a Notary Public for the State of Alaska personally appeared known to me to be the Mayor for the City of _____, and executed the foregoing document upon acknowledging that his act was duly authorized by ordinance of the City Council for the City of _____.

WITNESS my hand and official seal this _____ day of 19__ at _____, Alaska.

_____
NOTARY PUBLIC FOR ALASKA
My Commission Expires:

Appendix Two H

OCCUPANCY PERMIT

THE CITY OF _____ , a municipal corporation in the State of Alaska, pursuant to authorization of Ordinance ___ approved by the City Council on _____ 20__, grants to _____ a right to the continued use and occupancy of all structures and improvements located on the following described property:

This right extends only to those structures and improvements existing on the above described property as of the date of this permit and shall continue for a period of _____ years from the date of this permit or until the use of said improvements and structures is abandoned, whichever occurs first. Abandonment shall occur if in the determination of the City Council of _____ the structures and improvements remain vacant or unused for a period of _____ years. The rights granted by this permit are personal and shall not extend to the heirs, executors or assigns of the grantee. The rights granted by this permit are subject to the power of eminent domain or the right of the City, upon ninety (90) days notice to grantee, to remove the structures and improvements at City's expense to another location when in the determination of the City Council the public interest requires said removal. The rights granted by permit do not extend to structures or improvements constructed after the date of this permit.

Upon expiration of this permit, the City may require at grantee's expense the removal of any structure and improvements on the above described property, or the City may take possession of said structures and improvements and dispose of the same in any manner it deems appropriate, with or without compensation to grantee.

Dated: CITY OF _____

_____

Mayor

STATE OF ALASKA)
) ss.
_____Judicial District.)

THIS IS TO CERTIFY that on this the ___ day of 20____ before me the undersigned a Notary Public for the State of Alaska personally appeared _____ known to me to be the Mayor for the City of _____, and executed the foregoing document upon acknowledging that his act was duly authorized by ordinance of the City Council for the City of _____.

WITNESS my hand and official seal this ___ day of 20____ at _____, Alaska.

_____

NOTARY PUBLIC FOR ALASKA
My Commission Expires:

SAMPLE CONVEYANCE TO TRIBAL ORGANIZATION

ORDINANCE 87-10
AN ORDINANCE OF THE CITY OF ALEKNAGIK, ALASKA PROVIDING FOR THE CONVEYANCE OF CERTAIN PROPERTY TO THE ALEKNAGIK TRIBAL GOVERNMENT

BE IT ENACTED BY THE ALEKNAGIK CITY COUNCIL, AS FULLOWS:

Section 1. Classification.

This is a non-code ordinance.

Section 2. Recitals.

(a) The City of Aleknagik received title to Lot 1, Block 2, U.S.S. # 3309 from the Townsite Trustee, United States Department of the Interior on December 4, 1984.

(b) On February 5, 1933 the Aleknagik Tribal Council was awarded a grant in the amount of $350,000 from the United States Department of the Interior, Bureau of Indian Affairs, in order to construct a community hall for the residents of Aleknagik.

(c) In order to facilitate the construction of the Hall, the City Council on April 6, 1983 agreed to permit the Tribal Government to construct the hall on the property described above. A community hall was needed by the residents of Aleknagik and if the City Council did not permit the construction of the hall the grant award would have been withdrawn.

(d) The Tribal Council has requested the City to transfer title to the property upon which the hall is located now that the City is in a position to convey title.

(e) The Tribal Council is a governing body recognized by the United States Government and is a non-profit organization. Although only Alaska Native residents of the City of Aleknagik are entitled to membership in the Tribe, the Tribal Government has maintained and operated the hall for the use and benefit of all the residents of the City of Aleknagik.

Section 3. Findings.

(a) The City Council has considered the present use of the property described above and has examined the existing and potential land need of the City government and the residents of the Community, and hereby finds that the best use of the above described land, because of its location and tradition of use, is for a community hall. The continued use of the property for a community hall and the continued operation of the hall by the Aleknagik Tribal Government will benefit the residents of the City of Aleknagik.

(b) The property described above is not needed for any other foreseeable public or city purpose.

(c) The Aleknagik Tribal Government is a recognized tribal authority and a non-profit organization and pursuant to Title IV, Chapter 4.3, Section 4 the conveyance of the property described above may be for less than fair market value.

(d) The conveyance of the property to the Aleknagik Tribal Government will help the Tribal Government obtain funds to continue providing service to the residents of the City of Aleknagik.

Section 4. Authorization.

The Mayor is authorized to convey and quitclaim to the Aleknagik Tribal Government all interest which the City has in that property described as Lot 1 B, Block 2,s subdivision of Lot 1, Block 2, U.S.S. 3309, provided the Aleknagik Tribal Government covenants in writing to keep the property open and available for use by all the residents of the City of Aleknagik on a non-discriminatory basis.

PASSED AND APPROVED BY A DULY CONSTITUTED QUORUM OF THE CITY COUNCIL FOR THE CITY OF ALEKNAGIK THIS _____ DAY OF _____, 1987.

Introduction:

Public Hearing:

_____
Mayor

ATTEST:

_____
City Clerk

public notice

* * * * * * * * * * *

ON TUESDAY, MARCH 16, 1987 THE CITY COUNCIL WILL HOLD A PUBLIC HEARING AT THE CITY HALL, AT 7:30 P.M. FOR THE PURPOSE OF HEARING PUBLIC COMMENTS ON THE PROPOSED PASSAGE OF ORDINANCE 87-1 0. ORDINANCE 87-1 0 PROPOSES THAT THE CITY SELL TO THE TRIBAL COUNCIL THE LAND UNDERNEATH THE TRIBAL COUNCIL BUILDING. A COPY OF THE ORDINANCE AND THE CONTRACT FOR SALE IS AVAILABLE FOR PUBLIC VIEWING AT THE CITY CLERK'S OFFICE FROM 9:00 A.M. TO 5:00 P.M. COPIES WILL ALSO BE AVAILABLE AT THE PUBLIC HEARING. EVERYONE IS ENCOURAGED TO ATTEND AND THE MEETING WILL CONTINUE UNTIL EVERYBODY WHO WANTS TO SPEAK HAS BEEN HEARD.

THE ORDINANCE APPROVING THE SALE OF THE LAND TO THE TRIBAL COUNCIL IS SCHEDULED FOR FINAL PASSAGE AT THE REGULAR CITY COUNCIL MEETING ON TUESDAY, APRIL 14, 1987.

* * * * * * * * * * *

QUITCLAIM DEED

THE GRANTOR, City of Aleknagik, a municipal corporation in the State of Alaska, pursuant to authorization of Ordinance 87-10 approved by the City Council on April 14, 1987, for the sum of ten dollars and other valuable consideration, conveys and quitclaims to the Aleknagik Tribal Government, all interest which it has, if any, in the following described property:

Lot 1B, Block 2, a subdivision of Lot 1. Block 2, U.S.S. # 3309, Aleknagik, Alaska.

SUBJECT TO the declaration of covenant which shall run with the land and be binding upon the grantee and all other parties and persons claiming through the grantee herein that the property above described shall be used for the benefit and use by all the residents of the City of Aleknagik, for a period of fifty (50) years from the date of this deed.

DATED: CITY OF ALEKNAGIK

_____
Mayor

STATE OF ALASKA)
) ss.
Third Judicial District.)

THIS IS TO CERTIFY that on this the _____day of 19__ before me the undersigned a Notary Public for the State of Alaska personally appeared _____ known to me to be the Mayor for the City of Aleknagik, and executed the foregoing document upon acknowledging that his act was duly authorized by ordinance of the City Council for the City of Aleknagik.

WITNESS my hand and official seal this day of _____ 19__ at Aleknagik, Alaska.

_____
NOTARY PUBLIC FOR ALASKA
My Commission Expires:

Appendix Two K

APPENDIX 2K: Other Documents

2k

Appendix Two K

APPLICATION FOR LOT PURCHASE

CITY OF ALEKNAGIK
APPLICATION FOR LAND PURCHASE

APPLICATION MUST BE ACCOMPANIED BY A TEN DOLLAR ($10.00) NON-REFUNDABLE FEE

PLEASE COMPLETE THE FOLLOWING:

Date: _____ *Lot Desired:* _____

Name: _____

Address: _____

1. Age: _____
2. Occupation: _____
3. Property owner in Aleknagik? _____
4. Have you been a resident in Aleknagik for at least __ days? _____
5. Is this the only application from your household? _____

If the answer is no, please explain.

6. Where are you registered to vote?

7. What plans have you made to construct a house on the lot you wish to purchase?

8. Do you own property in any other community? If so, for what do you use this property?

9. How long have you lived in Aleknagik?

STATEMENT:

I hereby state that all the above information is true and correct. I understand that my application will not be considered by the City Council if it is found that any information I have provided is not true.

_____ _____

Signature of Applicant *Date*

Appendix Two K1

ORDINANCE APPROVING LAND EXCHANGE IN ALEKNAGIK

CITY OF ALEKNAGIK, ALASKA
ORDINANCE 87-
AN ORDINANCE PROVIDING FOR THE CONVEYANCE OF CITY PROPERTY INTERESTS IN EXCHANGE FOR THE ACQUI SITION OF OTHER PROPERTY AND PUBLIC RIGHTS OF WAY

BE IT ENACTED BY THE ALEKNAGIK CITY COUNCIL, AS FOLLOWS:

Section 1. Classification.
This is a non-code ordinance.

Section 2. Recitals.

(a) The heirs of Peter Krause have a recognized claim to certain property within the city limits of the City of Aleknagik by virtue of Native Allotment application # A 054491;

(b) The extent of the Native Allotment obstructs surveyed rights of way and public access and creates conflicts of title between the Native Allotment and the City of Aleknagik and between the Native Allotment and other residents of the City;

(c) The extent of the Native Allotment obstructs planned future access to a public sanitary landfill;

Section 3. Findings

(a) An exchange of property is the most expedient and fair means to resolve the property conflicts and acquire the property necessary to secure public easements;

(b) The property owned by the City of Aleknagik selected for exchange with the heirs of Peter Krauss is not needed for any other foreseeable public purpose of greater importance to the residents of the City than securing public easements, rights of way and access to a proposed sanitary landfill;

(c) The value to the City of Aleknagik and its residents of the land and rights to be received is equivalent to or exceeds the value of the land to be conveyed.

Section 4. Property Exchange.

The exchange of interests in land is to be made with the United States Department of the Interior, Bureau of Indian Affairs, trustee for the heirs of Peter Krauss. The City will convey to the Bureau of Indian Affairs approximately 2.9 103 acres of land and in exchange will receive approximately .7 14 1 acres of land and approximately 5.6336 acres of easements and public rights of way in accordance with the plat attached hereto as Attachment "A". Attachment "A" is incorporated by reference into and made a part of this ordinance.

Section 5. Authorization.

The Mayor is authorized to convey and quitclaim to the Bureau of Indian Affairs all interest which the City has in the 2.9103 acres described above and on Attachment "A" and is authorized to accept on behalf of the City of Aleknagik all interest which the Bureau of Indian Affairs and the heirs of Peter Krauss have in the .7141 acres of land and 5.6336 acres of easements and public rights of way described above and on Attachment "A".

Section 6. Prior Ordinance.

This ordinance supersedes and replaces Ordinance 86- of the City of Aleknagik.

PASSED AND APPROVED BY A DULY CONSTITUTED QUORUM OF THE CITY COUNCIL FOR THE CITY OF ALEKNAGIK THIS ___ DAY OF _____, 1987.

Introduction:

Public Hearing:

_____
Mayor

ATTEST:

_____
City Clerk

Documents Prepared for the City of Larsen Bay to Conduct a Municipal Land Sale

BRIAN W. DURRELL
DAVID R. MILLEN
DOUGLAS S. PARKER
JAMES N. REEVES

LAW OFFICES
BOGLE & GATES
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
SUITE 525
900 WEST FIFTH AVENUE
ANCHORAGE, ALASKA 99501
(907) 276-4557 TELEX: 090-26-695
TELECOPIER: 907-276-4152
PLEASE REPLY TO ANCHORAGE OFFICE

SEATTLE OFFICE
THE BANK OF CALIFORNIA CENTER
SEATTLE, WASHINGTON 98164
CABLE "BOGLE SEATTLE"
(206) 682-5151 TELEX: 32-1067

WASHINGTON, D.C. OFFICE
SUITE 900
ONE THOMAS CIRCLE, N.W.
WASHINGTON, D.C. 20005
(202) 293-3600 TELEX: 89-7410

September 17, 1984

Mayor Frank M. Carlson
P.O. Box 8
Larsen Bay, Alaska 99624

Mr. Jay A. Brunner, Planner
Municipal and Regional Assistance
Division
Alaska Department of Community
and Regional Affairs
949 East 36th Avenue, Suite 400
Anchorage AK 99508

Re: City of Larsen Bay
Our Ref: 15000/28432

Dear Sirs:

Based upon the telephone conference held among the three of us on September 11, 1984, I have revised the documents which we provided with our letter of September 10. I have also prepared the additional documents which the City will need in order to conduct its land sale. Enclosed are the following:

1) Land Disposal Ordinance

2) Non-code Oridinance Authorizing Specific Land Sale, to be submitted for voter approval after its adoption by the Council

3) Instructions for conducting the sale

4) Sworn statement of residency

5) Deed containing residential use restriction

6) Promissory Note

7) Deed of Trust

The Land Disposal Ordinance has been revised slightly to make it easier to read and understand. For example, the rules concerning who will be treated as a "resident," set forth in Section 8(c), have been clarified.

The specific non-code ordinance authorizing the land sale has been changed in two important ways. First, it now provides for voter ratification after it has been adopted by the Council. We are proposing to do this in order to avoid any possible legal question which might otherwise be raised, due to some comments in a Alaska Attorney General's opinion last year. To be absolutely safe, we believe that the Council should first adopt this ordinance, and then submit it to the voters as a ballot proposition for their approval. The voters will also see exactly which land will be offered for sale, what the minimum bid (based on estimated value) will be for each lot, and what procedures will be followed.

The second change in the specific sale ordinance involves the procedures for the sale. Rather than using resident preference rights, which would allow nonresidents to participate in the bidding subject to the right of residents to match the high bid, we have substituted a provision restricting participation in the land sale to residents only. In doing this, we are relying upon the Alaska Attorney General's opinion to which we have previously referred.

The authorizing ordinance and the instructions are written with a sealed bid auction procedure in mind. Remember that State law requires that the sealed bids be opened and tabulated in public. The best way to do this is to set a specific date and hour for the bid opening, and conduct it in a public meeting format.

We have also prepared a sworn statement of residency, to be submitted by each person who wants to submit a bid. You should review this carefully, along with Section 8(c) of the ordinance, to be sure that it makes sense to you and meets the community's wishes.

BOGLE & GATES

We will stand ready to discuss these documents with you at any time, and to assist the City in the adoption of the ordinances, the conduct of the sale, and the various actions that must be taken after the sale is held.

Very truly yours,

BOGLE & GATES

James N. Reeves

jlh

Appendix Three A

ORDINANCE # _____

LEASING, SALE AND EXCHANGE OF CITY LAND

Sections:

Section 1. Power to dispose of real property.

The City may dispose of real property or interests therein, including future interests and after-acquired title, by sale, lease, exchange or other lawful means of conveyance, subject to the provisions of this chapter.

Section 2. Form of document of conveyance.

No disposal by the City of any interest in real property by any means shall be effective unless the procedure followed by the City complies with the requirements of this Chapter and the disposal is reflected in a document of conveyance which meets the following requirements:

(a) The document of conveyance must be in a recordable form permitted by state statute;

(b) The document of conveyance must be signed by the Mayor or, in the Mayor's absence, another City official designated in writing by the Mayor.

(c) The document of conveyance must contain a specific reference to the ordinance or resolution by which the City Council has authorized the conveyance to be made.

(d) The document of conveyance must be delivered by the City to its grantee or lessee at the time that the grant or lease is made.

Section 3. Sale or lease by public auction.

Unless otherwise provided in this chapter, and subject to the preference rights referred to in Section 8 of this chapter, the City may dispose of interests in real property only by sale or lease, at public auction, to the highest responsible bidder. The public auction may be conducted by the sealed bid method or by the outcry method. The method used shall be determined by the City Council and shall be set forth in the ordinance authorizing the sale or lease of City lands.

Section 4. Exchange of properties.

The preferred method of disposing of interests in City lands are lease and sale. The City may dispose of City property by exchanging it for other property only if both of the following conditions are met:

(a) The Council determines, in findings set forth in its, resolution authorizing the exchange, that the property is not required for City purposes and that the interests of the City in disposing of the property would be better served by an exchange for other property than by a sale or lease; and

(b) The Council determines that the property proposed to be conveyed to the City in exchange for the City's property is of equal or greater value than the City's property.

Section 5. Procedures applicable for sales, leases and exchanges.

When the City sells, leases or exchanges property, it must follow these procedures:

(a) An estimate of value shall be made by an appraiser or by the assessor. The Clerk may act as the assessor for the purpose of this Section. In the case of a sale or exchange, the estimate of value must be an estimate of the present fair market value of the property. If the proposed disposal is a lease, the estimate of value must be an estimate of both the present fair market value of the property and also the present fair market rental value of the property. Estimates of value may be based upon general information as to recent land sales or leases in Larsen Bay or nearby communities, and need not include detailed site-specific data or real estate market analysis. The estimated value shall be the minimum legally acceptable price for the property. The estimate of value must be reviewed and approved by the City Council prior to the conduct of any sale, lease, or exchange. This review and approval may be made by the Council at any time prior to the acceptance of high bids following their tabulation and review.

(b) Land of estimated value of under twenty-five thousand dollars ($25,000) shall be disposed of as follows:

(i) The Council must first enact an ordinance setting forth:

[a] A finding that the property proposed to be disposed of is not required for City purposes;

[b] A finding that the best interests of the City would be served by disposing of the land by sale, lease or exchange;

[c] If the Council determines that the land should be disposed of by exchange, additional findings as required by Section 4 of this chapter;

[d] The terms and conditions upon which the sale, lease or exchange will be conducted by the City.

(ii) Notice of the City's intent to dispose of the land, and of the manner by which the land is to be disposed of (i.e., by sale, lease or exchange, sealed bid or public outcry auction), shall be posted in at least three public places

within the City for at least thirty days prior to the disposal. Notice may also be given by other means considered reasonable by the Mayor or Council. The notice must contain a brief description of the land, its area and general location, the minimum purchase or rental price, any terms or limitations concerning land, and the times and places set forth for the public outcry auction or sealed bid opening (if applicable) and for the exercise of preference rights to meet high bids.

(c) Disposal of City land valued at twenty-five thousand dollars ($25,000) or more shall be in the same manner prescribed in subsection (b) above, except that the ordinance authorizing the disposal must be ratified prior to the disposal by a majority of the qualified voters voting at a regular or special election at which the question of the ratification of the ordinance is submitted.. A notice stating the time of the election and the place of voting and describing the property to be disposed of and the terms and conditions of the disposal shall be posted in at least three public places in the City at least thirty (30) days before the election.

(d) A deed issued by the City in connection with any disposal under this Section shall be in the form of a statutory quitclaim deed.

Section 6. Financial terms.

Except in the case of an exchange, all disposals of City property under this section shall be for cash. The Council may provide by ordinance for the sale of property pursuant to an installment sale agreement or with a promissory note secured by a first deed of trust on the sale property. Rent on leases shall be payable quarterly or monthly, as the Council may determine. Any lease or installment purchase agreement issued by the City under this chapter must provide, among other terms and conditions, that upon a failure by the purchaser or lessee to make timely payment thereunder the contract or lease is terminated and all payments made thereunder are forfeited to the City.

Section 7. Sale of present and after-acquired title or future interest in real property.

The Council may authorize the sale of after-acquired title or future interests in real property to which the City is

or may in the future become entitled. When this power is exercised, the ordinance and any deeds issued under this Section must contain a specific disclaimer of any warranty of title. A deed issued under this Section may also contain provision for issuance of a subsequent confirmatory quitclaim deed upon the request of the grantee at such future time as the City may obtain title to the land.

Section 8. Preference rights and eligibility limitations for residents.

(a) The Council may authorize the granting of preference rights to residents, as described in subsection (c) below, for any specific sale. If more than one resident preference right holder applies to purchase the same parcel, the competing preference right holders shall-submit sealed bids and the highest bidder shall be entitled to purchase the parcel at the price bid.

(b) Upon a finding by the Council that serious local residential housing needs require it, the Council may impose an eligibility requirement for a specific land sale. If the Council imposes this eligibility requirement, then the sale procedure shall provide that all prospective bidders qualify in advance of the sale by submitting sworn statements of residency to the Clerk. These statements of residency shall be available for public review. Any challenges to residency shall be determined by the Clerk, subject to appeal to the Council.

(c) A resident, for the purposes of this section, is a person who lives in Larsen Bay and has the present intent to make¨Larsen Bay his/her home and remain in Larsen Bay. Whether or not a person is a resident shall be decided based upon all of the facts concerning that person's living condition and intentions. A person who has maintained his/her dwelling and has physically resided in Larsen Bay continuously for a period of at least one-hundred twenty (120) days immediately preceding the filing of the sworn statement of residency shall normally be a resident. A person who has not resided in Larsen Bay continuously for a period of at least one-hundred twenty (120) days immediately preceding the filing of the sworn statement of residency shall normally be treated as a nonresident. If other facts show that a person having less than the required 120 days of

residency is a resident, however, he/she may be treated as a resident. Likewise, if other facts show that a person having more than the required 120 days of residency is not a resident, he/she should not be treated as a resident.

Section 9. Leases, sales or grants to government agencies or public utilities.

The Council may provide by ordinance for the lease, sale or grant of City lands to a government agency or a public utility at less than its fair market value for use for a public purpose. The ordinance authorizing a public purpose lease, sale or grant must include a statement of the reasons why the Council has decided to dispose of the land for less than its fair market value.

CITY OF LARSEN BAY ORDINANCE #_____

AUTHORIZATION FOR SALE OF CERTAIN CITY LANDS

Be it resolved by the Council for the City of Larsen Bay as follows:

1. This non-code ordinance is adopted by the City Council pursuant to Section 3 of the City ordinance entitled "Leasing, Sale and Exchange of City Land" (adopted by the Council on _____, 1984), for the purpose of authorizing the sale of certain City lands. After its adoption, this ordinance will be submitted to the voters for ratification as a ballot proposition at the next election.

2. The lands which are the subject of this ordinance are described on Appendix A. The City acquired these lands on _____ [date] by a deed from the Townsite Trustee, United States Department of the Interior. Appendix A also lists the estimated value of each lot. The estimated value will be the minimum acceptable bid for the lot.

3. The Council has studied these lands and the existing and future land needs of the City and of its residents, and hereby finds that these lands are not required for City purposes and that the best interests of the City would be served by selling the lands. The Council also finds that there is an important public interest in encouraging Larsen Bay residents to become land owners in order to promote population stability.

4. The lands shall be sold at a sealed bid auction to be held by the City Clerk. Bids shall be accepted by the Clerk from _____ [date and hour] until _____ [date and hour]. The Clerk shall then publicly open and tabulate the bids on _____ [date] at _____ [hour].

5. The land sale will be restricted to pre-qualified residents only. Any resident, as that term is defined in Section 8(c) of the City's Land ordinance, may qualify to participate in the sale by submitting a sworn statement of residency with his/her sealed bid.

6. No one may purchase more than one lot at the sale.

7. Each lot purchaser will be required to pay at least twenty percent (20%) of the purchase price within five (5) days after the auction. If a purchaser fails to make this payment within five (5) days, he will lose his right to purchase the lot. The City will accept a promissory note for the balance of purchase price, up to a maximum of 80%, payable in equal annual installments with interest at the rate of twelve percent (12%) over a term of no more than ten (10) years. The promissory note will be secured by a first deed of trust on the lot.

8. Each deed issued by the City will contain the restriction that the lot may not be used for any purpose other than owner-occupied, single-household occupancy during the five years following the date of the auction.

Dated this _____ day of _____, 1984.

_____
[name and title]
For the City Council

Ratified by the votes of the City of Larsen Bay by a vote of _____ at the election held on _____ [date].

_____
Clerk

INSTRUCTIONS FOR LARSEN BAY LAND SALE

The following is a step-by-step review of the procedures which should be followed by the City in order to prepare for and conduct the sale of City lands:

1. The Council must first adopt a general ordinance dealing with the sale, lease and exchange of City lands. This will be the framework for all future leases and sales. (A proposed ordinance is provided with these instructions.)

2. Now it is time for the City Council to adopt an ordinance authorizing the Mayor and the Clerk to go forward with the sale of the land which has been identified and subdivided. This non-code ordinance should explain what procedures will be followed in selling the land, what the terms of payment will be, what deed restrictions (if any) should be included, and what preference rights or eligibility limitations will be imposed. After the Council has adopted this ordinance, it should be submitted to the voters for ratification at the next election. (A sample sale ordinance is provided with these instructions.)

3. After the Council has adopted the sale ordinance and the voters have approved it, the Clerk or the Mayor should go forward with the required procedures. The first requirement is to post public notices in the community so that everyone will know about the sale and can decide whether to submit a bid on some land. The law does not require that this public notice be posted or published anywhere outside of the City.

4. The sale ordinance limits participation in the sale to residents only. The person who conducts the sale will have to make blank sworn statements of residency available for any resident who wants to participate in the sale. (A sample sworn statement of residency is provided with these instructions.) If there are any disputes about eligibility, those disputes can be decided by the City Council before the bids are approved and deeds are issued.

5. The next step is to hold the sale. The sale ordinance which is attached calls for what is referred to as a sealed bid auction procedure.

6. After the auction is over, the winning purchasers must pay the City for the land within five (5) days. A winner who does not pay within five (5) days loses his right to buy the lot. The lot will be held by the City, so it can be

offered for sale again at a later land auction. The City will allow purchasers to "borrow" up to eighty percent (80%) of the purchase price from the City, by giving the City a promissory note and a deed of trust on the property. This will make it possible for the purchasers to buy the property for only twenty percent (20%) of its price and pay off the rest of the price with smaller annual payments over a ten-year period. When a purchaser makes his payment to the City (of twenty percent or more of the purchase price), the City should issue a deed to the lot to the purchaser and the purchaser should sign a promissory note and a deed of trust. (Samples of the deed, the promissory note and the deed of trust are provided with these instructions.) The City official conducting the sale should then record the deed and the deed of trust with the recording office, and give the purchaser copies of them.

7. Now that the land has been sold, the only thing left for the City to do is to keep track of payments received from the purchasers and to enforce the deed restrictions. In the sale ordinance and sample deed which are provided with these instructions, there is a deed restriction to prevent purchasers from using the lands for any purpose other than owner-occupied single-household residential use for the first five years after the sale. This does not force anyone to build a house. The purchaser could let the land sit vacant for five years, and then use it for some other purpose. During the first five years, however, only owner-occupied single-household residential use would be allowed. If someone violates this restriction, it will be the City's responsibility to take some action to do something about it.

8. If an owner sells his land before he has finished paying off the City for the purchase price, he should notify the City of the new owner so that the City can make sure that the new owner continues to make the payments. Normally, the original purchaser will still be obligated to make sure that the City is paid. That way, if the new owner does not pay then, the City should be able to go back to the original owner and get the money from him.

SWORN STATEMENT OF RESIDENCY

I, _____, hereby swear or
(name)
affirm under penalty of perjury that the facts set forth in this statement are true. I am a resident of the City of Larsen Bay. I have lived in Larsen Bay for the last 120 days.

(If you have not lived in Larsen Bay for the last 120 days, but believe that you should be qualified to participate in the land sale as a resident anyway, please explain all of the facts concerning your residency in writing on the back side of this statement.)

_____
(signature)

Date: _____

_____
(print your name here)

_____
(signature of witness)

Appendix Three E

QUITCLAIM DEED

The Grantor, The City of Larsen Bay, P.O. Box 8, Larsen Bay, Alaska, 99624, for and in consideration of the sum of $ _____, conveys and quitclaims to _____, the Grantee, of _____, Alaska, all interest in the following described real estate, situated in the State of Alaska:

> This grant is subject to the condition that, prior to _____, 19__, the subject property may not be used for any purpose except owner-occupied single-household residential use. (This condition does not require the owner to construct any building on the property during the period in which it is in effect.) Upon breach of this condition, the grantor shall be entitled to re-enter and recover title to the subject property by filing an action in a court of competent jurisdiction and obtaining a judgment divesting the grantee of title and revesting it in the grantor.

Dated this _____ day of _____, 1984.

GRANTOR:

_____

Title: _____

For the City of Larsen Bay

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

BEFORE ME, the undersigned, a notary public in and for the state of Alaska duly commissioned and sworn as such, this day personally appeared _____ known personally to me, who, being duly sworn, stated that _____ is the _____ [title of office held] for the City of Larsen Bay, acting pursuant to Ordinance #_____ duly adopted on _____, 19__, and that executed the same freely and voluntarily for the uses and purposes therein set forth.

WITNESS my hand and official seal this _____ day of _____, 1984.

_____
Notary Public for Alaska
My commission expires _____

Liability. The Maker hereby waives demand, presentment for payment, protest, and notice of protest and of nonpayment.

Maximum Interest. Notwithstanding any other provision of this Note or of the Deed of Trust of interest, fees and charges payable by reason of the indebtedness evidenced hereby shall not exceed the maximum, if any, permitted by any governing law.

Applicable Law. This Note shall be construed according to the laws of the State of Alaska.

_____

_____

PROMISSORY NOTE

$_____ Larsen Bay, Alaska
_____, 19__

For value received the undersigned (hereinafter "Maker") promises to pay to the order of The City of Larsen Bay (hereinafter "Holder"), the principal sum of _____ Dollars ($_____), together with interest from the date hereof until paid on all sums which are and which may become owing hereon from time to time, all as hereinafter provided and upon the following terms and conditions:

Interest. Unless there shall be a default, interest shall accrue from the date hereof and be paid at the rate of ___ percent (___%) per annum; provided, however, that in the event of any default, as hereinafter defined, all sums then and thereafter owing hereon, at the option of the Holder, shall bear interest at the rate of percent (___%) per annum (the "Default Rate").

Payments. Maker shall pay this note in _____ equal installments on or before the _____ day of _____ (month) until it has been paid in full. Each payment made on this note shall be applied first to interest accrued to date of payment and then to principal.

Late Payment Charge. If any installment is not paid within _____ (___) days after it becomes due, then the Maker agrees to pay a late charge equal to ____ percent (__ %) of the delinquent installment to cover the extra expense involved in handling delinquent payments. This is in addition to and not in lieu of any other rights or remedies the Holder may have by virtue of any breach or default.

The Deed of Trust. This Note and the sums evidenced hereby are secured by a deed of trust (the "Deed of Trust") of even date herewith, executed and delivered by, or caused to be executed and delivered by the Maker to the original Holder hereof. The Maker agrees to perform and comply with, or to cause to be performed and complied with, all of the terms and conditions of the Deed of Trust.

Default; Attorneys Fees and Other Costs and Expenses. In the event of any default, including a failure to comply with the provisions of the Deed of Trust, all sums owing and to become owing hereon, at the option of the Holder, shall become immediately due and payable and shall bear interest thereafter at the Default Rate per annum. The Maker agrees to pay all costs and expenses which the Holder may incur by reason of any default, including without limitation reasonable attorneys' fees with respect to legal services relating to any default or to a determination of any rights or remedies of the Holder under this Note and reasonable attorneys' fees relating to any actions or proceedings which the Holder may institute or in which the Holder may appear or participate and in any appeals therefrom. Any judgment recovered by the Holder hereof shall bear interest at the Default Rate per annum, not to exceed however the highest rate then permitted by law on such judgment. The venue of any action hereon may be laid in the Third Judicial District, State of Alaska, at the option of the Holder.

Appendix Three F

*(**Note:** This form has been retyped from the original document)*

Deed of Trust

THIS DEED OF TRUST, Made this..... day of.....19.....
BETWEEN.....
.....herein called TRUSTOR,
whose address is ....., State of Alaska,
(Number and Street) (City)
Transamerica Title Insurance Co. herein called TRUSTEE, and
701 E. Tudor Rd. Anchorage
City of Larsen Bay , herein called BENEFICIARY.

WITNESSETH: That Trustor GRANTS, BARGAINS, SELLS, and CONVEYS to TRUSTEE IN TRUST WITH POWER OF SALE; the property in the ..... Recording District, ... Judicial District, State of Alaska. described,.' as:

TOGETHER with the tenements. hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, the rents, issues and profits thereof. SUBJECT, HOWEVER, to the right, power and authority hereinafter given to and conferred upon Beneficiary to collect and apply such rents, issues and profits. To have and to hold the same, with the appurtenances, unto Trustee.

THIS DEED OF TRUST IS MADE FOR THE PURPOSE OF SECURING: The performance of each agreement of Trustor herein containing and payment of the indebtedness evidenced by one promissory note of even date, herewith, in the Principal sum of $..... payable to Beneficiary or order.

A. To protect the security of this Deed of Trust. Trustor agrees:

1. To keep said property in good condition and repair; not to remove or demolish any building thereon; to complete or restore promptly and in good and workmanlike manner any building which may be constructed, damaged or destroyed thereon and to pay when due all claims for labor performed and materials furnished therefore; to comply with all laws affecting said property or requiring any alterations or improvements to be made thereon: not to commit or permit waste thereof, not to commit, suffer or permit any act upon said property in violation of law; to cultivate, irrigate, fertilize, fumigate, prune and do all other acts which form the character or use of said property may be reasonably necessary, the specific enumerations herein not excluding the general.

2. To provide, maintain and deliver to Beneficiary fire insurance with extended coverage, satisfactory to and with loss payable to Beneficiary in an amount not less than $..... The amount collected under any fire or other insurance policy may be applied by Beneficiary upon any indebtedness secured hereby and in such order as Beneficiary may determine, or at option of Beneficiary the entire amount so collected or any part hereof may be released to Trustor. Such application or release shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant to such notice.

3. To appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustees; and to pay all costs and expenses, including cost of evidence of title and attorney's fees in a reasonable sum, in any such action or proceeding in which Beneficiary or Trustee may appear, and in any suit brought by Beneficiary to record this Deed.

4. To pay; at least ten days before delinquency all taxes and assessments affecting said property, when due, all encumbrances, charges and liens, with interest, on said property or a part thereof, which appear to be prior to superior hereto; all costs, fees and expenses of this Trust.

5. To pay immediately and without demand all sums so expended by Beneficiary or Trustee, pursuant to the provisions thereof, with interest from date of expenditure at ..... per cent per annum.

6. Should Trustor fail to make any payment or to do any act as herein provided, then Beneficiary or Trustee, but without obligation so to do and without notice to or demand upon Trustor and without releasing Trustor from any obligation hereof, may: make or do the same in such manner and to such extent as either may be deemed necessary to protect the security hereof. Beneficiary or Trustee being authorized to enter upon said property for such purposes; appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee; pay, purchase, contest or compromise any encumbrance, charge or lien which in the judgment of either appears to be prior or superior hereto; and, in exercising any such powers, pay necessary expenses, employ counsel and pay his reasonable fees.

B. It is mutually agreed that:

1. Any award or damages in connection with any condemnation for public use of or injury to said property or any part thereof is hereby assigned and shall be paid to Beneficiary who may apply or release such monies received by him in the same manner and with the same effect as above provided for disposition of proceeds of fire or other insurance.

2. By accepting payment of any sum secured hereby after its due date, Beneficiary does not waive his right either to require prompt payment when due of all other sums so secured or to declare default for failure so to pay.

3. At any time or from time to time, without liability therefor and without notice, upon written request of Beneficiary and presentation of this Deed and said note for endorsement, and without affecting the personal liability of any person for payment of the indebtedness secured hereby, Trustee may: reconvey any part of said property; consent to the making of any map or plat thereof, join in granting any easement thereon, or join in any

DEED OF TRUST, Page 2

extension agreement or any agreement subordinating the lien or charge hereof.

4. Upon written request of Beneficiary stating that all sums secured hereby have been paid, and upon surrender of this Deed and said note to Trustee for cancellation and retention or other disposition as Trustee in its sole discretion may choose and upon payment of its fees, Trustee shall reconvey, without warranty, the property then held hereunder. The recitals in such reconveyance of any matters or facts shall be conclusive proof of the truthfulness thereof. The Grantee in such reconveyance may be described as "the person or persons legally entitled thereto".

5. As additional security, Trustor hereby gives to and confers upon Beneficiary the right, power and authority, during the continuance of these Trusts, to collect the rents, issues and profits of said property, reserving unto Trustor the right, prior to any default by Trustor in payment of any indebtedness secured hereby or in performance of any agreement hereunder, to collect and retain such rents, issues and profits as they become due and payable. Upon any such default, Beneficiary may at any time without notice, either in person, by agent, or by a receiver to be appointed by a court, and without regard to the adequacy of any security for the indebtedness hereby secured, enter upon and take possession of said property or any part thereof, in his own name sue for or otherwise collect such rents, issues, and profits, including those past due and unpaid, and apply the same, less costs and expenses of operation and collection, including reasonable attorney's fees, upon any indebtedness secured hereby, and in such order as Beneficiary may determine. The entering upon and taking possession of said property, the collection of such rents, issues and profits and the application thereof as aforesaid, shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant to such notice.

6. Upon default by Trustor in payment of any indebtedness secured hereby or in performance of any agreement hereunder, all sums secured hereby shall immediately become due and payable by at the option of the Beneficiary. In the event of default, Beneficiary shall execute or cause the Trustee to execute a written notice of such default and of his election to cause to be sold the herein described property to satisfy the obligation hereof, and shall cause such notice to be recorded in the office of the recorder of each recording district wherein said real property or some part thereof is situated.

Notice of sale having been given as then required by law and not less than that time required by law having elapsed after recordation of such notice of default, Trustee, without demand on Trustor, shall sell said property at the time and place fixed by it in said notice of sale, either as a whole or in separate parcels, and in such order as it may determine, at public auction to the highest bidder for cash in lawful money of the United States, payable at time of sale. Trustee may postpone sale of all or any portion of said property by public announcement at such time and place of sale, and from time to time thereafter may postpone such sale by public announcement at the time fixed by the preceding postponement. Trustee shall deliver to such purchaser its deed conveying the property so sold, but without any covenant or warranty, express or implied. The recitals in such deed of any matters or facts shall be conclusive proof of the truthfulness thereof. Any person, including Trustor, Trustee, or Beneficiary as hereinafter defined, may purchase at such sale.

After deducting all costs, fees and expenses of Trustee and of this Trust, including costs of evidence of title in connection with sale, Trustee shall apply the proceeds of sale to payment of: all sums expended under the terms hereof, not then repaid, with accrued interest per cent per annum; all other sums then secured hereby; and the remainder, if any, to the person or persons legally entitled thereto. Trustor shall be liable for and agrees to pay any deficit.

7. This Deed applies to, inures to the benefit of, and binds all parties hereto, their heirs, legatees, devisees, administrators, executors, successors and assigns. The term Beneficiary shall mean the owner and holder, including pledgee, of the note secured hereby, whether or not named as beneficiary herein, or, if the note has been pledged, the pledgee thereof. In this Deed, whenever the context so requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

8. Trustee accepts this Trust when this Deed, duly executed and acknowledged, is made a public record as provided by law. Trustee is not obligated to notify any party hereto of pending sale under any other Deed of Trust or of any action or proceeding in which Trustor, Beneficiary or Trustee shall be a party unless brought by Trustee.

9. Beneficiary may, from time to time, as provided by statute, appoint another Trustee in place and stead of the Trustee herein named, and thereupon, the Trustee herein named shall be discharged and the Trustee so appointed shall be substituted as Trustee hereunder with the same effect as if originally named Trustee herein.

10. If two or more persons be designated as Trustee herein, any, or all, powers granted herein to Trustee may be exercised by any such persons if such inability in any instrument executed by any of such persons shall be conclusive against Trustor, his heirs and assigns.

e undersigned Trustor requests that a copy of any Notice of Default and of any Notice of Sale hereunder be mailed to him at address hereinbefore set forth.

Signature of Trustor

....

....

DEED OF TRUST, Page 3

ACKNOWLEDGMENT

State of Alaska)
) ss
……..Judicial Division)

I, the undersigned, ……..…… hereby certify that on this …… day of ……., 19…. personally appeared before me, ……..…… to me known and known to me to be the individual(s) described in and who executed the within instrument, and acknowledged that ……..…. signed and sealed the same freely and voluntarily as ……..…. act and deed, for the uses and purpose therein mentioned.

DATED at …… Alaska, the day, month and year herein last above written.

……
Notary Public for Alaska

My commission expires: ……

RECORDING DATA

DO NOT RECORD

REQUEST FOR FULL RECONVEYANCE

To be used only when full note has been paid

The undersigned is the legal owner and holder of all indebtedness secured by the within Deed of Trust. All sums secured thereby have been fully paid. You are hereby requested and directed to cancel all evidences of indebtedness secured by said Deed of Trust and to reconvey, without warranty, the estate now held by you under the same.

……

……

THE PROMISSORY NOTE OR NOTES AND ANY EVIDENCES AND/OR ADDITIONAL ADVANCES MUST BE PRESENTED WITH THIS REQUEST.

Appendix Three G

Constitutional Analysis of a Land Disposal Program for the City of Larsen Bay, January 24, 1984

January 24, 1984

MEMORANDUM TO JIM REEVES

RE: LARSEN BAY LAND DISPOSAL PLAN

INTRODUCTION

You have requested a constitutional analysis of a land disposal program proposed for the City of Larsen Bay, Alaska. Briefly, the City wishes to convey municipally-held real estate at terms which are advantageous to its long-term residents. As you have described it, Larsen Bay currently has an acute housing shortage . The proposed land disposal program would encourage residents to build new homes to alleviate overcrowding.

Briefly, the City most likely may prefer its residents over non-residents if it disposes of municipally-owned real property. Residency should be defined by the more subjective test of domicile and/or by durational residency limited to a reasonable time period.

DISCUSSION

1. Generally.

Alaskan local governments justifiably are leery of imposing any residency or durational residency restrictions on programs, which might be construed as "public aid," programs, in the wake of recent Alaska Supreme Court decisions, several of which were analyzed further by the U.S. Supreme Court. However, the courts did not intend to delete residency restrictions, or for that matter durational residency requirements, from government assistance programs. Residency clearly may be imposed as a pre-requisite to program participation so long as a reasonable purpose is articulated and a rational nexus exists between the requirement and its purpose. Once residency presents a legitimate hurdle for program participation, a subjective domicile test clearly may be used to establish residency. A much harder question is whether a durational residency requirement also may be employed to test the "bona fides" of an individual's claim of residency. Although duration requirements arguably are subjected to more enhanced judicial scrutiny, even they are permissible so long as the governmental interest clearly out-weighs resultant interference with individual fundamental rights.

2. Residency Requirement.

An initial consideration is the extent to which a court will scrutinize classifications based on residency. As you know, the higher the level of analysis (e.g., strict scrutiny), the less likely it is that a reviewing court will favorably judge a classification scheme.

Alaska'a highest court has indicated it will apply the toughest test, the federal strict scrutiny standard (or "compelling state interest" test), in those instances where federal constitutional law would require it. Williams V. Zobel, 619 P2d 448, 453 (Alaska 1980) (hereinafter "Zobel II"). However, the same court made it clear in Gilman v. Martin, 662 P2d 120 (Alaska 1983), that it will not strictly scrutinize residency requirements:

> "The right to interstate or intrastate travel is impinged upon only when a governmental entity creates distinctions between residents based on the duration of their residency, and not when distinctions are created between residents and non-residents. (Citing McCarthy v. Philadelphia Civil Service Commission, 424 US 645, 96 SCt 1154, 47 LEd2d 366 (1976) and Memorial Hospital v. Maricopa County, 415 US 250, 255, 94 SCt 1076, 1080, 39 LEd2d 306, 313 (1974)).***
>
> This does not mean that the residency requirement is free from scrutiny under the equal protection clauses of the United States and Alaska Constitutions; it only means that the requirement is not subject to the strict scrutiny applied when a fundamental right, such as some aspects of the right to interstate travel is at issue." 662 P2d at 125.

The Alaska court concluded in Gilman it would apply, "at a minimum," the more easily satisfied rational basis test. That test has been characterized in Isakson v. Rickey, 550 P2d 359, 362 (Alaska 1976) as follows:

> "[T]he classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

Even if the federal rational basis standard is satisfied, a residency requirement still must pass under the equal protection clause of the Alaska Constitution. The Alaska Supreme Court prescribed a "sliding scale" test for state equal protection claims in State v. Erickson, 574 P2d 1 (Alaska 1978). The same court recently summarized the Erickson tset in State v. Ostrosky, 667 P2d 1184 (Alaska 1983):

> In contrast to the rigid tiers of federal equal protection analysis, we have postulated a single sliding scale of review ranging from relaxed scrutiny to strict scrutiny. The applicable standard of review for a given case is to be determined by the importance of the individual rights asserted and by the degree of suspicion with which we view the resulting classification scheme.[13] As legislation burdens more fundamental rights, such as rights to speak and travel freely, it is subjected to more rigorous scrutiny at a more elevated position on our sliding scale. ***
>
> Having selected a standard of review on the Erickson sliding scale, we then apply it to the challenged legislation. This is done by scrutinizing the importance of the governmental interests which it is asserted that the legislation is designed to serve and the closeness of the means-to-ends fit between the legislation and those interests. As the level of scrutiny selected is higher on the Erickson scale, we require that the asserted governmental interests be relatively more compelling and that the legislation's means-to-ends fit be correspondingly closer. On the other hand, if relaxed scrutiny is indicated, less important governmental objectives will suffice and a greater degree of over/or underinclusiveness in the means-to-ends fit will be tolerated. (footnote omitted, emphasis added)

It is apparent from the emphasized language from Ostrosky that residency requirements are still subject to heightened scrutiny under state equal protection. Thus, the court's statement in Gilman that it would, "at a minimum," look to the rational basis standard articulated in Isakson, should not be given undue credit. At a maximum, "any residency requirement should

be tailored to satisfy the upper end of the Erickson scale, which apparently is not far removed from a strict scrutiny stanard a residency requirement, such requirements in other Alaskan programs have run afoul of these simpler standards.

Gilman v. Martin, supra, is obviously critical to an analysis of the Larsen Bay plan. That case involved a lottery-type land distribution program in the Kenai Peninsula Borough. A borough ordinance required participants to have been borough residents for a year preceding their application. The stated purpose of the ordinance was to sell "certain parcels of Borough selected lands. . . to adjoining property owners or to leaseholders so as to resolve existing controversies regarding access and title." 662 P2d at 126. Noting that 56 percent of all privately owned parcels in the Kenai Borough were owned by non-residents, the court concluded that the residency requirement violated even the minimal rational basis standard articulated in Isakson:

> "In view of the avowed purpose of the sale to 'resolve existing controversies regarding access and title' to properties, the decision of the Borough to restrict the sale of its land to Borough residents -- and thereby assist only forty-four percent of the land owners in resolving existing controversies regarding access and title -- is a 'display of arbitrary power' rather than 'an exercise of judgment.' The classification is unreasonable and does not 'rest upon some ground of difference having a fair and substantial relation to the [avowed] object of the legislation, so that all persons similarly circumstanced [are] treated alike.' Isakson v. Rickey, 550 P2d at 362. (Quoting State v. Wylie, 516 P2d at 145.) We therefore agree with the Superior Court that Ordinance 79-53 is unconstitutional to the extent it requires participants to have been residents of the Borough at the time of their applications." 662 P2d at 126-127.

In dictum, the court stated that the residency requirement "might have been worthy of consideration if the Borough had stated . . . that the purpose of the lottery was to benefit its residents." 662 P2d at 126. However, the court qualified this comment with the following footnote:

> "We note, however, that 'discrimination on the basis of residence must be supported by a valid . . . interest independent of the discrimination itself. Zobel III, 457 US 55, 70, 102 SCt 2309, 2318, 72 LEd2d 672, 684 (Brennan, J., concurring). Furthermore, as we indicated in Lynden Transport, Inc. v. State, 532 P2d 700, 711 (Alaska 1975), 'benefiting [the] economic interests of residents over non-residents is not a purpose which may constitutionally vindicate discriminating legislation. . .' We do not hold that residency requirements are per se invalid. At the least, however, when a purpose is stated for the requirement, the purpose must be a valid one that is substantially furthered by the classification." 662 P2d at 126 fn. 6.

It is evident from Gilman that a governmental entity must, at a minimum, have "substantial purpose" for preferring residents in land disposal programs. Such purposes should be carefully and precisely articulated since possible reasons for favoring residents were considered and rejected by the U.S. Supreme Court, in Zobel v. Williams, 457 US _____, 102 SCt 2309, 72 LEd2d 2309 (1982) (hereinafter Zobel III). The State of Alaska argued that its Permanent Fund distribution scheme, among other things, would provide residents with an incentive to remain in Alaska. The U.S. Supreme Court was not impressed with this reasoning, finding that such an objective was "not rationally related to the distinctions" the State sought to make between long-term residents and new arrivals. It is important to note that the Court rejected the "incentive" argument, even under a rational basis analysis, due to the sliding scale durational residency aspect of the dividend plan (which created too many classes of residents). Such a purpose is likely equally invalid even for pure residency requirements due to the heightened scrutiny suggested by State v. Erickson, supra and State v. Ostrosky, supra.

Another purpose articulated by the State in support of the Permanent Fund distribution plan, that dividends constitute a reward for past residency, was also considered illegitimate by the U.S. Supreme Court. The Court looked to Shapiro v. Thompson, 394 US 618, 632-633, 89 SCt 1322, 22 LEd2d 600 (1969), where it had said:

> "Appellants argue further that the challenged classification may be sustained as an attempt to distinguish between new and

> old residents on the basis of the contributions they have made to the community through the payment of taxes. . . Appellant's reasoning would permit the State to apportion all benefits and services according to the past tax [or intangible] contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of State services.'" (original emphasis) Quoted in Zobel III, 102 SCt at 2314.

Again, the U.S. Supreme Court's reasoning in Zobel III is directed at the durational residency requirement. However, it is unlikely such an articulated purpose would have any more validity when used to justify a pure residency requirement.

By far, the most plausible argument supporting residential preference is that the very purpose of the municipal land disposal program is to alleviate substantial overcrowding. It is understood that Larsen Bay's experience, much like that of other rural Alaskan communities, is that large family units are crowded into limited living spaces.[1] This problem would likely be alleviated by transferring municipally-held lands to presently impacted residents. It is probable that Larsen Bay's per capita income is significantly lower than larger urban areas in Southern Alaska. If the City of Larsen Bay were to begin selling its real property at prices low enough to be afforded by its residents, quite understandably more well-to-do Alaskans from other communities could successfully outbid current Larsen Bay residents if the land disposal necessarily is conducted pursuant to the bidding procedures of AS Chapter 29. The only manner in which the municipality might ensure that its residents receive the proffered lands, thus achieving the desired objective of easing overcrowding, would be to favor residents in the bidding procedure.

Another possible purpose for preferring residents in the land disposal program probably would not satisfy Zobel and Gilman. The land disposal program will result in a significant amount of property going from tax-exempt to taxable status, resulting in a substantial increase in the City's property tax

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[1] This point is supported by the recent "Alaskan Statewide Housing Needs Study" prepared by Citz ? M. Hill in March, 1983.

base. However beneficial this is to the City, it is not rationally related to a preference for residents. Larsen Bay's property tax base will be affected by the land disposal plan regardless whether the land is transferred to residents or non-residents. In fact, if non-residents are able to bid, they will likely drive up sale prices, inflate land values, and the City's revenues would be higher. Therefore, any arguments along that line likely would be considered insufficient.

3. Testing the "Bona Fides" of Residency.

Of course, requiring that program participants be local residents is but an initial step. It will be necessary to prescribe some sort of standard clarifying what is meant by a "resident." Physical presence in a locale for a described duration, e.g., thirty (30) days, is a common objective indicator of residency. This objective standard is often coupled with a more subjective "domicile" test, i.e., an individual's manifestation of intent to maintain primary abode in a given location. Domicile is apparent from indicia such as primary year-round residence, where licenses are maintained, etc. It is recommended that both durational residence for a reasonable period and domicile be established as "residency" requirements for land disposal program eligibility.

a. Durational Residency. It is not an entirely easy task to determine the extent to which durational residency requirement might be subjected to federal and state equal protection analysis by Alaska courts. With regard to the federal clause, the State Supreme Court said in Zobel II that it would "no longer regard all durational residency requirements as automatically triggering strict scrutiny." 619 P2d at 448.[2]

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[2] Early Alaska cases applied the federal strict scrutiny standard and for the most part struck down durational residency requirements. State v. Van Dort, 502 P2d 453 (Alaska 1972)(75-day residency requirement for voter registration struck down); State v. Wylie, supra (one-year residence requirement for state employment struck down); State v. Adams, supra (one-year residence requirement for initiation of divorce proceedings struck down); Hicklin v. Orbeck, supra (one-year residence for petroleum and pipeline related jobs struck down). In these earlier cases, the Alaska court indicated that infringement on the fundamental right to interstate migration alone compelled application of the strict scrutiny standard. However, these cases did not consider the U.S. Supreme Court's ruling in Memorial Hospital v. Maricopa County, 415 US 250, 94 SCt 1076, 39 LEd2d 306 (1974) that a durational residency requirement will be struck down only if it "penalizes" the right of interstate travel by depriving a recent migrant of a "basic necessity of life" or infringes on a fundamental right other than travel. Thus, interstate migration, standing alone, apparently is not a fundamental right in and of itself.

In Zobel III, the U.S. Supreme Court did not comment on the Alaska court's stance since the Permanent Fund distribution plan failed even the rational basis test.[3] It should be noted that prior to Zobel, the Alaska Supreme Court felt that durational residency requirements automatically triggered federal strict scrutiny. Hicklin v. Orbeck, 565 P2d 159 (Alaska 1977). However, in its review of that case, the U.S. Supreme Court limited its analysis to the Privileges and Immunities Clause of Article IV. Hicklin V. Orbeck, 437 US 518, 98 SCt 242, 57 LEd2d 397 (1978).[4] Given this federal inattention to the Alaska court's thinking as to the applicable analytical standard, it must be asserted that the most recent pronouncement in Zobel II, that strict scrutiny might not ordinarily apply, is correct.

There might be an argument under the federal equal protection clause that a durational residency requirement should be analyzed under strict scrutiny since it conceivably impinges upon the fundamental right of interstate or intrastate

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[3] Zobel III involved a "sliding scale" durational residency scheme, that being Permanent Fund dividend distribution plan, which would have rewarded State residents with a $50.00 dividend for each of Alaskan residencythis plan was found violative of the equal protection clause since it would have discriminated between at least 20 different classes of residents. The use of such "sliding scale" durational residency was further foreclosed by the Alaska court in Gilman v. Martin, supra.

[4] The federal Privileges and Immunities Clause is inapplicable since the proposed land disposal plan would discriminate only on the basis of local residency. An Alaskan residing in Fairbanks would be treated no differently under the proposed plan than would be a resident of Bismark, North Dakota.

travel[5] or impacts a "basic necessity of life."[6] These factors certainly raise the possibility that a state equal protection claim will be subjected to heightened scrutiny under the "sliding scale" approach of State v. Erickson, supra. Again, Erickson requires an analysis of three factors: (1) the legitimacy of the purposes for the proposed requirement; (2) whether the means chosen to accomplish the objectives actually do so; and (3) the balance between the governmental interest and any individual rights which might be transgressed.

The City might propose several legitimate reasons for favoring longer term residents over new arrivals but should avoid arguments which have failed elsewhere. As stated previously, the U.S. Supreme Court in Zobel III discounted a number of arguments raised by the State in support of its Permanent Fund Distribution Program. These included maintaining a financial incentive for individuals to maintain residence in Alaska and recognition for underined

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5 See footnote 1.

6 Although the U.S. Supreme Court noted in Hicklin v. Orbeck, supra, that it had never applied the "basic necessity" factor, at least one federal circuit court has hinted that "cheap alternative housing" or "shelter" might be a "basic necessity of life" which might require strict scrutiny. Hawaii Boating Association v. Water Transportation Facilities Division, 651 F2d 661 (9th Cir. 1981). However, this point was made in a footnote to a decision reviewing the legitimacy of non-residential mooring fees in a small boat harbor. To date, no federal court that I am aware of has expressly ruled that housing or land for housing constitute "basic necessities" triggering strict scrutiny. Such an opportunity was presented in Cole v. Housing Authority of the City of Newport, 435 F2d 807 (1st Cir. 1970), where the First Circuit Court struck down durational residency requirements for public housing eligibility. However, the court did not mention whether public housing constitutes a "basic necessity of life." Instead, it applied strict scrutiny after concluding that the durational residency requirement impermissibly interfered with the fundamental right to travel. This case, preceded Maricopa County and other federal rulings that infringement of the right to travel, by itself, will not trigger strict scrutiny. Thus, the case is weak for applying the federal strict scrutiny standard to any durational residency requirement on the basis that land for housing is a "basic necessity."

"contributions of various kinds, both tangible and intangible, which residents have made during their years of residency." 102 SCt at 2313. Again, there is probably little merit in postulating the same arguments in favor of the proposed Larsen Bay program.

As Justice Brennan noted in his concurrence in Zobel III, a durational residency requirement is constitutional if "used to test the bona fides of citizenship." Zobel III, supra, 102 SCt at 2318. However, if, the "bona fides" of citizenship constitute the sole purpose for a durational residency requirement, the duration of residence required must be reasonable and bear a substantial relation to the governmental purpose sought to be achieved. Gilman v. Martin, supra, 662 P2d at 127, fn. 7. Thus, in the absence of any other legitimate purpose, the question becomes for how long local residency may be required to ensure an individual's bona fide intent to remain a resident. The six-month residency requirement enacted by the Alaska Legislature for the Permanent Fund distribution plan (in lieu of the sliding scale payment scheme) might be as good a yard stick as any. The six-month rule is likely intended to discourage "outsiders" from flocking to Alaska and too easily obtaining easy money. The State's normal 30-day residency standard obviously would do little to child such opportunism. The same rationale could legitimately support a six-month residence requirement for the Larsen Bay land disposal program. Arguably, more than 30 days is necessary to discourage outsiders from temporarily setting up a tent in Larsen Bay in order to obtain an inexpensive site for a summer home or hunting/fishing. A six-month requirement would tend to discourage those who depend on jobs outside of Larsen Bay. At the same time, it would not seem unduly harsh on individuals who truly desire to live there on a year-round basis. A six-month trial period would seem a most reasonable test of such resolve.

The final step in the Erickson analysis requires that the means chosen to promote the purpose be balanced against affected constitutional rights. While an infringement of the right to travel by itself is not sufficient to trigger federal strict scrutiny, travel is a basic right which calls for enhanced scrunity. State v. Ostrosky, supra. The infringement of this right must be balanced against the means employed to carry out the governmental interest. Given the strong interest in requiring bona fide local residency so that the current victims of overcrowding, current residents, are granted relief, on balance any infringement on the right to intrastate travel is comparatively minimal.

4. Domicile.

Durational residency constitutes an objective showing of intent to live in a particular geographical area. This objective test can be supplemented or supplanted by a more subjective test of domicile.[7] While it is preferable that the domicile test complement a durational residency requirement, it might be useful by itself should the durational requirement be struck down by a reviewing court.

A recent Alaska Attorney General's opinion offers a good summary of the "domicile" test:

> "A common-law distinction between 'domicile' and 'residence' has been incorporated into modern law. The terms are often used interchangeably, though they are not synonymous. Every person has at all times a domicile, but only one, either assigned by law, or if capable under the law, assigned by choice. However, one may have established residency in a number of states. Residency merely indicates a factual place of abode.
>
> There are three types of domicile -- (1) domicile or origin; (2) domicile of choice; and (3) domicile at law. A person's domicile of origin is the domicile of her/his parent, the head of the family, or the person on whom she/he is legally dependent, at the time of the child's birth. It is generally the place of birth. Domicile of choice is the place a person has affirmatively chosen to displace a previous domicile. Domicile by operation of law is a domicile which the law attributes to a person, independent of her/his own intentions, because of a legal domestic relation (i.e., spouse's domicile arising from the marriage; child's domicile based on parents).

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[7] The State presently applies both tests. For instance, AS 14.40.306(4) defines a "resident" for state educational loan purposes, as "a person domiciled in Alaska who has resided in Alaska for at least two years. . ."

Proof of domicile by choice and a determination of whether domicile by operation of law is controlling are the two areas that create confusion in determining whether an educational loan applicant is an Alaskan resident.

Domicile by choice requires actual physical presence in the State, although temporary absence does not destroy domicile, coupled with the state of mind of intending to acquire a new permanent abode and abandon the old. Domicile may be termed as a bona fide residency, not merely to live in a place, but to make a home there. In Hicklin v. Orbeck, 565 P2d 159, 171 (Alaska 1977) reversed in part on other grounds 437 US 518, 57 LEd2d 397 (1978), the Alaska Supreme Court explained that '[d]omicile or bona fide residence contains an objective requirement of physical presence and a subjective intent requirement.' See also State v. Adams, 522 P2d 1125, 1131 (Alaska 1974). To determine if the subjective intent element has been met, objective criteria can be utilized, such as whether a person receives any benefits from another state -- voting, car registration; driver's license; employment compensation; public assistance; 'resident' tuition rate for unemancipated children; professional and occupational licenses -- as well as considering the state where one resides 'year-round', owns property, and files tax returns. No one criteria is controlling.

Mere length of residency in a locality does not convert physical presence into domicile without the intent to permanently remain." (Footnotes omitted, original emphasis) August 28, 1979 Op. Atty. Gen., pp. 2-4.

Obviously Larsen Bay's land disposal ordinance should include in any residency requirement a domicile standard which incorporates the common-law factors discussed above.

Doug Parker

vlm

Appendix Five

APPENDIX 5: Attorney General Opinions on Municipal Land Disposals and Conveyances

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Appendix Five

ELIGIBILITY OF A TRADITIONAL COUNCIL OR A COUNCIL ORGANIZED UNDER THE INDIAN REORGANIZATION ACT OF 1934 TO RECEIVE LAND FROM MUNICIPALITIES UNDER AS 29.48.260(b), MAY 1, 1984

MEMORANDUM — State of Alaska

TO: Emil Notti
Commissioner
Dept. of Community
and Regional Affairs

FROM: Norman C. Gorsuch
Attorney General

By: Douglas K. Mertz
Assistant Attorney General
Department of Law

DATE: May 1, 1984

FILE NO: 366-178-84

TELEPHONE NO: 465-3600

SUBJECT: Re: Municipal land conveyances to traditional or IRA Councils

Your predecessor asked our opinion on the question of whether a traditional village council or a council organized under the Indian Reorganization Act of 1934 is eligible to receive land from municipalities under AS 29.48.260(b). That subsection permits general law municipalities to "sell, lease, donate or exchange" real property with "the United States, the state or a political subdivision" without the necessity of prior notice and public bidding contained in AS 29.48.260(c). We understand that several municipalities have inquired whether local native councils may be considered "political subdivisions" so that public land may be conveyed to them without the necessity of public bidding. 1/

1/ This office recently issued a memorandum of advice on municipal land disposals in general to your department (1983 Inf. Op. Att'y Gen. (Nov. 21; 366-522-83)) by Assistant Attorney General Kathryn Kolkhorst, and we have previously issued memoranda covering authority of municipalities to dispose of lands without competitive bidding to individuals or to the federal government for IRA councils. This office is also preparing a memorandum on whether traditional councils have capacity to hold title to land. See 1981 Inf. Op. Att'y Gen. (May 6; J66-725-81) and 1981 Inf. Op. Att'y Gen. (May 28; J66-725-81), both by Assistant Attorney General G. Thomas Koester.

After carefully examining the language of AS 29.48.-260(b), 2/ we conclude that traditional and IRA councils are not "political subdivisions" for purposes of that statute. There may be other mechanisms, however, which, in limited cases, can enable general law municipalities to make the same type of transfer. 3/

First, it is clear that native councils are not subdivisions of either the state or the federal government. They are not agencies of those governments, but instead are organized independently and do not exist to serve as an arm of either the state or federal government. 4/ These councils may receive substantial funding from the United States, and limited assistance from the State of Alaska, but that fact alone does not make an entity a "political subdivision" of a larger government. We have already opined that the Village Council of Minto, for example, is not a political subdivision of the state in the narrow sense of being a unit of local government authorized by the Alaska Constitution (see 1981 Inf. Op. Att'y Gen. (July 24; J66-747-81, by Assistant Attorney General Laura L. Davis)). At the same time, the

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2/ AS 29.48.260(b) states:

> Notwithstanding the provisions of (c) of this section, a municipality may sell, lease, donate or exchange with the United States, the state, or a political subdivision real estate or other property, or interest in property, when in the judgment of the assembly or council it is advantageous to the municipality to do so.

3/ AS 29.48 applies only to general law municipalities. The limitations contained therein do not apply to home rule local governments. Lien v. City of Ketchikan, 383 P.2d 729 (Alaska 1963). We also note that Senate Bill No. 1, which is now pending in the Alaska Legislature, would eliminate the restrictions in AS 29.48.260. This memorandum addresses only the restrictions in the current law.

4/ It is true that some native councils, those organized pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. § 476 et seq., must have their constitutions approved by the U.S. Secretary of the Interior and are subject to oversight by the Bureau of Indian Affairs. We believe no IRA council would dispute, however, that it exists to serve its own membership, not to serve as an arm of the federal government.

courts have rejected claims that reservation tribes in other states may constitute political subdivisions of state or federal government. (Confederated Tribes of Warm Springs Reservation v. Kurtz, 691 F.2d 878 (9th Cir. 1982); Wounded Head v. Tribal Council of Oglala Sioux Tribe, 507 F.2d 1079 (8th Cir. 1975)). In short, native councils cannot be considered political subdivisions of either the federal or state government. 5/

However, there remains the possibility that, under subsection (d) of AS 29.48.260, a municipality could dispose of certain lands to a native council without going through the public bidding requirements of subsection (c). Subsection (d) permits a municipality to establish by ordinance a formal procedure for disposal of municipal land acquired from the state, in which case the provisions of subsection (c) do not apply. Thus, it appears that a municipality which enacted ordinances setting up a formal procedure for land disposals could incorporate in those procedures provisions allowing alienation of land to a native council without the requirement of the public bidding process as long as the land was originally acquired from the state.

This authority is not completely unrestricted. No municipality may expend public resources, including land, except

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5/ One other interpretation of AS 29.48.260(b) must be dealt with, namely, the possibility that the phrase "political subdivision" in that subsection refers, not to subdivisions of the United States and the State, but to some sort of broader political "division", i.e., to separate and independent political areas. It is true that the phrase has been used in that sense to refer to tribal governments on reservations, where state and federal jurisdiction is curtailed by law (see Goddard v. Babbitt, 536 F. Supp. 538, 540 (D. Ariz. 1982)). Although it is possible that this argument could be made in reference to the Metlakatla Indian Community, which is Alaska's only reservation government, we do not believe the courts would extend this interpretation to cover nonreservation native councils. IRA and traditional councils in Alaska perform a variety of functions, but few even approach the model of a general local government representing the public at large in a specific area. This is particularly true in communities where AS 29.48.260 would come into play, i.e., communities which have a municipal government created under state law. Of course, this conclusion could change if the courts ever gave a more expansive interpretation to native council powers, but with the present state of the law we believe that such councils would not be considered political subdivisions.

for a public purpose. See Lien v. City of Ketchikan, 383 P.2d 721 (Alaska 1963). Under state law no municipality may engage in racially discriminatory actions, or deny equal protection to all citizens. The sum total of these constitutional requirements is that, in any disposal ordinance enacted under subsection (d) of AS 29.48.260, there must be provisions to ensure that disposals serve a public purpose, do not discriminate on a racial basis, and do not deny equal protection. To put these requirements in more concrete terms, any disposal of municipal lands to a native council under subsection (d), without an equal opportunity for all interested parties to compete for the land, should require that the native council use the land only for public purposes and without discrimination on racial grounds. Thus for example, a transfer of municipal land to an IRA organization for the purpose of building a community center should include a restriction that the facility be open to the public on an equal basis without regard to race. The disposal ordinance would also have to ensure that all similarly situated groups have the same opportunity to be the beneficiaries of such disposals, i.e., that the municipality is not unfairly restricting disposals to one limited membership group. With these restrictions in mind, it would then be permissible for municipalities to dispose of lands directly to native councils.

Let us know if you need further advice.

DKM:dlm

cc: Sandra Cook
Dept. of Community & Regional Affairs
Juneau

LAND DISPOSAL BY GENERAL LAW MUNICIPALITIES, NOVEMBER 21, 1983

MEMORANDUM State of Alaska

TO: Jeff Smith, Jr., Director
Division of Municipal
and Regional Assistance, CR&A

DATE: November 21, 1983
FILE NO: 366-522-83
TELEPHONE NO: 465-3600
SUBJECT: Municipal land disposal questions

FROM: Norman C. Gorsuch
Attorney General

By: Kathryn Kolkhorst
Assistant Attorney General
Oil and Gas Section - Juneau

This opinion will address the several questions your predecessor asked about AS 29.48.260(a) -- 29.48.260(f) in order to assist you in developing draft land disposal ordinances. Each question you have posed is answered for general law municipalities, as the statute does not apply to home rule municipalities. Questions 6, 7, and 8 are answered for home rule municipalities and general law municipalities exempt from AS 29.48.260(c). General comments concerning the potential effect of SB 1 are also included.

GENERAL COMMENTS

Home rule municipalities possess "all legislative powers not prohibited by law or by charter." Alaska Const. art. X, § 11; AS 29.08.010. Only certain specific provisions in Title 29 apply to limit the powers of home rule municipalities, 1/ and the land disposal statute is not one of these limitations. Therefore, the statute does not apply to home rule municipalities. See Lien v. City of Ketchikan, 383 P.2d 721, 723 (Alaska

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1/ AS 29.13.100 provides:

> Limitation of home rule powers. Only the following provisions of this title apply to home rule municipalities as prohibitions on acting otherwise than as provided. They supersede existing and prohibit future home rule enactments which provide otherwise: ...

The list which follows does not include AS 29.48.260.

1963) (AS 29.10.132(a), the predecessor of AS 29.48.260(a), is not applicable to a home rule city)

The provisions in AS 29.48.260 thus apply only to general law municipalities.

General law municipalities have various general powers, one of which is:

> to acquire, manage, control, use and dispose of real and personal property for a purpose authorized under AS 29.03.010 -- 29.95.030, federal law, or other law, or in accordance with such law, ...

AS 29.48.010(9).

For general law municipalities, AS 29.48.260(a) authorizes disposal of municipal property "no longer required for municipal purposes."

A liberal construction is given, in AS 29.48.310, to "all powers and functions" of boroughs and cities conferred by Title 29. In addition,

> Extent of powers. Unless otherwise limited by law, boroughs and cities have and may exercise all powers and functions necessarily or fairly implied in or incident to the object or purpose of all powers and functions conferred in this title.

AS 29.48.320.

AS 29.48.260

The following is the full text of AS 29.48.260:

> Municipal properties. (a) A municipality may acquire and hold real and personal property or interest in property, and may sell, lease or otherwise dispose of property no longer required for municipal purposes.
>
> (b) Notwithstanding the provisions of (c) of this section, a municipality may sell, lease, donate or exchange with the United States, the state, or a political subdivision real estate or

other property, or interest in property, when in the judgment of the assembly or council it is advantageous to the municipality to do so.

(c) The assembly or council shall by ordinance establish a formal procedure for the sale, lease or disposition or real property or interest in real property. The ordinance shall require (1) an estimated value of the property by a qualified appraiser or the assessor; (2) a notice of sale published in a newspaper of general circulation distributed within the municipality at least 30 days before the date of the sale, lease, or disposition, or posted within that time in at least three public places in the municipality; (3) public auction or opening of sealed bids, if any; and (4) other terms and conditions fixed by the assembly or council. However, no ordinance for the sale, lease, or disposition of real property or interest in real property valued at $25,000 or more is valid unless ratified by a majority of the qualified voters voting at a regular or special election at which the question of the ratification of the ordinance is submitted. Thirty days notice shall be given of the election and during that period the assembly or council shall have published at least once a week in a newspaper of general circulation distributed within the municipality a notice stating the time of the election and the place of voting, describing the property to be sold, leased or disposed of, giving a brief statement of the terms and conditions of the sale and the consideration, if any, and stating the title and date of passage of the ordinance. Notice shall also be given by posting a copy of it in at least three public places in the municipality at least 30 days before the election. If no newspaper of general circulation is distributed within the municipality, the notice given by posting is sufficient for the purposes of this section.

(d) The assembly or council may by ordinance establish a formal procedure for acquisition from the state of land or rights in land and the disposal of the land or rights in land, in which event the provisions of (c) of this section do not apply.

(e) A municipality, in order to make sites available for beneficial new industries, may acquire and hold real property, either inside or outside the corporate limits, and may sell, lease or dispose of it to persons who agree to operate a beneficial new industry upon the terms and conditions the assembly or council considers advantageous to the municipality.

(f) A deed, contract of sale, lease, or other instrument evidencing disposition by a borough of land or interest in land classified by the borough as agricultural land shall include, among other terms, conditions and limitations which may be required by law or which the assembly may elect to include, a condition that the land is restricted to agricultural use. The assembly may not by subsequent action waive or abrogate the condition for a period of 50 years. An abrogation of the restriction to agricultural use after the 50-year period requires the consent of any party having an interest in the land. The assembly shall provide for enforcement by appropriate legal means, including but not limited to forfeiture of the purchaser's interest for violation of the condition.

CASE LAW ON AS 29.48.260

Two Alaska Supreme Court cases have interpreted the statute. In Kodiak Island Borough v. Large, 622 P.2d 440 (Alaska 1981), the Alaska Supreme Court decided that subsection (d) of AS 29.48.260 (concerning land acquired from the state) dispenses with the requirements of competitive bidding set out in subsection (c). Id. at 445. That case concerned a municipality's sale to a private citizen of land transferred from the state. The sale was negotiated rather than competitively bid. The court did not address the requirement of subsection (c) that the municipality obtain voter approval for parcels valued over $25,000 because the land in question was valued at less than that amount. Id. at 442.

This case clearly holds that a general law municipality disposing of land from the state need not comply with the competitive bidding requirements of subsection (c).

A year before Kodiak Island Borough, the supreme court issued a divided opinion also interpreting AS 29.48.260. Libby v. City of Dillingham, 612 P.2d 33 (Alaska 1980), involved a challenge to Dillingham's negotiated lease of a cold storage facility. Dillingham is a general law municipality. The superior court had held that the business was a "beneficial new industry" within the meaning of subsection (e) of the statute and that such a business was exempt from the competitive bid requirement of subsection (c).

The supreme court majority agreed that the business was a "beneficial new industry" for purposes of subsection (c) but held that the competitive bid requirements of subsection (c) were applicable. Id. at 39. Because two of the other subsections of the statute -- (b) and (d) -- contained explicit exemptions from the requirement of subsection (c), the court reasoned the legislature intended only those subsections to be exempted. "Where the legislature inserted an explicit exemption in some subsections and not in others, it would be inappropriate for us to find an 'implied exemption' in a subsection where the legislature obviously chose not to insert an exemption." Id. at 41.

The precedential value of this conclusion is very weak, however, because Justices Rabinowitz and Boochever both believed that the legislature did not intend "beneficial new industries" to be subject to either competitive bid or voter ratification. In concurring opinions, these two justices looked to the statutory antecedent to AS 29.48.260(e), the public policies underlying the earlier statutes, and general principles of statutory interpretation. 2/

2/ Although disagreeing with the majority on the question whether subsection (c) applied to "beneficial new industries," both Rabinowitz and Boochever concurred in the remand because neither believed the business in question to be a "beneficial new industry." Therefore, they believed the particular business was subject to the bid and ratification requirements of subsection (c). Justice Matthews expressed no opinion on the question of whether subsection (c) applied to "beneficial new industries" because he did not believe that the issue was properly before the court.

The following are answers to your specific questions.

1. Does the statute limit the land disposal method to public auction and sealed bids? Or, can a municipality dispose of interest in land by other methods such as a lottery, point system, or staking?

The statute on its face limits the land disposal system to a competitive bid which requires appraisal, 30 days notice of the sale, and "public auction or opening of sealed bids, if any." AS 29.48.260(c). It is a general principle of statutory construction that if a legislature enumerates only a few procedures, it must have intended to exclude any others it did not name. 3/ According to this principle, the fact that the legislature listed only auction and sealed bids meant the legislature intended to exclude any other form of disposal.

Nevertheless, a look at the history of this bill is necessary in order to determine whether the legislature actually debated the issue.

The statute governing municipal land disposal from 1949 until the new municipal code legislation went into effect in 1972 was AS 29.10.132. It is set out in its entirety in note 4. 4/

3/ The principle is called expressio unius est exclusio alterius. 2A C. Sands, Sutherland Statutory Construction § 47.23.

4/ AS 29.10.132 provides:

> City properties. (a) The council may acquire by purchase or otherwise and hold real estate and other property, or any interest in property, and may sell, lease or dispose of the real estate and other property, or interest in property, including property acquired or held for or devoted to a public use, when in the judgment of the city council it is no longer required for municipal purposes.
>
> (b) The council may sell, lease or donate or exchange with the United States, the state, or any political subdivision real

That statute authorized land disposal and required a voter

estate or other property, or interest in property, whenever in the judgment of the city council it is advantageous to the city to do so.

(c) In the sale, lease or disposition of real property or interest in real property valued at more than $5,000, the city council shall by ordinance fix and prescribe the terms of the sale, lease or disposition, and the consideration for it when fixed by the city by ordinance shall be considered adequate and final. However, no ordinance for the sale, lease, or disposition of real property or interest in real property valued at more than $5,000 is valid unless ratified by a majority of the qualified voters voting at a general or special election at which the question of the ratification of the ordinance is submitted. Thirty days, notice shall be given of the election and during that period the city council shall have published at least once each week in a newspaper published in the city a notice stating the time of the election and the place of voting, describing the property to be sold, leased, or disposed of, giving a brief statement of the terms and conditions of the sale and the consideration, if any, and stating the title and date of passage of the ordinance. If no newspaper is published in the city, the notice shall be given by posting a copy of it in at least six public places in the city at least thirty days before the election.

(d) The council may by ordinance sell, lease or donate to or exchange with any local independent school district, any real estate or other property, or interest in property used exclusively for school purposes, whenever in the judgment of the city council it appears advantageous to the city to do so,

ratification of large parcels. However, competitive bid was not required; the city was permitted to set the price.

Revision of the municipal laws was directed by the Third Legislature, First Session, and in 1963 and 1964 the Local Affairs Agency of the Office of the Governor 5/, Department of Law, and the Legislative Council prepared the first draft of the new legislation. The revision was introduced as SB 101 in 1965, and reintroduced in 1966, 1967 and 1969 after several hearings and the deliberations of many committees. Although the first version of SB 101 did not include any requirement for competitive bid, CSSB 101 in 1965 required a competitive bid procedure which included "(3) public opening of sealed bids, if any." That same language is contained in HB 508, considered in 1966, and HB 185 in 1967. By 1971, after review of the 100-page bill by the Alaska Municipal League, the language had been changed to "(3) public auction or opening of sealed bids, if any." This language was included in SB 113, which was introduced in 1971 by the Local Government Committee and was included in the final version of the bill that passed in 1972. I could find no documentation in the

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> and the sale, lease, donation or exchange is not subject to the provisions of this section requiring ratification by the voters.
>
> (e) The council, in order to make sites available for new industries which will benefit the municipality, may likewise acquire, own and hold such sites, including real property, either inside or outside the corporate limits and may sell, lease or dispose of them upon the terms and conditions as it considers advantageous to the civic welfare of the city, to persons who will agree to install, maintain and operate a beneficial new industry. Sites acquired under this paragraph and any right, equity, claim or title acquired by the municipality to real property sold to it for delinquent taxes are not "property acquired, owned or held for or devoted to a public use" as used herein.

5/ This agency was the forerunner of the Department of Community and Regional Affairs.

legislative files that this particular section of AS 29.48.260(c) was discussed.

The "plain meaning" of the statute permits only auction and sealed bid. In the absence of any legislative history indicating that other methods were intended to be included, the municipality must be limited to those two specified disposal methods. A sealed lottery application could be considered a sealed bid; however, the "bidder" could only be awarded the right to purchase the land at assessed value.

2. Does Section (d) which pertains to land conveyed to the municipality by the State allow municipalities the right to chose any method of disposal they wish and also not be bound by election requirements if the value of the property is over $25,000?

Subsection (d) explicitly exempts land disposals from the competitive bid and voter ratification procedures of subsection (c) where the land or right in land were obtained from the state, and where the assembly or council has by ordinance established a formal procedure for acquisition and disposal of state land. Thus, the answer to your question is that the municipality may choose any method of disposal not prohibited elsewhere in Title 29 or in the federal and state constitutions. Under subsection (d), the value of the land is immaterial. See discussion earlier in this memo of Kodiak Island Borough v. Large.

3. Section (c) (4) requires voter approval of a land sale if the value is $25,000 or greater. Does this requirement apply to the value of individual parcels or does it apply to the total value of all properties being sold?

The purpose of the requirement in subsection (c) appears to be to exempt small or less valuable parcels from the voter ratification requirement. It is not clear from the statute what standards the municipal officials should use in determining whether to aggregate small parcels in an ordinance (which would require a public vote) or put each parcel in a separate ordinance (passage of which would not require a public vote). The $25,000 limit must be applied to the behavior of the municipal officials in a reasonable and not arbitrary manner. If a general law municipality sells several noncontiguous parcels, each assessed at less than $25,000, the purpose of the statute would not be violated. However, a subdivision of a parcel into several plots,

each valued at under $25,000, could violate the statute if the total of all of the plots substantially exceeded the limit and the purpose of the subdivision was to avoid the voter ratification requirement.

4. Must a municipality lease land on a competitive basis or can they negotiate? If they must go competitive, can they use the same disposal methods as a sale of municipal property?

Under AS 29.48.260, a municipality may lease land to individuals in the same manner as it may sell the land. In other words, competitive bids are required, and if the lease is valued at $25,000 or more, voter ratification is necessary for the ordinance authorizing the lease. The exemptions provided by the statute for leases for the general law municipality are, again, the same as for sale, namely: 1) if the lease concerns land that was obtained from the state, neither competitive bid nor voter ratification is required, no matter what the value of the lease; and 2) if the lessee is a "beneficial new industry" it may be exempt from the competitive bid and ratification requirement. 6/

As for your question on other disposal methods by competitive lease, our answer would be the same as our answer pertaining to sales in question no. 1 of this memorandum.

5. Can a municipality exchange land with a private individual or corporation? If so, under what circumstances and conditions?

Where the municipality must comply with the competitive bid and voter ratification requirements of subsection (c) of course, no exchange would be permitted. If the land in question

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6/ As previously noted, the holding in Libby v. City of Dillingham, 612 P.2d 33 (Alaska 1980), that a "beneficial new industry" is not exempt from subsection (c) is a weak one. Of the two-vote majority subscribing to this view, only Justice Burke remains on the court. One of the justices who believed that the legislature did intend to make the exemption, Justice Rabinowitz, remains on the bench. Also remaining is Justice Matthews, who declined to reach the issue.

were obtained from the state under subsection (d), exchanges would be permitted for land "no longer required for municipal purposes." AS 29.48.260(a).

Because the municipality holds land as a public trust, the terms and conditions of the exchange must generally be fair and reasonable. C. Rhyne, Municipal Law 375-376 (1957). In any situation which avoids competitive bid, care should be taken to "guard against favoritism, improvidence, extravagance, fraud and corruption." 10 E. McQuillin, The Law of Municipal Corporations § 29.29 at 321 (rev. 3rd ed. 1966).

As the answers to your questions no. 6, 7 and 8 pertain to land disposal situations incompatible with competitive bidding, it should be understood that the answers to these questions apply to home rule municipalities, and to general law municipalities distributing land under provisions exempt from AS 29.48.260(c). I have answered your question no. 7 before the other two.

7. Once a property to be sold is assessed or appraised, can the municipality offer the property at less than this value or provide a discount?

It is fundamental that no public property in the state be transferred except "for a public purpose." Alaska Const. art. IX, § 6. 7/ Whether a public purpose is being served must be decided as each case arises and in the light of the particular facts and circumstances of each case. DeArmand v. Alaska State Dev. Corp., 376 P.2d 717, 721 (Alaska 1962).

The question whether a municipality may dispose of land for less than fair market value is a difficult one. On the one hand, the municipality has a duty to exercise all of its powers for a public use or purpose. 2 E. McQuillin, The Law of Municipal Corporations § 10.31 at 818. All its powers, property and offices constitute a public trust to be administered by its officers. Id. at 819. If a municipality cannot give away its property except for a public purpose, it should not be able to dispose of property without consideration, unless there is a

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7/ See Wright v. City of Palmer, 468 P.2d 326, 330-331 (Alaska 1970); Lien v. City of Ketchikan, 383 P.2d 721, 722 (Alaska 1963).

public purpose for the gift. Id. § 28.43 at 127. 8/ As noted in McQuillin,

> Statutes governing the sale of public property are designed to secure the most beneficial terms for the public body, and the basic philosophy underlying these statutes is that economy must be recovered, extravagance avoided, and opportunities for fraud or favoritism suppressed.

Id. § 28.44 at 130.

On the other hand, a municipality has broad discretion in managing its property, both because of the liberally construed grant of powers necessary to provide for its citizens 9/ and because of a modern trend extending the scope of permissible public purposes afforded municipal activities. Id. § 10.31 at 819. Absent evidence of "fraud, corruption or arbitrary unreasonable actions amounting to abuse of discretion," discretionary functions of municipalities such as this will generally not be reviewed by courts, according to McQuillin. Id. § 10.33 at 825. Accord, C. Rhyne, Municipal Law 380-381. It is clearly possible to have a justifiable public purpose for offering land at a discount to citizens, and it is our opinion that a municipality may offer such discount subject to certain limitation. First, the discount must not be so substantial that it amounts to a failure of consideration, i.e., an outright gift. See cases cited in note 7. Second, in determining those citizens eligible for a discount, the municipalities may not discriminate in a manner which violates the constitutional grant of equal protection under the law.

6. Is it permissible to require that an individual demonstrate a specified degree of improvement on a property

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8/ In general a municipality may not make a gift of land to a private organization. Gritton v. Des Moines, 73 N.W.2d 813, 820 (Iowa 1955); United Community Services v. Omaha Nat. Bank, 77 N.W.2d 576, 582-583 (Neb. 1956); Borough of Rockaway v. Rockden American Legion, Post No. 175, 189 A.2d 212, 212-213 (N.J. 1963).

9/ See AS 29.48.310 and AS 29.48.320.

and/or a certain length of residency before a municipality issues title to the property or allows a discount on the purchase price? [10/]

A municipality may withhold title to property until the purchaser meets certain conditions. A specified degree of improvement such as the construction of a house or a certain length of residency after the "purchase" are conditions which are supported by permissible purposes, such as encouraging community growth and population stability. Please see answer no. 8 for analysis of permissible purposes. A municipality may also provide a discount once a condition is fulfilled, subject to the restrictions listed in answer no. 7 of this memorandum, that the discount not be so substantial as to make the land an outright gift.

8. In what manner and under what conditions can a municipality offer preference rights for the purchase or lease of municipal property? Specifically, can they require: that a person be a resident without specifying a length of residency?; that a person be an occupant of the property prior to the disposal?; that a person have personal property on the premises for given period of time prior to disposal?; a valid, preexisting lease?; a veteran's status?; or have an income below a certain level?

A municipality discriminating among potential purchasers of its land must not deny to any person "the equal protection of the laws." U.S. Const. amend. XIV, § 1. In the constitution, "all persons are equal and entitled to equal rights, opportunities, and protection under the law." Alaska Const. art. I, § 11.

In order to fulfill this requirement of equal protection, the municipality must first make no classification based on race, national origin, or sex.

10/ Sandra Cook, then of the Division of Community Planning, informed me on August 8, 1983 that this question was intended to cover future conditions, i.e., conditions to apply after the sale.

Second, any classification made by the municipality to favor one group over the other must have a fair and substantial relation to a legitimate governmental objective. State v. Ostrosky, 667 P.2d 1184 (Alaska 1983); State v. Erickson, 574 P.2d 1 (Alaska 1978); Isakson v. Rickey, 550 P.2d 359 (Alaska 1976).

The analysis of the six conditions you have listed, and any others you might think of in the future, should therefore proceed as follows:

1. Does the condition have a legitimate purpose? Or, does the government have a good reason for making the classification?

2. Does the classification include most or all people and only those people who should be included in order to satisfy the intended purpose?

Both questions must be affirmatively answered in order for any of the conditions to be upheld.

a) Low income and veteran's status.

Such conditions as low income and veteran's status are intended to benefit easily identifiable groups, and it is permissible for a municipality to favor them. The conditions, of course, must clearly define includable income.

b) Residency.

Requiring a prospective purchaser to be a resident has the permissible purposes of encouraging the municipality's residents to be landowners and promoting population stability. An extended durational component to a residency status is not permitted, as the supreme court held in Gilman v. Martin, 662 P.2d 120 (Alaska 1983). 11/

11/ The court held:

> We note that if a residency requirement is constitutional, "length of residency may ... be used to test the bona fides of citizenship." Zobel III, 457 U.S. at 70, 102 S.Ct. at 2318, 72 L.Ed.2d at 684 (Brennan, J., concurring). The duration of residence requir-

Gilman concerned a land sale lottery ordinance enacted by the Kenai Peninsula Borough for disposal of land conveyed from the state. 12/ The ordinance authorized sale of borough land at fair market value to persons who filed applications and had been residents of the borough for at least a year. The court held that a durational residency requirement was unconstitutional, but that a simple nondurational residency requirement would have been acceptable if it were reasonable and had a "fair and substantial relation" to the purpose of the ordinance. Id. at 125-127. If the ordinance had simply stated that its purpose was to benefit its residents, the court implied strongly that such an ordinance would have met constitutional objectives. 13/

The court also held that a percentage reduction in the sale price of a parcel for each year of residency was unconstitutional under both the United States and Alaska equal protection clauses. Id. at 129.

The disposal of the land by lottery was permissible, the court ruled, because AS 29.48.260(d) did not limit the method

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> ed, however, must be reasonable and bear a substantial relation to the governmental purpose sought to be achieved. Isakson v. Rickey, 550 P.2d 359, 362 (Alaska 1976).

Id. at 127.

12/ Kenai Peninsula Borough is a general law municipality. Because the land had been obtained from the state, AS 29.48.260(c) did not apply.

13/ However, the state purpose of the ordinance had been to sell parcels to "adjoining owners." Since many of these owners of property adjacent to that being sold were nonresidents of the borough and thus ineligible to participate in the lottery, the court found that the ordinance did not have "fair and substantial return" to its stated purpose. The court in note 6 stated: "We do not hold that residency requirements are per se invalid. At least, however, when a purpose is stated for the requirement, the purpose must be a valid one that is substantially furthered by the classification." Gilman, 662 P.2d at 126, n.6.

of disposal, and AS 29.48.310 directs that a "liberal construction shall be given to all powers and function of boroughs and cities conferred in this title." 14/

c) Occupancy of the particular land.

The conditions tied to occupancy on a particular plot of land, having property on the land, or having a pre-existing lease are slightly more problematic. What is the purpose of singling out those persons who have made a commitment to land before it was available for sale? There could be a possibility that persons with "inside" knowledge of a municipal council's plans could gain an unfair advantage.

In our telephone conversations, Sandra Cook and I talked about distributing land by a point system which would favor purchasers with higher scores in categories such as have been listed above. 15/ Of course, for any point system classification to be constitutional, each element in it which awarded points would have to be constitutional.

EFFECTS OF SB 1

SB 1 repeals the existing Title 29 and substitutes the following provision which would control land disposal:

> Municipal property. The governing body shall by ordinance establish a formal procedure for acquisition and disposal of land and interest in land by the municipality.

This provision, if passed, would be AS 29.35.090. I understand that this provision is the same as it was when the bill was first

---

14/ See also Alaska Const. art. X, § 1. The majority also held that the lottery was not prohibited by state gambling statutes.

15/ The only other possible classification we discussed that was not listed in your memorandum was that of head-of-household. A municipality may permissibly reward those of its land purchasers who have dependents.

Jeff Smith, Jr., Director
Division of Municipal
& Regional Assistance, C&RA
File no. 366-522-83

November 21, 1983
Page 17

introduced four years ago. Tamara Cook of the Legislative Affairs Agency, who is familiar with the bill, tells me that this is the only restriction on land disposal in SB 1.

The passage of the bill in its present form would have no effect on home rule municipalities since they already can exercise all powers not prohibited; but it would remove all the restrictions AS 29.48.260 presently places on general law municipalities. Thus, under this new bill both kinds of municipalities could dispose of land by any of the various methods such as auction, lottery, or point system. They would still be required to dispose of the land in a manner that did not violate the state or federal constitutions, as explained earlier in this memorandum.

KMK:djc

cc: Sandra Cook
Division of Municipal
& Regional Assistance, C&RA

Appendix Five B

MUNICIPAL LAND CONVEYANCES TO REGIONAL HOUSING AUTHORITIES, May 28, 1981

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K – STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

May 28, 1981

RECEIVED

JUN 1 1981

Dept. of Comm. & Reg. Affairs
Div. of Community Planning

Michael J. Walleri
Village Government Specialist
Tanana Chiefs Conference, Inc.
Doyon Building
201 First Avenue
Fairbanks, Alaska 99701

Re: Municipal conveyances to regional housing authorities. Our file J-66-725-81.

Dear Mr. Walleri:

You requested that I review my conclusion, set out in my May 6, 1981 letter to Regional Solicitor John M. Allen, that under Alaska law it is permissible for a municipality to convey land to a Regional Housing Authority established under AS 18.55.996 without following the competitive bidding procedures set out in AS 29.48.260(c). Specifically, you requested that I review that conclusion in light of the Alaska Supreme Court's decision in Libby v. City of Dillingham, 612 P.2d 33 (Alaska 1980).

In Libby, the Alaska Supreme Court held that the authority in AS 29.48.260(e) for a municipality to dispose of land "upon the terms and conditions the assembly or council considers advantageous to the municipality" to make sites available for beneficial new industries does not include the authority to dispense with competitive bidding. A majority of the Court concluded that AS 29.48.260(e) should not be read as creating an implied exception to the competitive bidding requirement of AS 29.48.260(c) where AS 29.48.260(b) and (d) establish express exceptions to the competitive bidding requirements. Justice Rabinowitz, concurring in the result, reached the opposite conclusion. He also noted that fact specific exceptions to competitive bidding requirements have been recognized by the courts, including at least one instance in which a court recognized such an exception for low-rent housing for the elderly. Libby, supra at 45, n. 11 (Rabinowitz, J., concurring), citing Lehigh Constr. Co. v. Housing Auth. of City of Orange, 56 N.J. 447, 267 A.2d 41 (1970).

However, an implied exception to the competitive bidding requirement of AS 29.48.260(c) need not be found for a municipality to convey land to a Regional Housing Authority without competitive bidding. AS 29.48.260(b) contains an explicit exception to the competitive bidding requirement. That subsection provides:

> Notwithstanding the provisions of (c) of this section, a municipality may sell, lease, donate or exchange with the United States, the state, or a political subdivision real estate or other property, or interest in property, when in the judgment of the assembly or council it is advantageous to the municipality to do so.

Although a Regional Housing Authority is not per se "the state, or a political subdivision" as set out in AS 29.48.260(b), it is "a public body corporate and politic . . . possessing all powers, rights and functions now or subsequently specified for the Alaska State Housing Authority." AS 18.55.996(b) (in part). The Alaska State Housing Authority (ASHA) has been held to be an instrumentality of the state. Alaska State Housing Authority v. Dixon, 496 P.2d 649 (Alaska 1972). While there are significant statutory differences between the corporate makeup of ASHA and Regional Housing Authorities, Regional Housing Authorities are created pursuant to legislative authorization and perform a public service much the same as ASHA. For that purpose, they would appear to occupy the same position as ASHA, that is an instrumentality of the state for purposes of the exception to the competitive bidding requirement contained in AS 29.48.260(b).

This conclusion is reenforced by reference to AS 18.55.280, which enables a municipality to donate property to ASHA without appraisal, public notice or advertisement or competitive bidding. Since Regional Housing Authorities possess "all powers, rights and functions now or subsequently specified for the Alaska State Housing Authority," they would seem to possess the same right to receive such a donation.

AS 18.55.996 (b) also provides (in part):

> The authority shall have the power to enter into agreements with local government, other political subdivisions of the state, the state or the federal government for the exercise of a function or power relating to construction, operation and maintenance of public facilities or public utilities. Upon execution of such an agreement and for the period of the agreement the authority shall have the same powers and functions relating to the subject matter of the agreement as those which may legally be exercised by the governmental unit . . .

Under AS 29.48.030(a)(20), municipalities may exercise the powers necessary to provide "housing and urban renewal, rehabilitation and development" as public facilities and services. Construing AS 18.55.996(b) and AS 29.48.030(a)(20) together and harmonizing them, it appears that a municipality could contract with a Regional Housing Authority to perform the public services of housing and urban renewal, rehabilitation and development. Under such an agreement, it would elevate form over substance to require the municipality to lease land to the Regional Housing Authority pursuant to competitive bidding. This is particularly true since, unlike Libby, the Regional Housing Authority may be a single source public provider of the services, not one of many interested private sources for which the municipality may be holding land (in effect) for a private purpose.

Summarizing, it remains our opinion that municipalities may make donations of municipally-owned lands directly to a Regional Housing Authority without competitive bidding pursuant to AS 29.48.260(b), and that the Alaska Supreme Court's decision in Libby does not change this result.

We hope you find this elaboration of our earlier statement helpful. If you have further questions, please contact me at your convenience.

Sincerely,

WILSON L. CONDON
ATTORNEY GENERAL

By: G. Thomas Koester
G. Thomas Koester
Assistant Attorney General

GTK:dlm

cc: John M. Allen
Regional Solicitor

Lee McAnerney
Commissioner
Dept. of Community & Regional Affairs

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Assistant Attorney General
Anchorage AGO

Deborah Vogt
Assistant Attorney General
Juneau AGO

Lawrence Kimball, Director
Div. of Community Planning
Dept. of Community & Regional Affairs

Appendix Five C

CONVEYANCE OF MUNICIPALLY-OWNED LOTS IN TOWNSITES TO INDIVIDUALS, MAY 6, 1981

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

JAY S. HAMMOND, GOVERNOR

POUCH K – STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

May 6, 1981

John M. Allen, Esq.
Regional Solicitor
Office of the Solicitor
Alaska Region
United States Dept. of the Interior
510 "L" Street, Suite 408
Anchorage Alaska 99501

Re: Regional Solicitor's April 23, 1981 memorandum regarding "Conveyance of municipally-owned lots in townsites to individuals." Our file J-66-725-81

Dear Mr. Allen:

Assistant Attorney General Thomas E. Meacham of the Anchorage Office of the Alaska Department of Law provided me with a copy of your above-captioned Memorandum. After review of that Memorandum and discussion with Mr. Meacham and others, we believe that some comment from the State of Alaska's perspective is necessary.

The situation appears to be as follows:

> Many predominately Native municipalities are reluctant to dispose of their lands by public auction. . . . In addition, Natives who relied upon the Saxman Opinion (66 I.D. 212) already occupy some municipally-owned lands. Some municipalities are therefore interested in exploring methods by which local residents could gain title to the municipally-owned land without a public auction. Tanana Chiefs' Conference has suggested that the United States accept the unoccupied lands from the municipalities pursuant to 25 U.S.C. § 451 and redispose of them in fee to the local IRA Council which, in turn, would convey them to individual tribal members.

Memorandum, pp. 1-2.

The problem appears to be that AS 29.48.260 restricts the authority of municipalities to dispose of municipal property. As a general rule, as you note in your Memorandum, p. 1, municially-owned lands may be disposed of only in accordance with a disposal ordinance requiring an appraisal, public notice, and a public auction. AS 29.48.260(c). However, as you also note, Memorandum, p. 2, AS 29.48.260(b) authorizes a municipality to "sell, lease, donate or exchange" municipally-owned lands with the United States. In the event of such a sale, lease, donation or exchange, your conclusion was that "there is statutory authority for the United States to accept the lands from the municipality and redispose of them for use in any program authorized by the provisions of law for the benefit of Indians." Memorandum, p. 2 (emphasis added).

Our major concern with your conclusion is that the contemplated conveyance would result in the dedication of municipally-owned lands for the benefit of a racially-defined class. This would be a direct violation of the equal protection clauses of the Fourteenth Amendment to the United States Constitution and Article I, Section 1 of the Alaska Constitution. While these provisions are not applicable to the United States, they do apply to both the State of Alaska and municipalities organized under Alaska law.

That result stems directly from 25 U.S.C. § 451, the statute you cite as authority for the Secretary to accept a conveyance from municipalities. That statute gives the Secretary of the Interior authority to accept donations of funds or other property "for the advancement of the Indian race." (Emphasis added.) Accordingly, a conveyance to the United States under AS 29.48.260(b) accepted by the Secretary under 25 U.S.C. § 451 would be ultra vires since it would be exclusively for the "Indian race" on behalf of which the Secretary would accept the property. Such dedication of public property would not serve a "public purpose," only a racially-restricted one.

You also state:

> Although Alaska State law does not permit a direct donation of municipally-owned lots from the municipality to the Indian Housing Authority, I do not believe that 25 U.S.C. § 451 represents an evasion or undermining of State law. AS 29.48.260(b) specifically allows the donation of land to the United States when in the judgment of the municipal council or assembly, it

> is advantageous to do so. It is certainly not arbitrary for the municipality to determine that donation of land to a Regional Housing Authority for the construction of low-cost housing is advantageous to the municipality.

Memorandum, p. 5.. We agree that it would not be arbitrary for the municipality to determine that donation of land to a Regional Housing Authority for the construction of low-cost housing is advantageous to the municipality. We are not familiar with what you refer to as the "Indian Housing Authority," but agree with you that state law (as well as the Fourteenth Amendment) would not permit a municipal conveyance to such an entity if it was racially restrictive. However, such a donation may be made directly from the municipality to a Regional Housing Authority without first conveying it to the United States. The only apparent reason for conveying it to the United States initially would be in an attempt to avoid the constitutional problem resulting from a municipal conveyance specifically for the benefit of a racially restricted class.

AS 18.55.995, quoted in your Memorandum, p. 5, does not change this result. As initially enacted, it provided that the Regional Housing Authorities were created "for the specific purpose of implementing the President's National Indian Program for Indian Housing." However, the quoted language was repealed the following year in Section 2, Chapter 151 SLA 1975. Accordingly, while various specified Native associations are given the authority to establish Regional Housing Authorities under AS 18.55.996, and may receive donations of land from municipalities, the programs administered by those Associations must be racially neutral. Cf. Lien v. City of Ketchikan, 383 P.2d 721 (Alaska 1963) (municipality may lease land to sectarian order of the Catholic faith for construction and operation of a hospital to provide for care of sick without regard to race, color or creed and thus accomplish a valid public purpose).

As long as no restrictions on the use of the property based on race are imposed, there appear to be no obstacles to a conveyance of municipally-owned land for low-cost housing purposes. Under AS 18.55.996(b), Regional Housing Authorities have virtually identical powers to those of the Alaska State Housing Authority. Accordingly, under AS 18.55.450, Regional Housing Authorities may accept donations from municipalities. Under AS 18.55.280, the municipality

may donate property to a Regional Housing Authority without appraisal, public notice or advertisement or bidding. In sum, there are no legal obstacles to a direct conveyance from a municipality to a Regional Housing Authority for development of low-cost housing on a racially neutral basis.

You also conclude that a municipality conveying land to the Secretary under 25 U.S.C. § 451 for reconveyance for the benefit of Indians would not frustrate the legislative scheme of the Alaska Native Claims Settlement Act. However, Section 2(b) of ANCSA evinces a Congressional intent that the Act be implemented "without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding . . . to the legislation establishing special relationships between the United States Government and the State of Alaska." A conveyance to the Secretary under 25 U.S.C. § 451 would appear to require that the lands conveyed be used for racially restrictive purposes in perpetuity. Although perhaps not expressly prohibited by ANCSA, such a device certainly would run counter to the thrust of that Act.

In addition, you do not distinguish between unoccupied Native townsite lands which may be conveyed directly to the municipality by the townsite trustee (see City of Klawock v. Gustafson, Slip Op. No. K74-2 (D.C. Ak. Nov. 11, 1976)) and lands which village corporations must convey to municipalities (or to the State in trust for future municipalities) pursuant to Section 14(c)(3) of ANCSA. With respect to the latter category, a further conveyance from the municipality to the Secretary under 25 U.S.C. § 451 for a racially restricted purpose would appear to be a clear violation of the intent of ANCSA.

We hope you find these comments helpful. We recognize that the Federal Government is not bound by the equal protection requirements of the Fourteenth Amendment to the United States Constitution and Article I, Section 1 of the Alaska Constitution when dealing with Natives. However, State-chartered municipalities oganized under AS 29 are subject to those requirements. While the fact that a municipal conveyance of land for a racially-restricted purpose would be unconstitutional may not prevent the Secretary from accepting the conveyance, we doubt the Secretary

would knowingly encourage such an unconstitutional act.

I would appreciate the opportunity to discuss these matters with you at greater length at your convenience.

Sincerely,

WILSON L. CONDON
ATTORNEY GENERAL

By: G. Thomas Koester
G. Thomas Koester
Assistant Attorney General

GTK:dlm

cc: Commissioner Lee McAnerny
Thomas E. Meacham
Deborah Vogt
Larry Kimball

Appendix Five D

Note: This has been re-printed from the original document

MUNICIPAL LAND DISPOSAL - INCENTIVE LEASING

Fred B. Arvidson
Partner

In this article, and the ones to follow in subsequent issues of THE MUNICIPAL ADVISER, we focus on land disposal - primarily sales and leases of municipal land. In our first article we provide an overview of the policy issues involved. Does it really matter how land is sold or leased? Are there reasons for doing it a particular way? Later we will focus on the ways local governments can accomplish their objectives in leasing or selling public property while minimizing the risks of unfairness inherent in some methods although it might seem strange, questions like "how can we pro- mote the local economy?" and "how can we promote local hire?" are commonly raised when a local government seeks to lease (or sell) some of its real property. These are being asked in addition to the standard questions like ' 'shouldn't we get fair market value?" and "just what is fair market value anyway?" and we want to avoid competing with private enterprise?-

THE OBJECTIVE

The essential first step in a local government's consideration of the sale or lease of public land is to answer the question: "Just what are we trying to accomplish with this sale or lease?" Most problems in sale or leasing stem from the fact that the local governing body never had a clear answer to this question in the first place.

Answering this question is absolutely essential. If the primary J concern of the local community is to promote those industries that provide local employment, then the whole approach to the issue is different than one if the objective is to maxi- mize revenues. If local hire is the goal, a lease that requires a certain level of local employment as a condition to the lease might make more sense than one that simply seeks the maximum price for the parcel. Writing an agreement that calls for local employment can't probably be done in a public auction setting, whereas a public bid might be the best possible way to maximize price.

Without a clear understanding of the objectives, a sale or lease program is doomed to fail. Of course, in most situations there isn't just one objective.

With mixed motives (maximizing revenue, avoiding competition with "private promotion of local hire, to name just a few) it becomes very difficult to structure the following: 1) the property will be put on the market (public auction, request for proposals, private negotiation, etc.), 2) the measure to be used in deciding which private party will get the deal (total rent, commitment to investment, commitment to local hire, etc.), 3) how the deal will be structured (sale, lease, lease with options, etc.), and 4) who will negotiate the deal (the city manager, the council as a whole, a subcommittee, etc.).

There are many ways to dispose of property and the following outline should help identify which methods best serve different policy objectives.

DISPOSAL MECHANISMS

Public Auction: By far the simplest, and some can argue the fairest mechanism for land disposal is to put the land out to bid. For example, if a city owns a residential subdivision, a public auction bid sale of residential lots may well be the fairest mechanism for disposal. Some cities have followed this approach. This is also the approach taken by the State of Alaska in some of its remote parcel disposal programs where either a "first come-first served" approach (remote parcel staking) or a lottery approach has been used (fixed price but random selection of purchasers). All of these systems can work in the local community, although they seem to make the most sense when the government is disposing of a number of parcels that are generally equivalent in use and the use is a general one. A classic example would be residential lots in a subdivision.

The issue is much more difficult when the city is dealing with unique or one-of-a-kind land parcels or facilities. It may make eminently good sense to put 200 lots out to public bid for residential construction but it may make much less sense to put a unique 20 acre industrial development site out to bid.

Before the comprehensive changes to Title 29 in 1986 there was a substantial difference between how home rule municipalities and first and second class governments could

dispose of land. Generally, first and second class governments couldn't dispose of land except by public auction and with ratification of the sale or lease the voters. This presented problems in that it is difficult to lease unique land or buildings by auction. For example, one developer may have a project that simply will not work without some changes in land use classification, or utility development, etc. Without the ability to negotiate those items from the local government a "fill in the blank" with the lease rate or purchase price may well preclude prospective tenants or buyers from even getting interested. With the changes to Title 29, first class and second class governments can develop their own disposal procedures IF THEY ADOPT CODE PROVISIONS TO THAT EFFECT. If a government has not enacted disposal provisions allowing for flexibility, then the "old" Title 29 provisions probably still apply and the local community simply doesn't have an option.

DISPOSAL BY REQUESTS FOR PROPOSALS

Under this approach, the local governments seek out those who might be interested in the land in an attempt to entice those people into making offers. This system is widely used in Alaska and has some distinct advantages in that it allows the proposer to tailor the deal to fit his individual needs. For example, one proposer might absolutely require the extension of an increased sewer main to the property. Another might need access to some other public property (for example, a dock) under certain conditions (preferential berthing while another might be more interested in some other feature of the property.

By allowing the prospective purchasers or tenants to develop their own proposal the local government can probably expand the market of people interested as those who might have been precluded because the "fill in the blank" approach taken in the auction System failed to meet a critical need.

Flexibility is the key to this approach and, at first look, it seems the best possible to go. Unfortunately, this system poses some real problems for the local government. A principal difficulty is trying to compare proposals that everyone recognized at the outset would be different (if they were all going to be identical - except for price - the auction method would have been the way to go). How do you fairly compare apples (rent) with oranges (commitments to invest)?

How does a city fairly chose between two proposers on the basis of financial ability, reputation, etc., and how do you prevent favoritism from creeping into the process? These are the difficult issues. A number of issues need to be addressed BEFORE the re- quest for proposals is prepared. A few key issues are:

1. Deadlines for submission and confidentiality. It hardly seems fair to let proposers learn from the competition before they have to submit their proposal. Extensions of time for proposals should probably NOT be granted except for EXTRAORDINARY circumstances (the airplane carrying the proposal crashed as opposed to a non-unusual delay due to weather). Proposals should be submitted in sealed packages and NOT opened until the deadline for receipt has passed. Someone in the city (most probably the city clerk) should keep careful records of when the proposals were received and assure that they are not made public until after the time for submission has passed.

2. Evaluation criteria. If the city is trying to accomplish some goal other than maximizing cash flow, (encouraging the development of a beneficial new industry) then those goals should be - spelled out in the request for proposals. The beneficial new industry was one of the very few exceptions under the "old" Title 29 that allowed disposal of property without auction or at fair market value.

The State of Alaska has developed fairly complicated and sometimes confusing systems for "grading" proposals. The price of the rent or purchase might be considered 40 % of the evaluation criteria. Our experience, however, has been that when the criteria are complicated and fixed it becomes very difficult to apply them in a rational way. Any attempt to take a subjective question (which proposal is better) and decide it based on objective criteria (the price is worth 40% of a total of 100 points) is really difficult to do. Using a formula to decide a subjective issue can lead to problems. Unless the formula is perfect, it leads to imperfect results. Too many times the evaluators try to fit their judgment as to which proposal they think is the best into the various criteria. Any such approach can lead to serious problems, as the results can be subject to attack ("Why did you rank Company A at a 30 and Company

B at a 28?").

It is probably better to recognize that the process isn't perfect and there may be no magical formula that will work. It is probably better for the city to spend its time and effort in ensuring that the people making the decision are fair and that the approach was fair.

3. Who decides. The biggest problem in a proposal process is the issue of who decides. The local governing body is responsible. Sometimes the responsibility for the decision and the people who make it are different. It is important to realize that this can be a disaster. If a Council says "we just followed the recommendation of our city manager" it should realize that the voters don't vote for the city manager, but they do vote for the council, so the council will be responsible even if it didn't participate in the decision making process; There is a lesson to be learned here. City councils should not blindly follow recommendations and city managers who want to keep their jobs shouldn't allow themselves to be put into the position of making that sort of decision.

Yet involvement of the city council in the entire process may not be practical.

Often a city council simply doesn't have time to hear the proposals for all parties, so a screening committee can be useful. Often the city manager or administration can act to screen proposals and make recommendations. Sometimes the proposals are so difficult to understand that a professional engineer or financial expert is required. For example, how can a city council member know whether the financing mechanism called for in a proposal is realistic? On those sorts of issues, the experts should be consulted. Similarly, the city attorney may be useful in reviewing the legal risks associated with the various proposals. We would not recommend that these experts (including the attorney) be relied upon to make the decision. Rather their function is to point out the risks involved and answer questions.

Another useful technique, especially where the project involves some sort of unusual proposals, is to have an interview process where the top proposers submit to interviews by the council (or a committee).

4. The procedure. Once the proposals are in there are bound to be problems. Sometimes a proposal is confusing. Does the administration have the right (or the duty) to contact the proposer and get clarifications? At what point do clarifications become negotiations? And if negotiations are to be conducted, who does them and what subjects can be covered?

These are difficult issues that need to be resolved, again, BEFORE the proposals are in. There are several basic safeguards that ought to be followed:

a) Equal access: If a proposer has a question — an issue not covered by the request for proposal — then the city ought to probably give the answer to all those who may have expressed an interest in submitting a proposal.

b) Bid shopping: No matter how good the request for proposal and the quality of a proposal itself, it is probably that the "best" proposers will have questions and the city will have concerns. How are these handled? A couple of problems arise. First of all, a city should be very careful not to be accused of "bid shopping." In a bid shopping environment the government seeks to change a proposer's bid or proposal based on the content of some other proposal (Company A offered us _____ . Do you think you can match that?). These kinds of contacts can lead to serious trouble, including all sorts of opportunity for the bribing of public officials.

c) Open meetings: A problem present whenever any sort of contact occurs between the people making the decision. Do meetings of a subcommittee reviewing proposals have to be public? What about interviews between proposers and the council? If they are open do competing proposers have the right to attend, and if they do, doesn't the last to be interviewed have an advantage?

One possible way to try to bring some order to what can become a chaotic situation is to provide that the selection process will follow this order:

1. Those proposals that are "non-responsive" will be discarded and the best of the group will be selected for further review.
2. A short list is then reviewed in depth by the group making the initial recommendation.
3. Experts as needed (financial experts to review financing pains, city attorney for review of legal risks) are called in by the committee to review areas and answer questions.
4. If there are questions that need to be answered the committee or its representative will contact the proposers for information. A record of those contacts should be kept, and when in doubt, the committee should carefully consider whether the information

sought or received would provide a competitive advantage, and if it does, then the other proposers should be informed.
5. The committee should recommend more than one firm for the council to consider.
6. The council should pick what it considers to be the best proposal.
7. The administration should then negotiate with the top proposer until an agreement is reached (or until negotiations fail). That final agreement should then be submitted to the council and the public for a complete review, public hearing, etc.

Throughout the process any member of the council should be welcome to participate at any meeting with any party, so the council can be assured there is complete access to all information upon which they will base their decision.

There is a real conflict between the public purposes to be served by public meetings (open decisions openly arrived at) and the process of negotiation where the parties are trying to get the best possible deal. The same sort of policy issues that are present when negotiations between management and labor and public are present.

NEGOTIATION

The most flexible, the most conducive mechanism for private development is the so-called "disposal by negotiation." In this process, the local government and the private party sit down in the same way two private parties might in an effort to structure a deal that is good for both sides.

There are good reasons to have this procedure in the local government's repertoire of disposal mechanisms.

A typical situation might involve a private developer who has the idea to develop a new business in town (a self-service gas station, a bowling alley, a port facility to export a new commodity like coal). Ideas are the raw materials for businesses. Without the idea a new business can't be developed.

And yet once the idea is disclosed, it loses its competitive value, for anyone can then use it. Patents and copyrights protect some forms of ideas but ideas on which businesses start aren't capable of being protected.

If the response of the city to this innovative idea is to auction the land for the construction of a bowling alley - or even to solicit proposals for the development of a bowling alley - the competitive value of the idea to the person who thought of it is lost. There is an underlying feeling here that private parties ought to be able to benefit from their good ideas, and yet, the traditional disposal techniques of public land involve so much disclosure that the idea will most likely be made public long before a deal can be structured and there isn't any way to protect a competitor from using that same idea on private land in the meantime.

The competition, during the time the innovator is dealing with the city, could well tie up a private parcel to accomplish the same thing. In that case, the innovator loses the advantage of his idea while the local government loses any input it might have in the development.

One way to avoid this situation is to allow private proposals to be made, negotiations conducted, deals "made" and THEN disclose them to the public for approval by the local governing body.

This allows the private party to maintain the competitive advantage until a deal is struck even though he is dealing with a public agency.