

M * A * S * H *

99603

Our Cover

For our cover, we have chosen a photograph of the original health care facility building, circa 1951.

Adknowledgements

A thank you is extended to the following individuals for their enthusiasm and hard work in the sharing of historical details, the compilation of facts, and the manuscript work.

Helen Alm
Debbie Boelter
John Cooper
Jack Epperson
Harry Gregoire
Mike Herring
Tom Keffer

Howard Myhill
Leo Rhode
Leah Rich
Ron Rich
Norma Ryan
Brenda Steenblock
Gene Williams

INTRODUCTION

This is a brief political history of our hospital. Due to the time press imposed on us, I am sure that I will omit some pertinent person, place or thing. For this I apologize, in advance, to the injured party or parties.

The interesting thing I found in working on this project is that so much has occurred in so short a time. The obstacles placed in the way of the people dedicated to having first class medical service in their community were staggering. The methods used to overcome these obstacles were simple. They consisted of mental concepts: Faith, determination and a belief in the future. These, combined with a willingness to get involved, proved equal to the task.

Most of these people are still alive and active in something. However, faced with what appears to be another obstacle to quality medical service to our area, they have rallied to the cause, again. All were asked to dictate their memories of the hospital onto tape. Many did. From tape they were typed in transcript form.

These transcripts were made available to me, along with various other documents, statements and photographs of historic import. I've attempted to assemble these into a clear, concise political document. This is not meant as an impartial review of mere events. It is, rather, to me, a documentation of an impossible dream fulfilled.

T. H. Keffer, President
South Peninsula Hospital
Service Area Board

FEBRUARY 1984

NOVEMBER 1988 SECOND PRINTING

SEPTEMBER 1989 THIRD PRINTING (20)

"There was a different philosophy around here at that time. Everyone got in and worked. We were trying to get something going. There is always more enthusiasm when your're trying to get something going. After it is going, then people lose interest in it. They look for another challenge."

Leo R. Rhode

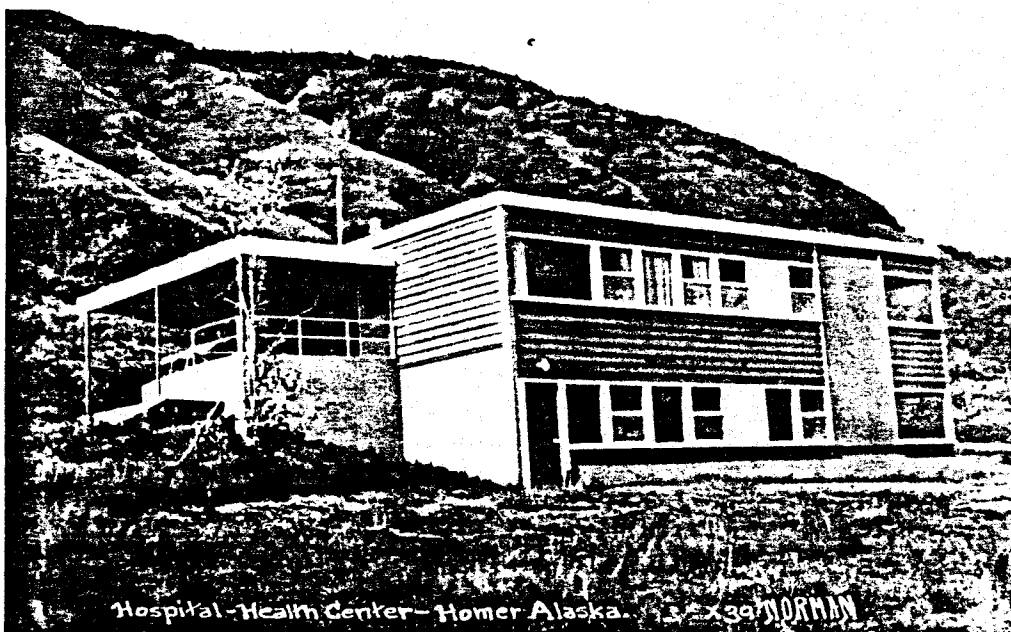
* * * *

"We started in doing the very basic things by hand. Us Board members got down there and leveled off the basement and got the plumbing situated and poured the concrete slab and built 'petition'. We made the doctor's offices down there. Then we started thinking bout how to improve things, at least to keep the Fire Marshal from shutting it down."

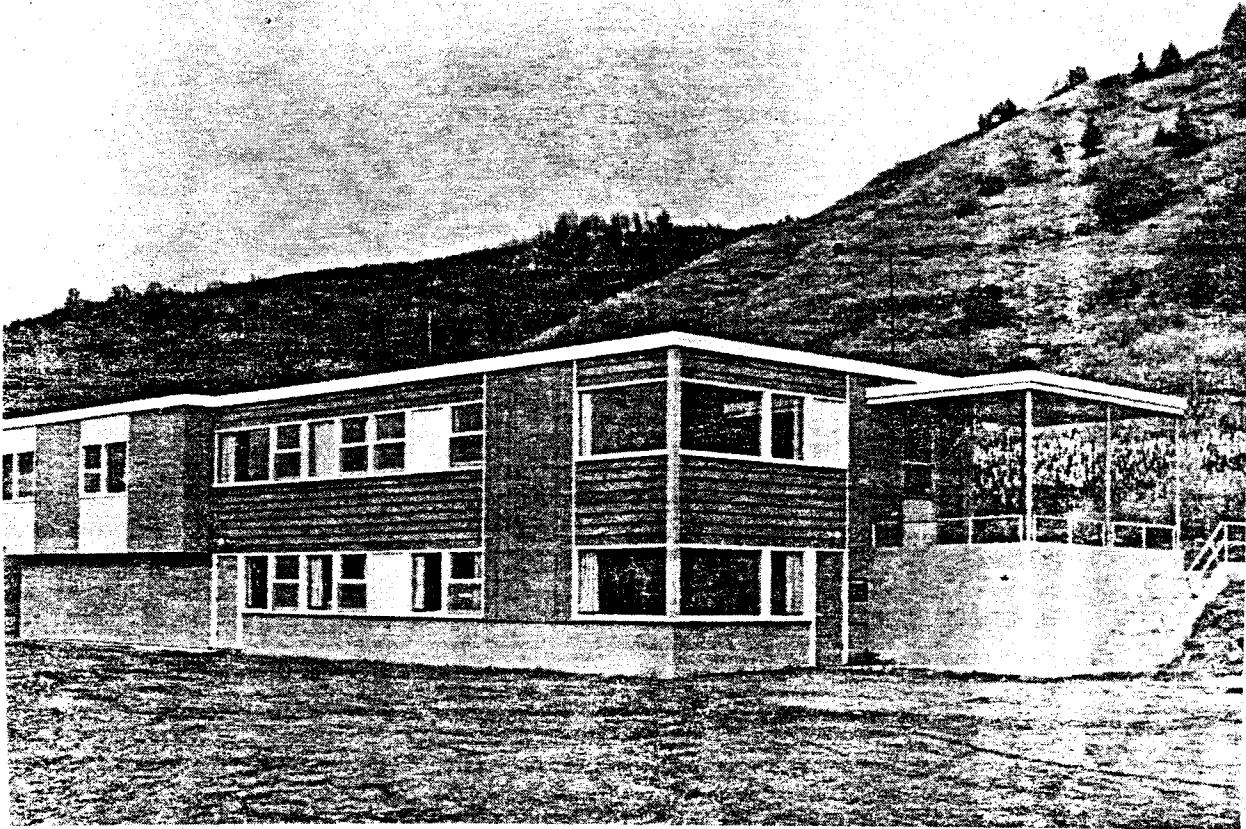
Jack Epperson

"It is kind of hard -- people don't want to know the facts. They've already made up their minds sometimes, and they just don't want to listen -- they were against it."

Harry Gregoire



Original Hospital & Health Center
(1955 - 1960)



Homer Hospital & Health Center
With new addition on west end (1960)

By the late 1960's, it was becoming clear to most people who lived in the Homer area that the existing Homer Hospital was no longer adequate to provide for the medical needs of the southern Kenai Peninsula. A new hospital was needed. However, it was also clear that changes in the hospital's organization were also needed before it would be possible to build a new hospital.

The old Homer Hospital, which opened in 1956, had at first been financially supported by the Homer Public Utility District (the predecessor of the City of Homer). After the City of Homer incorporated in 1964, the City of Homer assumed the financial responsibility of supporting the hospital, and the City of Homer continued to subsidize the hospital until 1970.

The problem with this arrangement between the hospital and the City of Homer was obvious to many residents of Homer. The hospital provided an area-wide service to patients from all areas of the southern Kenai Peninsula, while tax support came only from the residents of the City of Homer. This arrangement was not fair to Homer taxpayers. Moreover, hospital taxes promised to become even more burdensome if a new hospital were to be constructed. Thus, the idea of a hospital Service Area began to form.

In early 1969, the Kenai Peninsula Borough was approached to consider the establishment of a South Peninsula Hospital Service Area. And the Kenai Peninsula Borough Assembly agreed to let the voters of the proposed Service Area decide the question.

In March of 1969, the Kenai Peninsula Borough Assembly adopted Ordinance 69-4, which called for an election that would present the following proposition to the voters of the proposed South Peninsula Hospital Service Area:

PROPOSITION

Shall the South Kenai Peninsula Hospital Service Area construct, maintain and operate a hospital or hospitals in the manner provided in AS 29.10.159 for first class cities?

YES.....

NO.....

The Service Area voted 735 Yes, and 470 No. Thus, the Service Area had been established, but still to be determined was how the City of Homer would transfer its control of the existing hospital to the Service Area. The transfer question became a more serious concern when the Borough Chairman, George Navarre, announced his plan to build a large hospital in Soldotna and to have satellite clinics in Homer and Seward. The plan called for anyone who needed in-patient care from Homer to be sent to Soldotna for that care.

Chairman Navarre's plan caused great consternation on Homer's City Council. Members of the Homer City Council said that they had not supported a hospital in Homer for 15 years just to see it turned into a Soldotna feeding station. They wanted patients to be cared for in the area and not a hundred miles away. So they didn't want to turn the keys of the hospital over to the Borough without safeguards.

After much debate, it was agreed that in order to assure that a hospital adequate to meet the needs of the area be provided for,

the City would not simply give the hospital to the Kenai Peninsula Borough. Consequently, a 55-year lease between the City of Homer and the Borough was established on November 10, 1969.

The main features of the lease are that the land and buildings on it may only be used "for the operation of a public hospital and for those activities reasonably necessary, relative and incidental to the operation of said hospital and for no other purpose save and except by mutual written consent."

Another provision of the lease is that the property and all the improvements to it will revert back to the City of Homer at the end of the lease period.

Moreover, a particularly important clause from the City Council's standpoint was the restriction placed on subleasing and assignment. This precluded the Borough from making unilateral changes in the management of the hospital. It reads as follows: "Lessee agrees not to sublease or assign this lease or any portion thereof without first obtaining the written consent of the Lessor, providing however, that the Lessor shall not withhold its consent unreasonably."

Finally, the lease was binding not only with the Kenai Peninsula Borough Assembly and the Homer City Council in 1969, but also upon

their successors. The lease reads, "Each and every covenant, agreement, term, provision and condition herein contained shall extend to and be binding upon the respective successors and assigns of the parties hereto."

In addition to the Lease, a Sublease and Operating Agreement was also negotiated between the City of Homer and the Kenai Peninsula Borough.

The Sublease and Operating Agreement begins by setting forth the purpose of the agreement:

"WHEREAS, Lessor within the South Peninsula Hospital Service Area has assumed the responsibility to provide hospital services and has leased from the City of Homer the City of Homer hospital; and

WHEREAS, Homer Hospitals, Inc., desires to sublease said Homer Hospital and to assume the complete operation of said hospital facility."

Thus, Homer Hospitals, Inc., a not-for-profit corporation, was designated by the City and Borough to be responsible for the complete operation of the hospital.

Homer Hospitals, Inc., received its Charter of Incorporation from the State of Alaska on October 1, 1969. Homer Hospitals, Inc., was created in order to satisfy the City's concerns that local control be maintained. Also the establishment of Homer Hospitals, Inc.,

would enable the Kenai Peninsula Borough and the South Peninsula Hospital Service Area to avoid the legal liabilities and problems associated with operating a hospital.

By 1970, the Service Area had been established and the lease between the City of Homer and the Kenai Peninsula Borough was in place; the Sublease and Operating Agreement between Homer Hospitals, Inc., and the Borough was in effect and now Service Area residents began to look for a way to build a new hospital.

The new hospital would cost several million dollars, and even though there was now a Service Area to provide a tax base, that was still a lot of money. In 1970, the assessed value of the Service Area was under \$100 million. In other words, a 1 mill tax levy would raise less than \$100,000. As several years passed, it became clear that more money was needed than the Service Area could provide.

In order to reduce the Service Area tax burden, the hospital applied to the Federal Hill-Burton Hospital Construction program. It was determined that the hospital would be eligible for a loan which would cover a part of the building costs.

This, combined with an ever increasing assessed value of the Service Area, made it feasible to go to the voters of the Service Area again to propose bonds for the construction of a new hospital.

The idea of selling Service Area bonds gave rise to a new debate of the Kenai Peninsula Borough Assembly.

When the Service Area was established in 1969, the Service Area Board was advisory to the Borough Assembly and its members were appointed to the Service Area Board by the Board itself.

But now, in 1973, it was argued that the sale of Service Area bonds would create a fundamentally new situation. Since the Service Area was taking on this added responsibility, should not the Service Area Board have more authority too? And since the residents of the Service Area would pledge their property to retire this bonded indebtedness, should not the voters of the Service Area have the right to select the Service Area Board members?

This debate gave rise to Kenai Peninsula Borough Ordinance 73-33, which would change the Service Area Board from an advisory board to a board with much greater responsibilities. The ordinance read, "It is intended that board members shall be responsible for the level of services provided and to that end must be responsible to the electorate for the amount of taxes necessarily raised to provide such services, and the Kenai Peninsula Borough will raise the amount of the levy..."

Kenai Peninsula Borough Ordinance 73-33 was to be voted on by the voters of the South Peninsula Hospital Service Area and would only

become effective if the Service Area voters agreed: "This ordinance with respect to the election of board members becomes effective on adoption and with respect to all other matters becomes effective on the date the Kenai Peninsula Borough Assembly certifies the result of the election of the members of the board of directors."

Subsequently, the Service Area voters approved both the expanded Service Area Board powers and the bonded indebtedness. It seemed important to the voters that if they were going to incur a debt, that they also be given a greater voice in how their money was spent. Many people have said that they would not have approved the bond proposition without the increased authority of the Service Area Board.

By 1974, it seemed that a new hospital would not be far off. The Service Area Board had greatly expanded power and the authorization to go ahead with a bond sale. However, just when life was beginning to become simple for the hospital, everything was set back by a lawsuit.

In April, 1974, a suit was filed against the South Peninsula Hospital Service Area which challenged the legality of the Service Area. The case was first heard in the State Superior Court, but was ultimately decided by the Supreme Court of the State of Alaska

On October 21, 1974, Supreme Court Justices Boocheever and Rabinowitz, in the court's written opinion, concluded:

"...we emphasized the harm which may follow from dis-establishing a unit of local government."

"Disannexation or disincorporation of a municipality is not at issue here. Nevertheless, disestablishment of a hospital service area after it has been in active existence for five years would cause disruption and injury of the same order."

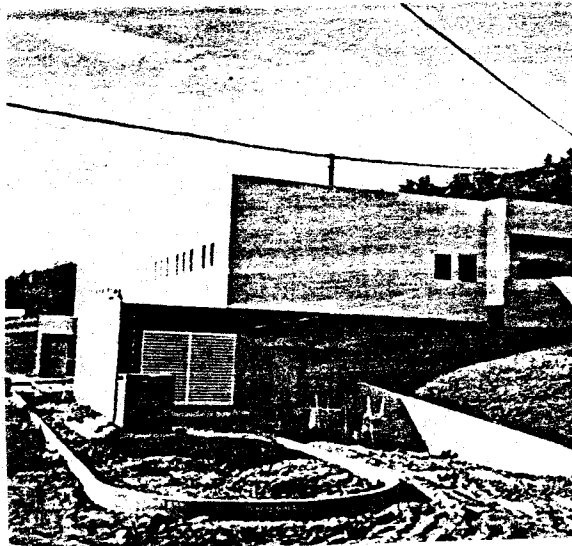
Moreover, the Supreme Court ruling was a complete legal victory for the South Peninsula Hospital Service Area. Although the Service Area was victorious in court, the legal battle had imposed a tremendous cost on the hospital. The hospital building program was stalled because the bonds could not be sold until the rendering of the Supreme Court decision. This cost the building program a year - and 1974 was no ordinary year.

1974 was the year of the oil embargo and the country's first encounter with hyperinflation in modern times. Also the trans-Alaska oil pipeline was getting under way and the demand for skilled labor, building equipment and material was great. Consequently, interest rates and construction costs soared. Moreover, contractors, fearful of the future, submitted only extraordinarily high bids on construction projects around the State.

The court case cost time and money and the result was that the new hospital building plans were considerably reduced in size and scope.

For example, we lost a wing of patient rooms and a properly sized laboratory. It was indeed a bitter victory when the boards were forced to eliminate about one-third of the project. Nevertheless, the ground was broken in 1975, and in May of 1977, at long last, the Service Area had a new hospital.

Also in 1977, Homer Hospitals, Inc., changed its name to South Peninsula Hospital in order to reflect the broader geographical area it serves.



South Peninsula Hospital - 1977

While the new hospital was a very welcome addition to the area's medical capability, it was immediately recognized that it would soon be too small to meet the growth of the Service Area. Therefore, plans to expand were started.

In May of 1980, a Certificate of Need application was submitted to the State of Alaska to: increase the acute care bed capacity from 13 to 23 beds; add 11 long-term care beds to the existing 4; and to expand the laboratory.

Once again, on October 6, 1981, the voters of the South Peninsula Hospital Service Area were asked to support the hospital's growth by approving a ballot proposition which would obligate them to pay for new bonds. The Service Area voters approved the ballot proposition by 909 for and 429 against.

That the bonds are an obligation of the Service Area, and only the Service Area, is underscored by the bond attorneys, Boettcher and Company in their statement of November 1, 1982:

"The Bonds are general obligations of the South Kenai Peninsula Hospital Service Area (the "Hospital Service Area"), and the full faith and credit of the Hospital Service Area are pledged to the payment of the principal of and interest on the Bonds. The Kenai Peninsula Borough (the "Borough") is legally obligated to levy and collect taxes upon all taxable property within the Hospital Service Area, without limitation as to rate or amount in amounts sufficient, together with other available funds therefor, to pay the principal of and interest on the Bonds as the same become due and payable. The Bonds are not an obligation or a charge against the assets or credit of the State of Alaska or the Borough, other than of the Hospital Service Area."

It was also in 1981 that the Kenai Peninsula Borough Assembly passed Ordinance 81-71, which later became widely publicized throughout Alaska as the "Informed Consent" Ordinance.

As a result of the Borough Informed Consent Ordinance, the South Peninsula Hospital was named along with the Borough in a class action suit brought by Laurance Marshburn, M.D.

Prior to the adoption of KPB Ordinance 81-71, the Borough Attorney, Andrew Sariski, advised the Assembly that the Ordinance was not constitutional. Mr. Sariski was ignored and subsequently dismissed from his position.

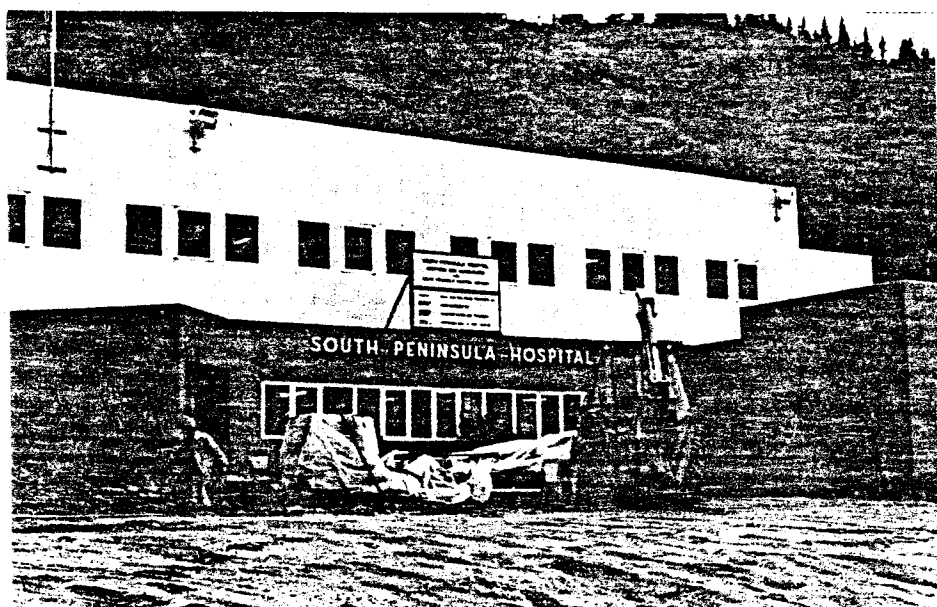
Among other issues raised, Dr. Marshburn's attorneys argued that the Kenai Peninsula Borough did not have the authority to regulate the South Peninsula Hospital Service Area Board. Judge Cranston, in ruling against the Kenai Peninsula Borough, wrote:

"Although the assembly need not establish a service area board, once it has done so pursuant to AS 29.63.090(c) or its predecessor, primary regulatory authority within its limited area of competence must be with the service area board. Otherwise, the board is merely an advisory body.

With respect to this particular case, the distinction between the CPHSA board which the assembly has directed to be advisory and the SPHSA board is significant. If the regulatory authority were in the assembly rather than the SPHSA board, the board should have been created in a manner similar to that used for the CPHSA.

Thus, as to the SPHSA, the court concludes that once a board is created to supervise the furnishing of special services within the service area, the board, not the assembly, must adopt the regulations necessarily incident to that power.

Consequently, assuming that the subject matter of the ordinance is within the scope of the borough's regulatory power, that power must, in the case of SPHSA, have been exercised by the service area board, not the assembly."



South Peninsula Hospital - September 14, 1984

"We moved down here in 1958 and of course the hospital was established at that time, the old hospital, the original, before any additions. I think it had only been open a year or two. But, that was one of the reasons for moving down here, because there was a hospital and a doctor, so this was a place for the family."

John Cooper

- THE END -

APPENDIX

<u>EXHIBIT</u>	<u>PAGE</u>	<u>EXHIBIT DATE</u>	<u>DESCRIPTION</u>
A	19	December 16, 1958	Deed-Territory of Alaska to Kenai Public Utility District Number One
B	25	March 4, 1969	Kenai Peninsula Borough Ordinance 69-3 "An Ordinance Establishing the Central Kenai Peninsula Hospital Service Area and Providing for an Appointed Hospital Board."
C	28	March 18, 1969	Kenai Peninsula Borough Ordinance 69-4 "An Ordinance Establishing the South Kenai Peninsula Hospital Service Area and Providing for an Appointed Hospital Board."
D	31	April 8, 1969	A packet covering the balloting and certification of results on the South Kenai Peninsula Hospital Service Area Special Election
E	47	September 18, 1969	Articles of Incorporation of Homer Hospitals, Inc. (ARTICLE II A. MISSION STATEMENT)
F	52	November 10, 1969	Lease of Homer Hospital
G	57	June 16, 1970	Sublease and Operating Agreement
H	60	July 20, 1972	Certificate of Amendment to Articles of Incorporation of Homer Hospitals, Inc.
I	67	August 21, 1973	Kenai Peninsula Borough Ordinance 73-33 "An Ordinance Amending Sections 27.20.020, 27.20.030 and 27.20.040, Providing for an Elected Board of Directors for the South Kenai Peninsula Hospital Service Area,"
J	70	October 21, 1974	Supreme Court Decision Concerned Citizens of South Kenai Peninsula v. Kenai Peninsula Borough, et al.
K	77	July 15, 1977	Bylaws of South Peninsula Hospital, Inc.

APPENDIX

<u>EXHIBIT</u>	<u>PAGE</u>	<u>EXHIBIT DATE</u>	<u>DESCRIPTION</u>
L	83	July 25, 1977 NAME CHANGE	Certificate of Amendment to Articles of Incorporation of Homer Hospitals, Inc.
M	87	November 16, 1982	South Peninsula Hospital Service Area Bond Prospectus
N	88	November 21, 1983	Decision and Order on Plaintiff's Motion for Summary Judgment
O	121	January 3, 1984	Kenai Peninsula Borough Ordinance 84-1 "Amending KPB 16.24.080 Pertaining to Powers and Duties of the South Kenai Peninsula Hospital Service Area Board"

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TERRITORY OF ALASKA

To

DEC 15 12 28 PM 1958

KENAI PUBLIC UTILITY DISTRICT NUMBER ONE

ALASKA
DEPARTMENT OF LANDS
ANCHORAGE

THIS INDENTURE made this 16th day of December, 1958, between the Territory of Alaska, acting through the Territorial Board of Health and the Territorial Department of Lands, hereinafter referred to as the Grantor, and the Kenai Public Utility District Number One, hereinafter referred to as the Grantee

W I T N E S S E T H:

That the Grantee, by Warranty Deed dated June 11, 1954, transferred to the Grantor the following described real property, situate, lying and being in the Homer Recording Precinct, Third Judicial Division, Territory of Alaska, and more particularly described as follows, to-wit:

The North Half (N $\frac{1}{2}$) of the Northwest Quarters (NW $\frac{1}{4}$) of the Southeast Quarter (SE $\frac{1}{4}$) of the Southeast Quarter (SE $\frac{1}{4}$) of Section Eighteen (18), Township Six (6) South, Range Thirteen (13) West, Seward Meridian, Territory of Alaska;

This transfer was made for the purpose of allowing the Grantor to obtain allocation of funds from the United States of America, acting by and through the Assistant Director of the Territories, for the construction of a Hospital Health Center upon the above described property. The Grantee reserved the right to repurchase the above described property upon completion of the Hospital Health Center by assuming any obligation incurred by the Grantor to the United States of America, in the construction of said project. Upon payment in full of said obligation by the Grantee, the Grantor was to re-convey the above described property to the Grantee, and

WHEREAS, the aforesaid hospital and health center have been completed upon the above described property,

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that the said Grantor, in consideration of the reservations, conditions, covenants and restrictions hereinafter set forth and the agreement of the said Grantee faithfully to observe and perform the same, and in consideration of other good and valuable considerations, receipt of which is hereby acknowledged, does hereby Remise, Release and Quit Claim unto the said Grantee, its successors and assigns, all of the right, title, interest, property and estate of the said Grantor in or to the real property situate in the Homer Recording Precinct, Third Judicial Division, Territory of Alaska and more particularly described as follows:

Land:

The North Half (N $\frac{1}{2}$) of the Northwest Quarter (NW $\frac{1}{4}$) of the Southeast Quarter (SE $\frac{1}{4}$) of the Southeast Quarter (SE $\frac{1}{4}$) of Section Eighteen (18), Township Six (6) South, Range Thirteen (13) West, Seward Meridian, Territory of Alaska.

Improvements:

A one-story frame hospital and health center, with full basement, containing offices for a public health nurse, a doctor and a dentist, waiting rooms, a conference and demonstration room, rooms for minor surgery, examinations, laboratory, X-ray facilities, two patients' beds, with necessary and incidental service facilities

SUBJECT TO all easements, liens, reservations, exceptions and interests of record or now existing on the foregoing described land; TOGETHER WITH, all and singular, the tenements, hereditaments and appurtenances, thereunto belonging or in anywise appertaining, rents, issues and profits thereof and also all the estate, right, title, interest, property, possession, claim and demand whatsoever in law as well as in equity of the said Grantor, of, in or to the foregoing described premises, for every part and parcel thereof, except as hereinafter otherwise expressly provided and except as the same or any thereof are hereinafter reserved, conditioned, limited or restricted;

TO HAVE AND TO HOLD the foregoing described property together with the appurtenances, unto the said Grantee, its successors and assigns and each of them, PROVIDED, HOWEVER, that this deed is made and accepted upon each of the following conditions subsequent, which shall be binding upon and enforceable against the said Grantee, its successors or assigns, and each of them, as follows:

1. a) That for a period of twenty (20) years from the date of this deed the above described property herein conveyed, shall be utilized continuously for public health purposes.
- b) The Health Center unit described in "as-built plans", drawn by Edwin B. Crittenden, architect, as Room 17, Waiting Room, Room 19, Public Health Nurse Office and Room 21, Toilet must be reserved for the use of the public health nurse at all times.
2. That during the aforesaid period of twenty (20) years, the said Grantee will resell, lease, mortgage, or encumber, or otherwise dispose of the above described property or any part thereof or interest therein only as the Territorial Board of Health or its successor in function in accordance with the applicable law and regulations, may authorize in writing.
3. That one year from the date of this deed and annually thereafter for the aforesaid period of twenty (20) years unless the Grantor or his successor in function otherwise directs, the Grantee will file with the Territorial Board of Health or its successor in function reports on the operation and maintenance of the above described property and will furnish, as requested, such other pertinent data evidencing continuous use of the property for the purpose specified in the above identified application.

In the event of a breach of any of the conditions set forth above whether caused by the legal or other inability of said Grantee, its successors or assigns, to perform any of the obligations herein set forth, all right, title and interest in and to the above described property shall, at its option, revert to and become the property of the Grantor, which in addition to all other remedies for such breach, shall have an immediate right of entry thereon, and the said Grantee,

Handwritten notes:
See attached
to [unclear]
[unclear]

its successors or assigns, shall forfeit all right, title and interest in and to the above described property and in any and all of the tenements, hereditaments, and appurtenances thereunto belonging; PROVIDED HOWEVER, that the failure of the Grantor or his successor in function, to insist in any one or more instances upon complete performance of any of the said conditions shall not be construed as a waiver or a relinquishment of the future performance of any such conditions, but the obligations of the said Grantee, its successors and assigns, with respect to such future performance shall continue in full force and effect; PROVIDED FURTHER that in the event the Grantor fails to exercise its option to re-enter the premises for any such breach of said conditions within twenty-one (21) years from the date of this conveyance, the conditions set forth above together with all rights of the Grantor to re-enter as in this paragraph provided, shall, as of that date, terminate and be extinguished.

In the event title to the above described premises is reverted to the Grantor for non-compliance or voluntarily reconveyed in lieu of reverter, the said Grantee, its successors and assigns, at the option of the Grantor or his successor in function, shall be responsible and shall be required to reimburse the Grantor for the decreased value of the above described property not due to reasonable wear and tear, acts of God, and alterations and conversions made by the said Grantee to adapt the property to the health use for which the property was acquired. The Grantor shall, in addition thereto be reimbursed for such damages including such costs and attorney fees as may be incurred in recovering title to or possession of the above described property, as it may sustain as a result of the non-compliance.

The said Grantee may secure abrogation of the conditions numbered 1, 2 and 3 herein by:

- a. Obtaining the consent of the Grantor or his successor in function; and
- b. Payment to the UNITED STATES OF AMERICA of the public benefit allowance granted to the said Grantor of One Hundred (100%) per cent from the current market value of Forty Five Thousand Dollars and no cents (\$45,000.00), less a credit at the rate of five (5%) per cent of said public benefit allowance for each twelve (12) months during which the property has been utilized in accordance with the purposes specified in the above identified application.
- c. Payment to the Grantor of Twenty Eight Thousand Dollars and no cents, (\$28,000.00) less a credit at the rate of five (5) per cent of that amount for each twelve months during which the property has been utilized in accordance with the purposes specified above.

The Grantee, by the acceptance of this deed, covenants and agrees for itself, its successors or assigns, that at all times during the period that title to said property is vested in the Grantee subject to conditions 1, 2 or 3 hereinbefore set forth (except for any period during which the Grantor exercises the right to repossess, control and use the same as provided in the next succeeding paragraph hereof) the Grantee shall at its own sole cost and expense keep and maintain the improvements, including all buildings, structures and equipment, at any time situate upon said property, in good order, condition and repair, free from any waste; and in the event any of the same shall need repair or shall become lost, damaged or destroyed by any cause other than ordinary wear and tear, acts of God or alterations or conversions made by the Grantee to adapt the property to the use for which it was acquired, the Grantee will promptly repair such improvements and restore the same to their former condition. Should the Grantee, its successor or assigns, fail to repair or replace any improvements

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which need repair or which have been lost, damaged or destroyed as aforesaid, within ninety (90) days after written notice so to do, given to the Grantee by the Grantor, or his successor in function, the Grantor shall be authorized, as the agent of the Grantee, its successors and assigns, to enter upon the premises and to cause such repairs or replacements to be made on behalf and at the expense of the Grantee, its successors and assigns, and any amounts expended by the Grantor in connection therewith shall forthwith become a debt due and owing by the Grantee, its successors or assigns, to the Grantor. If the Grantee, its successors or assigns, shall cause any of said improvements to be insured against loss, damage or destruction and any such loss, damage or destruction shall occur during the period Grantee holds title to said property subject to said conditions 1, 2 and 3, said insurance and all moneys payable to the Grantee, its successors or assigns, thereunder shall be held in trust by the Grantee, its successors or assigns, and shall be promptly used by the Grantee for the purpose of repairing such improvements and restoring the same to their former condition, or, it, if not so used, shall be paid over to the Treasurer of the United States in an amount not exceeding the unamortized public benefit allowance.

IN WITNESS WHEREOF, the said Grantor has hereunto set its hand and seal, the day and year first hereinabove written.

Everett L. Brown
Everett L. Brown on Behalf of the Alaska
Land Board and Territory of Alaska
Grantor

Gary Hurlow
Approval as to form
Office of Attorney General

Harvey V. Gibson
on Behalf of Dept. of
Health and Territory of Alaska, Grantor

Margaret S. Anderson
Kenai, Public Utility District No. 1
Grantee

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UNITED STATES OF AMERICA)
TERRITORY OF ALASKA) ss

This certifies that on the 16th day of December, 1958, before me a notary public in and for the Territory of Alaska, duly commissioned and sworn, personally appeared EVERT L. BROWN, to me known and known to me to be the person described in and who executed the foregoing deed on behalf of the Territory of Alaska as Director of the Alaska Department of Lands. The said Evert L. Brown, after being first duly sworn according to law, stated to me under oath that he is the Director of the Alaska Department of Lands and has authority pursuant to law to execute the foregoing deed as such director on behalf of the Territory of Alaska, acting through the Alaska Department of Lands and that he executed the same freely and voluntarily as the free and voluntary act and deed of the said Territory of Alaska and the Alaska Department of Lands.

WITNESS my hand and official seal the day and year in this certificate first above written.

Julius T. Pugh
Notary Public for Alaska.
My commission expires 12/13/61

UNITED STATES OF AMERICA)
TERRITORY OF ALASKA) ss

This is to certify that on the 27th day of December, 1958, before me, a notary public in and for the Territory of Alaska, personally appeared Margaret S. Anderson, known to me, and known to me to be the person who executed the foregoing instrument; and she further acknowledged to me that she executed the same freely and voluntarily, for the uses and purposes therein stated, on behalf of the Kenai Public Utility District No. 1.

James S. Thompson
Notary Public for Alaska.
My commission expires 16 Mar 1960

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United States of America)
) ss
Territory of Alaska)

This is to certify that on the 9 day of December 1958,
before me, a Notary Public in and for the Territory of Alaska, personally
appeared Harry V. Gibson, M.D., who acknowledged himself to be the
Commissioner of the Alaska Department of Health and that, as such
Commissioner, he is authorized by the Alaska Department of Health to
execute the foregoing agreement; and he further acknowledged to me that
he had read the foregoing and knows the contents thereof, and that he
executed the same freely and voluntarily, for the uses and purposes
therein stated.

Henry Russell
Notary Public, Territory of Alaska
My commission expires 7/1/61

Introduced: February 4, 1969
Hearing: March 4, 1969
Adopted: March 4, 1969

B

Central

KENAI PENINSULA BOROUGH

ORDINANCE 69-3

AN ORDINANCE ENTITLED: AN ORDINANCE ESTABLISHING THE
CENTRAL KENAI PENINSULA HOSPITAL
SERVICE AREA AND PROVIDING FOR
AN APPOINTED HOSPITAL BOARD.

Q WHEREAS, the Assembly finds that hospital services are
needed within the Central Peninsula area and that such
services can best be provided by the establishment of a
service area of the borough and cannot be better provided
by annexation to another service area or city or by the
incorporation of a city.

BE IT ORDAINED BY THE ASSEMBLY OF THE KENAI PENINSULA
BOROUGH:

Section 1. Title 27 of the Kenai Peninsula Borough
Code of Ordinances is amended to add a new chapter to read:

CHAPTER 15. CENTRAL KENAI PENINSULA HOSPITAL SERVICE
AREA

Section 27.15.010. Boundaries. There is hereby estab-
lished pursuant to AS 07.15.050 a service area within
the borough designated the "Central Kenai Peninsula
Hospital Service Area", including that portion of the
borough described as follows:

As a point of beginning, begin at the N.W.
corner of T15N, R23W (projected), Seward
Meridian, State of Alaska;
THENCE East to the N.E. Corner of T15N, R12W
(projected);
THENCE South to the S.W. corner of T13N, R11W
(projected);
THENCE East to the N.E. corner of T13N, R10W
(projected);
THENCE South to the S.E. corner of T13N, R10W
(projected);
said corner being in Cook Inlet at longitude 150°
58'16"W, latitude 61°10'00"N;
THENCE Southeastly to the S.E. corner of T12N,
R9W (projected), said corner being in Cook Inlet
at longitude 150°46'37"W, latitude 61°04'49"N;

B

Section 27.15.030. Terms and qualifications.
Members of the hospital board shall be qualified voters of the borough who are residents of the service area. Members shall be appointed for a term of 3 years except that the first board shall contain members appointed for lesser periods to provide for staggered terms. Vacancies on the board shall be created and shall be declared by the assembly in accordance with AS 07.30.060.

Section 27.15.040. Powers and duties.
The hospital board shall advise the chairman and assembly concerning the administration and operation of the service area, review the annual budget and make recommendations and perform such additional functions as the assembly may direct.

Section 2. This ordinance becomes effective 30 days after enactment and upon approval of the voters of the service area.

ADOPTED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH
THIS 4 DAY OF March, 1969.



Assembly President

ATTEST:



Assembly Clerk

70
B

THENCE Northeasterly to the N.E. corner of T12N, R7W (projected), said corner being in Cook Inlet at longitude 150°26'01"W, latitude 61°10'01"N;
THENCE Southeasterly to the N.E. Corner of T11N, R6W (projected), said corner being in Turnagain Arm at longitude 150°14'40"W, latitude 61°04'49"N;
THENCE East to the N.E. corner of T11N, R5W (projected), said corner being in Turnagain Armaat longitude 150°04'01" W. latitude 61°04'49"N;
THENCE Southeasterly to the common boundary of the Kenai National Moose Range and the Chugach National Forest and Chickaloon Bay;
THENCE South along the common boundary of the Kenai National Moose Range and the Chugach National Forest to the intersection with the boundary between election district numbers 9 and 10;
THENCE Southerly along the boundary line between election district numbers 9 and 10 to an intersection with the Township line between T1N and T2N (Projected);
THENCE West along the township line between T1N and T2N to a point 3 miles off shore in Cook Inlet;
THENCE Southwesterly to an intersection with Seward baseline at a point 3 miles offshore in Cook Inlet from the western shore of Cook Inlet;
THENCE West to the S.W. corner of T1N, R24W (projected);
THENCE North to the N.W. corner of T4N, R26W (projected);
THENCE East to the S.W. corner of T5N, R23W (projected);
THENCE North to the N.W. corner of T8N, R23W (projected);
THENCE West to the S.E. corner of T9N, R24W (projected);
THENCE North to the N.E. corner of T12N, R24W (Projected);
THENCE West to the S.E. corner of T13N, R24W (projected);
THENCE North to the N.E. corner of T15N, R24W (projected); the point of beginning.

Section 27.15.020. Hospital Board. There is hereby established a hospital board for the Central Kenai Peninsula Hospital Service Area composed of 9 members who shall be nominated by the borough chairman and appointed by the assembly.

Introduced February 4, 1969
Hearing: March 18, 1969
Adopted: March 18, 1969

Start
©

KENAI PENINSULA BOROUGH

ORDINANCE 69-4

AN ORDINANCE ENTITLED: AN ORDINANCE ESTABLISHING THE SOUTH KENAI PENINSULA HOSPITAL SERVICE AREA AND PROVIDING FOR AN APPOINTED HOSPITAL BOARD.

WHEREAS, The Assembly finds that hospital services are needed within the South Peninsula area and that such services can best be provided by the establishment of a service area of the borough and cannot be better provided by annexation to another service area or city or by the incorporation of a city.

BE IT ORDAINED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH:

Section 1. Title 27 of the Kenai Peninsula Borough Code of Ordinances is amended to add this new chapter to read:

CHAPTER 20. SOUTH KENAI PENINSULA HOSPITAL SERVICE AREA

Section 27.20.010. Boundaries. There is hereby established pursuant to AS 07.15.050 a service area within the borough designated the "South Kenai Peninsula Hospital Service Area", including that portion of the borough described as follows:

As a point of beginning, begin at the N.W. corner of T1S, R25W (projected), Seward Meridian, State of Alaska;
THENCE East along Seward baseline to a point in Cook Inlet; and 3 miles offshore on the west side of Cook Inlet;
THENCE northeasterly to a point of intersection with Township line between T1N, T2N and 3 miles offshore in Cook Inlet on the east side of Cook Inlet;
THENCE East along Township line between T1N and T2N to an intersection with the boundary line between election district numbers 9 and 10;
THENCE in a southerly direction along the boundary between election district numbers 9 and 10,

C

to the S.E. corner of the N.E. 1/4 of Sec. 28,
T11s, R10W (projected), said corner being at
or approximately at Gore Point;
THENCE southwesterly to the S.E. corner of the
N.E. 1/4 of Sec. 27, T12S, R13W (projected),
said corner being on or approximately on the
southerly point of East Chugach Island;
THENCE southwesterly to the S.E. corner of
Sec. 31, T12S, R14W (projected), said corner
being at or approximately at Perl Rock;
THENCE southwesterly to longitude 153°00'00"W,
latitude 59°02'00"N., in Cook Inlet;
THENCE southwesterly to the N.E. corner of
Sec. 27, T15S, R24W, (projected), at Cape Doug-
las on the West side of Cook Inlet;
THENCE West to the N.E. corner of Sec. 29, T15S,
R26W (projected);
THENCE South to the S.E. corner of Sec. 32, T16S,
R26W (projected);
THENCE West to the N.E. corner of T17S, R28W
(projected);
THENCE South to the S.E. corner of T17S, R28W
(projected);
THENCE West to the S.W. corner of T17S, R32W
(projected);
THENCE North to the N.W. corner of T17S, R32W
(projected);
THENCE West to the S.W. corner of T16S, R32W
(projected);
THENCE North to the N.W. corner of T13S, R32W
(projected);
THENCE West to the S.W. corner of T12S, R32W
(projected);
THENCE North to the N.W. corner of T11S, R32W
(projected);
THENCE East to the S.W. corner of T10S, R30W
(projected);
THENCE North to the N.W. corner of T9S, R30W
(projected);
THENCE East to the S.E. corner of T8S, R29W
(projected);
THENCE North to the N.E. corner of T8S, R29 W
(projected);
THENCE East to the N.E. corner of T8S, R28W
(projected);
THENCE North to the N.W. Corner of T6S, R27W
(projected);
THENCE East to the S.W. corner of T5S, R26W
(projected);

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C

THENCE North to the N.W. corner of T5S, R26W
(projected);
THENCE East to the S.W. corner of T4S, R25W
(projected);
THENCE North to the N.W. corner of T1S, R25W
(projected);
THENCE East to the point of beginning,
EXCEPTING therefrom that portion of Seldovia
recording district lying south of a line which
follows easterly along the mainland and the
shore of China Foot Bay;
THENCE along the left and west bank of the
Doroshin River to its source;
THENCE east to the summit of the watershed div-
iding the waters flowing in the Gulf of Alaska
from the waters flowing into Kachemak Bay.

Section 27.20.020. Hospital Board. There is hereby
established a hospital board for the South Kenai Pen-
insula Hospital Service Area composed of nine (9)
members who shall be nominated by the borough chairman
and appointed by the assembly.

Section 27.20.030. Terms and Qualifications. Members
of the hospital board shall be qualified voters of
the borough who are residents of the service area.
Members shall be appointed for a term of three (3)
years, except that the first board shall contain mem-
bers appointed for lesser periods to provide for
staggered terms. Vacancies on the board shall be
created and shall be declared by the assembly in
accordance with AS 07.30.060.

Section 27.20.040. Powers and duties. The hospital
board shall advise the chairman and assembly concern-
ing the administration and operation of the service
area, review the annual budget and make recommendation
and perform such additional functions as the assembly
may direct.

Section 2. This ordinance becomes effective 30 days
after enactment and upon approval of the voters of the
service area.

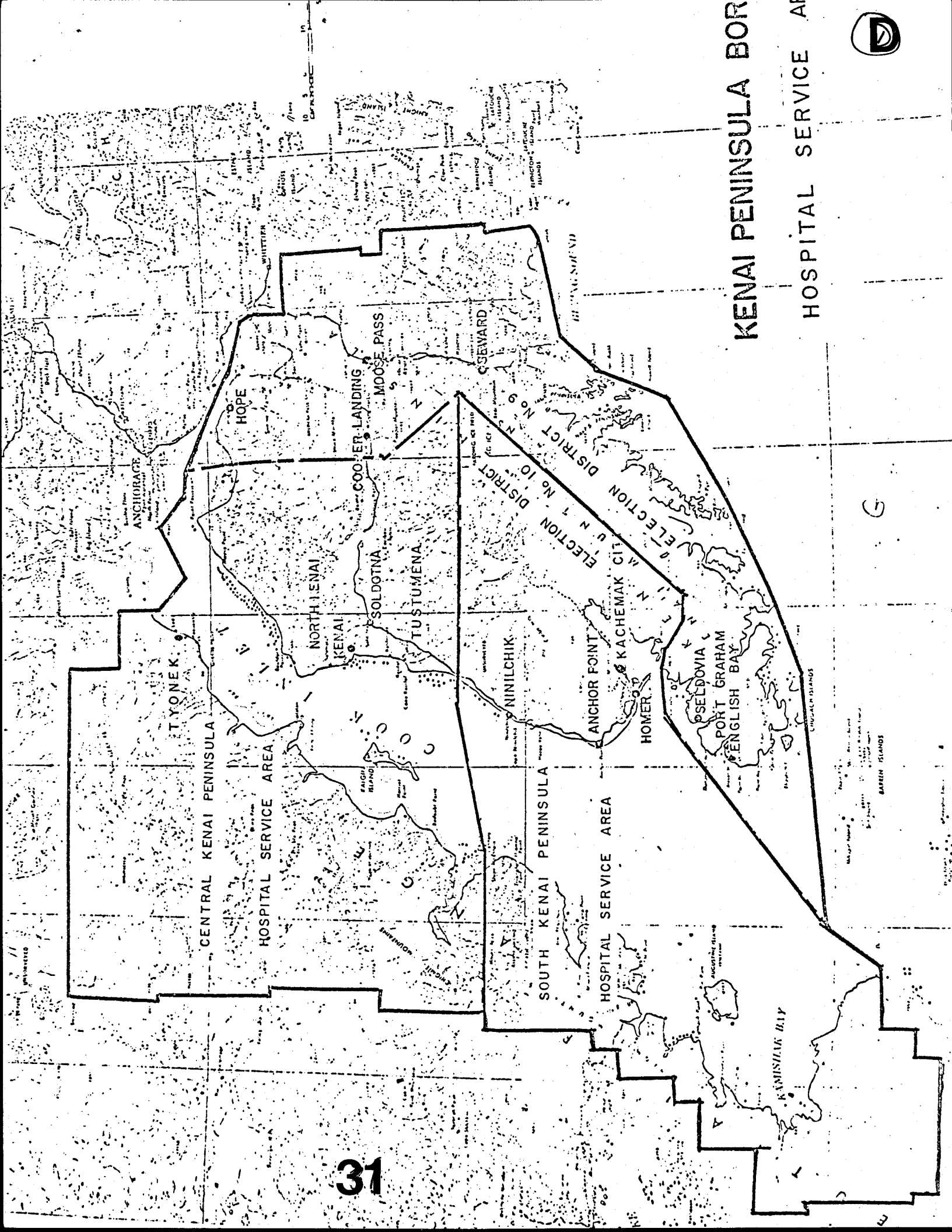
ADOPTED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH
THIS 18 DAY OF March, 1969.

ATTEST:

[Signature]
Assembly Clerk

[Signature]
Assembly President
Bob Ross

Kenai Peninsula Borough
Ordinance 69-4 Page 3



KENAI PENINSULA BOR

HOSPITAL SERVICE AREA



KENAI PENINSULA BOROUGH

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SAMPLE BALLOT

KENAI PENINSULA BOROUGH
SPECIAL ELECTION, APRIL 8, 1969

- ○ Mark only by use of cross marks, "X" marks, checks or plus signs. Place mark in square at the right of the issue you favor.
- Mark must be inside or touching the square so as to indicate clearly the intent of the voter. Erasures and corrections will invalidate the ballot.
- If you spoil or mar your ballot, you may return it to the election judge and receive another ballot.

PROPOSITION

Shall the South Kenai Peninsula Hospital Service Area construct, maintain and operate a hospital or hospitals in the manner provided in AS 29.10.159 for first class cities?

YES

NO

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	Yes	No	Total
Anchor Point	34	14	48
Fritz Creek	43	27	70
Homer	167	48	215
Nimlichik	3	43	46
Hallbut Cove (absentee)			
Absentees	15	14	29
Total	452	146	598
Kalifonsky	26	28	54
Kenai 1 (so)	78	118	196
Kenai 2 (no)	60	60	120
Nikiski 1	42	44	86
Nikiski 2	57	99	156
Hidgeway	54	17	71
Soldotna	222	22	244
Sterling	62	22	84
Tustumena	28	18	46
Tyonek	51	23	74
Absentees	9	6	15
Total	735	470	1205

Ernie Cannon

Walter J. Ross

James E. Kline

KENAI PENINSULA BOROUGH
BOX 850
SOLDOTNA, ALASKA

Brought special election

April 8, 1969

Francis Byrum

D

KENAI PENINSULA BOROUGH

RESOLUTION 69-14 R

WHEREAS, the assembly has received from the canvassing board of the Kenai Peninsula Borough certificates of results of the borough special elections held on April 8, 1969; and

WHEREAS the certificates record the results as follows:

SOUTH KENAI PENINSULA SERVICE AREA

Proposition: Shall the South Kenai Peninsula Hospital Service Area construct, maintain and operate a hospital or hospitals in the manner provided in AS 29.10.159 for first class cities?

Total Yes Votes 252

Total No Votes 146

Total votes: 398

CENTRAL KENAI PENINSULA SERVICE AREA

Proposition: Shall the Central Kenai Peninsula Hospital Service Area construct, maintain and operate a hospital or hospitals in the manner provided in AS 29.10.159 for first class cities?

Total Yes Votes 735

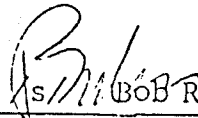
Total No Votes 470

Total votes: 1205

NOW, THEREFORE, THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH DECLARES THAT:

1. Total "Yes" vote for the South Kenai Peninsula Service area was 252 and total "No" vote was 146; therefore proposition passed.
2. Total "Yes" vote for the Central Kenai Peninsula Service area was 735 and total "No" vote was 470; therefore the proposition passed.

ADOPTED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH THIS 15 DAY OF April, 1969.


Bob Ross
Assembly President

ATTEST:

34 EXHIBIT "E"

Upon motion by Gerbitz, seconded by Coursen, the resolution set forth below was adopted by the following vote:

YES: Gerbitz, Coursen, Dye, Jackson, Williams, Farnsworth,
Elvsaas, Stockton
NO: None

RESOLUTION NO. 44

WHEREAS, the City of Homer was incorporated out of a part of the Kenai Peninsula Public Utility District No. 1 on 3/31/64 and has taken over all assets and liabilities of said PUD, and

WHEREAS, a petition of an estimated 80% of the residents of the area of the PUD remaining outside the city requested action be taken to dissolve the remaining area of the PUD, and

WHEREAS, the remaining area of the PUD outside the City has remained inactive and has no governing body, and

WHEREAS, the Assembly of the Kenai Peninsula Borough has given notice of intention on April 10, 1964, to take action pursuant to the provisions of AS 07.10.140 and has caused public notice to this effect to be posted,

NOW, THEREFORE, the Assembly of the Kenai Peninsula Borough resolves and declares that:

1. Pursuant to the provisions of AS 07.10.140 (b) the Kenai Peninsula Borough hereby assumes the powers, duties and other items enumerated in AS 07.10.130 of the Kenai Peninsula PUD No. 1.
2. Kenai Peninsula PUD No. 1 shall be, and hereby is, declared dissolved and to have no further force or effect.

Agenda item 13: Land management contract

The assembly considered further a land management agreement with the State Division of Lands, first consideration having been on November 16, 1964, when the assembly declared intention to enter into an agreement substantially as presented in draft. The chairman reported enactment of committee substitute for Senate Bill 172 was expected within a day or two, that this would remove the land sale by ordinance requirement if formal procedures for acquisition, management and disposal of borough lands were adopted by ordinance by the assembly and recommended action be taken without delay. Mr. Havelock read the pertinent provisions of the draft management agreement in the form of an ordinance as follows:

out delay. Mr. Havelock read the pertinent provisions of the draft management agreement in the form of an ordinance as follows:

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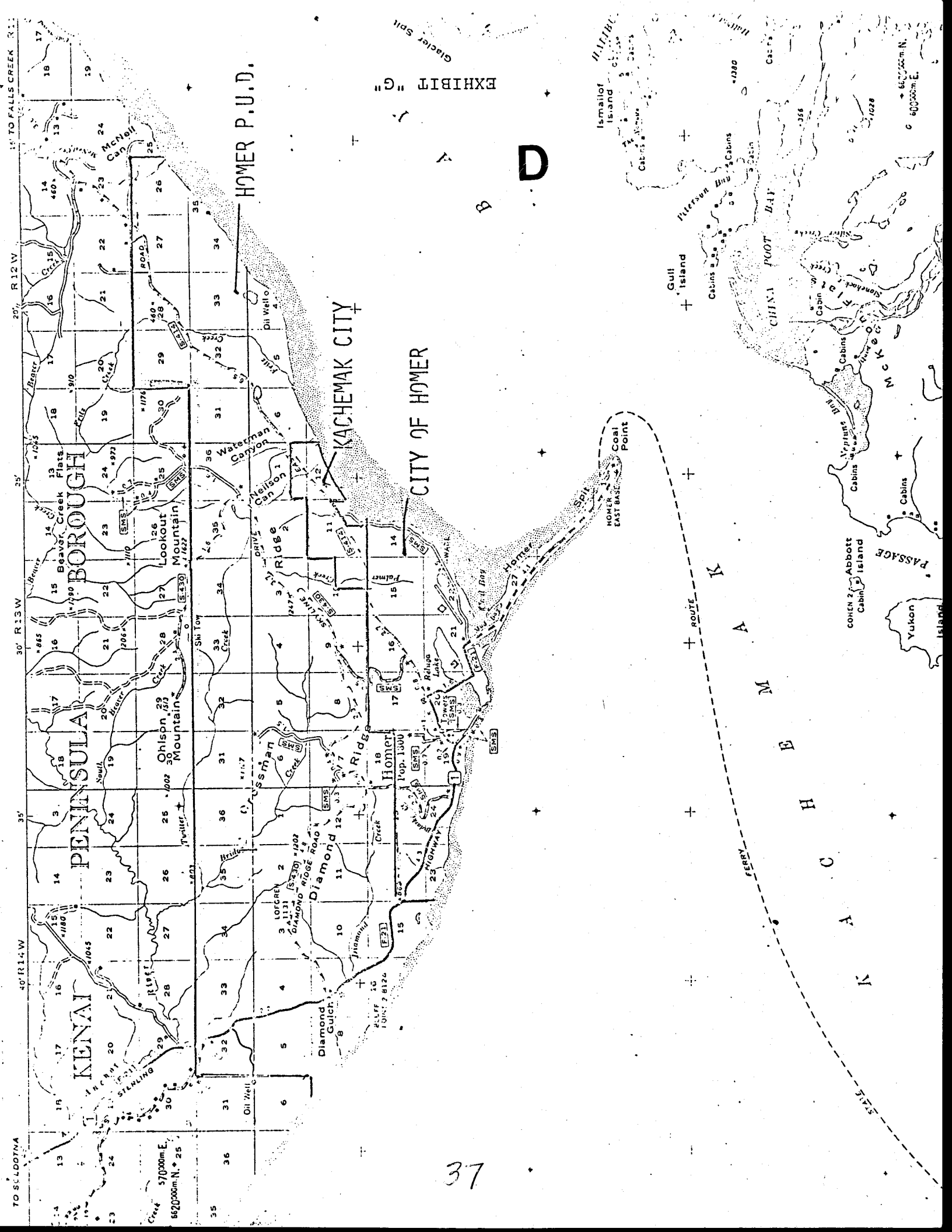
- 7 -

The undersigned does hereby certify that the above script 4/6/65 is a true and correct copy of the official records of the Kenai Peninsula Borough on file in the Clerk's office.

Soldotna, Alaska 3 day of April, 1970

James B. [Signature]
Borough Clerk

EXHIBIT "F"



Introduced by: Mayor
Date: March 20, 1973
Hearing: April 17, 1973
Adopted: April 17, 1973

KENAI PENINSULA BOROUGH

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ORDINANCE 73-14

AN ORDINANCE ENTITLED: AN ORDINANCE AUTHORIZING THE INCURRING OF INDEBTEDNESS FOR GENERAL OBLIGATION BONDS IN AN AMOUNT NOT TO EXCEED \$1,500,000 TO BE USED FOR THE PURPOSE OF ACQUIRING A SITE AND CONSTRUCTING AND EQUIPPING A HOSPITAL AND RELATED FACILITIES TO BE LOCATED IN THE SOUTH PENINSULA HOSPITAL SERVICE AREA, PAYMENT OF SUCH INDEBTEDNESS TO BE DERIVED FROM TAXES LEVIED WITHIN THE SOUTH PENINSULA HOSPITAL SERVICE AREA AND SUCH OTHER REVENUES ATTRIBUTABLE TO THE OPERATION OF THE SOUTH PENINSULA HOSPITAL AS MAY BE PROPERLY PLEDGED FOR SUCH PAYMENT, SUBJECT TO THE APPROVAL OF THE VOTERS OF THE SOUTH PENINSULA HOSPITAL SERVICE AREA AT A SPECIAL ELECTION TO BE HELD IN THE SOUTH PENINSULA HOSPITAL SERVICE AREA ON JUNE 5, 1973.

BE IT ORDAINED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH:

Section 1. Indebtedness in the form of general obligation bonds in an amount not to exceed \$1,500,000 may be incurred by the Kenai Peninsula Borough for the purpose of raising funds for acquiring a site and constructing and equipping a hospital and related facilities to be located in the South Peninsula Hospital Service Area. The bonds may mature in such amounts and at such time or times and may be issued in such series, all as may be found necessary by the Assembly of the Kenai Peninsula Borough.

Section 2. Payment of the above described indebtedness shall be derived from taxes levied within the South

EXHIBIT "H"

D

Peninsula Hospital Service Area and such other revenues attributable to the operation of the South Peninsula Hospital as may be properly pledged for such payment. The full faith and credit and resources of the South Peninsula Hospital Service Area only shall be pledged to the repayment of the indebtedness so incurred.

Section 3. For purposes of the ballot, the proposition on the ballot shall read as follows:

Shall Ordinance 73-14 be approved, by which the Kenai Peninsula Borough is allowed to incur indebtedness in an amount not to exceed \$1,500,000 for the purpose of raising funds for acquiring a site and constructing and equipping a hospital and related facilities to be located in the South Peninsula Hospital Service Area, payment of such indebtedness to be derived from taxes levied within the South Peninsula Hospital Service Area and such other revenues attributable to the operation of the South Peninsula Hospital as may be properly pledged for such payment?

YES

NO

Section 4. This ordinance takes effect on the day of enactment, subject to approval by a majority vote of those voting at the Special Election in the South Peninsula Hospital Service Area called pursuant to AS 29.58.340(c).

ADOPTED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH THIS 17 DAY OF April, 1973.

[Signature]
Assembly President

ATTEST:

[Signature]
Borough Clerk

Introduced by: Mayor
Date: June 12, 1973

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KENAI PENINSULA BOROUGH

RESOLUTION 73-40 R

A RESOLUTION CERTIFYING THE RESULTS OF THE SPECIAL ELECTION HELD IN THE SOUTH PENINSULA HOSPITAL SERVICE AREA JUNE 5, 1973

WHEREAS, the assembly of the Kenai Peninsula Borough has received from the Borough Canvassing Board the "Certificate of Results of the special election held on June 5, 1973 in the South Peninsula Hospital Service Area, and

WHEREAS, the "Certificate of Results" records the following:

PROPOSITION: Shall Ordinance 73-14 be approved, by which the Kenai Peninsula Borough is allowed to incur indebtedness in an amount not to exceed \$1,500,000 for the purpose of raising funds for acquiring a site and constructing and equipping a hospital and related facilities to be located in the South Peninsula Hospital Service Area, payment of such indebtedness to be derived from taxes levied within the South Peninsula Hospital Service Area and such other revenues attributable to the operation of the South Peninsula Hospital as may be properly pledged for such payment?

YES: 274

NO: 266

Number of persons voting in this election: 540

NOW, THEREFORE THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH DECLARES:

1. Total "Yes" vote for the Proposition is 274
and total "No" vote for the Proposition is 266;
therefore the proposition passed.

ADOPTED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH THIS
 DAY OF JUNE, 1973.

ATTEST:

Francis Dymally Clerk

40

[Signature]
Assembly President

EXHIBIT "I"

June 11, 1973

54 64
41 27
14
D 117
15 17
129-134

Report from Canvassing Board for the Special Election
Held in the South Peninsula Hospital Service Area on
June 5, 1973.

400
207
200
200
100
100
100

PRECINCT	YES	NO	TOTAL
ANCHOR POINT	54	26	80
FRITZ CREEK	41	64	105
HALIBUT COVE (absentee)			
HOMER	141	130	271
NINILCHIK	19	27	46
QUESTIONED (total 9 rec'd -3 not qualified)	4	2	6
ABSENTEE (total 33- 1 not qualified - signature not witnessed)	15	17	32
	<u>274</u>	<u>266</u>	<u>540</u>

Canvassing Board included: Audrey Shelman, Nita Ross, Ann Roser
and canvassing was completed by Noon, June 11, 1973.

Note from Clerk: Of Approximately 1500 eligible voters
within the 5 precincts only 540 voted.
Halibut Cove had approx. 29 qualified voters - ALL were
sent ballots and 7 voted.

Estimated costs of election: \$1051.37
Approx. costs per vote: \$1.95

The 3 questioned voters were checked out with the State Election
Office, were found not to be registered and have been notified.
The Absentee ballot was from Halibut Cove and the signature was
not witnessed according to law and the ballot was not counted.
The person has been notified.

Introduced by: Administration
September 7, 1971

Hearing: October 12, 1971

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KENAI PENINSULA BOROUGH

ORDINANCE 71-20

AN ORDINANCE ENTITLED: AN ORDINANCE RELATING TO THE
COMPOSITION OF THE ASSEMBLY

WHEREAS, the Attorney General of the State of Alaska has given his opinion that borough assemblies must be apportioned in accordance with "one man - one vote" principles as expressed in the decisions of the U. S. Supreme Court, regardless of the provisions of AS 07.10.040; and,

WHEREAS, said Attorney General's opinion states that a system of weighted voting is an acceptable means to achieve a proper apportionment, at least on a temporary basis; and,

WHEREAS, a weighted voting system would be most suitable for the Kenai Peninsula Borough, otherwise the varying sizes of the cities would necessitate a large assembly which would be costly and perhaps unwieldy.

BE IT ORDAINED BY THE ASSEMBLY OF THE KENAI
PENINSULA BOROUGH:

Section 1. Sec. 05.10.005 of the Kenai Peninsula Borough Code of Ordinances is repealed and reenacted to read:

Sec. 05.10.005. Assembly - Composition, Apportionment and Terms. (a) The assembly shall consist of 16 members having total votes of 144. Members and their votes shall be apportioned as follows:

<u>City</u>	<u>Assemblymen</u>	<u>Votes</u>	<u>Total</u>
Homer	<u>1</u>	10	10
Kenai	<u>3</u>	<u>10</u> 2/3	<u>32</u>
Seldovia	<u>1</u>	<u>4</u>	<u>4</u>
Seward	<u>2</u>	<u>7</u> 1/2	<u>15</u>
Soldotna	<u>1</u>	<u>11</u>	<u>11</u>
<u>Non-City</u>	<u>8</u>	<u>9</u>	<u>72</u>
<hr/>			
TOTAL	<u>16</u>		<u>144</u>

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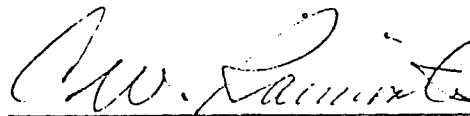
(b) Members of the assembly representing the area outside first class cities are elected at large for staggered terms of three years. Members of the assembly representing first class cities are appointed by and from the city councils for terms of three years.

(c) The weighted voting system provided for in (a) of this section shall be applicable to all actions of the assembly without regard to AS 07.20.070(d) including actions taken when sitting as a Board of Equalization or Board of Adjustment.

Section 2. Nothing contained in this ordinance shall affect the terms of existing assemblymen.

Section 3. This ordinance takes effect thirty (30) days after enactment.

ENACTED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH THIS 12 DAY OF October, 1971.



Assembly President

ATTEST:


Borough Clerk

Kenai Peninsula Borough
Ordinance 71-20 -2-

Introduced by: Bjerregaard
Date: July 10, 1973 Amended 7/10/73
Hearing: August 7, 1973
Hearing Continued August 21, 1973

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KENAI PENINSULA BOROUGH

ORDINANCE 73-33

AN ORDINANCE ENTITLED: AN ORDINANCE AMENDING SECTIONS 27.20.020, 27.20.030 and 27.20.040, PROVIDING FOR AN ELECTED BOARD OF DIRECTORS FOR THE SOUTH KENAI PENINSULA HOSPITAL SERVICE AREA, REGULAR AND SPECIAL BOARD MEETINGS, A BOARD CHAIRMAN, TERMS OF THE DIRECTORS, VACANCIES OF THE BOARD AND CLARIFYING THE POWERS AND DUTIES OF THE BOARD.

WHEREAS, the Assembly finds that it is in the best interests of the borough and the South Kenai Peninsula Hospital Service Area to provide for an elected board of directors, regular and special board meetings, a board chairman, terms of the directors, vacancies of the board and to clarify the powers and duties of the board;

BE IT ORDAINED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH:

Section 1. That section 27.20.020 of the Kenai Peninsula Borough Code of Ordinances is hereby amended to read as follows:

Section 27.20.020. Board of Directors. (a) There is hereby established a board of directors for the South Kenai Peninsula Hospital Service Area composed of nine members who shall be nominated and elected by the qualified voters of the service area in the same manner as provided for areawide assemblymen in the Kenai Peninsula Borough Code of Ordinances Title 11, Elections.

(b) The board shall meet once a month at a regularly scheduled time and place designated by the board. Special meetings of the board may be called by the chairman of the board or by three members upon one day's notice thereof. The notice shall set forth the time and place of the meeting and shall be mailed or telephoned to each member. The attendance of a member at a meeting constitutes a waiver of notice of the meeting. All meetings are open to the public as provided in AS 29.23.580 and AS 44.62.310 and in accordance with the policies set forth in AS 44.62.312.

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Five members shall constitute a quorum, and if a quorum is present, actions may be taken by a majority vote of those members present.

(c) At the first regular meeting following the certification of the election by the assembly, and annually thereafter the board shall elect by majority vote of the members and from the members a chairman who shall hold office until a successor is elected.

Section 2. That section 27.20.030 of the Kenai Peninsula Borough Code of Ordinances is hereby amended to read as follows:

Section 27.20.030. Terms and Qualifications. (a) Members of the board of directors shall be qualified voters of the borough who are residents of the service area. Members shall be elected to Seats A through I for a term of three years, except that the first board shall contain members elected to Seats G, H, and I for initial terms of one year and to Seats D, E, and F for initial terms of two years in order to provide for staggered terms.

(b) Vacancies on the board are created under the following conditions and upon declaration of vacancy by the board:

1. if no candidate files for election to a seat which is to be filled at said election or if a successful candidate fails to qualify or take office within thirty days after his election or appointment;
2. if a member is physically absent from the service area for a ninety day period, unless excused by the board;
3. if a member resigns and his resignation is accepted;
4. if a member is physically or mentally unable to perform the duties of his office;
5. if a member is removed from office;
6. if a member misses three consecutive regular meetings unless excused; or
7. if a member is convicted of a felony or of an offense involving a violation of his oath of office.

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(c) Vacancies on the board shall be filled by majority vote of the remaining board until the next general election of the borough at which time a new member shall be elected to fill the unexpired term or for a three year term if no unexpired term remains.

Section 3. That section 27.20.040 of the Kenai Peninsula Borough Code of Ordinances is hereby amended to read as follows:

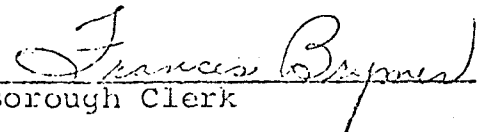
Section 27.20.040. Powers and Duties. Pursuant to the Provisions of AS 29.63.090 the board of directors of the service area shall have the power to provide for hospital services within the service area and for the administration and operation of the service area, providing however, that in exercising such power, the board of directors must comply with the objectives and provisions of the Hill-Burton Hospital Construction Act and the regulations passed pursuant thereto and with the agreements entered into by the Kenai Peninsula Borough as part of the application for grant and loan funds under such act. It is intended that board members shall be responsible for the level of services provided and to that end must be responsible to the electorate for the amount of taxes necessarily raised to provide such services, and the Kenai Peninsula Borough will raise the amount of the levy whenever in its judgment such action is necessary to secure adequate funds for repaying bonded indebtedness of the service area. The board shall promptly furnish accurate and complete copies of the minutes of all board meetings to the mayor and the assembly.

Section 4. This ordinance with respect to the election of board members becomes effective on adoption and with respect to all other matters becomes effective on the date the Kenai Peninsula Borough Assembly certifies the result of the election of members of the board of directors.

ADOPTED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH THIS
21st DAY OF August, 1973.

ATTEST:


Erle Cooper, Assembly Pres.


Borough Clerk

FILED FOR RECORD
DEPARTMENT OF COMMERCE
STATE OF ALASKA

OCT 1 1969



ARTICLES OF INCORPORATION

OF

HOMER HOSPITALS, INC.

We, the undersigned natural persons of the age of twenty-one (21) years or more, acting as Incorporators of a corporation under the Alaska Non-Profit Corporation Act, adopt the following Articles of Incorporation for such corporation:

ARTICLE I

The name of this non-profit corporation shall be Homer Hospitals, Inc.

ARTICLE II

The objects and purposes for which the corporation is formed are as follows:

A. To promote and foster high standards in medical care and treatment, to operate, maintain, and construct hospital or hospitals and related services sufficient to provide care for all residents of this hospital service area at the lowest possible cost.

B. To acquire by gift, devise, purchase, lease, exchange, hire, or otherwise, land or personal property, or any interest therein.

C. To sell, lease, mortgage, or otherwise dispose of or encumber lands, houses, buildings, and other property of the corporation.

D. To hold, sell and deal with stocks, bonds, debentures, and securities of any government, corporation, public or private, or other body of authority.

E. To borrow money and issue its debenture bonds, promissory notes, or other obligations under such general conditions and subject to such limitations as provided by applicable law.

F. To be subject to dissolution in accordance with the laws of the State of Alaska.

G. To sue and to be sued, complain, and defend in any court of law or equity.

H. To appoint such agents and employees as may be determined necessary and proper and to define their authority and duties, fix their compensation, require bonds of such of them as it deems advisable and fix the penalty thereof, dismiss such agents or employees, or any thereof, at pleasure, and appoint others to fill their places.

I. To adopt by-laws regulating the manner in which the privileges granted to it by law are to be exercised and enjoyed and the business of the corporation is to be conducted.

J. To receive and hold in trust for the stated corporate or medical purposes and for other person, societies or corporations any property of any kind whatever.

K. To exercise such incidental powers as may reasonably be necessary to carry out the business for which the corporation is formed.

L. To exercise all powers authorized by law.

ARTICLE III

This corporation is one which does not contemplate pecuniary gain or profit to the members thereof and is organized solely for non-profit purposes.

ARTICLE IV

The principal place of transacting the business of the corporation shall be South Kenai Peninsula service area, headquartered at the hospital in Homer, Alaska.

ARTICLE V

The period of duration of the corporation shall be perpetual.

ARTICLE VI

Those eligible for membership in this corporation are as follows:

A. All original incorporators are charter members of this corporation.

B. Additional or replacement members shall be elected by the members of the corporation at its annual meeting or a special meeting called for that purpose. Qualification for election shall be established by the corporate By-Laws.

C. All members are subject to re-election at the annual meeting of the corporation.

ARTICLE VII

The highest amount of indebtedness or liability to which the corporation may be subject is \$10,000,000.00.

ARTICLE VIII

The affairs of this corporation shall be managed and controlled by the Board of Directors, consisting of the President, Secretary, Treasurer and other general directors as may be provided for in the By-Laws. The members of this Board shall be elected annually and shall each be assigned such powers and duties as may from time to time be provided for by the By-Laws of the corporation.

ARTICLE IX

The first Board of Directors of this corporation shall be Teddy E. Lemaire, President; Ann C. Gillas, Secretary; Jack W. Epperson, Treasurer; and they shall hold office for one year or until their successors shall have been elected and qualified under and pursuant to such By-Laws as may be adopted.

ARTICLE X

Provisions for the regulations of the internal affairs of the corporation and to implement the articles set forth herein shall be set forth in the By-Laws.

ARTICLE XI

The Articles of Incorporation may be amended as provided by law.

E

DATED this 18th day of September 1969.

Teddy E. Lemaire
Teddy E. Lemaire

Ann C. Gillis
Ann C. Gillis

Jack W. Epperson
Jack W. Epperson

Norma E. Turkington
Norma E. Turkington

Josephine C. Olson
Josephine C. Olson

E. Noreen Johnson
E. Noreen Johnson

Donald L. Ledger
Donald L. Ledger

Gene R. Williams
Gene R. Williams

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

I, the undersigned Notary Public in and for the State of Alaska, hereby certify that on this 18th day of September 1969, there appeared personally before me the persons whose signatures appear above, who being duly sworn, severally declared that they are the persons who signed the foregoing Articles of Incorporation as incorporators, and that the statements therein contained are true.

Margaret A. ...
Notary Public in and for
Alaska

My commission expires: 7/8/73

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ARTICLE XII

The address of the Initial registered office of the corporation is the Homer Hospital, Box 683, Homer, Alaska and the name of its Initial registered agent at such address is Teddy E. Lemaire.

ARTICLE XIII

The name and address of the Incorporators are as follows:

Teddy E. Lemaire	Box 724	Homer, Alaska
Jack W. Epperson	Box 221	Homer, Alaska
Josephine C. Olson		Anchor Point, Alaska
Donald L. Ledger	Box 25	Anchor Point, Alaska
Ann C. Gillas	Star Route A	Homer, Alaska
Norma E. Turkington	Box 282	Homer, Alaska
E. Noreen Johnson	Box 273	Homer, Alaska
Gene R. Williams	Star Route A	Homer, Alaska

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LEASE OF HOMER HOSPITAL

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THIS AGREEMENT, made and entered into this 10th day of November, 1969, by and between the CITY OF HOMER, hereafter referred to as the Lessor, and the KENAI PENINSULA BOROUGH, hereafter referred to as Lessee:

W I T N E S S E T H:

That for and in consideration of certain obligations to be paid and performed by the Lessee, the Lessor does hereby demise, lease and let and the said Lessee does hereby hire and take charge of and from the Lessor, the following described real property and improvements thereon:

The North one-half (N1/2) of the Northwest one-quarter (NW1/4) of the Southeast one-quarter (SE1/4) of the Southeast one-quarter (SE1/4) of Section Eighteen (18), Township Six South (T6S), Range Thirteen West (R13W), Seward Meridian, State of Alaska.

SUBJECT to all reservations, easements and covenants of record.

The purpose of this lease is to grant the Kenai Peninsula Borough continued use of the hospital facility under the terms of the following lease:

1. TERM: The term of this lease shall be for a period of fifty-five (55) years, commencing on the first day of July, 1969, and ending on June 30th, fifty-five (55) years from said date.
2. RENT: The Lessee shall pay Ten and no/100 Dollars (\$10.00), plus other valuable considerations, including the exchange of promises and conditions included herein.
3. ACCEPTANCE OF PREMISES: Lessee has examined and knows the condition of said premises and accepts the same "as is".
4. USE OF PREMISES: Lessee hereby covenants that the use of said leased premises shall be for the operation of a public hospital and for those activities reasonably necessary, related and incidental to the operation of said hospital and for no other

LAW OFFICES OF
ANN, JEWELL & FARRELL
342 W. SECOND AVENUE
SITKA, ALASKA
278-1544
HOMER, ALASKA
235-8705
KENAI, ALASKA
283-7755

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1 purpose save and except by mutual written consent of all parties
2 hereto.

3 5. IMPROVEMENTS: Lessee shall be entitled to make im-
4 provements to the building presently on the above-described real
5 estate or to add other improvements thereon and shall comply with
6 all the laws applicable thereto.

7 All improvements and additions made or constructed upon
8 the premises shall be at the expense of the Lessee, but the same
9 shall become part of the leased premises and shall stay with the
10 land at the termination of this lease.

11 6. REPAIRS AND MAINTENANCE: It is understood and agreed
12 that Lessee shall pay for all repairs and maintenance to the
13 aforementioned premises and shall pay for any and all replace-
14 ments of existing equipment, out of its own funds.

15 7. OPERATIONAL EXPENSES: It is further understood and
16 agreed that Lessee shall pay for and be solely responsible for
17 all costs connected with the operation of said hospital, includ-
18 ing costs for supplies, labor, equipment, etc.

19 8. INSURANCE: Lessee agrees to secure and maintain fire
20 and extended coverage insurance on the real property and improve-
21 ments with an insurer qualified to do business in the State of
22 Alaska in an amount not less than Eighty (80%) per cent of the
23 appraised value of the premises, with the Lessor named as an
24 additional insured.

25 9. HOLD HARMLESS AND INDEMNITY: The Lessee covenants
26 and agrees to save and hold the Lessor harmless from any and
27 all loss or damage to persons or property occurring on the
28 premises or occurring anywhere by reason of Lessee's occupation
29 of the premises and operation as a hospital, and Lessee further
30 agrees and covenants to indemnify Lessor for any and all costs
31 or expenses incurred by Lessor for any reason arising out of
32 Lessee's occupation of the premises.

LAW OFFICES OF
HARR, JEWELL & FARRELL
242 W. SECOND AVENUE
ANCHORAGE, ALASKA
279-1544
HOMER, ALASKA
255-5709
KENAI, ALASKA
263-7759

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1 10. WASTE AND LAWFUL USE: Lessee covenants and agrees
2 that it shall not commit, nor allow any waste upon the premises
3 or any nuisance to be committed thereon, and further agrees to
4 comply with all laws, whether State, Local or Federal.

5 11. NON-LIEN: Lessee further promises at all times to
6 keep the demised premises free from any liens arising out of work
7 performed, materials furnished, or obligations incurred by or for
8 it.

9 12. PEACEFUL SURRENDER: Lessee further agrees that upon
10 termination of the lease, either by expiration of the term or
11 upon Lessee's breach of this lease, that it shall surrender and
12 give up possession of the premises to the Lessor; and agrees that
13 it will return the premises in substantially the same condition
14 as when received, reasonable use and wear excepted.

15 13. NOTICE OF BREACH: If Lessee is guilty of a breach
16 of this lease, Lessor shall give Lessee a written notice to the
17 effect, specifying in what manner the lease is breached and
18 thereafter Lessee shall have sixty (60) days from the receipt
19 of such notice within which to correct said breach. Failure to
20 correct the same shall give Lessee the privilege of re-taking
21 possession of the property.

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22 14. SUBLEASING AND ASSIGNMENT: Lessee agrees not to
23 sublease or assign this lease or any portion thereof without
24 first obtaining the written consent of the Lessor; providing
25 however, that the Lessor shall not withhold its consent unreason-
26 ably.

27 15. HOLDING OVER: The holding over after the expiration
28 of this lease with the consent of the Lessor shall be deemed a
29 tenancy from month to month.

30 16. DESTRUCTION OF PREMISES: In the event that the prem-
31 ises are destroyed or damaged through fire, flood or other casu-
32 alty covered by insurance Lessee agrees to use such sums as may

LAW OFFICES OF
HARR, JEWELL & FARRELL
542 W. SECOND AVENUE
ANCHORAGE, ALASKA
779-1544
MOHEB, ALASKA
255-8709
KENAI, ALASKA
283-7759

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1 Be recovered from the insurer in the reconstruction of the sub-
2 ject premises or the construction of a new hospital, provided
3 that if Lessee ceased to exercise the governmental function of
4 providing hospital services within the South Peninsula Hospital
5 Service Area. Lessee will pay to Lessor out of said sums received
6 that amount which bears the same ratio to the total amount as
7 the depreciated value of the present facility bears to the total
8 value of the facility at the time of damage or destruction.

9 17. AGREEMENT BINDING UPON SUCCESSORS: Each and every ²
10 covenant, agreement, term, provision and condition herein con-
11 tained shall extend to and be binding upon the respective suc-
12 cessors and assigns of the parties hereto. ¹¹

13 IN WITNESS WHEREOF, the parties have executed this lease
14 the day and year first above written.

15 LESSOR: CITY OF HOMER

16 By William C. Puts
17 City Manager

18 ATTESTED TO:

19 Rose R. Charron
20 City Clerk

21 Approved as to form:
22 HAHN, JEWELL & FARRELL
23 City Attorneys

24 By A. Robert Hahn, Jr.
25 A. Robert Hahn, Jr.

26 LESSEE: KENAI PENINSULA BOROUGH

27 By Berry A. Nason
28 Borough Chairman

29 ATTESTED TO:

30 Francis J. ...
31 Borough Clerk

32 Approved as to form:

James D. Nordale
33 James D. Nordale
34 Borough Attorney

LAW OFFICES OF
HAHN, JEWELL & FARRELL
542 W. SECOND AVENUE
ANCHORAGE, ALASKA
279-1544
HOMER, ALASKA
255-8709
KENAI, ALASKA
283-7759

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1 STATE OF ALASKA)
: ss.
2 THIRD JUDICIAL DISTRICT)

3 THIS IS TO CERTIFY that on the 10th day of November, 1969,
4 before me, the undersigned, a Notary Public in and for Alaska,
5 duly commissioned and sworn as such, personally appeared WILLIAM
6 CURTIS, known to me and known to me to be the City Manager of the
7 CITY OF HOMER, Lessor in the above and foregoing Lease, and he
8 acknowledged to me the execution thereof to be his free and vol-
9 untary act and deed for and on behalf of the CITY OF HOMER, for
10 the uses and purposes therein set forth.

11 IN WITNESS WHEREOF, I have hereunto set my hand and affixed
12 my notarial seal the day and year in this certificate first above
13 written.

Marie R. Charron
Notary Public in and for Alaska
My Commission Expires: 7-28-73

13 STATE OF ALASKA)
: ss.
14 THIRD JUDICIAL DISTRICT)

15 THIS IS TO CERTIFY that on the 21 day of November 1969,
16 before me, the undersigned Notary Public in and for Alaska, duly
17 commissioned and sworn as such, personally appeared GEORGE A.
18 NAVARRE, known to me and known to me to be the Borough Chairman
19 of the KENAI PENINSULA BOROUGH, Lessee in the above and foregoing
20 Lease, and he acknowledged to me the execution thereof to be his
21 free and voluntary act and deed for and on behalf of the KENAI
22 PENINSULA BOROUGH, for the uses and purposes therein set forth.

23 IN WITNESS WHEREOF, I have hereunto set my hand and affixed
24 my notarial seal the day and year in this certificate first above
25 written.

Francis G. Soper
Notary Public in and for Alaska
My Commission Expires: 7-22-72

SUBLEASE AND OPERATING AGREEMENT

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This Agreement made and entered into as of the 16th day of June, 1970 by and between the KENAI PENINSULA BOROUGH, a municipal corporation of the State of Alaska, Lessor, and HOMER HOSPITALS, INC., a non-profit corporation organized and existing under the laws of the State of Alaska, with its principal office at Homer, Alaska, Sublessee,

W I T N E S S E T H:

WHEREAS, Lessor with the South Peninsula Hospital Service Area has assumed the responsibility to provide hospital services and has leased from the City of Homer and the City of Homer hospital; and

WHEREAS, Homer Hospitals, Inc. desires to sublease said Homer hospital and to assume the complete operation of said hospital facility.

1. NOW, THEREFORE, in consideration of the mutual covenants and agreements herein contained, Lessor does hereby demise, lease and let unto Sublessee for a period of 25 years beginning on the 10 day of November, 1969, and ending on the 10 day of November, 1994, the following described real property and improvements thereon:

The North one-half (N/2) of the Southwest Quarter (SW/4) of the Southeast Quarter (SE/4) of the Southeast Quarter (SE/4) of Section 18 T6S R13W, Seward Meridian, State of Alaska,

subject to all reservations, easements and covenants of record.

2. Sublessee hereby covenants and agrees to continually operate the premises hereby leased as a public hospital and for those activities reasonably necessary, related and incidental to the operation of a public hospital and for no other purposes except as otherwise provided in this paragraph. It is understood that as a condition in the Deed dated 16 November, 1958, conveying the subject premises from the Territory of Alaska to the Kenai Public Utility District No. 1 (predecessor to the City of Homer) Rooms 17 (Waiting Room), 19 (Public Health Nurse Office), and 21 (Toilet) must be reserved for the use of the public health nurse at all times until December 16, 1978, and Sublessee covenants and agrees to observe said reservation and to maintain said premises accordingly. Sublessee may maintain a portion of the premises as doctors' office space and rent said space at rates the same as those generally prevailing in the Homer area for a period of not more than 5 years from the date of this lease.

3. The Lessee agrees that as long as it is in possession of the hospital it will continuously operate and maintain a licensed hospital under Alaska Statutes 18.20 and regulations promulgated thereunder pertaining to hospitals of like type and bed capacity.

4. Lessee will at the expense of Lessor furnish, supply and maintain all expendable hospital supplies as may be required for the continual and proper operation of a duly licensed hospital. All equipment located within the hospital as shown on EXHIBIT A attached hereto is the property of Lessor, except any new items of equipment which are purchased and installed by Lessee using funds not provided by Lessor or derived from the operation of the hospital and not being in replacement of inventoried items, which items shall remain the property of Lessee with full right of removal at the expiration of this lease. Lessor shall have the right to purchase such equipment at its fair market value at the time of expiration. Lessor agrees that it will purchase at its expense additional and replacement equipment as needed and recommended by the Lessee with prior approval of the Lessor.

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5. Lessee agrees that it will keep the building and grounds in a good state of repair, normal wear and usage excepted. In the event that structural changes or additions or major renovations are found necessary by the Lessee, or are required by state law or regulation, such changes and alterations will be made at the expense of the Lessor only after prior approval of the Lessor.

6. Lessor agrees to provide and make available for the use of the Lessee in the operation of the hospital a drawing account or operational fund, which account may be drawn upon by the Lessee as needed to meet hospital operating expenses. Lessor agrees to augment the account from time to time if necessary because of slow collections or other reasons. It is intended that Lessee shall not provide its own funds for the maintenance or continuation of the hospital operation.

7. Lessee shall provide Lessor with a monthly financial and operating statement of the hospital. Prior to April 1 of each year Lessee shall submit to Lessor a proposed budget for the next succeeding fiscal year beginning July 1. It is understood that this budget will reasonably forecast the succeeding year's operation and no substantial deviation will be made in it. This budget shall be first submitted to the South Peninsula Service Area Advisory Board for its review. Within a reasonable time after June 30 of each year and in no event later than September 30, Lessee shall furnish Lessor an audited financial statement for the fiscal year prepared by accountants approved by Lessor and at Lessor's expense. Upon the termination of this lease for any reason there shall be a complete accounting and final payment and settlement of accounts within 90 days following the submission of the accounting report covering the entire period of operation by Lessee.

8. It is understood by the parties that insofar as possible rates, fees and charges will be established in such an amount as will place the hospital on a self-supporting basis, having due regard for comparable rates, fees and charges of other licensed hospitals of similar size and scope of services located in the State of Alaska. Lessee shall establish rates, fees and charges for the use of the hospital and its facilities which shall be neither excessive nor too small. Lessor will not interfere with Lessee's right to fix such reasonable rates, fees and charges but does reserve the right to periodically make recommendations to Lessee concerning such rates, fees and charges. Lessor agrees that it will assist Lessee in determining and deciding all matters of policy pertaining to public relations and relationship of the hospital to the community which it serves through the South Peninsula Service Area Advisory Board. It is understood however that Lessee is in charge of the operation and maintenance of the hospital and has the full responsibility for its operation in accordance with the terms of this agreement and such policies as are mutually agreed upon. Lessee, or its representative, will attend the meetings of the Service Area Advisory Board and will keep the board informed in regard to the functions and programs of the hospital as they affect the total service to the citizens of the community.

9. In the event that contributions of money or property are made to the Lessee for the purchase of equipment or other articles specifically for use or location within the hospital the Lessee may accept such gifts, it being understood, however, that Lessee shall comply with the wishes of the donor insofar as they are compatible with the operation of the hospital and that all items purchased with such gifts by the Lessee be and remain a part of the hospital and the property of Lessor or other designated donee, except that should the terms or conditions of the gift, bequest, contribution or grant contain specific stipulations, restrictions or directions pertaining to its use, then there shall be strict compliance with the terms, instructions and wishes of the donor or grantor.

10. Any physician or surgeon graduated from an accredited medical school and having received a degree in doctor of medicine and being licensed to practice in the State of Alaska, and having made proper application for appointment to the medical staff and such application having been recommended for approval by the

Lessee

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credentials committee of the medical staff and approved by the Board of Directors of Lessee shall be permitted to practice in the hospital, provided however the Board of Directors may, for good cause, limit or deny any physicians or surgeon the privilege to practice in the hospital, such action, if any, to be in accordance with the By-laws, rules and regulations governing the medical staff.

11. All persons in need of hospitalization shall be admitted to the hospital without regard of race, creed, color, or national origin.

12. Lessee, at the expense of the Lessor, shall provide adequate insurance coverage for the parties as their individual interests may appear. Types and amounts of insurance are subject to the approval of the Lessor.

13. It is mutually agreed that either of the parties hereto may terminate and cancel this sublease and agreement at any time during the term thereof for a breach of any of the covenants and agreements herein contained or when and if either party, because of financial or business conditions, considers a modification of the terms hereof necessary to relieve either from pecuniary loss, in the proper conduct and operation of said hospital and is unable to obtain the consent of the other party to a reasonable change or modification sufficient to relieve such condition by giving the other party 180 days notice, in writing, by registered or certified mail. If a breach of contract is alleged by either party and if a disagreement arises between the parties as to whether or not a breach has been committed, then each party shall name an arbitrator, which two arbitrators shall name a third and the three arbitrators shall determine whether or not a breach has been committed, which determination shall be final. If a breach of contract as determined by the arbitrators this agreement shall be terminated 90 days thereafter unless a written waiver is furnished the party having committed the breach by the other party. Waiver by either party of any breach of this agreement at any time shall not be deemed a waiver of any subsequent breach.

14. Lessee covenants and agrees that it will not sublet the hospital building or grounds or any part thereof except as otherwise herein provided without the written consent of the Lessor. This agreement shall not be assigned or transferred by Lessee.

15. In the event the Lessor has received or makes application for and receives Federal Financial Assistance under the Hospital Survey and Construction Act (Public Law 725, 79th Congress or any amendment thereto), or from the State of Alaska, the Lessee agrees to abide by or fulfill the applicable operational assurances given by the Lessor in its application for financial assistance. In the event that such assurances are not fulfilled by the Lessee, such failure shall be deemed to constitute a breach of this contract and the Lessor may give written notice to the Lessee of intention to terminate the contract. In such event the Lessee agrees to relinquish to the Lessor total possession of the grounds, buildings, and all appurtenances thereto within ninety (90) days after receiving such written notice.

IN WITNESS WHEREOF the parties have hereunto set their hands this 16 day of June, 1970.

KENAI PENINSULA BOROUGH - /s/ George A. Navarre, Chairman - Attest /s/ Frances Brymer
Approved as to Form: J. D. Nordale, Borough Attorney

HOMER HOSPITALS, INC. - /s/ Teddy E. Lemaire, President - /s/ Ann C. Gillas, Secretary

State of Alaska

Department of Commerce

Juneau

H

CERTIFICATE OF AMENDMENT

The undersigned, as Commissioner of Commerce, of the State of Alaska, hereby certifies that duplicate originals of Articles of Amendment to the Articles of Incorporation of HOMER HOSPITALS, INC.

duly signed and verified pursuant to the provisions of the Alaska Non-Profit Corporation Act, have been received in this office and are found to conform to law.

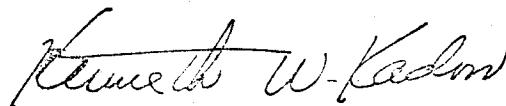
ACCORDINGLY the undersigned, as such Commissioner of Commerce, and by virtue of the authority vested in him by law, hereby issues this Certificate of Amendment to the Articles of Incorporation of

HOMER HOSPITALS, INC.

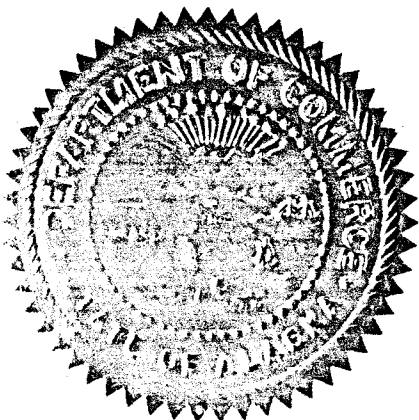
and attaches hereto a duplicate original of the Articles of Amendment,

IN TESTIMONY WHEREOF, I have hereunto set my hand
and affixed my official seal, at Juneau, the Capital, this

20th day of July A.D. 19 72



KENNETH W. KADOW
COMMISSIONER OF COMMERCE



MINUTES OF SPECIAL MEETING
OF
BOARD OF DIRECTORS
OF
HOMER HOSPITALS, INC.

ALL H

AMENDMENT

A special meeting was called to order at 7 o'clock
P.M., on the 23rd day of May, 1972, at Homer Alaska.

Upon motion duly made and seconded, it was unanimously
resolved that the members of HOMER HOSPITALS, INC. be urged to
change the Articles of Incorporation as follows:

1. That Article 2A be amended to add the following;

Said corporation is organized exclusively for charitable,
religious, educational, and scientific purposes, including, for such
purposes, the making of distributions under section 501 (c) (3) of
the Internal Revenue Code of 1954.

The remainder of Article 2 is deleted.

2. That article 12 be amended to read as follows:

No part of the net earnings of the corporation shall inure to the
benefit of, or be distributable to, its members, trustees, officers,
or other private persons, except that the corporation shall be
authorized and empowered to pay reasonable compensation for services
rendered and to make payments and distributions in furtherance of the
purposes set forth in Article 2, paragraph (a) hereof. No substantial
part of the activities of the corporation shall be the carrying on of
propaganda, or otherwise attempting, to influence legislation, and the
corporation shall not participate in, or intervene in (including the
publishing or distribution of statements) any political campaign on
behalf of any candidate for public office. Notwithstanding any other
provision of these articles, the corporation shall not carry on any
other activities not permitted to be carried on (a) by a corporation
exempt from Federal income tax under section 501 (c) (3) of the
Internal Revenue Code

of 1954 (or the corresponding provision of any future United States Internal Revenue Law) or (b) by a corporation, contributions to which are deductible under section 170 (c) (2) of the Internal Revenue Code of 1954 (or the corresponding provision of any future United States Internal Revenue Law).

3. That Article 13 be amended to read as follows:

Upon the dissolution of the corporation, the Board of Trustees shall, after paying or making provision for the payment of all of the liabilities of the corporation, dispose of all of the assets of the corporation exclusively for the purposes of the corporation in such manner, or to such organization or organizations organized and operated exclusively for charitable, educational, religious, or scientific purposes as shall at the time qualify as an exempt organization or organizations under section 501(c)(3) of the Internal Revenue Code of 1954 (or the corresponding provision of any future United States Internal Revenue Law), as the Board of Trustees shall determine. Any of such assets not so disposed of shall be disposed of by the Court of Common Pleas of the county in which the principal office of the corporation is then located, exclusively for such purposes or to such organization or organizations, as said Court shall determine, which are organized and operated exclusively for such purposes.

FURTHER it was unanimously resolved upon motion duly made and seconded that ARTICLE 12 and ARTICLE 13 be redesignated as ARTICLE 14 and ARTICLE 15.

ARTICLE 14 to read as follows:

The address of the initial registered office of the corporation is the Homer Hospital, Box 683, Homer, Alaska and the name of its initial registered agent at such address is Teddy E. Lemaire.

ARTICLE 15 to read as follows:

The name and address of the Incorporators are as follows:

- | | | |
|--------------------|--------------|-------------------|
| Teddy E. Lemaire | Box 724 | Homer, Alaska |
| Jack W. Epperson | Box 221 | Homer, Alaska |
| Josephine C. Olson | | Anchor Point, Ak. |
| Donald L. Ledger | Box 25 | Anchor Point, Ak. |
| Ann C. Gillas | Star Route A | Homer, Alaska |

H

Norma E. Turkington	Box 282	Homer, Alaska
E. Noreen Johnson	Box 273	Homer, Alaska
Gene R. Williams	Star Route A	Homer, Alaska

There being no further business to come before the meeting, the meeting was adjourned. The amendment was adopted and received 2/3 of the votes.

DATED: *July 11, 1972*

Ann C. Hillas

 Secretary

John Ploeger

 President

Melva J. Hillas
my commission expires January 30, 1975

H

MINUTES OF SPECIAL MEETING
OF MEMBERS OF
HOMER HOSPITALS, INC.

AMENDMENT

A legally noticed meeting of the members of the corporation was called to order by John Cooper, at the hour of 7:30 o'clock P.M. , on the 23rd day of May, 1972.

Upon motion duly made and seconded, it was unanimously resolved by those present that the members of HOMER HOSPITALS, INC. be urged to change the Articles of Incorporation as follows:

1. That Article 2A be amended to add the following:

Said corporation is organized exclusively for Charitable, religious, educational, and scientific purposes, including, for such purposes, the making of distributions to organizations that qualify as exempt organizations under Section 501 (c) (3) of the Internal Revenue Code of 1954.

The remainder of Article 2 is deleted.

2. That Article 12 be amended to read as follows:

No part of the net earnings of the corporation shall inure to the benefit of, or be distributable to, its members, trustees, officers, or other private persons, except that the corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth in Article 2, paragraph (a) hereof. No substantial part of the activities of the corporation shall be the carrying on of propaganda, or otherwise attempting, to influence legislation, and the corporation shall not participate in, or intervene in (including the publishing or distribution of statements) any political campaign, on behalf of any candidate for public office. Notwithstanding any other provision of these articles, the corporation shall not carry on any other activities not permitted to be carried on (a) by a corporation exempt from Federal Income Tax under section 501 (c) (3) of the Internal Revenue Code of 1954 (or the corresponding provision of any future

United States Internal Revenue Law) or (b) by a corporation, contributions to which are deductible under section 170(c)(2) of the Internal Revenue Code of 1954 (or the corresponding provision of any future United States Internal Revenue Law).

3. That Article 13 be amended to read as follows:

Upon the dissolution of the corporation, the Board of Trustees shall, after paying or making provision for the payment of all of the liabilities of the corporation, dispose of all of the assets of the corporation exclusively for the purposes of the corporation in such manner, or to such organization or organizations organized and operated exclusively for charitable, educational, religious, or scientific purposes as shall at the time qualify as an exempt organization or organizations under section 501(c)(3) of the Internal Revenue Code of 1954 (or the corresponding provision of any future United States Internal Revenue Law), as the Board of Trustees shall determine. Any of such assets not so disposed of shall be disposed of by the Court of Common Pleas of the county in which the principal office of the corporation is then located, exclusively for such purposes or to such organization or organizations, as said Court shall determine, which are organized and operated exclusively for such purposes.

FURTHER it was unanimously resolved upon motion duly made and seconded that ARTICLE 12 and ARTICLE 13 be redesignated as ARTICLE 14 and ARTICLE 15.

ARTICLE 14 to read as follows:

The address of the initial registered office of the corporation is the Homer Hospital, Box 683, Homer, Alaska and the name of its initial registered agent at such address is Teddy E. Lemaire.

ARTICLE 15 to read as follows:

The name and address of the Incorporators are as follows:

- | | | |
|--------------------|--------------|-------------------|
| Teddy E. Lemaire | Box 724 | Homer, Alaska |
| Jack W. Epperson | Box 221 | Homer, Alaska |
| Josephine C. Olson | | Anchor Point, Ak. |
| Donald L. Ledger | Box 25 | Anchor Point, Ak. |
| Ann C. Gillas | Star Route A | Homer, Alaska |

Norma E. Turkington	Box 282	Homer, Alaska
E. Noreen Johnson	Box 273	Homer, Alaska
Gene R. Williams	Star Route A	Homer, Alaska

There being no further business to come before the meeting, the meeting was adjourned.. The amendment was adopted and received 2/3 of the votes.

DATED: *July 11, 1972*

Ann C. Gillow
Secretary

John P. Cooper
President

my commission expires January 20, 1975
Melva J. Hillas

South

Introduced by: Bjarregaard
Date: July 10, 1973 Amended 7/10/73
Hearing: August 7, 1973
Hearing Continued August 21, 1973
Adopted: August 21, 1973

KENAI PENINSULA BOROUGH

ORDINANCE 73-33

AN ORDINANCE ENTITLED: AN ORDINANCE AMENDING SECTIONS 27.20.020, 27.20.030 and 27.20.040, PROVIDING FOR AN ELECTED BOARD OF DIRECTORS FOR THE SOUTH KENAI PENINSULA HOSPITAL SERVICE AREA, REGULAR AND SPECIAL BOARD MEETINGS, A BOARD CHAIRMAN, TERMS OF THE DIRECTORS, VACANCIES OF THE BOARD AND CLARIFYING THE POWERS AND DUTIES OF THE BOARD.

WHEREAS, the Assembly finds that it is in the best interests of the borough and the South Kenai Peninsula Hospital Service Area to provide for an elected board of directors, regular and special board meetings, a board chairman, terms of the directors, vacancies of the board and to clarify the powers and duties of the board;

BE IT ORDAINED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH:

Section 1. That section 27.20.020 of the Kenai Peninsula Borough Code of Ordinances is hereby amended to read as follows:

Section 27.20.020. Board of Directors. (a) There is hereby established a board of directors for the South Kenai Peninsula Hospital Service Area composed of nine members who shall be nominated and elected by the qualified voters of the service area in the same manner as provided for areawide assemblymen in the Kenai Peninsula Borough Code of Ordinances Title 11, Elections.

(b) The board shall meet once a month at a regularly scheduled time and place designated by the board. Special meetings of the board may be called by the chairman of the board or by three members upon one day's notice thereof. The notice shall set forth the time and place of the meeting and shall be mailed or telephoned to each member. The attendance of a member at a meeting constitutes a waiver of notice of the meeting. All meetings are open to the public as provided in AS 29.23.580 and AS 44.62.310 and in accordance with the policies set forth in AS 44.62.312.

Five members shall constitute a quorum, and if a quorum is present, actions may be taken by a majority vote of those members present.

(c) At the first regular meeting following the certification of the election by the assembly, and annually thereafter the board shall elect by majority vote of the members and from the members a chairman who shall hold office until a successor is elected.

Section 2. That section 27.20.030 of the Kenai Peninsula Borough Code of Ordinances is hereby amended to read as follows:

Section 27.20.030. Terms and Qualifications. (a) Members of the board of directors shall be qualified voters of the borough who are residents of the service area. Members shall be elected to Seats A through I for a term of three years, except that the first board shall contain members elected to Seats G, H, and I for initial terms of one year and to Seats D, E, and F for initial terms of two years in order to provide for staggered terms.

(b) Vacancies on the board are created under the following conditions and upon declaration of vacancy by the board:

1. if no candidate files for election to a seat which is to be filled at said election or if a successful candidate fails to qualify or take office within thirty days after his election or appointment;
2. if a member is physically absent from the service area for a ninety day period, unless excused by the board;
3. if a member resigns and his resignation is accepted;
4. if a member is physically or mentally unable to perform the duties of his office;
5. if a member is removed from office;
6. if a member misses three consecutive regular meetings unless excused; or
7. if a member is convicted of a felony or of an offense involving a violation of his oath of office.

(c) Vacancies on the board shall be filled by majority vote of the remaining board until the next general election of the borough at which time a new member shall be elected to fill the unexpired term or for a three year term if no unexpired term remains.

Section 3. That section 27.20.040 of the Kenai Peninsula Borough Code of Ordinances is hereby amended to read as follows:

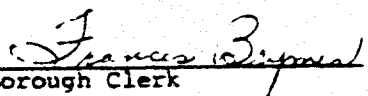
Section 27.20.040. Powers and Duties. Pursuant to the Provisions of AS 29.63.090 the board of directors of the service area shall have the power to provide for hospital services within the service area and for the administration and operation of the service area; providing however, that in exercising such power, the board of directors must comply with the objectives and provisions of the Hill-Burton Hospital Construction Act and the regulations passed pursuant thereto and with the agreements entered into by the Kenai Peninsula Borough as part of the application for grant and loan funds under such act. ~~It is intended that board members shall be responsible for the level of services provided and to that end must be responsible to the electorate for the amount of taxes necessarily raised to provide such services, and the Kenai Peninsula Borough will raise the amount of the levy.... whenever in its judgment such action is necessary to secure adequate funds for repaying bonded indebtedness of the service area.~~ The board shall promptly furnish accurate and complete copies of the minutes of all board meetings to the mayor and the assembly.

Section 4. This ordinance with respect to the election of board members becomes effective on adoption and with respect to all other matters becomes effective on the date the Kenai Peninsula Borough Assembly certifies the result of the election of members of the board of directors.

ADOPTED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH THIS
21st DAY OF August, 1973.

ATTEST:


Erle Cooper, Assembly Pres.


Borough Clerk

Kenai Peninsula Borough
Ordinance 73-33 Page 3

thing. After all, what is a rehearing? In an appellate court it is nothing more than a reargument. It was so ruled by the Supreme Court of Missouri in just those words in *Granite, etc., Co. v. Park View Realty & Improvement Co.*, et al., supra [270 Mo. 698, 196 S.W. 1142]. In that case it was said (270 Mo. loc. cit. 700, 196 S.W. 1142, 1143) "that the term 'rehearing' indicates, i. e., that the case is for reargument and resubmission."

We therefore treat the petition as an application for rehearing. We have previously recognized that our rule does not specify the grounds upon which a rehearing will be granted, but we would concede that the hospitalization of a justice who has heard the oral argument as a member of a three-justice panel as permitted by Article 5, § 4(a) of the Wyoming Constitution, would be and is proper basis for concern of a litigant and could be basis for rehearing where the panel is split and there is a dissenting opinion, provided that the judge who became hospitalized was thereby incapacitated from effective considera-

tion of the written briefs and record in the case and the oral argument which he has heard.

This is not such a case. Mr. Justice McIntyre, as was his continuing practice, carefully considered the briefs in the matter prior to the oral argument, participated actively in the argument, and in oral conference following the argument, and specifically considered and rejected an opinion of Justice McClintock, tendered by him as the opinion of the panel, and then considered and joined in the opinion tendered by Justice Guthrie. We therefore have no hesitation, with the complete agreement of the dissenting justice, in stating that concurrence by Justice McIntyre, whose hospitalization has been of such a nature as not to preclude conference with other judges and thoughtful consideration of the facts and issues involved in the cause, represents a thoughtful and active concurrence in the majority opinion as heretofore rendered and filed herein.

The petition for rehearing is therefore denied.

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3. Evidence ⇨32, 43(1)

Borough ordinance and Supreme Court order were judicially noticeable. Rules of Civil Procedure, rule 43(a)(3).

4. Evidence ⇨51

Preliminary to judicial notice court must announce its intentions to parties and indicate for record particular facts to be taken as true. Rules of Civil Procedure, rules 43, 43(a)(4, 5).

5. Appeal and Error ⇨1170.7

Where opponents did not argue that photocopies of public records were inaccurate or that original public records had been altered, failure of superior court to notify parties and identify documents to be relied upon before taking judicial notice of documents was harmless error. Rules of Civil Procedure, rules 43, 61.

6. Constitutional Law ⇨253(2)

Substantive due process is denied when legislative enactment has no reasonable relationship to legitimate governmental purpose.

7. Constitutional Law ⇨70.3(4)

Municipal Corporations ⇨63.(3) It is not court's role to decide whether particular statute or ordinance is wise one; choice between competing notions of public policy is to be made by elected representatives of people.

8. Constitutional Law ⇨48(1)

Court's inquiry into arbitrariness of legislative enactment begins with presumption that action of legislature is proper.

9. Constitutional Law ⇨48(4)

Party claiming denial of substantive due process has burden of demonstrating that no rational basis for challenged legislation exists.

10. Constitutional Law ⇨48(1)

Burden of proving arbitrariness of legislative enactment is heavy one, for if any conceivable legitimate public policy for enactment is apparent on its face or is offered by those defending enactment, opponents of measure must disprove factual basis for such justification.

CONCERNED CITIZENS OF SOUTH

KENAI PENINSULA and Mary Ann McBride, Appellants,

v.

KENAI PENINSULA BOROUGH et al., Appellees.

No. 2239.

Supreme Court of Alaska.

Oct. 21, 1974.

Action by taxpayers seeking dissolution of hospital service district. The Superior Court, Third Judicial District, Anchorage District, Ralph E. Moody, J., granted summary judgment for the defendants, and taxpayers appealed. The Supreme Court, Erwin, J., held that the creation of the service district was not an arbitrary act denying due process of law; that the description set out in the ordinance creating the hospital district adequately designated the district's boundaries; and that laches barred taxpayer's other claims that organization of the hospital district violated state statutes and constitutional provisions.

Affirmed.

Boothever, J., joined by Rabinowitz, C. J., concurred and filed opinion.

1. Judgment ⇨185(2)

Party seeking summary judgment has burden of showing both that case presents no material issue of fact requiring taking of testimony and that applicable law requires judgment in its favor, which burden must be discharged by submission of material admissible as evidence. Rules of Civil Procedure, rule 56.

2. Judgment ⇨185(3)

Assertions of fact in pleadings and memoranda, unauthenticated and unsworn documents, and uncertified copies of public records are not admissible in evidence and cannot be relied upon for purposes of summary judgment. Rules of Civil Procedure, rule 56.

11. **Constitutional Law** \S 46(4)
Municipal Corporations \S 122(2)
 When due process claim is tested by motion for summary judgment, existence of facts known to court which provide rational basis for challenged enactment is sufficient by itself to establish that statute or ordinance is not arbitrary, so long as opponents of legislation do not assert contrary of those facts.

12. **Judgment** \S 181(6)
 Mere assertion that due process has been denied is not enough to withstand summary judgment.

13. **Constitutional Law** \S 253(2)
 Where region neighboring designated hospital service area already had hospital facilities, ordinance excluding that region from hospital area did not deny substantive due process.

14. **Municipal Corporations** \S 120
 If language is ambiguous or incomplete, ordinance is to be construed on same principles as statute, primary rule being that court should endeavor to ascertain and give effect to intention of legislative body.

15. **Judgment** \S 185.1(3)
 While civil rules do not expressly provide for trial court's consideration of answers to interrogatories in deciding motion for summary judgment, central policy of civil rules assuring that summary judgment is based upon facts admissible in evidence is consistent with relying upon sworn answers to interrogatories along with any other materials otherwise admissible in evidence. Rules of Civil Procedure, rule 56(c, e).

16. **Judgment** \S 185(4)
 Generally, where party intends to rely upon answers to interrogatories as basis for summary judgment, he should notify court and opposing counsel to permit opportunity to challenge factual basis for answers. Rules of Civil Procedure, rules 56, 56(c).

17. **Judgment** \S 185(4)
 Where material relied upon in answers to interrogatories was supported by docu-

ments, veracity of which depended upon public records which opponents were invited to inspect 45 days prior to granting of summary judgment, and appellants took no action to so inspect, movant's failure to specify answers to interrogatories to be relied upon in motion for summary judgment was not error. Rules of Civil Procedure, rule 56.

18. **Hospitals** \S 2
 Where borough assembly minutes clearly indicated that portion of Supreme Court order providing description of boundaries of hospital district was inadvertently omitted from description in ordinance establishing hospital district, ambiguity and description could be cured by reference to minutes and Supreme Court order. AS 07.15.050.

19. **Judgment** \S 186
 Where there is variance between court's oral ruling on motion for summary judgment and written findings prepared by prevailing party, oral ruling controls. Rules of Civil Procedure, rule 52(a).

20. **Equity** \S 87
 Doctrine of laches creates equitable defense when party delays asserting claim for unconscionable period.

21. **Equity** \S 72(1)
 To impose laches, court must find both unreasonable delay in seeking relief and resulting prejudice to defendant.

22. **Equity** \S 84
 Sustaining defense of laches requires justification by trial court that equities of case justify refusal to hear and decide party's claim.

23. **Equity** \S 84
 Imposition of laches is act of discretion which will not be interfered with unless Supreme Court feels definite and firm conviction that mistake has been committed.

24. **Equity** \S 71(2)
 No specific time must elapse before defense of laches can be raised, because propriety of refusing to hear claim turns

as much upon gravity of prejudice suffered by defendant as length of plaintiffs' delay.

25. **Hospitals** \S 8
 Where pursuant to establishment of hospital district in 1969 hospital had been maintained, new hospital was contemplated, and more than \$60,000 had been expended for architectural design and other services, challenge to legality of hospital district brought five years after its establishment was barred by laches.

26. **Equity** \S 85
 In contest over validity of unit of municipal government, laches can be raised as defense to such claim. AS 29.18.150.

Karl L. Walter, Jr., Groh, Benkert & Walter, Anchorage, for appellants.

John R. Strachan, Robison, McCaskey, Strachan & Hoge, and A. Robert Hahn, Jr., Hahn, Jewell & Stanfill, Anchorage, and Ben T. Delahay, Borough Atty., Kenai Peninsula Borough, Kenai, for appellees.

John R. Spencer, City Atty., City of Anchorage, Anchorage, for amicus curiae.

Before RABINOWITZ, Chief Justice, and CONNOR, ERWIN, BOOCHEVER and FITZGERALD, Justices.

OPINION

ERWIN, Justice.

Appellants are taxpayers who seek a dissolution of the South Kenai Peninsula Hospital Service Area. The service area was created in 1969 by Ordinance No. 69-4 of the Kenai Peninsula Borough Assembly to operate a hospital in the southwestern portion of the Borough. Delegation of assembly powers to the service area was approved by voters of the area on April 8, 1969. A hospital board was organized, and a fifty-five year lease was negotiated for

operation of the former City of Homer hospital. Plans were laid for enlarging the facility, and on June 5, 1973, service area voters authorized issuance of \$1,500,000 in bonds for construction of a new hospital. Thereafter, a federal grant and loan in the amount of \$1,439,900 and a state grant of \$1,723,100 were secured and an architectural design contract for the new structure was awarded.

On February 13, 1974, the complaint in this action was filed. Defendants then moved for summary judgment. In an oral ruling granting the motion, the superior court held that creation of the service area was not an arbitrary act denying due process of law; that the description set out in Ordinance No. 69-4 adequately designated the hospital district boundaries; and that laches barred plaintiffs' other claims that organization of the service area violated state statutes and constitutional provisions. Findings of fact prepared by defendants were then adopted. These omitted mention of laches and ruled on the merits against the plaintiffs on all issues.

On appeal appellants have again raised the questions of due process and definiteness in the boundary description and have also asked us to consider whether a service area can be formed which encompasses cities capable of providing the same service. This last issue was found by the superior court to be barred by laches. In addition, appellants have contended that the superior court did not require appellees to carry the burden of proving they were entitled to summary judgment. In response, appellees have resisted these claims and have asserted the defense of laches.

Because circumstances required an immediate announcement of our decision, the judgment of the superior court was affirmed by order on July 2, 1974. This opinion sets forth our reasons for the affirmation.

and grant could not be assured if this litigation were not terminated before July 15, 1974.

Appellees demonstrated that the availability of their federal hospital construction loan

1. SUMMARY JUDGMENT PRACTICE

Appellants argue that the superior court had before it no evidence which could have supported a decree of summary judgment. We do not agree. Appended to appellants' memorandum in support of their motion for summary judgment were photocopies of Borough resolutions and ordinances, sample ballots, election canvass reports, and constitutional and statutory provisions. In addition, at the time the court ruled on the motion, the record included amended pleadings and sworn answers to interrogatories propounded by both sides.

[1,2] A party seeking summary judgment under Civil Rule 56² has the burden of showing both that the case presents no material issue of fact requiring the taking

of testimony and that applicable law requires judgment in its favor.³ This burden must be discharged by submission of material admissible as evidence.⁴ Assertions of fact in pleadings and memoranda, unauthenticated and unsworn documents, and uncertified copies of public records are not admissible in evidence and cannot be relied upon for the purposes of summary judgment.

[3,4] None of the exhibits appended to appellants' memorandum were sworn, certified or authenticated documents. However, both Ordinance No. 69-4⁵ and Supreme Court Order No. 12⁶—the only documents essential to the court's decree—were judicially noticeable under Civil Rule 43(a)(3).⁷

(c) *Form of Affidavits*—*Farrier Testimony*—*Defense Required*. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or sworn therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

3. *Irraund, Inc. v. White*, 486 P.2d 50, 53-54 (Alaska 1971). See *Whaley v. State*, 235 P.2d 718, 720 (Alaska 1958).

4. *Miller v. City of Fairbanks*, 546 P.2d 234, 235 (Alaska 1973); *Irraund, Inc. v. White*, 486 P.2d 50, 54 N. 6 (Alaska 1971).

5. Note 15 *infra*.

6. Note 23 *infra*.

7. In their supporting memorandum, the appellees requested judicial notice.

Alaska R.Civ.P. 43 provides in part: (a) *Judicial Notice*.

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Cite as, Alaska, 527 P.2d 447

While judicial notice permitted taking the essential facts as true without formal proof, the superior court ignored important procedural requirements of Rule 43. Preliminary to judicial notice, the court must announce its intentions to the parties and indicate for the record the particular facts to be taken as true.⁸ This allows the parties to test both the propriety of noticing any fact and the truth of the matter to be established.⁹

[5] The superior court neither notified the parties nor identified for the record the documents to be relied upon. This was a violation of Civil Rule 43(a)(5). Never-

8. *Lemon v. State*, 522 P.2d 169, 162 (Alaska 1974); Alaska R.Civ.P. 43(a)(5) at note 7 *supra*.

9. Alaska R.Civ.P. 43(a)(4) at note 7 *supra*; C. McCormick, *Law of Evidence* § 339, at 718 (1954).

10. In opposing the motion for summary judgment, appellants made a broad objection on the ground that the photocopies appended to appellants' memorandum had not been authenticated.

Plaintiffs have not had the opportunity to verify all the documents sought, and the propriety of such exhibits should be determined by this court only after the plaintiffs have had full opportunity to verify the admissibility of the exhibits.

In the two months which transpired between filing of the motion and its disposition, a period of active discovery by both parties, appellants made no further indication to the court or the appellees that they believed any particular photocopy to be inaccurate.

11. Alaska R.Civ.P. 61 states:

So error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

12. See *United States v. 1,078.27 Acres of Land*, 440 F.2d 1030, 1034 (9th Cir. 1971).

plate. The final three paragraphs purport to exclude an area south of a line following the southern shore of Kachemak Bay, but the description does not set out the point at which the line begins. The question which we address is whether the superior court correctly concluded that this description could be made definite by reference to other documents.

[14] An ordinance expresses the legislative will of a borough. If its language is ambiguous or incomplete, an ordinance is to be construed on the same principles as a statute,¹⁷ the primary rule being that a court should endeavor to ascertain and give effect to the intention of the legislative body.¹⁸ The record in this litigation demonstrates a clear intent to exclude the Seldovia Recording District from the hospital service area. The minutes of the borough assembly meeting on February 4, 1969, state:

There was consideration of two ordinances. One to include Seldovia, English Bay, and Port Graham, and one to exclude this area.

Assemblyman Pace reported that he had been directed by the City Council to

We have concluded that their intention is not to urge the rights of unrepresented third parties but to assert their own right to be free from arbitrary legislation. The contrary conclusion would raise serious questions of their standing to sue.

17. *Jane County v. R. A. Heintz Const. Co.*, 228 Or. 182, 384 P.2d 627, 630-630 (1963); *Sandona v. City of Cle Elum*, 37 Wash.2d 831, 228 P.2d 889, 892 (1951); 2 J. Sutherland, *Statutory Construction* § 3005, at 273 (8d ed. 1943). See *Guidoni v. Wheeler*, 5 Alaska 229 (1915), *aff'd*, 230 F. 93, 4 Alaska Fed. 309 (9th Cir. 1916).

18. *Femmer v. City of Juneau*, 97 P.2d 649, 650, 9 Alaska 315, 332 (9th Cir. 1939); *United States v. R. & J. Enterprises*, 178 F. Supp. 1, 4 (D. Alaska, 1959); *United States v. Hartsfield*, 10 Alaska 254, 268 (1942). See *State v. American Can Co.*, 302 P.2d 291, 296 (Alaska 1961).

19. See note 2 *supra*.

20. This is in conformity with the federal practice:

object to introduction of an ordinance to include the Seldovia Recording District. The City Council voted unanimously last Tuesday to object to inclusion in the southern hospital service district. Seldovia owns their own hospital and the people cannot see where the service area will help them overcome their problems and the residents believe that being included in the service area would only add additional tax burdens.

[15] We see no impediment to examining these minutes to determine the assembly's intent because they appear in the record as part of the sworn Answers to Plaintiffs' Interrogatories. While Civil Rule 56(c) does not expressly provide for a trial court's consideration of answers to interrogatories in deciding a motion for summary judgment,¹⁹ a central policy of Civil Rule 56(c)—assuring that a summary judgment is based upon facts admissible in evidence²⁰—is consistent with relying upon sworn answers to interrogatories along with any other materials otherwise admissible in evidence.²¹

[16, 17] These minutes were not appended to appellees' motion for summary

The materials which the court is entitled to consider at the hearing on the motion for summary judgment are: the pleadings; affidavits which meet the testimonial requirements of Rule 56(c); depositions; answers to interrogatories; admissions; and testimony; documentary and other evidentiary materials. (footnotes omitted; emphasis added)

6 Moore's Federal Practice § 50.15 (8), at 2438 (1974). *Miller v. City of Fairbanks*, 500 P.2d 828, 829 (Alaska 1973); *Brown, Inc. v. White*, 486 P.2d 50, 54 n. 5 (Alaska 1971).

21. 6 Moore's Federal Practice § 56.11 (9), at 2195-97 (1974).

Alaska's Civil Rule 56 was modeled upon the corresponding federal rule of civil procedure in effect in 1960. The federal rule enumerated depositions, admissions on affidavits as among the sources a court could draw from to decree summary judgment, but failed to list answers to interrogatories. Notwithstanding the analogy federal courts and other jurisdictions early

judgment, but it is unnecessary that the superior court's attention be directed to particular answers to interrogatories in the record. Generally, however, where a party intends to rely upon answers to interrogatories as a basis for summary judgment, he should notify the court and opposing counsel to permit an opportunity to challenge the factual basis for the answers. In this case there was no error in appellees' failure to specify the answers to interrogatories to be relied upon because of the circumstances pointed out in note 10 *supra* and because the material relied upon was supported by documents, the veracity of which depended upon public records which appellants were invited to inspect some 45 days prior to the framing of summary judgment.

Appellees also requested the superior court to read Ordinance No. 69-4 together with boundary descriptions in other public documents, including Supreme Court Order No. 12, establishing recording districts for the state and defining their geographical boundaries. The disputed portion of Ordinance No. 69-4 describes a portion of the boundaries of the Seldovia Recording District in language nearly identical to Order

similar rules of procedure were uniformly in holding that answers to interrogatories could be utilized in summary judgment practice. See *American Airlines v. Ulen*, 87 U.S.App.D.C. 307, 186 F.2d 529, 531-532 (1949), and the cases cited in *Annot.*, 74 A.L.R.2d 884 (1962); *contra* *Town of River Junction v. Maryland Cas. Co.*, 110 F.2d 278, 283 (5th Cir. 1940).

"[A]nswers to interrogatories" was added to Federal Rule 56(c) by amendment in 1963. The accompanying note by the Advisory Committee observed that omission of the phrase had been inadvertent. 28 U.S.C.A. Rule 56, at 416 (1971). *Cf. E. H. Marhofer, Jr., Co. v. Mount Sinai, Inc.*, 190 F.Supp. 355, 359 (E.D.W.Va.1961).

22. Supreme Court Order No. 12, at 50-51 (rev.1964) states:

Said district shall encompass all the territory within the following described boundaries:

Beginning at Cape Douglas on the north shore of Shelikof Strait, running thence northerly to a point in the center of

No. 12.²² Undoubtedly, the draftsman of the ordinance relied upon the order for the geographical description of the excluded area. Had the first three clauses of that description been included as well, the ordinance description would have been complete.

[18] We believe that the boundary description in Ordinance No. 69-4 sufficiently describes the limits of the hospital service area when read in light of the borough assembly minutes. The defect in the description is not an inaccuracy but an omission of a series of calls necessary to exclude the area intended. We are not faced with the difficult question of which of two monuments or distances is contemplated by ambiguous language. Here there are no competing alternatives; there is only evidence that the description was incomplete, that a portion of Order No. 12 was the language omitted, and that the borough assembly intended that language to be a part of the ordinance. Where there is such clear indication of the assembly's intent as the minutes provide, ambiguity caused by incompleteness rather than inaccuracy can be readily resolved. We are able to ascertain the assembly's intent and give effect

Cook Inlet at 152°30' west longitude and 59°40' north latitude; thence in a southeasterly direction to a point in the center of Kachemak Bay directly south of the point of land of the Honner Spit; thence south to the mainland; thence easterly along the mainland and the shores of China Pool Bay to the left and west bank of the mouth of the Doroshin River where it empties into China Pool Bay; thence along the left and west bank of the Doroshin River to its source; thence east to the summit of the watershed dividing the waters flowing into the Gulf of Alaska from the waters flowing into Kachemak Bay; thence southerly along said summit to a point three miles south of Point Gore; thence south and westerly in a circuitous line midway between the Harren Island and the southern extremity of the Chugach Islands to a point south of Cape Elizabeth; thence southwesterly to Cape Douglas; thence southwesterly to the point of beginning. (emphasis added)

Compare the emphasized language with the last three paragraphs in note 15 *supra*.

to it from the facts in the record. Accordingly, we affirm the superior court's decree of summary judgment for appellees on this issue.

IV. LACHES

The remainder of appellants' claims were held by the superior court to be barred by their delay in bringing this action. This ruling is questioned on appeal by appellants' assertion that including cities with hospital powers within the service area was unlawful.

Appellants have not addressed themselves to whether delay in filing suit should foreclose consideration of their claim because they believe the superior court did not reach such a conclusion. The transcript of the court's ruling shows the contrary. After deciding the due process and boundary description issues adversely to appellants, the court ruled that all issues surrounding dissolution of a prior public utility district and organization of the service area were barred by plaintiffs' long delay in instituting suit.²³ Following this

23. A transcription of the pertinent part of the superior court's ruling reads: "[G]oing now to the question of the PUD, whether it was dissolved, and the matter of the establishment of this service area, it's been since 1969; now it's 1974. And this issue is now being raised collaterally in this proceeding. I hold that the parties are estopped because of the fact that they've been operating as a de facto governmental area. The parties are estopped from [contesting] the dissolution of the PUD and the establishing of this area since it's an unreasonable time which they have waited to raise this matter. Although the judge referred to the de facto existence of the service area, we believe he did not intend to apply a variation of the doctrine of de facto municipal incorporation. Compare Port Valdez Co., Inc. v. City of Valdez, Op. No. 1044, 522 P.2d 1147, at 1152-1156 (Alaska 1974); United States Smelting, Refining & Mining Co. v. Local Boundary Comm'n, 489 P.2d 140, 144 n. 15 (Alaska 1971). The doctrine of de facto municipal incorporation does not address a plaintiff's delay in filing suit. It requires only that there be

24. The court stated: "[F]or the purposes of expediting the proposed findings of fact and conclusions of law submitted by the defendants, I did want to give my oral opinion on this matter to supplement this, but I think that I can adopt your proposed findings.

25. See City of Anchorage v. Stewart, 527 P.2d 737, 739 (Alaska 1965), for discussion of conflicts between oral decision and findings after trial.

(City of Alaska, 527 P.2d 417)

tion for summary judgment.²⁶ Findings are helpful but not binding on review, and where they vary from the court's actual ruling, they must be disregarded.

[20-23] The question before us then is whether the trial court erred when it applied the defense of laches. The doctrine creates an equitable defense when a party delays asserting a claim for an unreasonable period. A court must find both an unreasonable delay in seeking relief and resulting prejudice to the defendant.²⁷ Sustaining this defense requires a decision by the trial court that the equities of the case justify refusal to hear and decide a party's claim. It is an act of discretion which will not be interfered with unless we feel a definite and firm conviction that a mistake has been committed.²⁸

[24] No specific time must elapse before the defense of laches can be raised because the propriety of refusing to hear a claim turns as much upon the gravity of the prejudice suffered by the defendant as the length of a plaintiff's delay. Where harm to the defendants would be great, as in a belated attack upon local government, a plaintiff's delay in asserting his claim need not be extreme.²⁹ In a different context, we emphasized the harm which may follow from disestablishing a unit of local government:

26. Alaska R.(Civ.P. 52(a) provides, in part: Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). This sentence emphasizes that Rule 52(a) is addressed to "all actions tried upon the facts without a jury or with an advisory jury." Summary judgment rests in part upon the conclusion that there are no facts to be tried. Although findings are unnecessary, we welcome a judge's statement of the reasons for his decision.

27. E. g., Pioneer Mining Co. v. Pacific Coal Co., 4 Alaska 463, 473-474 (1912), aff'd, Pacific Coal and Transport. Co. v. Pioneer Mining Co., 246 F. 577, 4 Alaska 115 (9 Cir., 1913).

28. See Alaska Pioneer Co. v. Lee, 542 P.2d 128, 132 (Alaska 1972); Gravel v. Alaskan 527 P.2d-295a

Disincorporation of a municipality substantially disrupts the life and livelihood of anyone associated with the municipality. Among the deleterious consequences of a disincorporation are the election of public officials, invalidation of corporate actions (possibly creating individual liability on the part of public officials or unjustly depriving employees, contractors and other creditors of claims against the corporate body), and voiding of actions taken under the police, taxation and eminent domain powers.³⁰

Disannexation or disincorporation of a municipality is not at issue here. Nevertheless, disestablishment of a hospital service area after it has been in active existence for five years would cause disruption and injury of the same order.

[25] Appellants' claims arose in April, 1969, when voters of the area approved the Borough's delegation of hospital powers. Since July 1, 1969, the service area has maintained a hospital operating on an average annual budget, derived in part from property taxes, of \$205,000. The hospital serves the entire southwestern portion of the Kenai Peninsula Borough. A new hospital is now contemplated, bonds have been authorized for its construction and more than \$60,000 has been expended for architectural design and other services.³¹

Village, Inc., 423 P.2d 273, 277 (Alaska 1967).

29. See, e. g., People ex rel. Cherry Valley Fire Protection Dist. v. City of Rockford, 122 Ill. App.2d 272, 258 N.E.2d 577, 580 (1970). Compare AS 20.18.150 which provides: "Challenge of legality: No person may challenge the formation of a municipality except within six months of the date of its incorporation.

30. Port Valdez Co., Inc. v. City of Valdez, Op.No.1044, 522 P.2d 1147, at 1153 (Alaska 1971) (holding that annexations may be immune to private suit under the de facto municipal incorporation doctrine).

31. These facts are to be found in sworn answers to appellants' interrogatories.

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[26] All the claims which appellants attempted to argue before the superior court could have been asserted in April, 1969. Yet a complaint was not filed until February, 1974, four years and ten months later. On these facts, we do not believe the superior court abused its discretion in finding appellants' claim barred by laches.²⁷

The judgment of the superior court is affirmed.

BOOCHEVER, J., concurring, with whom RABINOWITZ, C. J., joins.

BOOCHEVER, J., concurring, with whom RABINOWITZ, C. J., joins.

I concur with Justice Erwin's opinion but do not agree that "[w]here there is a variance between a court's oral ruling on a motion for summary judgment and written findings prepared by the prevailing party, the oral ruling controls." The written findings and conclusions should be the product of greater deliberation, and the general rule is that where formal findings

of fact and conclusions of law filed pursuant to statute conflict with statements of fact made in an opinion or memorandum of decision, the formal findings prevail. However, facts stated in a memorandum that are not inconsistent with the findings may be considered as incorporated in those findings.²⁸

While I believe that generally the written findings and conclusions should control, I do not regard such a rule as one that must be slavishly followed in all cases. The circumstances under which the findings are filed may be considered when appropriate.²⁹

Here there was no inconsistency between the judge's oral decision based on laches and the written findings and conclusions. For the reasons that findings are not required in granting a summary judgment, that the judge signed the particular findings involved in an understandably hurried manner and that he expressly stated that he wished to supplement them by his oral opinion, I concur in the affirmation on the basis of laches.

76 P.2d 84 (1938); State v. Kay, 164 Wash. 685, 4 P.2d 488 (1931); Coohige v. Bush, 240 Wis. 458, 245 N.W. 150 (1952).

2. Wilson v. Davithson, 219 Minn. 42, 17 N.W. 2d 31, 34 (1944).

3. See City of Anchorage v. Stewart, 574 P.2d 737 (Alaska 1978). The circumstances whereby the trial judge orally expounded on a erroneous theory of law in reaching his decision were such that we could not escape the conclusion that his initial decision was based on error and that his subsequent signing of the counsel presented order did not reflect the true position in deciding the case as justice required. In the case at hand, the judge involved retired for reasons of health a short time after signing the decision, and prior to our decision in affirming a new trial.

1. Dept. of Social Welfare v. Machado, 98 Cal. App.2d 364, 220 P.2d 411 (1950); Levine v. Handolph Corp., 150 Conn. 232, 188 A.2d 59 (1963); Woodson v. Raymonds, 42 N.M. 101,

4. Grand Jury \hookrightarrow 36

Where indictment was sought against defendant's companion in crime as well as against defendant, concern for companion's substantive rights with respect to self-incrimination constituted compelling reason for use of companion's hearsay statement before grand jury, which returned indictment against defendant. Rules of Criminal Procedure, rule 6(r); Const. art. 1, \S 9.

5. Indictment and Information \hookrightarrow 10.2(2)

Where hearsay admission of defendant's companion in crime was properly admitted before grand jury, and statement was corroborated by other evidence, evidence was sufficient to support indictment. Rules of Criminal Procedure, rule 6(r).

6. Homicide \hookrightarrow 250

Evidence on cause of death, including physician's testimony, was sufficient to support conviction of manslaughter.

7. Criminal Law \hookrightarrow 376

Generally, evidence of character is not admissible as tending to show that person committed act consistent with that character.

8. Criminal Law \hookrightarrow 37(1)(2), 372(1)

Evidence of other crimes is admissible to show motive or larger plan or conspiracy.

9. Witnesses \hookrightarrow 345(1)

Evidence of convictions of crimes involving dishonesty is admissible to show that witness' testimony is untrustworthy. Rules of Criminal Procedure, rule 26(f).

10. Criminal Law \hookrightarrow 369.15

Where previous crime is so nearly identical in method with crime in question that it indicates same person committed both crimes, evidence of prior crime is admissible.

11. Criminal Law \hookrightarrow 369.15

Where defendant alleged that companion administered fatal beating with rifle, evidence of prior assaults administered by companion involving beatings with fists was not admissible under exception allowing evidence of prior crimes where they

Walter Mack GALAUSSKA, Appellant,

STATE of Alaska, Appellee.

No. 2027.

Supreme Court of Alaska.
Oct. 25, 1974.

Defendant was convicted in the Superior Court, Fourth Judicial District, Fairbanks, Edward V. Davis, J., of manslaughter, and he appealed. The Supreme Court, Fitzgerald, J., held that the indictment was not fatally flawed by presentation of hearsay evidence to the grand jury; that the evidence was sufficient to sustain the conviction; that the trial court did not err in limiting evidence as to the prosecution's chief witness' violent character to general reputation evidence, and excluding evidence of particular assaults perpetrated by witness; and that the trial court did not err in refusing to instruct the jury that said witness' testimony was to be viewed as that of an accomplice.

Affirmed.

Boochever, J., dissented and filed opinion.
Connor, J., did not participate.

1. Criminal Law \hookrightarrow 1032(2)

Objection involving sufficiency of evidence supporting indictment must be raised before trial to preserve issue on appeal.

2. Criminal Law \hookrightarrow 422(9)

Where state sought a murder indictment against two defendants, testimony of police officer before grand jury as to admission of one defendant was admissible against that defendant but inadmissible as against the other.

3. Grand Jury \hookrightarrow 36

In circumstances involving hearsay evidence which would be inadmissible at trial, there must be compelling justification for its introduction to grand jury. Rules of Criminal Procedure, rule 6(r).

BYLAWS

of

SOUTH PENINSULA HOSPITAL, INC.

K

PREAMBLE

Recognizing that a hospital is formed to provide medical care for our fellow man, we accept and assume this responsibility under God. We further recognize our responsibility to the taxpayers and citizens of the southern area of the Kenai Peninsula Borough. In addition, there are the Alaska Statutes and various governmental agency regulations which must be observed.

To properly administer our responsibilities, we hereby organize ourselves in conformity with these Bylaws.

ARTICLE I - Name and Objectives

- Section 1. The name of this corporation shall be South Peninsula Hospital, Inc., and its mailing address shall be P.O. Box 275, Homer, Alaska 99603.
- Section 2. The name of this Board shall be the South Peninsula Hospital, Inc. Hospital Board, and shall be referred to in these Bylaws as the Hospital Board.
- Section 3. The objective of the Hospital Board shall be to construct, maintain, and operate a hospital or hospitals in the manner required by the laws and regulations of the State of Alaska. The Hospital Board shall be responsible for the control and operation, including the appointment of a qualified medical staff, the conservation and use of hospital monies, and the formulation of administrative policy as required in AS 18.20.010.
- Section 4. The Hospital Board shall promote hospital accreditation as recommended by the Joint Commission on Accreditation of Hospitals.

ARTICLE II - Meetings

- Section 1. Meetings. The Hospital Board shall hold at least ten (10) meetings a year at South Peninsula Hospital, or such other place as may be designated.
- Section 2. Special Meetings. Special meetings may be called by the President, Vice-President, Secretary, or Treasurer, at the request of the Administrator, Chief of Staff or the majority of Board members. Members shall be notified of special meetings, the time, place, date and purpose of said meeting. Twenty-four hour notice shall be given to members except in the event of an emergency, when less time may be given.

- Section 3. Quorum. A quorum for the transaction of business at any regular, special, or emergency meeting shall consist of a majority of the members of the Hospital Board including a presiding officer, but a majority of those present shall have the power to adjourn the meeting to a future time.
- Section 4. Minutes. All proceedings of meetings shall be permanently recorded, in writing by the Secretary and distributed to the members of the Hospital Board and ex-officio members.
- Section 5. The annual meeting of the Board of South Peninsula Hospital, Inc. shall be held once a year at a time and place determined by the Board of Directors. The purpose of the annual meeting shall be appointment of members to the Board of South Peninsula Hospital, Inc., and election of officers.

ARTICLE III - Members

- Section 1. The Hospital Board shall consist of not more than nine members who are residents of the Hospital Service Area. Each term of office shall commence on January 1 in the year of appointment.
- Section 2. Appointments to the Hospital Board shall be made at the behest of the Hospital Board with a seventy-five percent (75%) affirmative vote of the entire Hospital Board. Term of office shall be three (3) years with appointments staggered so that three members' term will expire each year. Members may be reappointed by a seventy-five percent (75%) affirmative vote of the entire Hospital Board. Election shall be by secret ballot.
- Section 3. Vacancies created by a member no longer able to serve shall be filled by the procedure described in Section 2 for the unexpired term.
- Section 4. Ex-officio, non-voting members of this Hospital Board shall be the Chief of Medical Staff and the Administrator.
- Section 5. Any Hospital Board member who absents himself from two (2) consecutive regular meetings may be replaced. In the event of sickness or circumstances beyond the control of the absent member, his absence may be excused by a majority of the Hospital Board members.
- Section 6. In the event of an erring member, it shall require three-quarters (3/4) of the members consent for removal of the member from the Hospital Board.
- Section 7. No member shall commit the Hospital Board unless specifically appointed to do so by the Hospital Board, and the appointment recorded in the minutes of the meeting at which the appointment was made.
- Section 8. Hospital Board members shall serve without remuneration. Reimbursement for out-of-pocket expenses may be made only by Hospital Board approval.

ARTICLE IV - Officers

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- Section 1. The Officers of the Hospital Board shall be a President, Vice-President, Secretary, and Treasurer.
- Section 2. At the first regular meeting in the month of January each year, the officers shall be elected, all of whom shall be from among its own membership, and shall hold office for a period of one year.
- Section 3. The President shall preside at all meetings of the Hospital Board and shall be a voting member of all committees.
- Section 4. Vice-President. The Vice-President shall act as President in the absence of the President, and, when so acting, shall have all of the power and authority of the President.
- Section 5. In the absence of the President and the Vice-President, the members present shall elect a presiding officer.
- Section 6. Secretary. The Secretary shall be responsible for the minutes of the meetings and shall act as custodian of all records and reports and other duties as set forth by the Hospital Board.
- Section 7. Treasurer. The Treasurer shall have charge and custody of and be responsible to the Hospital Board for all funds, properties and securities of South Peninsula Hospital, Inc. in keeping with such directives as may be enacted by the Hospital Board. The President shall also be authorized to countersign checks in the absence of the Administrator or Treasurer.

ARTICLE V - Committees

- Section 1. The President shall appoint the number and types of committees consistent with the size and scope of activities of the hospital.
- Section 2. Committee reports, to be presented in writing by the appropriate committee, shall be made a part of the minutes of the meeting at which they are presented.

ARTICLE VI - Administrator

- Section 1. The Administrator shall be selected by the Hospital Board to serve under its direction and be responsible for carrying out its policies. The Administrator shall have charge of and be responsible for the administration of the hospital.
- Section 2. The Administrator shall supervise all business affairs such as the records of financial transactions, collection of accounts and purchases, and issuance of supplies, and to insure that all funds are collected and expended to the best possible advantage. The Administrator shall receive funds and deposit such funds in a local banking institution. Remittances will be made by check drawn upon the Administrator's signature for necessary operational expense of the hospital. All books and records of account shall be maintained within the hospital facilities. Such books and records shall be current at all times.

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- Section 3. The Administrator shall prepare an annual budget showing the expected receipts and expenditures of the hospital.
- Section 4. The Administrator shall prepare and submit a written budget report of all expenses and revenues of the hospital, preferably in advance of meetings. Other special reports shall be prepared and submitted as required by the Hospital Board. This budget report shall be included in the minutes of that meeting.
- Section 5. The Administrator shall perfect and submit to the Hospital Board for approval, a plan of organization of personnel and others concerned with the operation of the hospital.
- Section 6. The Administrator shall serve as the liaison officer and channel of communications between the Hospital Board and the medical staff.
- Section 7. The Administrator shall establish formal means of accountability upon the part of staff members and employees.
- Section 8. The Administrator shall see that all physical properties are kept in a good state of repair and operating condition.
- Section 9. The Administrator shall perform any other duty that may be necessary in the best interest of the hospital.
- Section 10. The Administrator shall be held accountable to the Hospital Board intoto and not to individual Hospital Board members.

ARTICLE VII - Medical Staff

- Section 1. The Medical Staff shall be organized under Bylaws approved by the Hospital Board in conformance with those recommended by Principles for Establishing Medical Staff Bylaws, Rules and Regulations by the Joint Commission on Accreditation of Hospitals.
- Section 2. The Medical Staff shall be responsible to the Hospital Board for the quality of all medical care provided patients in the hospital and for the ethical and professional practice of its members.

ARTICLE VIII - Authorization of Indebtedness

- Section 1. Indebtedness. It shall require seventy-five percent (75%) of the entire Hospital Board to commit funds beyond current income, cash available, and appropriations of the current budget.
- Section 2. The corporation shall have a common seal consisting of a circle; on its circumference the words, South Peninsula Hospital, Inc.; across its face the words, "corporation seal". The Secretary shall affix this seal upon all legal documents where required.

ARTICLE IX - Amendments

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- Section 1. These Bylaws may be altered, amended or repealed by the members at any regular or special meeting provided that notice of such meeting shall have contained a copy of the proposed alteration, amendment or repeal and that said proposed alteration, amendment, or repeal shall be read at two consecutive meetings prior to a vote.
- Section 2. An affirmative vote of seventy-five percent (75%) of the entire membership shall be required to ratify amendments, alterations or repeals to these Bylaws.
- Section 3. These Bylaws shall be reviewed annually for purposes of revising and updating as the need dictates.

ARTICLE X - Order of Business

- Section 1. The order and conduct of business at all meetings of the Hospital Board shall be governed by Roberts Rules of Order Revised, except when provided otherwise in these Bylaws.

Signed by order of the Hospital Board and in their presence, the

_____ day of _____, 19__.

Secretary: _____

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SOUTH PENINSULA HOSPITAL

P.O. BOX 275 • HOMER, ALASKA 99603 • [907] 235-8101

K

BYLAWS OF SOUTH PENINSULA HOSPITAL, INC.

The Articles and Sections governing special meetings and appointments to the Hospital Board are as follows:

ARTICLE II - Meetings

- Section 2. Special Meetings. Special meetings may be called by the President, Vice-President, Secretary, or Treasurer, at the request of the Administrator, Chief of Staff or the majority of Board members. Members shall be notified of special meetings, the time, place, date and purpose of said meeting. Twenty-four hour notice shall be given to members except in the event of an emergency, when less time may be given.
- Section 3. Quorum. A quorum for the transaction of business at any regular, special, or emergency meeting shall consist of a majority of the members of the Hospital Board including a presiding officer, but a majority of those present shall have the power to adjourn the meeting to a future time.

ARTICLE III - Members

- Section 2. Appointments to the Hospital Board shall be made at the behest of the Hospital Board with a seventy-five percent (75%) affirmative vote of the entire Hospital Board. Term of office shall be three (3) years with appointments staggered so that three members term will expire each year. Members may be reappointed by a seventy-five (75%) affirmative vote of the entire Hospital Board.
- Section 3. Vacancies created by a member no longer able to serve shall be filled by the procedure described in Section 2 for the unexpired term.

State of Alaska



Department of Commerce and Economic Development

Certificate

The undersigned, as Commissioner of Commerce and Economic Development of the State of Alaska, hereby certifies that duplicate originals of Articles of Amendment to the Articles of Incorporation of HOMER HOSPITALS, INC.

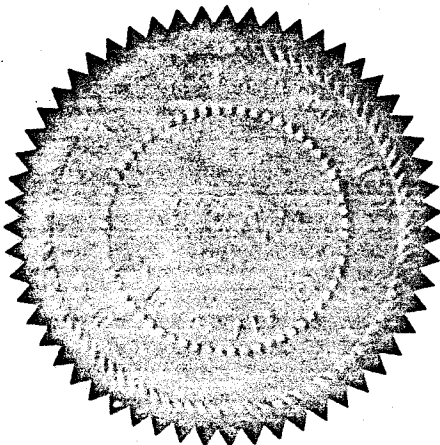
duly signed and verified pursuant to the provisions of the Alaska Non-Profit Corporation Act, have been received in this office and are found to conform to law.

ACCORDINGLY the undersigned, as Commissioner of Commerce and Economic Development, and by virtue of the authority vested in him by law, hereby issues this Certificate of Amendment to the Articles of Incorporation of

HOMER HOSPITALS, INC.

and attaches hereto a duplicate original of the Articles of Amendment changing the corporate name to

SOUTH PENINSULA HOSPITALS, INC.



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal, at Juneau, the Capital, this

25th day of July A.D. 19 77

A handwritten signature in cursive script, appearing to read "H. Phillip Hubbard".

H. PHILLIP HUBBARD
COMMISSIONER OF COMMERCE
AND ECONOMIC DEVELOPMENT

83

JUL 25 1977

DEPARTMENT OF COMMERCE
& ECONOMIC DEVELOPMENT

ARTICLES OF AMENDMENT
FOR
HOMER HOSPITALS, INC.

I.

The present name of the corporation is
HOMER HOSPITALS, INC.

II.

The amendments of the Articles of Incorporation
of HOMER HOSPITAL, INC., are as follows:

ARTICLE I

NAME

The name of this non-profit corporation is
SOUTH PENINSULA HOSPITALS, INC.,

III.

The adoption date of the amendments to the Articles
of Incorporation by the directors is April 19,
1977.

IV.

The corporation has no shares outstanding or
entitled to vote since it is a non-profit corporation.

V.

All directors of the corporation voted for the
above amendments of April 19, 1977.

L

VI.

The amendments do not provide for exchange, re-classification, cancellation of issued shares nor of the manner in which the exchange, reclassification, cancellation of issued shares is carried out.

VII.

The amendments do not effect stated capital.

DATED this 20 day of July, 1977, at
Homer, Alaska.

C. Michael Hough
President

James Clute
Secretary

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

On July 20, 1977, before me, the undersigned, a Notary Public in and for said State, personally appeared C. Michael Hough, known to me to be the President of the corporation that executed the within instrument, and known to me to be the person who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same pursuant to its by-laws and by authority of its board of directors.

Walter E. Seabell
Notary Public for Alaska
My Commission expires: 10/28/80

L

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

On July 20, 1977, before me, the undersigned, a Notary Public in and for said State, personally appeared Julie Clutts, known to me to be the Secretary of the corporation that executed the within instrument, and known to me to be the person who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same pursuant to its by-laws and by authority of its board of directors.

Judith E. Isabella
Notary Public for Alaska
My Commission expires: 10/28/80

M

NEW ISSUE

#RATING: MOODY'S: Baa -1

In the opinion of Wohlforth & Flint, Bond Counsel, interest on the Bonds is exempt from federal income taxes under existing laws, rules, regulations and interpretations.

KENAI PENINSULA BOROUGH ALASKA

\$3,150,000

General Obligation South Kenai Peninsula Hospital Service Area Bonds, 1982 Series A

Dated: November 1, 1982

Due: July 1, as shown below

Principal (commencing July 1, 1984) and semi-annual interest on the Bonds (commencing July 1, 1983 and due each January 1 and July 1 thereafter) are payable at the principal offices of Rainier National Bank, Seattle, Washington or Chemical Bank, New York, New York, at the option of the holder. The Bonds are issuable in the form of coupon Bonds in the denomination of \$5,000 registrable as to principal only.

The Bonds are not subject to redemption prior to their maturity.

// The Bonds are general obligations of the South Kenai Peninsula Hospital Service Area (the "Hospital Service Area"), and the full faith and credit of the Hospital Service Area are pledged to the payment of the principal of and interest on the Bonds. The Kenai Peninsula Borough (the "Borough") is legally obligated to levy and collect taxes upon all taxable property within the Hospital Service Area, without limitation as to rate or amount in amounts sufficient, together with other available funds therefor, to pay the principal of and interest on the Bonds as the same become due and payable. The Bonds are not an obligation or a charge against the assets or credit of the State of Alaska or the Borough, other than of the Hospital Service Area. See "THE BONDS — Security" and "THE HOSPITAL SERVICE AREA" herein.

\$3,150,000 Bonds

<u>Maturity</u>	<u>Principal</u>	<u>Yield</u>	<u>Coupon</u>	<u>Maturity</u>	<u>Principal</u>	<u>Yield</u>	<u>Coupon</u>
1984	\$150,000	8.50%	12.00%	1990	\$300,000	10.20%	10.20%
1985	200,000	9.00	12.00	1991	325,000	10.40	10.40
1986	200,000	9.25	12.00	1992	375,000	10.60	10.60
1987	225,000	9.50	12.00	1993	400,000	10.80	10.80
1988	250,000	9.75	12.00	1994	450,000	11.00	11.00
1989	275,000	10.00	11.75				

Plus accrued interest from November 1, 1982

The Bonds are offered for sale when, as and if issued and received by the Underwriters, subject to prior sale, to withdrawal or modification of the offer without notice, and to the unqualified legal opinion of Wohlforth & Flint, Anchorage, Alaska, Bond Counsel. Certain legal matters will be passed upon for the Underwriters by their counsel, Mudge Rose Guthrie & Alexander. It is expected the Bonds will be available for delivery in Denver, Colorado, on or about November 23, 1982.

Boettcher & Company

November 16, 1982

= See the caption "Rating" herein.

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THIRD JUDICIAL DISTRICT AT KENAI

LAURENCE A. MARSHBURN, M.D.,)
 et al.,)
 Plaintiffs,)
 vs.)
 THE KENAI PENINSULA BOROUGH)
 ASSEMBLY, a public body, et al.,)
 _____)

3HO 81-179 Civil

DECISION AND ORDER
 ON PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT

STATEMENT OF THE CASE

Plaintiff's have filed this suit seeking a judgment declaring that Kenai Peninsula Borough Ordinance 81-71 (hereinafter referred to as the "ordinance" or "KPB ordinance") is contrary to law and a judgment enjoining its enforcement by defendants. The motion before the court is one for summary judgment wherein plaintiffs assert that there is no genuine issue of material fact to be decided and that based upon the uncontested facts in the record they are entitled to a judgment in their favor. Defendants agree that the issues are ripe for summary judgment, but disagree that plaintiffs are entitled to judgment and assert that the ordinance is in all respects valid.

The motion is supported by deposition testimony as well as by affidavits submitted by each party. Oral argument was held in Homer, Alaska on October 31, 1983. The record was left open until November 10, 1983, on which date this motion became ripe for decision.

STATEMENT OF FACTS

Ordinance 81-71 was adopted by the Kenai Peninsula Borough (hereinafter referred to as the "Borough") Assembly on July 21, 1981. A copy of the ordinance is appended hereto as Appendix "A". In summary the ordinance provides as follows:

1. Except in case of a medical emergency, no abortion may be performed in certain facilities owned, constructed or maintained through Borough funds unless a physician or registered nurse has presented to the patient and the patient has executed an "Explanation and Informed Consent to Abortion". The form is prescribed by the Borough Assembly, a copy of which is appended as Appendix "B". The document must contain the patient's signature indicating that she has received and read the form before the abortion.

2. The abortion may not be performed within four (4) hours after the patient's receipt of the Explanation and Informed Consent.

3. With respect to the abortion, reasonable efforts must be made to notify the parents of patients under the age of 17.

4. Each physician shall maintain copies of the Explanation and Informed Consent to Abortion for a period of seven (7) years. The forms are confidential and may be released only upon the patient's consent or court order.

The Explanation and Informed Consent to Abortion is summarized as follows:

1. There is provision for stating the name, age, and address of the patient and the name and address of the physician.

2. The date, time and place of the form's delivery and "full explanation" is stated by the patient.

3. The following inquiries are to be answered by "yes" or "no":

a. Confirmation of pregnancy;

b. Whether the physician has expressed an opinion over the duration of pregnancy and whether the fetus is viable;

c. Whether the patient has requested information about fetal development;

d. Whether the physician has given information concerning specific matters of fetal physical development involving weight, length, heartbeat, skeletal development, reflexes, movement and sensitivity, brainwave patterns, and likelihood the fetus will survive the abortion;

e. Whether the physician has discussed the possibility of specific complications from the abortion such as hemorrhaging, uterine perforation, infection, danger of premature birth, and tubal pregnancies, sterility and mental depression;

f. Whether the physician has discussed availability of alternatives to abortion involving free and confidential counseling after which the patient may still decide to have the abortion, adoption, financial aid, medical assistance, foster homes, and advice on how to receive the assistance;

g. Whether the physician has explained the provision for the four (4) hour waiting period.

4. The patient's specific consent to an identified abortion procedure.

5. Confirmation by the patient that the information on the form was fully explained and that the patient possessed the form four (4) hours after explanation.

6. Signature of the patient and two (2) witnesses.

7. Description of the abortion method to be used.

8. Statement by the physician that the patient was counselled on the information contained on the form and that the form was delivered not less than four (4) hours prior to the informed consent and that, in the case of a patient 17 years or younger, an attempt was made to notify her parents or guardian.

Within the Kenai Peninsula Borough there are two hospital service areas, the South Kenai Peninsula Service Area and the Central Kenai Peninsula Service Area. The creation of each service area was approved by the electorate at an election held

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April 8, 1979. The issue before the voters was whether the proposed service areas should "construct, maintain and operate a hospital or hospitals in the manner provided in A.S. 29.10.159 for first class cities."

Both the South Peninsula Hospital Service Area (hereinafter "SPHSA") and the Central Peninsula Hospital Service Area (hereinafter "CPHSA") are governed by nine (9) member boards either nominated by the borough mayor and confirmed by the assembly in the case of CPHSA, Borough Code 16.08.020, or elected by qualified voters of the service area in the case of the SPHSA, Borough Code 16.24.020. The CPHSA board shall advise the mayor and assembly concerning the administration and operation of the service area, Borough Code 16.08.040. The SPHSA board shall have the power to provide for hospital services within the service area and for the administration and operation of the service area, Borough Code 16.24.080.

The hospital maintained within the CPHSA is operated and managed by the Lutheran Hospitals and Homes Society of America pursuant to a lease agreement and operating contract dated April 1, 1970. ^{1/} The service area board is to assist the Lutheran Hospitals and Homes Society in carrying out its services as related to the CPHSA, Borough Resolution 71-20R.

^{1/} Among other provisions that agreement provides:

"The Borough agrees that it will assist the society in determining and deciding all materials of policy pertaining to public relations and relationship of hospital to the community which it serves thru the assembly and CPHSA advisory board. It is understood, however, that the society is in charge of the operation and maintenance of the hospital and has the full responsibility for its operation in accordance with the terms of this agreement and such policies as are mutually agreed upon. The society, or its representatives, will attend the meetings of the service area advisory board and will keep the board informed in regard to the function and programs of the hospital as they effect the total service to the citizens of the community."

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A similar agreement was entered into between the Borough and Homer Hospitals, Inc., with regard to the operation of the hospital within the CPHSA, sublease and operating agreement dated June 16, 1970.

Relevant to the legal issues subsequently to be discussed are certain facts pertaining to the State Medical Board, A.S. 08.64.010-160. The board has power to adopt regulations pertaining to abortion, A.S.08.64.105. Incident to that authority the Board adopted regulations contained at 12AAC 40.060-140. These regulations predated the ordinance here under attack. Lastly, the board in response to the subject ordinance promulgated an order that no physician nor other person shall require a patient to execute the form prescribed by the ordinance prior to the performance of an abortion. Other facts not specifically set out above will be referred to as necessary throughout this decision and such reference will be incorporated herein as findings of fact by the court.

CAVEAT

The observations of Justice Blackmun in Roe v. Wade, 410 U.S. 113, 116-117, 35 L.Ed.2d 147, 156, 157 (1973) are no less applicable to this case. It is appropriate to refer to those observations in order that the court's function may be placed in its proper perspective. Justice Blackmun stated:

"We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes towards life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking in conclusions about abortion.

In addition, population growth, pollution, poverty and racial overtones tend to complicate and not to simplify the problem.

Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and predilection. We seek earnestly to do this,..."

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The only additional comment made necessary by this suit is to make clear that the court is to resolve the issues presented not only with reference to the United States Constitution as interpreted by the United States Supreme Court, but also with respect to the Alaska Constitution and Statutes as interpreted by the Alaska Supreme Court. In resolving these issues, the court is not adopting, rejecting, approving or disapproving the strong ethical and moral convictions involved in any consideration of abortion. This the court cannot and should not do. To the best of its ability, the court is deciding this case solely on the basis of the applicable legal principles.

IDENTIFICATION OF ISSUES

Plaintiff's arguments fall into two broad categories, each involving substantially separate bodies of law. An outline of the issues raised by plaintiffs follows:

- A. The Ordinance Violates Plaintiff's State and Federal Due Process and Privacy Rights.
- B. Legislative Power of the Borough.
 1. A second class borough has no power to regulate the practice of medicine;
 2. The state has preempted the area of abortion regulation;
 - a. The state has occupied the field of government regulation of abortion;
 - b. The borough regulations are inconsistent with state regulations in the area of abortion.
 3. The ordinance is an assumption of power by the borough assembly which can be exercised only by the respective service area boards.

Each issue will be more specifically discussed in the following portions of this decision.

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DISCUSSION

Plaintiffs have mounted a two-pronged attack on the ordinance. The first prong raises issues based on the application of federal and state constitutional law. Since cases of this nature have been the subject of widespread litigation in the federal courts, the applicable legal principles are relatively clear. The second prong raises issues based on the application of Alaska constitutional and statutory law of local government. These issues are generally ones of first impression and involve the relationship between the state, borough and borough service areas. Although this court will rule on all of plaintiffs' arguments, the initial discussion will focus on the more well trodden path of federal and state constitutional law. Discussion of the less traveled road of preemption and municipal law will then follow.

A. Is the Ordinance Valid Under the Due Process and Right to Privacy Provisions of the United States and Alaska Constitutions?

1. Established Case Law.

Plaintiffs assert that the ordinance is an invasion of a patient's right of privacy under both the United States and the Alaska Constitutions. In support of their argument, plaintiffs rely on principles established in Roe v. Wade, 410 U.S. 113, 35 L.Ed.2d 147 (1973), City of Akron v. Akron Center for Reproductive Health, Inc., 51 U.S. Law Week, 4767 (1983), and their progeny or predecessors as the case may be. Additionally, plaintiffs claim the ordinance to be invalid under Article I, Sections 7 and 11 (Due Process), and Section 22 (Right of Privacy) of the Alaska Constitution. Defendants distinguish this ordinance from that involved in Akron and further argue that since the ordinance by its terms only governs abortions in facilities constructed or maintained by public funds, the ordinance is valid under the

rationale of Poelker v. Doe, 432 U.S. 519, 53 L.Ed.2d 528 (1977),
Maher v. Roe, 432 U.S. 464 53 L.Ed.2d 484 (1977), and Harris v. McRae,
448 U.S. 297, 65 L.Ed.2d 784 (1980).

The logical starting point for our analysis of the ordinance's constitutionality is Roe v. Wade, supra. The court in that case held as unconstitutional a Texas statute making it a crime to procure an abortion. ^{2/} The court established the following principles which must apply to this court's consideration of the ordinance:

1. The patient has a constitutional right of privacy.

The court said:

"This right of privacy, whether it be founded in the 14th Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or as the District Court determined, in the 9th Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." (410 U.S. 113, 153).

2. The right to privacy is a fundamental right and any limitation thereon may be justified only by compelling state interest, 410 U.S. 113, 115.

3. There are state interests to be considered. The court said:

"...A state may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute." (410 U.S. 113, 154).

^{2/} In the context of its opinion, the court set out in detail the manner in which laws pertaining to abortion have developed, Roe v. Wade, supra, at 410 U.S. 129-147.

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4. The point of compelling state interest is approximately at the end of the first trimester. The court said:

"With respect to the state's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge is approximately at the end of the first trimester....It follows that from and after this point, a state may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health...

This means, on the other hand, for the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the state, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the state." (410 U.S. 113, 163).

On the same day it decided Roe v. Wade, supra, the Supreme Court decided Doe v. Bolton, 410 U.S. 179, 35 L.Ed.2d 201 (1973). The court held as unconstitutional a Georgia criminal abortion statute which, inter alia required that an abortion be performed only in certain accredited hospitals, that the abortion decision be reviewed by a hospital committee and be concurred in by two other physicians. In deciding these issues, the court in Bolton established a fifth principle with respect to state abortion regulations which can be summarized as follows:

5. Abortion regulation may not unduly infringe on the physician's right to practice. The court said:

"The statute's emphasis, as has been repetitively noted, is on the attending physician's 'best clinical judgment that an abortion is necessary.' That should be sufficient. The reasons for the presence of the confirmation step in the statute are perhaps apparent, but they are insufficient to withstand constitutional challenge. Again, no other voluntary medical or surgical procedure for which Georgia requires confirmation by two other physicians has been cited to us. If a physician is licensed by the State, he is recognized by the State as capable of exercising acceptable clinical judgment. If he fails in this, professional censure and deprivation of his license are available remedies. Required acquiescence by co-practitioners has no rational connection with a patient's needs and unduly infringes on the physician's right to practice." (410 U.S. 179, 199).

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Nevertheless, a statute requiring the patient's informed consent given before an abortion during the first twelve weeks of pregnancy is constitutionally permissible, Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 49 L.Ed.2d 788 (1976). The court said:

"It is true that Doe and Roe clearly established that the State may not restrict a decision of the patient and her physician regarding abortion during the first stage of pregnancy. Despite the fact that apparently no other Missouri Statute [with certain exceptions] requires a patient's prior written consent to a surgical procedure, the imposition...of such a requirement for termination of pregnancy even during the first stage, in our view, is not in itself an unconstitutional requirement." (428 U.S. 52, 66-67).

In a footnote to its opinion in Danforth, the court contemplated the meaning of "informed consent". The court said:

"One might well wonder, off hand, just what 'informed consent' of a patient is. The three Missouri federal judges who composed the three judge District Court, however, were not concerned, and we are content to accept, as the meaning, the giving of information to the patient as to just what would be done and as to its consequences. To ascribe more meaning than this might well confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession." (428 U.S. 52, 67 fn. 8).

One additional Supreme Court Decision, City of Akron v. Akron Center for Reproductive Health, Inc., et al, supra, hereinafter cited as Akron requires consideration before specific analysis of the Kenai Pensinsula Borough Ordinance. Plaintiffs in Akron attacked the validity of an ordinance of the City of Akron, Ohio, which required with respect to all abortion operations:

1. That the operation be performed in a hospital after the first trimester;
2. That parental consent be obtained from the parents of an unmarried minor under 15 years of age unless a court order is obtained;
3. That the physician inform the patient of the state of her pregnancy, the development of the fetus, the day of possible

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viability, possible physical and emotional complications, and information as to alternatives to abortion;

4. That the abortion be delayed for 24 hours following the patient's execution of the consent form.

The United States Supreme Court held that the ordinance was unconstitutional.

As a preface to its decision, the court reaffirmed certain principles established in the line of cases beginning with Roe v. Wade, supra. Specifically, the court reaffirmed the principle that "a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy." Further, the court reaffirmed the application of the "compelling interest" test instead of the less strict "rational basis" test for purposes of measuring the permissibility of state regulation, Akron, supra, at 4768 fn. 2.

The court considered in detail three provisions of the Akron ordinance which touch upon areas similar to those contained within the Borough Ordinance. First, as to the parental consent and notification provisions, the court reviewed its prior decisions on the issue. ^{3/} The court outlined the following general principles applicable to parental notification and consent:

1. A blanket provision requiring parental consent as a condition for the performance of an abortion of an unmarried minor is impermissible, Planned Parenthood v. Danforth, supra, at 428 U.S. 74.

^{3/} The procedural history of the consent and notification requirements in Akron are somewhat complex. The ordinance had two provisions. First, before the abortion either 24 hours actual notice or 72 hours constructive notice must be given to a parent or guardian of a minor under 18 years of age, unless the court ordered the abortion. That portion of the requirement was upheld by the Court of Appeals, 651 F.2d at 1206, and not appealed. A second subsection of the notification provision required that the written consent of a parent or a guardian of a minor under 15 years of age be obtained unless a court orders performance of the abortion. That provision was ruled unconstitutional by the District Court and Court of Appeals whose decisions were challenged in the U.S. Supreme Court.

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2. A procedure must be afforded to bypass parental consent or notification. The court stated:

"[T]he state must provide an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests." Akron, supra, 4773.

3. A requirement for parental notification in all cases is unconstitutional. The court said:

"...the statute ^{4/} makes no provision for a mature or emancipated minor completely to avoid hostile parental involvement by demonstrating to the satisfaction of the court that she is capable of exercising her constitutional right to choose an abortion. On the contrary, the statute requires that the minor's parents be notified once a petition has been filed, [Ohio Rev. Code Ann.] Section 2151.28, a requirement that in the case of a minor seeking an abortion would be unconstitutional." ^{5/} Akron, supra, 4774, fn. 31.

Second, in holding the informed written consent provision of the ordinance unconstitutional, the court concluded:

1. Citing Danforth, Bellotti v. Baird 443 U.S. 622 (1979), and Colautti v. Franklin, 439 U.S. 379 (1979) as supporting the permissibility an "informed consent" requirement, the court said:

"This does not mean, however, that a state has unreviewable authority to decide what information a woman must be given before she chooses to have an abortion. It remains principally the responsibility of the physician to insure that appropriate information is conveyed to his patient, depending on her particular circumstances." (Akron, supra, 4774).

^{4/} Here the court is referring to a state statute not the Akron ordinance. The statute is within that portion of the Ohio Rev. Code Ann. dealing with juvenile court jurisdiction.

^{5/} In support of its conclusion, the court cited H.L. v. Matheson, 450 U.S. 398 420 (1981). In Matheson, the court upheld a Utah statute requiring parental notification of an abortion to be performed on an unmarried minor on the ground that the trial court found that the minor plaintiff was "unmarried, 15 years of age, resides at home, and is dependent on her parents." The court concluded that the finding afforded an insufficient basis for finding the minor was mature or emancipated, 450 U.S. 398, 396.

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2. The court concluded that the ordinance was too restrictive as to the details of the informed consent. The court said:

"By insisting upon recitation of a lengthy and inflexible list of information, Akron unreasonably has placed obstacles in the path of the doctor upon whom [the woman is] entitled to rely for advice in connection with her decision." (Akron, supra, at 4775.)

By way of example, the court noted:

a. The ordinance's requirement that the physiological characteristics of the unborn child be described is too speculative, Akron, supra, at 4774; 5a/

b. The ordinance's requirement that certain potential complications be explained is "a parade of horrors" intended to suggest that abortion is a particularly dangerous procedure, Akron, supra, at 4775.

c. That "...much of the information required is designed not to inform the woman's consent, but rather to persuade her to withhold it all together." Akron, supra, at 4774.

Lastly, the court considered the 24 hour waiting period requirement and found it unconstitutional, stating:

"There is no evidence suggesting the abortion procedure will be performed more safely, nor are we convinced that the state's legitimate concern that the woman's decision be informed is reasonably served by requiring a 24 hour delay as a matter of course...But, if the woman after appropriate counselling, is prepared to give her written informed consent and proceed with the abortion, a state may not demand that she delay the effectuation of the decision." (Akron, supra, at 4776).

2. Kenai Peninsula Borough Ordinance 81-71.

5a/ The supreme Court was relying on the record in the District Court, Akron, fn. 34 at p. 3774. The record herein leaves no doubt as to the certainty of the gross physical characteristics of the first trimester fetus, namely weight, length and sex, Def. Ex. C1-C3. However, there is no evidence in the record of this case showing that during the first trimester the precise fetal physical characteristics addressed by the form may be ascertained. The affidavit of Carolyn V. Brown, M.D. is in line with the Supreme Court's conclusion, fn. 7 supra, at p. 15. Accordingly, this court is bound by that conclusion.

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Ordinance 81-71, for purposes of constitutional analysis, in this case must be broken into three areas of concern: (1) the informed consent requirement; (2) parental notification requirement; and, (3) 4 hour waiting period requirement. Each will be considered in order.

a. Informed Consent.

In pertinent part the ordinance reads:

"No abortion may be performed...unless a physician or registered nurse has first presented to the patient, and the patient has executed, a copy of Explanation and Informed Consent to Abortion. The Explanation and Informed Consent to Abortion shall be in the form prescribed by the assembly. ^{6/}

The ordinance requires further that the patient sign the consent form indicating that she has read it before the abortion. In addition, section 2 of the ordinance reads:

"That the form entitled Explanation and Informed Consent to Abortion attached to this ordinance as Attachment "A" is adopted for use as provided in Chapter 10.12."

The content of the consent form has been summarized supra at p. 2-3.

The Borough argues that its ordinance may be distinguished from that before the court in Akron in that the information set out on the form need only be given by the physician if the patient requests it. Therefore, any requirement that the specific information be given originates in the patient rather than the Borough. Plaintiffs argue that the distinction is meaningless since the questions are mandatory and alert the patient to the possibility that there may be information characterized by the court in Akron as being too speculative or as constituting a "parade of horrors".

The court concludes that the form which is an integral part of the ordinance is impermissible under Akron and its predecessors referred to in the preceding discussion of U.S. Supreme Court

^{6/} We have omitted language limiting the ordinance by its terms to certain public facilities. The effect of that language will be discussed infra at page 18.

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decisions. The responsibility to suggest to the patient particular areas of medical concern must lie with the physician and not the state. Section 10.12.010 and its appended form of consent unduly infringe on the physician's right to practice, see Akron, supra, Doe v. Bolton, supra. ^{7/} Additionally, the form by suggesting to the patient areas of inquiry almost identical to those disapproved by the court in Akron must be construed as achieving the result found unacceptable to that court, namely a design "...not to inform the woman's consent, but rather to persuade her to withhold it all together," Akron, supra, at 4774. This is in direct conflict with the patient's right to privacy as to her decision, Doe v. Wade, supra. ^{8/}

For the above stated reasons Section 10.12.010 is contrary to the law established in Doe v. Wade, supra, and its progeny including Akron, supra.

b. Parental Notification.

In pertinent part the ordinance reads:

"With respect to each abortion performed in a covered facility, the attending physician shall certify on a form prescribed by the assembly that with regard to any patient under the age of 17 years, reasonable efforts were made to notify parents or guardians prior to performing the abortion, provided that, such efforts shall not require delay of the abortion beyond the 4 hour waiting period provided above."

^{7/} See the affidavit of Carolyn V. Brown, M.D., stating in part that the fetal information sought to be given was speculative (§10) and that the form's provision as to complications are inappropriate from a physician's standpoint (§11).

^{8/} A strict reading of the consent form suggests that, by its terms, the giving of information it describes is not left to the patient's decision. e.g. the patient must certify:

"I certify that the information printed on this form was fully explained to me by my physician."

The physician must certify that:

"...the above patient was counselled with regard to information printed on the form."

The language could lead a reasonable person to believe that all information must have been explained whether or not checked "yes" or "no".

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The Borough argues that a careful analysis of the U.S. Supreme Court's decisions fails to disclose any decision holding that a blanket requirement for parental notification as opposed to parental consent is impermissible. Plaintiffs tend to agree but reason that if the court's statement at fn. 31 in Akron is considered along with the specific holding and facts of H.L. v. Matheson, supra, the conclusion must be that the parental notification provision of the Borough ordinance is unconstitutional.

In Akron the court was deciding only the constitutionality of the parental consent provision, see fn. 3 supra, at 11. Therefore, the court's statements at footnote 31 were unnecessary to its decision and accordingly dicta. Thus, this court's decision on the issue must necessarily be a forecast of expected U.S. Supreme Court response to a provision of the type here involved.

The focus of the Supreme Court in all abortion decisions is on the patient's rights of privacy, and consequently any interference with that right must be based on "compelling" state interest. The question thus posed by the notification provision is whether as to all minors under the age of 17 there is a compelling state interest which justifies state intrusion into the minor's rights of privacy. ^{9/}

With respect to those minors who are emancipated or who are of sufficient maturity to reach the decision independent of influences other than those of the physician, the Borough has shown no compelling state interest for interference with such a minor's rights of privacy. Absent some method whereby there may be an adjudication of the minor's maturity or emancipation, the ordinance is overbroad. The state does have a legitimate interest in protecting immature minors and promotion of family integrity.

^{9/} Minors are not deprived of applicable constitutional rights because of their status as minors, In Re Gault, 387 U.S. 1, 18 L.Ed.2d 527 (1966).

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Hence, parental notification is proper in the case of unemancipated and immature minors, H.D. v. Matheson, supra, Akron, supra, at 4774 fn. 32. ^{10/} Since Section 10.12.030 is not limited to such cases, it represents an improper infringement on the rights of privacy of unemancipated and mature minors, Roe v. Wade, supra, H.L. v. Matheson, supra, Akron, supra. ^{11/}

3. The 4 Hour Waiting Period.

In pertinent part, Ordinance 81-71 provides:

"No abortion may be performed in a covered facility within 4 hours after the patient has received the attached Explanation and Informed Consent to Abortion, and the counselling and information called for therein."

The Borough argues that although the court in Akron struck down a 24 hour waiting period, a reasonable waiting period of four hours is permitted. Plaintiffs argue that any requirement for a waiting period, however slight, is impermissible.

As in all other regulations affecting the abortion decision a waiting period must be supported by a compelling state interest, Akron, supra. No compelling state interest has been shown in support of the 4 hour waiting period in this case; particularly in light of the Supreme Court's statement in Akron that once the woman has given her informed consent after appropriate counselling,

"...the state may not demand that she delay the effectuation of that decision." Akron, supra at 476.

Accordingly, based on the rationale expressed above the requirement that the patient delay the abortion operation for 4

^{10/} The court is not oblivious to problems posed in establishing a timely method for adjudicating questions of a minor's maturity and emancipation consistent with the medical exigencies involved. The court is not suggesting the form such a "judicial bypass" might take. However, until such a procedure is established the notification provision must fall in its entirety.

^{11/} Affidavits in support of each parties' position, e.g. Dr. Henry David for plaintiffs and Dr. Vincent M. Rue for defendants deal with the issue of parental notification of minors under 17 years of age and the psychological benefits or detriments experienced by such persons incident to abortion procedures. The disagreement of the affiants, including experts, supports a need for a judicial bypass procedure.

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hours after the giving of her informed consent is violative of her right of privacy, Roe v. Wade, supra, Akron, supra. ^{12/}

C. PUBLIC FUNDING.

Ordinance 81-71 applies only to abortions:

"...performed in a hospital, clinic, out-patient, office building, emergency or other health care facility constructed, owned, renovated, or maintained through the use of Borough funds or Borough service area tax revenues..." (Kenai Peninsula Code 10.12.010).

The Borough argues that this public funding or public facilities provision removes this ordinance from the restrictions on state regulation heretofore discussed. Specifically, the Borough relies on a line of U.S. Supreme Court decisions involving publicly funded facilities. There are three leading cases.

In Mayer v. Roe, 432 U.S. 464, 53 L.Ed.2d 484 (1977), plaintiffs challenged a Connecticut welfare regulation which limited expenditure of public funds only for those abortions which were certified as medically necessary. In Harris v. McRae, 448 U.S. 297, 65 L.E.D.2d 784 (1980), plaintiff attacked certain federal legislation limiting the expenditure of Medicaid funds to certain types of medically necessary abortions. In each case the U.S. Supreme Court found the legislation to be permissible. The rationale of the decisions was expressed in Mayer as follows:

"The Connecticut regulation before us is different in kind from the laws invalidated in our previous abortion decisions. The Connecticut regulation places no obstacles --absolute or otherwise--in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a result of Connecticut's

^{12/} Although the foregoing discussion has been with reference to the U.S. Constitution as interpreted by the U.S. Supreme Court, the same rationale applies also to all provisions of ordinance 81-71 discussed above in light of Article I, Section 22 of the Alaska Constitution which specifically recognizes a right of privacy. See, Falcon v. Alaska Public Offices Commission, 570 P.2d 469 (1977). Indeed the state right to privacy is broader than the federal right, Woods & Ronde, Inc. v. State Department of Labor, 565 P.2d 138 (1977), and State v. Glass, 583 P.2d 872 (1978).

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decision to fund child birth;...The indigency that may make it difficult--and in some case, perhaps impossible--for some women to have abortions is neither created nor in any way affected by the Connecticut regulation."
(432 U.S. at p 474).

The court specifically noted that its decision was not a retreat from the rationale of Roe v. Wade, supra, see also Harris v. McRae, supra, at 448 U.S. 314-315.

In Poelker v. Doe, 432 U.S. 519 53 L.Ed.2d 528 (1977), plaintiff, an indigent woman, challenged a policy determination by the mayor of the city of Saint Louis which prohibited the performance of abortion in a city hospital except where there is a threat of medical emergency. In holding that there was no constitutional violation, the Supreme Court treated the issue as identical in principle with that presented in Harris v. McRae, supra, and Mayer v. Roe, supra. The court said:

"...[We] find no constitutional violation by the city of St. Louis in electing, as a policy choice, to provide publicly financed hospital services for child birth without providing corresponding services for nontherapeutic abortions." (432 U.S. p 521).

In Poelker, the majority opinion implies, and the dissent makes clear, that what was at issue, at least in the court's opinion, was whether the city would provide physicians and medical facilities to indigent women, one of whom was plaintiff.

A similar question was before the 8th Circuit in Nyberg v. City of Virginia, 667 F.2d 754 (8th Cir. 1982), cert. den., 77 L.ed.2d 1358 (1983). There the court held the city could not prohibit staff physicians from performing abortions for paying patients at the only hospital in the city. The court in Nyberg noted that the city of Virginia was not required to hire doctors and provide free medical service by way of a subsidy to abortions. The court said:

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"There is a fundamental difference between providing direct funding to effect the abortion decision and allowing staff physician to perform abortions at an existing publicly owned hospital. While it is true public money may have been used to build a hospital, that capital expenditure was to provide facilities for a large number of operations of which first trimester abortions was but one. The decision that a city must allow staff physicians to perform abortions at the sole community hospital is far removed from those decisions which do not require direct public expenditure to facilitate abortions."

A close reading of Maheer, Harris and Poelker must lead to the conclusion that the state and its subdivisions can decline to provide public funding for the performance of abortions. However, the state has no authority to deny the use of its facilities, particularly where the facility is the sole available one, for performance of abortions for paying patients using privately funded physicians, e.g. Nyberg v. City of Virginia, supra. Thus, the Borough's rationale must fall. The scope of abortion regulation permissible to the Borough is not enlarged because of the public nature of the facilities involved. The ordinance here in question has nothing to do with the issue of expenditure of public funds for the performance of abortions upon indigents.

It must follow, based on the foregoing analysis, that Ordinance 81-71 is in violation of Amendment XIV of the Amendments to the United States Constitution and in violation of Article I, Section 22 of the Alaska Constitution.

B. Does the Kenai Peninsula Borough Possess Authority to Enact Ordinance 81-71?

1. State Preemption.

Plaintiffs raise a two-fold argument germane to the state preemption issue. First, they argue that the state has occupied the field of regulation of medical practice or if it has

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not, then secondly they argue that the Borough Ordinance is inconsistent with existing state regulation. Defendants counter both arguments by asserting that state law is not so extensive as to indicate its preemption of the field and that there is no facial conflict between any state regulation and the Borough Ordinance.

The Alaska Supreme Court has been reluctant in cases such as this to apply the doctrine of state preemption or to conclude that there is state occupation of the field of regulation, e.g. Chugach Electric Assoc. v. City of Anchorage, 476 P.2d 115 (Alaska 1970), City of Kenai v. Kenai Peninsula Newspapers, 642 P.2d 1316 (Alaska 1982). In Liberati v. Bristol Bay Borough, 584 P.2d 1115, 1122 (Alaska 1978), the court indicated that preemption exists,

"...in the absence of an expressed legislative direction or a direct conflict with a statute, only where an ordinance substantially interferes with the effective functioning of a state statute or regulation or its underlying purpose."

The type of interference necessary was explained in that case by reference to Ray v. Atlantic Richfield Co., 435 U.S. 151, 55 L.Ed.2d 179, 188-189 (1978), which the Alaska Supreme Court quoted with approval as follows:

"[a] conflict will be found 'where compliance with both federal and state regulations is a physical impossibility...', or where state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"

The State Medical Board pursuant to statute, A.S. 08.64.105, A.S. 18.16.010, has adopted regulations establishing the procedure in setting standards for facilities, equipment and patient care in the performance of an abortion, 12 AAC 40.060-140.

The question which goes to the heart of the preemption issue (as opposed to the issue of conflict, if no preemption) is

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whether the borough ordinance interferes with or is an obstacle to the underlying purpose of the state regulation. Any analysis of the question must begin by deciding what exactly is being regulated by the ordinance. The U.S. Supreme Court, throughout all of the decisions discussed in part [A], has left no doubt that it considers abortion to be a medical procedure, the carrying out of which is, with the exceptions noted in part [A], left to the privacy of the patient and to the best medical judgment of the physician, cf. Akron, supra, at 2491, Doe v. Bolton, supra, at 409 U.S. 192. Consequently, the ordinance regulates medical practice and procedure. The question which logically follows is whether such regulation has been left exclusively to the State Medical Board.

A.S. 18.16.010 reads in part:

"(a) No abortion may be performed in this state unless (1) the abortion is performed by a physician or surgeon licensed by the State Medical Board under A.S. 08.64.200;...; (3) consent has been received from the parent or guardian of ^{an} 13/unmarried woman less than 18 years of age;..."

A.S. 08.64.100 is a general grant of power to the medical board to adopt regulations necessary to carry out the provisions of A.S. 08.64. In addition, A.S. 08.64.105 is a specific grant of authority as to abortion:

"The State Medical Board shall adopt regulations necessary to carry into effect the provisions of A.S. 18.16.010 and shall define ethical, unprofessional or dishonorable conduct as related to abortions, set standards for professional competency in the performance of abortions and establish procedures and set standards for facilities, equipment and care of patients in the performance of abortions."

The State Medical Board consists of five licensed physicians, residing in as many separate Alaska Judicial Districts as possible

^{13/} By quoting the statute, the court is not expressing any opinion as to its constitutionality or unconstitutionality under Roe v. Wade, supra, and related cases. Such a decision is not necessary in this case.

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and two lay members, A.S. 08.64.010. A review of A.S. 08.64 discloses that the medical board has control over licensing, examinations and discipline of physicians as well as their continuing education. This is in addition to the specific responsibility of the board in the area of abortion.

The board, as constituted, is composed primarily of professionals knowledgeable in the medical field. Regulation is left to these experts with provision for nonprofessional lay views through the two non-medical members. Because of the board's competence, because of its general grant of authority in the field of medicine, because of its intended statewide composition and because of its specific grant of authority with respect to abortion, the court concludes that the state has "fully occupied" or "preempted" regulation of medical practice and procedure, and that having done so, the Borough has no authority to adopt regulations in the same field. In reaching this conclusion, the court is aware that the Alaska Supreme Court has rarely, if ever, decided a case on the basis of total preemption and has impliedly, at least, agreed with the observation of C. Antieau that the doctrine of the occupation of the field should be disregarded, 1 C. Antieau, Municipal Incorporation Law, §292.38 (1938), cited in Chugach Electric Assoc. v. City of Anchorage, supra, at p 120 fn. 16. However, in this case, for the reasons stated above the court concludes that the borough ordinance as a regulation of medical practice and procedure is an obstacle to the authority of the State Medical Board to regulate the same subject.

Even if the doctrine of preemption does not exist in Alaska in as pervasive a manner as decided above, the court concludes, nevertheless, that the borough ordinance conflicts with specific state legislation in the same area, cf. Chugach Electric Assoc v. City of Anchorage, supra, at 121.

Pursuant to A.S. 08.64.105, the State Medical Board has adopted 12 AAC 40.070. ^{14/} By adopting that regulation the board has expressed a policy consistent with Planned Parenthood of Missouri v. Danforth, supra, that informed consent is required in the broadly specified areas of medical complications and the possible emotional and physical sequelae of the procedure. However, the specificity of the information to be given is left to the discretion of the physician, e.g. Doe v. Bolton, supra. The Borough regulation is inconsistent with 12 AAC 40.070 in that it directly conflicts with the medical board's policy that beyond the identification of the broad categories to be covered, the specific details of the information to be given is left to the physician. ^{15/}

For the reasons stated above Kenai Peninsula Ordinance 81-71 is an invalid legislative enactment. Accordingly, the relief sought by plaintiffs is granted.

2. Scope of Borough Regulatory Power.

Plaintiffs argue that even if there were no issues of state preemption of the type discussed above, the ordinance is invalid as a legislative enactment beyond the scope of the Borough's powers. The argument is again two pronged; plaintiffs' first claim that the area of regulation is beyond the power of this second class borough, and secondly, that even if such regulatory power lies within the Borough's authority it can be exercised only by the two service area boards, not the assembly.

^{14/} That regulation reads:

"Unless otherwise provided in 12 AAC 40.060, a written informed consent shall be obtained from the patient or from any other person whose consent is required before termination of a pregnancy. Such written informed consent shall be on the patient's chart. The patient and other persons whose consent is required shall be advised of the medical implications and possible emotional and physical sequelae of the procedure."

^{15/} In support of their argument, plaintiffs rely on an order of the State Medical Board post-dating the ordinance. The order prohibits a physician from requiring a patient to execute the form prescribed by the ordinance. The court has relied on authority independent of the medical board's order in reaching its conclusions stated herein. Without deciding the issues involved, the court questions the authority of the board to issue the order in absence of specific statutory authority. See also A.S. 44.12.180(ff) and A.S. 44.62.300(8).

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The Kenai Peninsula Borough is a general law second class borough. ^{16/} The sole areawide powers conferred upon organization were those of education, planning and zoning, § 1, Ch. 52, SLA 1963. ^{17/}

The Borough's initial areawide powers were augmented by the creation of two service areas previously referred to, SPHSA and CPHSA. These service areas were granted the power "...to construct, maintain, and operate a hospital in the manner provided in A.S. 29.10.159 for first class cities." ^{18/} At the time of the election, the relevant statute provided that service areas may be established and operated by the assembly by ordinance, A.S. 07.15.050(a), and that the assembly may provide for an appointed or elected board to supervise the furnishing of those services, A.S. 07.15.050(c). Kenai Peninsula Borough Ordinances 69-3 and 69-4 carry out the assembly's statutory responsibility.

Disregarding for the moment the question of whether the assembly may now exercise any of the power granted to the two

^{16/} The KPB was created as a second class borough on January 1, 1964 by the Mandatory Borough Act, Ch. 52, SLA 1963 and the ensuing election held on December 3, 1963.

^{17/} Additional powers may be acquired and exercised on an area wide basis pursuant to A.S. 29.48.030, 29.48.035 and 29.33.250 or within service areas pursuant to A.S. 29.63.090.

^{18/} At the time of the election, April 8, 1969, A.S. 29.10.159 read:

"The council may establish, maintain, and operate hospitals for the care and treatment of the indigent, sick, injured, and maternity cases, and for this purpose may

- (1) purchase or lease real property;
- (2) erect necessary buildings, make necessary improvements and repairs, and alter an existing building for the use of the hospitals;
- (3) use money raised by taxation, and take such other action as may be necessary to provide hospital facilities;
- (4) provide for a board of directors to be appointed by the municipal executive subject to confirmation by the council and delegate to the board those responsibilities for the management, control and operation of the hospital that the council considers appropriate. (\$16-1-35(25) ACLA 1949; added by §1 ch 27 SLA 1953; am §1 ch 145 SLA 1968).

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service areas by the voters in the April, 1969 service area election, there is an issue as to the scope of the borough's power acquired incident to the creation of those service areas.

The statute then in effect, A.S. 29.10.159, provides the clearest direction. A review of that statute demonstrates that the focus of the Borough power was the acquisition of property for hospital use, the construction, repair and maintenance of the hospital, the raising and expenditure of tax money for hospital purposes and creation of a board responsible for managing, controlling and operating the hospital. The focus of the power, simply stated, was on hospital financing, construction, operation and management, not on the regulation of medical practices and procedures to be followed within the hospital. ^{19/}

The court has earlier concluded that this ordinance is an attempt to regulate medical practices and procedures within the service area hospitals. This regulation is outside the scope of authority granted under the applicable enabling legislation, A.S. 29.10.159.

The result remains the same if the current Municipal

^{19/} Of course there is some regulation of the medical staff, but this is pursuant to by-laws, rules and regulations governing the medical staff, Homer Hospitals, Inc. Operating Agreement ¶10, Lutheran Hospitals, etc Operating Agreement ¶5. Although not explicitly part of the record, a fair reading of each agreement contemplates that the staff by-laws are adopted by the staff, not through borough assembly or service area legislative action.

Code is used for measurement of the Borough's authority. 20/

A.S. 29.48.030 provides in part:

"A municipality may exercise the powers necessary to provide the following public facilities and services:...(5) health services and hospital facilities."

A service area may be established to exercise this power, A.S. 29.63.090(a).

Additionally, A.S. 29.48.035 grants a municipality the authority to regulate the use and operation of its public facilities and services.

The same question, which the court considered in its analysis of the legislation predating the 1972 Municipal Code Revision, is posed here; namely, does the power to regulate the use and operation of a hospital include the power to regulate

20/ An interesting question exists with respect to which statute is determinative of the extent of the borough power to be exercised through the service areas, former §29.10.159 or the current statutes, A.S. 29.63.090(a), 29.48.030, 29.48.035. Section 3, Ch. 118, SLA 1972 provided in part:

"A right or liability of a home rule or general law city or borough existing on September 10, 1972, is not affected by enactment of this act."

Questions which may be asked but need not be answered are:

(1) Is the KPB a general law borough since it was created by a specific act of the legislature, the Mandatory Borough Act, rather than by the then existing procedure for establishing boroughs under A.S. 07 ?

(2) Is the exercise of a particular power a "right" of the type contemplated in Section 3, Ch 118, SLA 1972, if so, then the nature and extent of that "right" is not affected by the 1972 Municipal Code Revision;

(3) If the KPB is not a general law borough, does the code revision affect its "rights and liabilities" in a way different from a general law borough.

The reason these questions need not be answered is that the court has concluded that under either statute or set of statutes the result is the same.

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medical practice and procedure within the hospital? Stated differently is it reasonably necessary for the Borough to regulate medical practice and procedure within its hospitals in order for it to exercise its hospital and health facility power. The court concludes that the power to regulate medical practice and procedure is not reasonably to be implied by the general grant of authority to regulate the use and operations of hospitals and health facilities. ^{21/}

This is the result even if the provisions of Article X, §1, of the Alaska Constitution are considered. ^{22/} A liberal construction of either former A.S. 29.10.159 or A.S. 29.48.035 does not carry the implied power for Borough regulation of medical practice and procedure. The result might be different if such regulations were necessary in order to carry out the other powers granted by those statutes, but such is not the case. The specific grants of power under the applicable statute may be achieved without the necessity of implying the power to regulate medical practice and procedure.

In summary, the court concludes that the Borough is without statutory authority to regulate medical practice and procedure within its hospitals.

3. Authority of Service Area Boards.

In the foregoing portion of this opinion, the court concluded that the Kenai Peninsula Borough had no statutory authority to regulate medical practice and procedure within its hospitals. With that conclusion as a predicate, it must necessarily

^{21/} The type of regulatory power contemplated by A.S. 29.48.035 would pertain to charges, hours of operations, restrictions on visitors, operation of ancillary facilities such as canteens, gift shops, cafeterias and other regulations deemed necessary to the operation of the hospital.

^{22/} In pertinent part that section provides:

"A liberal construction shall be given to the power of local government."

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follow that the service area boards likewise have no such authority. Nevertheless, for purposes of completeness, the court will rule on plaintiffs' argument that, assuming, the Borough has the power to regulate in the manner expressed by the ordinance, the power should be exercised by the service area boards, not the assembly.

At the time of their creation, the assembly by ordinance established service area boards, Kenai Peninsula Borough Ordinances 69-3, 69-4. 23/ At the time of the adoption of the ordinance, Borough Code, Section 16.08.040 provided with respect to the CPHSA Board:

"The hospital board shall advise the mayor and assembly concerning the administration and operation of the service area, review the annual budget and make recommendations and perform such additional functions as the assembly may direct."

The ordinance does not grant the governing board any legislative authority. Its capacity is only advisory. The assembly's limitation upon the authority of the service area board is not in violation of either former A.S. 07.15.050(c) or A.S. 29.63.090(c) since the direction to assembly that a board be established to supervise the furnishing of services was directory and not mandatory.

Plaintiffs, in apparent recognition of this problem, argue that by entering into the contract with Lutheran Hospitals and Homes Society of America, the assembly delegated its legislative authority to the society's board. But a municipal corporation cannot, by contract, divest itself of its general legislative power, 2 McQuillin, Municipal Corporations, §10.38 (1979). With specific

23/ The boards were established pursuant to A.S. 07.15.050(c) which provided:

"Boards. The assembly may provide for appointed or elected boards to supervise the furnishing of special services in service areas.

This is identical to the current law, A.S. 29.63.090(c).

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reference to this case, an analagous problem was considered by the court in Galveston v. Hill, 519 S.W.2d 103 (Tex. 1975). In that case, the City of Galveston sought to construct a grain elevator through the issuance of bonds. The elevator was to become part of the Galveston wharves, a public utility managed by a board of trustees. The board of trustees entered into a lease of the facilities to a private organization and through the lease specifically permitted the private organization to "...establish and enforce rules and regulations in the operations of the leased premises...". The court concluded that the contract was an improper delegation of governmental authority and therefore denied a petition by the attorney general to certify the proposed bond issue, stating:

"The management and control of the facility in such case, however, is to be limited to proprietary affairs and must not involve the re-delegation of governmental or legislative functions of the board of trustees." (519 S.W.2d at 105).

It must necessarily follow that the assembly may not, by contract, delegate to the Lutheran Homes and Hospitals Society of America legislative or governmental power which could be exercised by a service area board. Consequently, as to the CPHSA legislative regulatory authority rests with the assembly, not the service area board.

At the time of the adoption of the ordinance, Borough Code §16.24.080 provided in part with respect to the SPHSA:

"The board of directors of the service area shall have the power to provide for hospital services within the service area and for the administration and operation of the service area..."

This is a more specific grant of power than was given to the CPHSA board and represents the creation of the type of board contemplated by former A.S. 07.15.050(c) and A.S. 29.63.090(c).

A question, yet undecided in Alaska law, is whether such a service area board as created possesses general legislative

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authority with respect to the furnishing of services in its area. That is to say could such a board within its proper sphere of regulatory authority exercise that authority by ordinance or otherwise. Reference to the Alaska Constitution is necessary.

Article X, Section 1 provides in part:

"The purpose for this article is to provide for maximum local self government with a minimum of local government units, and to prevent duplication of tax levying jurisdictions..."

Article X, Section 2 provides:

"All local government power shall be vested in boroughs and cities. The state may delegate taxing power to organized boroughs and cities."

Article X, Section 4 provides:

"The governing board of the organized borough shall be the assembly...."

Article X, Section 5 provides in part:

"...The assembly may authorize the levying of taxes, charges or assessments within a service area to finance special services."

A fair reading of the above quoted constitutional provisions along with A.S. 29.48.150 compels the conclusion that ordinances may be enacted only by a borough, assembly or city council. A service area board may not carry out its functions by ordinance.

On the other hand, board regulations adopted incident to the furnishing of hospital services within a service area do not fall within those classes of legislative subject matter which must be dealt with by ordinance, A.S. 29.48.130. Accordingly, the adoption of regulations by a service area board incident to its supervising the furnishing of hospital services is within the board's power. The last question is whether regulation of those services is exclusively within the board's power or whether the assembly may act within the same subject matter area.

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Although the assembly need not establish a service area board, once it has done so pursuant to A.S. 29.63.090(c) or its predecessor, primary regulatory authority within its limited area of competence must be with the service area board. Otherwise, the board is merely an advisory body.

With respect to this particular case, the distinction between the CPHSA board which the assembly has directed to be advisory and the SPHSA board is significant. If the regulatory authority were in the assembly rather than the SPHSA board, the board should have been created in a manner similar to that used for the CPHSA.

Thus, as to the SPHSA, the court concludes that once a board is created to supervise the furnishing of special services within the service area, the board, not the assembly, must adopt the regulations necessarily incident to that power. ^{24/}

Consequently, assuming that the subject matter of the ordinance is within the scope of the borough's regulatory power, that power must, in the case of SPHSA, have been exercised by the service area board, not the assembly. The contrary is true with respect to the CPHSA since the assembly has retained regulatory power as to the provision of special services within that service area.

^{24/} This conclusion is further supported by the fact that the SPHSA is elected, not appointed. The applicable ordinance, KPB Code 16.24.080 provides in part:

"It is intended that the elected board members shall be responsible for the level of services provided and to that end must be responsible to the electorate for the amount of taxes necessarily raised to provide such services..."

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ORDER

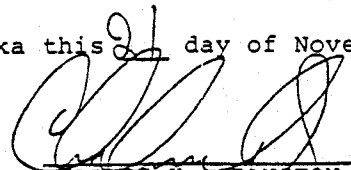
Based on the foregoing, it is
ORDERED, ADJUDGED and DECREED:

1. Chapter 10.12 of the Kenai Peninsula Borough Code is in its entirety declared unconstitutional as violating Amendment XIV to the Amendments of the Constitution of the United States, and Article I, Section 22 of the Constitution of the State of Alaska; and is an invalid legislative enactment of the Kenai Peninsula Borough. 25/

2. The Kenai Peninsula Borough, its officials, employees, agents, contractors and subcontractors are permanently enjoined from enforcing directly or indirectly any provision of Kenai Peninsula Borough Code, Chapter 10.12.

3. The matter of costs and attorneys fees to be awarded, if any, will be decided upon further proceedings under Civil Rules 79 and 82.

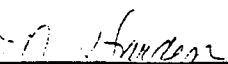
DATED at Kenai, Alaska this 21 day of November, 1983.



CHARLES K. CRANSTON
Superior Court Judge

I hereby certify that a copy
of the foregoing document
was sent on 11-21-83
to the following:

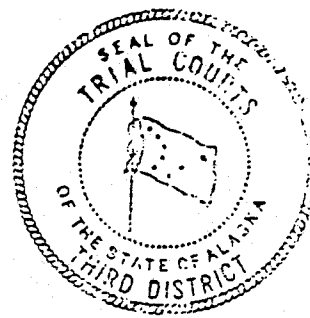
Friedman
Gordon
Williams
Garnett
Delaney
WEDVITR



Deputy Clerk

cc: Law Clerk

25/ The constitutional infirmities exist only insofar as the ordinance is applied to first trimester pregnancies. The parties have not addressed and the court is not ruling upon constitutionality of the ordinance if it is applied to post first trimester pregnancies, Roe v. Wade, supra. The application of the doctrine of state preemption and related state law render the ordinance invalid irrespective of the stage of pregnancy to which it may apply.



Introduced by: McGahan,
Dale, Stephens, Dimmick,
Jean, Douglas, Walli &
Glick
Date: Jan. 3, 1983
Hearing: Feb. 7, 1983
Vote:
Action:

KENAI PENINSULA BOROUGH

ORDINANCE 84-1

AMENDING KPB 16.24.080 PERTAINING TO POWERS AND DUTIES OF THE SOUTH KENAI PENINSULA HOSPITAL SERVICE AREA BOARD.

WHEREAS, the ordinances governing all service areas of the borough except the South Peninsula Hospital Service Area provide that all actions of the service area board are subject to approval by the assembly; and

WHEREAS, it is desirable to have actions of the South Peninsula Hospital Service Area Board subject to assembly approval;

NOW THEREFORE, BE IT ORDAINED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH:

Section 1. That KPB 16.24.080 is hereby amended as follows:

16.24.080 Board--Powers and duties. Pursuant to the provisions of AS 29.63.090, the board of directors of the service area, subject to Assembly approval and appropriation of funds, shall have the power to provide for hospital services within the service area and for the administration and operation of the service area; providing however, that in exercising such power, the board of directors must comply with the objectives and provisions of the Hill-Burton Hospital Construction Act and the regulations passed pursuant thereto and with the agreements entered into by the Kenai Peninsula Borough as part of the application for grant and loan funds under such act. [IT IS INTENDED THAT BOARD MEMBERS SHALL BE RESPONSIBLE FOR THE LEVEL OF SERVICES PROVIDED AND TO THAT END MUST BE RESPONSIBLE TO THE ELECTORATE FOR THE AMOUNT OF TAXES NECESSARILY RAISED TO PROVIDE SUCH SERVICES, AND THE BOROUGH WILL RAISE THE AMOUNT OF THE LEVY WHENEVER IN ITS JUDGMENT SUCH ACTION IS NECESSARY TO SECURE ADEQUATE FUNDS FOR REPAYING BONDED INDEBTEDNESS OF THE SERVICE AREA.] The board shall promptly furnish accurate and complete copies of the minutes of all board meetings to the mayor and the assembly.

Section 2. That this ordinance takes effect immediately upon its enactment.

ENACTED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH ON THIS _____ DAY OF _____, 1983.

Joseph C. Arness, Assembly President

ATTEST:

Borough Clerk