C. Nothing in the Alaska Administrative Code obligates respondents to establish local secondary schools in every villages and town in the state.

1. The provisions of the Alaska Administrative Code which appellants relied on below have been properly amended so as to clearly indicate that there exists no absolute duty to establish a secondary school in each populated location in the state.

It is evident that much of the impetus for Count I of the instant case was derived from various administrative regulations which were adopted by the Department of Education. 4 AAC 06.020 and 4 AAC 06.025 became effective on July 9, 1972. The original complaint was filed by appellants shortly thereafter (on August 10, 1972) (R. 18) undoubtedly on the wholly erroneous assumption that these regulations created new substantive rights. The Superior Court found these regulations to be ambiguous, but concluded that "the state's interpretation is more in line with the statutory scheme under which the regulations were promulgated . . ." (R. 875)

While the result reached by the Superior Court was undoubtedly correct, it is unnecessary for this Court to even decide this issue, for in the interim since the Superior Court's decision, the regulations in question have been changed to more accurately reflect the intent of the State Board and Department of Education. At its meeting in Juneau on November 14, 1973, the State Board unanimously passed the following resolution:

> WHEREAS the Superior Court in denying plaintiffs motion for Summary Judgment on the first count of the Hootch case found that 4 AAC 06.020 (a) and 4 AAC 06.025 are ambiguous on their face; and

WHEREAS the Superior Court resolved that ambiguity in a manner consistant [sic] with the intent which the Board and the Department of Education had when these regulations were originally promulgated; and

WHEREAS leaving these regulations in the Administrative Code in their current ambiguous form may lead to additional confusion,

NOW THEREFORE BE IT RESOLVED that the Department shall proceed forthwith to initiate proceedings to amend these regulations so as to render their language consistent with the above mentioned ruling of the Superior Court and intent of the Board.

This resolution was amended prior to passage by State Board member John Borbridge to include the following language:

BE IT FURTHER RESOLVED and emphasized that this Board action in no way changes or limits this Board's expressed policy and philosophy of making the best possible education available to all students of the state as close as possible to their usual homes and that this Board will continue to pursue its announced policy of constructing and providing for the operation of local secondary schools within the means of the state whenever and wherever educationally and economically feasible.

As a result of the Board's action, it was recommended that 4 AAC 06.025 be repealed and that 4 AAC 06.020(a) be repealed and reenacted to read:

4 AAC 06.020(a) Every child of school age shall have the right to a tuition free public education in his district of residence. Where it is unsound for economic or educational reasons to establish, maintain, or operate a facility, the governing body of a district, with the consent of the state board of education may establish attendance areas for students who wish to attend boarding programs elsewhere in the state. Any transportation, boarding or tuition costs necessitated by such arrangement shall be borne by the district.

> unless otherwise provided by law or regulation. Neither the state nor a district may require a student to live away from his usual home to obtain an education, however, the governing body of the district shall provide an approved educational program in the community for those students who wish to remain in that community.

These changes were properly noticed pursuant to the Alaska Administrative Procedures Act (AS 44.62), were the subject to public hearing where no objections were voiced, and were approved by the State Board of Education at its meeting on July 4 and 5 in Anchorage.

There is no doubt but that an administrative agency can change its rules, Helvering v. Wilshire Oil Co., 308 U.S. 90, 97 ff, 60 S. Ct. 18, 84 L.Ed. 61, 105 ff (1939), Frankel v. U.S., 320 F. Supp. 605, (S.D.N.Y. 1970), Sun Oil Company v. Federal Power Commission, 256 F.2d 233, 239 (5th Cir., 1958); Rawson Milk Company v. Benson, 187 F. Supp. 66, 74 (N.D.Ohio 1960), 193 ALR 1189. In a recent decision by a federal district court in California considered a situation where the Secretary of the Interior changed regulations under which plaintiffs therein would have received a benefit. Kelly v. United States Department of Interior, (E.D. Cal. 1972) 339 F. Supp. 1095. While the Secretary's actions were overturned due to procedural irregularities, that court noted in no uncertain language that such a change, if done pursuant to proper procedures, is allowable. Specifically, the court there there noted:

> No rule of law forbids an agency from changing its regulations. City of Chicago v. Federal Power Commission, 128 U.S. App. D.C. 107, 385 F.2d 629 at 637; see also Greater Boston Television Corp. v. Federal Communications

> Commission, 143 U.S. App. D.C. 383, 444 F.2d 841 at 852 (1971) and New Castle County Airport Commission v. Civil Aeronautics Board, 125 U.S. App. D.C. 268, 371 F.2d 733 at 735 (1966). Sound policy reasons, indeed, underscore the need for broad authority to revise them. Administrators need room to freshen state policies, adjust their rules to reflect actual experiences, and even reverse their thinking if necessary to promote Congress' programs effectively. This is not to say, of course, that administrators have carte blanche to wield their office arbitrarily. We only say that a change in the regulations resulting in an alleged loss of benefits does not in itself show that the Secretary has acted arbitrarily. (p. 1100)

2. Even under the Alaska Administrative Code as it previously existed there was created no absolute duty to establish a secondary school in every populated location in the state.

This Court no longer needs to reach the question of the affect of the regulations on which appellants have relied to establish their asserted right to attend secondary schools in their respective towns or villages of residence (Brief, pp. 47 - 63). Nonetheless, it should be noted that those regulations did not entitle appellants to the right which they assert.

The Superior Court found that the key regulatory provisions on which appellants relied were "ambiguous" (R. 875), but it concluded that respondents' interpretation of the regulations was "more in line with the statutory under which the regulations were promulgated". Appellants now assert that the term "community of residence" as used in the proferred regulatory sections was not ambiguous, but that the term has the "universal connotation of being a town, a village, or perhaps a residential city or neighborhood."

It is difficult to square the asserted "universal connotation" with the analysis which this very Court made of essentially the same phrase hardly a year prior to the adoption of these regulations. In Alvarado v. State, 486 P.2d 891 (Alaska 1971), a case argued to this Court by one of appellants' attorneys of record here, it was held that the due process guarantee of a fair and impartial jury included a requirement that the source from which jurors are selected include the "community" where the alleged crime was committed. The Court there observed:

> . . . we must define the term community to include Chignik. Several differing formulations of community might be proposed: in the narrowest sense, the village of Chignik might be considered an appropriate community; a broader possible community would be the election district in which Chignik is located; still broader would be the entire third judicial district. In short, a jury drawn from a source which reasonably reflects a fair cross section of any of these possible communities might properly be deemed constitutionally impartial. 486 P.2d at 903.

The permissible definitions which this Court cited in Alvarado would clearly include the textual interpretations which respondents have adopted (R. 750)[1/] as well as that asserted by appellants. An ambiguity thus existed, which required construing the ambiguous language with reference to the complete statutory and regulatory framework. State v. City of Anchorage, 513 P.2d 1104, 1110 (Alaska 1973); State v. American Car Company, 362 P.2d

---

1/ Interestingly, in that case, while not feeling compelled to make the legislative decision as to which of the possible alternatives would be followed, the Court did note that viewing the election district rather than the individual village as the proper "community" would perhaps be "at the same time more desirable and more workable." Id. at 905.

291, 296 (Alaska 1961); see also Port of Valdez Company v. City of Valdez, 437 P.2d 768, 769 (Alaska 19); Pepsi Cola Bottling Company of Anchorage v. New Hampshire Insurance Company, 407 P.2d 1009, 1013 (Alaska 1965). It was already pointed out (section I.B. above) that the statutory scheme then existent neither allowed nor permitted the interpretation which appellants sought to put on 4 AAC 06.020. Such a construction would fly in the face of the discretion which is to be exercised in determining whether or not a new school is to be established. AS 14.08.090(12) and (14), AS 14.08.100, AS 14.14.060(d); AS 14.17.031(c); AS 14.14.110, particularly where the legislature, while appropriating substantial funds and authorizing sizeable bond packages to expand rural secondary programs, has not provided the hugh authorization or appropriation necessary to carry out the immense program which appellants' interpretation would require.

To accept appellants' reading of the former wording of 4 AAC 06.020(a) would thus render the regulation ineffective as beyond the scope of the grant of statutory authority. AS 44.62.030. Where there exists one reading of a statute or regulation which renders it illegal, and another which preserves its usefulness, it is incumbent on the Court to construe the question section to preserve its legality. Sherman v. Holiday Construction Company, 435 P.2d 16, 19 (Alaska 1967) citing Armstrong Paint and Varnish Works v. Nu-Enamel Corporation, 305 U.S. 315, 332-333, 59 S. Ct. 191, 200, 83 L.Ed. 195, 205 (1938). This is precisely what the Superior Court did below.

It might be noted that while 4 AAC 06.025 was not speci-

fically discussed by the Superior Court, the analysis and results would have been the same. Moreover, these "minimum standards" are clearly denominated as "guidelines" - not requirements - and were to be referred to only when a school was once established. They did not mandate the establishment of schools.[2/]

As with the Alaska Statutes, appellants have again failed to mention various additional regulatory provisions which indicate that establishment of rural secondary schools is discretionary rather than mandatory. 4 AAC 24.010 - .020, (which became effective at the same time as the provisions which appellants do cite) indicate a number of considerations which are to be made in conjunction with the submission and approval of plans for new schools. The number of pupils in the area to be served is but one factor to be considered. 4 AAC 24.010(4), 4 AAC 24.020(1).

Additionally, the bylaws of the State-Operated Schools further implement this regulatory scheme. (R. 749, 770 - 771). These bylaws also indicate that establishment of rural secondary schools is a matter of sound discretion. On July 29, 1974, the Board of Directors issued a notice of proposed adoption of regulations. Among the regulations proposed for adoption are

---

2/ If appellants' statutory arguments were correct, and if these regulations were intended to implement those statutes, then Level I(A) would per force have had to provide for 1 to 8 elementary and secondary students while Level I(B) would have had to start with 8 students, (R. 49), or else, the guidelines would have been illegal. This lack of parallelism is just a final example of the fact that regulations promulgated by respondents have never created an obligation to establish secondary schools in every village, or town, in the state.

provisions pertaining to long-range planning for facilities, establishing new schools, establishing new secondary programs, and education in lieu of an established school. These proposed provisions are set out in the table of constitutional, statutory, and regulatory provisions. They, like their predecessors, and like the regulations of the Department of Education, do not create an obligation to establish secondary schools in every minute populated enclave of the state.