MEMORANDUM

State of Alaska

Department of Transportation & Public Facilities

To: Boyd J. Brownfield, P.E.
Deputy Commissioner

Date: January 24, 1997

File No.:

Tel No.: 451-5423

From: John A. Miller, P.E.
Chair, Statewide ROW Committee

Subject: Disposal of Excess Properties

As you recall, last year we determined our previous practice of conveying surplus ROW easements for no cost to the owner of the underlying fee estate was illogical. Generally these are PLO or Omnibus Act easements that are real property interests of considerable value and simply giving them away is inappropriate. We changed our policy to require sale at fair market value in these circumstances.

The ROW Manual provides that fair market value be determined by appraisal (and,if large, reviewed and approved by our Review Appraisers). It allows these appraisals be done in-house or, as is more commonly the case, done by a private fee appraiser paid for by the owner seeking the conveyance.

The appraiser, whether ours or private, must reach a conclusion as to the proportion of the value of the fee estate represented by the State's easement. Over the years appraisers, both ours and private, have generally concluded that these easements represent from 90 to 100 percent of the total value of the property. There are, however, arguments that can be made to support conclusions outside of this range. We expect some appraisers hired by property owners will make these arguments and we don't want to have to spend time arguing with them.

Therefore, we propose our policy be expanded to state that easements to be sold shall be appraised at full fee value and sold at 90 percent of this amount. This will give the purchaser the benefit of doubt as to the proper proportion. We suspect the remaining 10 percent will be more than saved in the amount of time we won't have to spend in arguments.

Approve: _____ Date: 2/6/97
Boyd J. Brownfield, P.E.
Deputy Commissioner

cc: John Jensen, Chief, Right of Way, Central Region
Marty J. Johnston, Chief, Right of Way, Southeast Region

Subject: Re: Fwd: sb 45
Date: Wed, 14 Apr 1999 12:32:05 -0800
From: "John F. Bennett" <johnf_bennett@dot.state.ak.us>
Organization: Alaska DOT&PF
To: Susan Urig <Susan_Urig@law.state.ak.us>

Sue, when I voiced objection to the Section 4 amendment that brought DNR into the mix, I mistakenly thought that we would have to get DNR approval for every future vacation of ROW under 19.05.070. Since DNR involvement under this amendment is only triggered when the municipality wants to vacate state owned or controlled ROW, I don't have a problem with that. I wonder if two paths to the same objective might be confusing. We are saying in this amendment that the municipality could vacate our ROW with our permission. On the other hand, if they asked us to vacate and we agreed, we would just issue a Commissioner's QCD and be done with it. So it seems a bit redundant.

There is a lot of confusion in terms when I talk to people about disposal of highway interests. Municipalities and property owners tend to lump all rights of way together without understanding how these rights were created and what bearing that might have when you want to dispose of them. Rights of Way under Title 29 are dedicated to the public in the subdivision process. Adjoining lot owners within the subdivision generally have a reversionary interest to the street centerline when the ROW is vacated under 29.40.160. Highway ROW is a mix of interests ranging from permits to fee and may include portions of ROW dedicated under Title 29. Other than those portions dedicated under Title 29, I have told our local borough that we do not accept that Title 29 is the appropriate authority to vacate highway ROW acquired in fee or PLO given our own Title 19 authority to vacate lands.

Specifying that a municipality cannot vacate a ROW "owned" should be clear given the documentation that vests title in the state. ROW that is "dedicated to the public" and for which no title document clearly vests title in a particular governmental entity is a more difficult subject. These ROW would be considered "controlled" or "managed" by the state if they have been incorporated into our highway system under our Title 19 Authority. I mentioned that I have seen Resolutions passed by local governments in the early '70's transferring management of ROW they owned or accepted by dedications to the State for incorporation into a federal aid project. I believe that the current local government approval process was intended to acknowledge that transfer of management in lieu of a resolution. I believe that management may now be getting cloudier as in order to get higher ranking for desired projects, DOT has been requiring municipalities to accept maintenance responsibilities. This to my knowledge has not yet included ROW property management responsiblities. As long as we can distinguish between ROW management and facility management we would be ok.

With regard to 29.40.120, I do not consider our ROW plans to constitute "plats" as addressed in this statute. Our ROW is acquired by deed- fee or easement, by permit or grant from agencies, or PLO, etc. Our ROW plans when recorded are merely a graphic representation of the existing ROW created by these documents. The recording of our plans does not constitute dedication to the public.

I'm sorry if my comments appear a bit disjointed. If you were not aware, John Miller has left the ROW Chief position and is now in Construction. So for the next couple of months I'll being working both my job and his old

one. Give me a yell if you need anything else. JohnB

Susan Urig wrote:

> *John pls review and comment*
> *>*
> *> Date: Tue, 13 Apr 1999 12:00:34 -0800*
> *> From: "Myles Conway" <Myles_Conway@law.state.ak.us>*
> *> To: Susan_Urig@law.state.ak.us*
> *> Subject: sb 45*
> *>*
> *> attached is the draft I sent to DNR for comment.*
> *>*
> *>* *Name: sb45.amend.doc*
> *> sb45.amend.doc* *Type: Microsoft Word Document (application/msword)*
> *>* *Encoding: x-uuencode*

SENATE BILL NO. 45

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - FIRST SESSION

BY SENATOR HALFORD

Introduced: 1/25/99
Referred: Judiciary, Finance

A BILL

FOR AN ACT ENTITLED

"An Act relating to tort immunity for personal injuries or death occurring on land; relating to the vacation by the state or a municipality of rights-of-way acquired by the state under former 43 U.S.C. 932; and providing for an effective date."

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

This statute also makes reference to RS-2477

*** Section 1.** AS 09.65.200(a) is amended to read:

(a) An owner of [UNIMPROVED] land is not liable in tort, except for an act or omission that constitutes gross negligence or reckless or intentional misconduct, for damages for the injury to or death of a person who enters onto or remains on the [UNIMPROVED PORTION OF] land if

(1) the injury or death resulted from a natural condition of the [UNIMPROVED PORTION OF THE] land or the person entered onto the land for recreation; and

(2) the person had no responsibility to compensate the owner for the

person's use or occupancy of the land.

* **Sec. 2.** AS 19.30.410 is amended to read:

Sec. 19.30.410. Vacation of rights-of-way. Notwithstanding another provision of law, the Department of Natural Resources, the Department of Transportation and Public Facilities, or another agency of the state may not vacate a right-of-way acquired by the state under former 43 U.S.C. 932 unless

(1) a reasonably comparable, established alternate right-of-way or means of access exists that is sufficient to satisfy all present and reasonably foreseeable uses;

(2) the right-of-way is within a municipality, the municipal assembly **or council** has requested the vacation, a reasonable alternative means of access is available, and the vacation is in the best interests of the state; or

(3) the vacation is approved by the legislature.

* **Sec. 3.** AS 29.10.200 is amended by adding a new paragraph to read:

(59) AS 29.35.090(b) (certain vacations of rights-of-way prohibited).

* **Sec. 4.** AS 29.35.090 is amended by adding a new subsection to read:

(b) Notwithstanding AS 29.40.160 or other provisions of law, a municipality may not vacate a right-of-way acquired by the state under former 43 U.S.C. 932. This subsection applies to home rule and general law municipalities.

* **Sec. 5.** AS 09.65.200(c) is repealed.

* **Sec. 6.** This Act takes effect immediately under AS 01.10.070(c).

Sec. 19.30.410. VACATION OF RIGHTS-OF-WAY. Notwithstanding another provision of law, the platting authority [DEPARTMENT OF NATURAL RESOURCES, THE DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES, OR ANOTHER AGENCY OF THE STATE] may vacate a right-of-way acquired by the state under former 43 U.S.C. 932 if:

(1) a reasonably comparable, established alternative right-of-way or means of access exists that is sufficient to satisfy all present and reasonably forseeable useable uses; and

(2) if the right-of-way is within a municipality, the municipal assembly or council has requested the vacation, the state has determined the vacation is in the best interests of the state and the state has provided its written consent as provided in AS 29.35.090; or

(3) the vacation is approved by the legislature.

Sec. 4 would be amended to read:

Sec. 29.30.090(b) Notwithstanding AS 29.40.160 or other provisions of law, a municipality may not vacate a right-of-way owned or controlled by the state under former 43 U.S.C. 932 or other law, without the express written consent of the Commissioner of the Department of Transportation and Public Facilities and the Commissioner of the Department of Natural Resources. This subsection applies to home rule and general law municipalities.

Sec. 3 would need a conforming amendment:

Sec. 29.10.200(59) AS 29.35.090(b) (certain vacations of rights-of-way <u>restricted</u> [PROHIBITED]).

Limitation of Home Rule powers

Municipal property

Check at 29.40.120

MEMORANDUM State of Alaska

DEPARTMENT OF LAW

TO: John F. Bennett, P.L.S.
ROW Engineering Supervisor
Northern Region

DATE: May 4, 1989

RECEIVED R/W
MAY 08 1989
Northern Region DOT & PF

FILE NO: 665-89-0137

TELEPHONE NO: 452-1568

THRU:

SUBJECT: Vacation of Rights-of-Way

FROM: Paul R. Lyle
Assistant Attorney General

CONFIDENTIAL
ATTORNEY/CLIENT
COMMUNICATION

You have asked for our advice concerning whether a conflict exists between AS 19.05.070 and AS 40.17.030 and 11 AAC 06.040-.050. I have reviewed the statutes and regulations and have determined that no conflict exists.

AS 19.05.070 allows DOT/PF to vacate highway rights-of-way by filing a vacation deed. AS 40.17.030(a)(4) & (6) require any conveyance to include the information necessary for indexing and the addresses of all persons who acquired an interest in property as a result of the conveyance. 11 AAC 06.040(a) roughly parallels requirements of AS 40.17.030(a)(4) & (6) [1]

The apparent conflict between these statutes arises because of DOT/PF's past practice of vacating rights-of-way without identifying to whom the state's property interest will pass upon recordation of the deed. Therefore, the deeds may not meet recording requirements. However, there is no real conflict between AS 19.05.070(a) and AS 40.17.030. AS 19.05.070 states that:

> ...Upon filing, [of the deed] title to the vacated land or interest in land inures to the owners of the adjacent real property in the manner and proportion considered equitable by the commissioner and set out in the deed.

Under AS 19.05.070 DOT/PF should be setting out in its vacation deeds the name of adjacent property owners and the interest acquired by each as a result of the vacation of the right-of-way. Therefore, if the requirements of AS 19.05.070 are followed the deeds will contain the information required by AS 40.17.030 and the document should be accepted for recording.

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[1] AS 40.17.030 was enacted in 1988 while the regulations in 11 AAC 06 were effective in 1986. There are conflicts between AS 40.17 and 11 AAC 06 but none which are material to your question.

You have asked whether the state can require adjacent owners to obtain title insurance for the purpose of protecting the state and proving their title to adjacent land. AS 19.05.070 does not set out the means by which the commissioner will make his determination. Generally, any requirement placed on adjacent landowners must be reasonable under the circumstances. Therefore, I recommend that DOT/PF bear the cost of title searches where the right-of-way is being vacated as part of a state or federally funded highway project. In the case where the vacation is being sought by a petitioning adjacent landowner it is reasonable to require the petitioning owner to bear the cost of proving his title by obtaining title insurance so that the state is fully protected against the claims which would certainly arise where title is clouded.

If you have any questions concerning this advice please do not hesitate to contact me.

PRL/jag

M E M O R A N D U M

S t a t e o f A l a s k a
Department of Transportation & Public Facilities
Northern Region Right of Way

To: John Athens
Assistant Attorney General
Department of Law

Date: April 4, 1989

File No:

Telephone No: 474-2413

From: John F. Bennett, P.L.S.
ROW Engineering Supervisor
Northern Region

Subject: Vacation of Rights of Way

As we discussed on March 29, 1989, you indicated that there may be a conflict between A.S. 19.05.070 relating to the Vacation of Rights of Way and Title 40 relating to recording requirements.

Please review the attached highlighted sections of Title 19 and 40 as well as Alaska Administrative Code 11.AAC 06 and determine if there is in fact a conflict and whether we should request a formal opinion from your office.

As I see it, the problem is:

1) A.S. 19.05.070 requires the filing of deeds of vacation in the appropriate recording district in order for the vacation to take effect.

2) A.S. 40.17.030 states that to be eligible for recording, a document must:

   a. include information needed to index the documents under regulations of the department,

   b. include the mailing address of all persons named in a document who grant or acquire an interest under the document if it is a conveyance.

3) A.S. 40.17.040 requires an indexing system designed so the public may find documents by names of grantors and grantees.

4) 11.AAC 06.040 and 11.AAC 06.050 relating to prerequisites for recording or filing documents requires that the document contain the legibly printed or typed names of all parties required by statute to be indexed.

It would seem that if the grantee is not named in a deed, it would be difficult or impossible to discover it in a title examination if the only party is the State of Alaska.

As we have vacations of rights of way pending, we will require guidance as to how we should proceed.

lkh

Attachments: as stated

cc: Dan Baum, Property Management (w/ attachments)

GUIDELINES FOR APPLYING FOR A COMMISSIONER'S DEED

To be used when applying to purchase right of way from the Department of Transportation and Public Facilities.

Send a letter requesting to purchase to:

John A. Miller
Chief, Right of Way
Northern Region Right of Way Section
Department of Transportation & Public Facilities
2301 Peger Road, M.S. 2553
Fairbanks, Alaska 99709-5316

- State the purpose of the request to sell.
- Attach a sketch of the site showing the exact location. You can obtain a copy of the right of way plan sheet from our office by calling Engineering at 451-5400.
- When requested, provide a title report showing you are the adjoining property owner and/or the underlying fee owner of the right of way you wish to purchase.
- When requested, provide an appraisal showing the fair-market value. You must select an appraiser from the list of approved appraisers. You will be provided with a copy of this list.
- Public Notice of the proposed sale shall be published for three consecutive weeks in the local paper. The applicant will be responsible for this fee.
- A processing fee of $200 payable to Alaska Department of Transportation and Public Facilities must accompany the request.

If you have any questions, or need assistance please call 451-5400, Property Management.

Affirmative action required to vacate – not apparent abandonment through non-use.

revival of the easement.[8]

ABANDONMENT. Although it is uncommon, an easement may be terminated by *abandonment.*[9] Non-use does not constitute abandonment,[10] so that the acts claimed to constitute abandonment must be of a character so decisive and conclusive to indicate a *clear intent* to abandon the easement.[11] A mere declaration of an intention to abandon an easement does not effect an abandonment,[12] nor does a failure to repair.[13]

As a general rule, an easement acquired by grant or reservation cannot be lost by mere nonuser for any length of time, no matter how great. The nonuser must be accompanied by an express or implied intention to abandon. However, the nonuser itself, if long continued, is some evidence of intent to abandon. On the other hand, in the case of an easement established by prescription, it is not necessary to show an intent to abandon in order to prove loss by disuse, and it has been held that such an easement is lost by

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[8] 25 Am Jur 2d, § 114.

Me. 1973. Once extinguished, easement does not again come into existence upon separation of former servient and dominant estates unless proper new grant or reservation is made. Fitanides v. Holman, 310 A.2d 65.

Pa. 1957. Easement may remain unaffected by unity of estates, or revive upon separation, if a valid and legitimate purpose will be subserved thereby. Schwoyer v. Smith, 131 A.2d 385, 388 Pa. 637.

[9] S.C. 1975. Easement may be lost by abandonment. Carolina Land Co., Inc. v. Bland, 217 S.E.2d 16, 265 S.C.98.

An easement acquired by user or prescription may be lost by abandonment or nonuser. Westbrook v. Comer, 29 S.E.2d 574, 197 Ga. 433.

[10] 25 Am Jur 2d, § 105.

[11] 25 Am Jur 2d, § 103.

[12] 25 Am Jur 2d, § 104.

[13] Mere neglect of the condition of a way is not enough in addition to nonuser to show an abandonment. Harrington v. Kessler, 247 Iowa 1106, 77 NW2d 633.

mere nonuser for the same period as way required to establish it.[14]

A right of way, whether acquired by grant or prescription, is not extinguished by the habitual use by its owner of another equally convenient way, unless there is an intentional abandonment of the former way. The use of a substituted way, however, may be evidence of abandonment if necessitate by a denial of the use of, or an obstruction of, the original way.[15]

As with prescription, the burden of proof is on the person making the claim.[16]

RIGHT TO ABANDON LOCATION. Generally, a public service corporation which has been granted the power of eminent domain and has acquired location by the exercise of this power, may, if it sees fit, surrender its franchise and abandon its location.[17]

One of the fundamental principles of eminent domain is the land taken

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[14] 25 am Jur. 2d, § 105

A temporary suspension of the use of an easement is not alone sufficient to show abandonment. Chitwood v. Whitlow, 313 Ky 182, 230 SW2d 641.

Mere nonuser of an easement for a less time than that required by the statute of limitations to acquire a prescriptive right does not raise a conclusive presumption of its abandonment. Groshean v. Dillmont Realty Co., 92 Mont 227, 12 P2d 273.

To constitute abandonment of a right of way created by express grant there must be, in addition to nonuser, circumstances showing an intention of the dominant owner to abandon use of the easement. Kurz v. Blume, 407 Ill. 383, 95 NE2d 338, 25 ALR2d 1258.

Mass. 1876. A right of way, whether acquired by grant or prescription, is not extinguished by its owner's habitual use of another, equally convenient, instead thereof, unless there is an intentional abandonment of the former. Jamaica Pond Aqueduct Corp. v. Chandler, 121 Mass. 3.

[15] 25 Am Jur. 2d, § 105

A right of way, whether acquired by grant or prescription, is not extinguished by habitual use by its owner of another owner equally convenient, unless there is an intentional abandonment of the particular way. Adams v. Hodgkins, 84 A. 530, 109 Me. 361, 42 LRA(NS) 741.

[16] Vt. 1943. The burden of proving abandonment of easement is on party asserting such abandonment. Nelson v. Bacon, 32 A.2d 140, 113 Vt. 161.

Sabins v. McAllister, 76 A.2d 106, 116 Vt. 302.

[17] 26 Am Jur 2d, § 145

> "We the Subscribers Selectmen of Poplin have made a little alteration in turning the highway that leads from Jonathan Beedes to Thomas Cases.....
>
> .....by taking out about Seven Rods of land out of the Fellows place now owned by Ezekiel Robinson and for Satisfaction to the Said Robinson we have Given to him the Said Robinson as follows (viz) all the land belonging to the Town in Said highway and range westerly of the following boundaries....."
>
> — *April 26, 1806*

DISCONTINUANCE OR ABANDONMENT. The term used to denote the termination of the public easement in a road varies depending upon the jurisdiction. The word "abandonment" or "abandoned highway" is frequently used, especially by the public.

"Abandonment" is a poor word to use because legally it has a particular meaning which does not apply to the termination of a public easement.[2] As discussed in Chapter 4, a public easement cannot be terminated by non-use or abandonment,[3] except in special cases, or where the easement was created by prescription.

Discontinuance is a frequently used term, and is defined by statute in many states. Discontinuance denotes formal action by the governing body, changing the status of the public easement, or terminating public rights altogether. *Vacation* is another commonly used term which means the same as discontinuance. Both serve to accomplish the same result, that is, terminate public rights in the easement. When this happens reversion takes place automatically and instantaneously.

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[2] Abandonment is the surrender, relinquishment, disclaimer, or cession of property or of rights. Black's Law Dictionary

[3] Mass. 1942. Intention to abandon is an important factor on the question of abandonment of an easement or other interest in land, and "abandonment" should not be inferred from mere nonuser. Boston Elevated Ry. Co. v. Commonwealth, 39 N.E.2d 87, 310 Mass. 528.

Md. 1972. Nonuser is insufficient to establish abandonment of an easement unless an intention to abandon can be shown. D.C. Transit System, Inc. v. State Roads Commission of Md., 290 A.2d 807, 265 Md. 622.

MEMORANDUM

State of Alaska
Department of Law

TO: Daniel Beardsley, SR/WA
Chief Right of Way Agent
Central Region
Department of Transportation
and Public Facilities

DATE: August 1, 1989

FILE NO.: 661-89-0307

TEL. NO.: 276-3550

SUBJECT: Sterling Highway encroachments

FROM: Bruce Tennant
Assistant Attorney General
Transportation Section, Anchorage

You have asked us whether the state may be estopped from utilizing a portion of the Sterling highway right-of-way easement where that portion has been platted and a landowner has constructed valuable improvements on it.

The answer to your question is that it is too close to make a definitive call. There is a chance a court would find the state estopped from utilizing a portion of the right-of-way without the payment of just compensation. The outcome may depend upon the strength of the landowner's equitable claims of estoppel balanced against the laws governing disposal of state-owned rights-of-way and elements of unwritten public policy.

FACTS

The State of Alaska is the owner of a 300-foot easement (150 feet on either side of the centerline) for the Sterling Highway on the Kenai peninsula. The right-of-way width was established on September 16, 1956, by Departmental Order No. 2665, which designated the Sterling Highway as a through road having a 300-foot right-of-way easement. Subsequently, the land in question was entered for homestead purposes and made subject to the 300-foot right-of-way.

In 1978, the Kenai Peninsula Borough submitted a number of plats for comment by the Department of Transportation and Public Facilities, among which was plat No. 79-59, Fairway Estates Subdivision. On April 6, 1978, James E. Sandberg, Regional Right of Way and Land Acquisition Agent, sent a letter to the Borough stating in part that the Department had no objection to Plat No. 79-59. Exhibit A, attached. That plat showed the Sterling Highway right of way as being 200 feet wide (100 feet on each side of the centerline). No other representations were made by the state or any representative, nor

was any action taken to vacate, by Commissioner's deed, the 50 feet of right-of-way now in question.

In 1983, a portion of Fairway Estates Subdivision was replatted by Plat No. 83-259, Fairway Estates Subdivision No. 2. This plat also showed the Sterling Highway right-of-way at 200 feet. The state, by letter to the Borough dated June 24, 1983, objected to the plat and suggested that it be changed to reflect the correct 300-foot right-of-way width. Exhibit B, attached. No changes were made by the Borough, and the plat was filed as presented to the state. The lot in question, Lot 7, Block 2 (your parcel 18A), was not included in Plat No. 83-259.

In 1983 the owner of Lot 7 applied for and received a building permit from the City of Soldotna and subsequently constructed a commercial building on the lot. The building encroaches 10 feet into the 300-foot right-of-way and the parking lot for the building encroaches an additional 30 feet into the 300-foot right-of-way.

In addition to the encroachment of the building on lot 7, lots 4A and 6A, Plat No. 83-259 encroach on the easement by 50 feet and lots 1,2,3 and 4 of Plat 79-59 encroach upon the easement by 10 feet. None of these lots are improved with any structures.

DISCUSSION

As a general rule, the theory of estoppel does not extend to state governments. However, under certain circumstances, courts have applied the doctrine of equitable estoppel to the states.

The essential elements of the doctrine of equitable estoppel are:

1. Assertion of a position by conduct or words.
2. Reasonable reliance on that position by another.
3. Resulting prejudice to the relying party.

Merdes v. Underwood, 742 P.2d 245 (Alaska 1988).

The Alaska Supreme Court has, on several occasions, ruled on the application of equitable estoppel against governmental units. In State v. Simpson, 397 P.2d 288 (Alaska 1964), the court ruled that the state was not estopped to claim ownership of a portion of the right-of-way on which a dry-cleaning building had been built. The building was constructed by owners who had a mistaken belief in the extent of their lot.

The court said that permitting the existence of the building for many years and accepting taxes on the property were not actions which would support an estoppel. The court stressed that there had been no affirmative action by the state upon which the owners could have reasonably relied and that, even though the decision destroyed the value of the building, there was no basis for upholding the building owner's claim.

The Simpson decision was based upon earlier cases from Oklahoma and Oregon which held that the government could not, absent express, affirmative action, be estopped from exercising its interest in a street right-of-way. See Town of Chouteau v. Blankenship, 152 P.2d 379 (Okla. 1944); City of Molalla v. Coover, 235 P.2d 142 (Or. 1951) These cases proceeded from the theory that the government held the street rights-of-way in trust for the public, i.e., in its "governmental capacity," and that a different standard would apply if the claimed estoppel concerned property held in a "proprietary" capacity. Indeed, the court in Town of Chouteau questioned whether the application of equitable estoppel would ever be proper in the case of streets. 152 P.2d at 384.

In addition to the question of whether an estoppel would lie against the government as regards property held in its governmental capacity, the Oregon court discussed the necessity that government conduct which is presented as the basis of an estoppel claim "must have been such as to have caused the [party asserting the estoppel] reasonably to believe that it was the intention to abandon this strip of land for street purposes." 235 P.2d at 148. No such intent is evident in the conduct of the department in the case at question today.

The Simpson case and its predecessors must be contrasted with Mun. of Anchorage v. Schneider, 685 P.2d 94 (Alaska 1984). Although the Schneider case deals with a zoning dispute, the court's statements regarding the application of equitable estoppel, and the limits thereon, are important. The court began by stating the "traditional rule" that estoppel may not be invoked against a municipality which has erroneously issued a building permit in violation of its zoning ordinances. It then discussed how the rigid application of this rule often leads to inequitable results, and concludes that a municipality may be estopped if the elements of equitable estoppel are present and if the public will not be significantly prejudiced by the estoppel.

It is not clear from the facts before us how the Alaska courts would treat the difference in approaches between the street right-of-way cases and the zoning cases. It is clear that

the zoning cases are much more liberal in allowing governmental rights or powers to be estopped. However, the discussion in the Schneider case indicates that where the governmental interest is greater, the corresponding burden on a party attempting to prove an estoppel of that interest will also be greater. If we consider that the government title interest in highway rights-of-way is greater than police power interests in controlling zoning, then it would follow that a party attempting to estopp the state from exercising its interest in a highway right-of-way would bear a very heavy burden of proof. Whether the act of the state evidenced by the 1978 Sandberg letter would satisfy that burden would be the question for the court. We believe that we could make a strong case for the proposition that the proof would be inadequate.

In answer to the other questions set out in your June 20, 1989 memorandum, it would follow that if the state is not estopped from utilizing its right-of-way easement to its full extent, that no action need be taken regarding vacation of the overlapping right-of-way.

CONCLUSION

If the state elects to exercise its easement rights in the property in question, litigation is highly likely to ensue. The landowners would likely claim that the state is estopped from utilizing the easement without first paying just compensation for the private interests taken. With regard to all of the lots except Lot 7, we believe that the state would prevail against such a claim. With regard to Lot 7, we believe that the state would be able to put forth strong defenses to such a claim, but the state of the law is such that the outcome of such a lawsuit is difficult to predict.

If you have further questions concerning this matter, please do not hesitate to call me.

BT:sw

Attachments

MEMORANDUM State of Alaska

DEPARTMENT OF LAW

TO: John F. Bennett, P.L.S.
ROW Engineering Supervisor
Northern Region

DATE: May 4, 1989

RECEIVED R/W

FILE NO: 665-89-0137

MAY 08 1989

TELEPHONE NO: 452-1568

Northern Region DOT & PF

THRU:

SUBJECT: Vacation of Rights-of-Way

FROM: Paul R. Lyle
Assistant Attorney General

You have asked for our advice concerning whether a conflict exists between AS 19.05.070 and AS 40.17.030 and 11 AAC 06.040-.050. I have reviewed the statutes and regulations and have determined that no conflict exists.

AS 19.05.070 allows DOT/PF to vacate highway rights-of-way by filing a vacation deed. AS 40.17.030(a)(4) & (6) require any conveyance to include the information necessary for indexing and the addresses of all persons who acquired an interest in property as a result of the conveyance. 11 AAC 06.040(a) roughly parallels requirements of AS 40.17.030(a)(4) & (6) [1]

The apparent conflict between these statutes arises because of DOT/PF's past practice of vacating rights-of-way without identifying to whom the state's property interest will pass upon recordation of the deed. Therefore, the deeds may not meet recording requirements. However, there is no real conflict between AS 19.05.070(a) and AS 40.17.030. AS 19.05.070 states that:

> ...Upon filing, [of the deed] title to the vacated land or interest in land inures to the owners of the adjacent real property in the manner and proportion considered equitable by the commissioner and set out in the deed.

Under AS 19.05.070 DOT/PF should be setting out in its vacation deeds the name of adjacent property owners and the interest acquired by each as a result of the vacation of the right-of-way. Therefore, if the requirements of AS 19.05.070 are followed the deeds will contain the information required by AS 40.17.030 and the document should be accepted for recording.

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[1] AS 40.17.030 was enacted in 1988 while the regulations in 11 AAC 06 were effective in 1986. There are conflicts between AS 40.17 and 11 AAC 06 but none which are material to your question.

You have asked whether the state can require adjacent owners to obtain title insurance for the purpose of protecting the state and proving their title to adjacent land. AS 19.05.070 does not set out the means by which the commissioner will make his determination. Generally, any requirement placed on adjacent landowners must be reasonable under the circumstances. Therefore, I recommend that DOT/PF bear the cost of title searches where the right-of-way is being vacated as part of a state or federally funded highway project. In the case where the vacation is being sought by a petitioning adjacent landowner it is reasonable to require the petitioning owner to bear the cost of proving his title by obtaining title insurance so that the state is fully protected against the claims which would certainly arise where title is clouded.

If you have any questions concerning this advice please do not hesitate to contact me.

PRL/jag

M E M O R A N D U M

S t a t e o f A l a s k a
Department of Transportation & Public Facilities
Northern Region Right of Way

To: John Athens
Assistant Attorney General
Department of Law

Date: April 4, 1989

File No:

Telephone No: 474-2413

From: John F. Bennett, P.L.S.
ROW Engineering Supervisor
Northern Region

Subject: Vacation of Rights of Way

As we discussed on March 29, 1989, you indicated that there may be a conflict between A.S. 19.05.070 relating to the Vacation of Rights of Way and Title 40 relating to recording requirements.

Please review the attached highlighted sections of Title 19 and 40 as well as Alaska Administrative Code 11.AAC 06 and determine if there is in fact a conflict and whether we should request a formal opinion from your office.

As I see it, the problem is:

1) A.S. 19.05.070 requires the filing of deeds of vacation in the appropriate recording district in order for the vacation to take effect.

2) A.S. 40.17.030 states that to be eligible for recording, a document must:

   a. include information needed to index the documents under regulations of the department,

   b. include the mailing address of all persons named in a document who grant or acquire an interest under the document if it is a conveyance.

3) A.S. 40.17.040 requires an indexing system designed so the public may find documents by names of grantors and grantees.

4) 11.AAC 06.040 and 11.AAC 06.050 relating to prerequisites for recording or filing documents requires that the document contain the legibly printed or typed names of all parties required by statute to be indexed.

It would seem that if the grantee is not named in a deed, it would be difficult or impossible to discover it in a title examination if the only party is the State of Alaska.

As we have vacations of rights of way pending, we will require guidance as to how we should proceed.

lkh

Attachments: as stated

cc: Dan Baum, Property Management (w/ attachments)

TED SMITH

CONSULTING FORESTER
BOX 1026
WILLOW, ALASKA, 99688

Telephone (907) 495-6637
Fax (907) 495-6637

February 17, 1997

Senator Lyda Green
Alaska State Legislature
State Capitol (MS 3100)
Juneau, AK. 99801-1182

Dear Senator Green:

I note that your SB 56 has already passed the Senate so I am once again behind the curve. SB 56 is a good bill, but it doesn't do much to solve the problems of illegal acts by the Department of Transportation.

At the time the Parks Highway (among others) was built, the State policy was to acquire rights-of-way by easement rather than purchase. Most people were willing to give the Department an easement at no cost just to have the highway built. Those easements were specifically for highway purposes. The Department did not acquire any rights for non-highway use. The Federal Highway Administration has defined directional signage as non-highway use and controls it by use of airspace regulations. The Department thus has no authority to regulate non-highway use on lands over which they have only a right-of-way. ***This constitutes an uncompensated taking - a violation of the Constitution.***

To compound this problem, the Department has required fees from the real owners of the rights for the exercise of those rights. These fees were adopted by issuance of an internal document, not by compliance with the Administrative Procedures Act. A memo from the Legislative Affairs Agency dated October 23, 1992 (copy enclosed) found that ***"the policy*** (for issuing air space leases) ***is invalid and unenforceable."***

I hope you can help to remedy this problem.

Sincerely,

Ted Smith

cc: Sen. Halford
Reps. Kohring & Ogan
Commissioner Perkins

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM October 23, 1992

SUBJECT: DOTPF - Airspace Leasing Program
(Work Order No. 8-LS0132)

TO: Senator Curt Menard
ATTN Johanna Munson

FROM: George Utermohle GU
Legislative Counsel

This memorandum is in response to your inquiry as to whether the Department of Transportation and Public Facilities (DOTPF) must implement its airspace leasing program for business signs by regulation.

DOTPF has recently implemented an airspace leasing program in order to comply with the requirements of the federal aid highway program. Airspace leases grant permission to a person to use airspace within the right-of-way of a highway. Use of federal aid highway rights-of-way for nonhighway purposes by a person, other than a railroad or public utility, are subject to the airspace management provisions of 23 C.F.R. 713.101 - 205. For purposes of the federal aid highway program, "airspace" is "that space located above, at, or below the highway's established gradeline lying within the approved right-of-way limits." 23 C.F.R. 713.203; emphasis added.

The authority of the DOTPF to implement an airspace leasing program arises implicitly under AS 19.05.010, 19.05.030(1), 19.05.040, and AS 44.42.020(a)[1] and

---

[1] Alaska Statutes 19.05.010 states:

> The department is responsible for the planning, construction, maintenance, protection, and control of the state highway system.

Alaska Statutes 19.05.030(1) states:

> The department has the following duties:
> (1) direct approved highway planning and construction and maintenance, protection and control of highways;

(continued...)

explicitly under AS 19.25.200(a)[2].

The procedures and standards for issuance of an airspace lease for a business sign are set out in a document entitled "Summary of Policy for Leasing Adjacent Right of Way for Extending Business Premises." DOTPF has not adopted regulations implementing the airspace leasing program.

Under AS 44.62 (Administrative Procedure Act), DOTPF must adopt regulations in accordance with the procedures set out in that chapter. A regulation is a "rule, regulation, order, or standard of general application" including "'manuals,' 'policies,' 'instructions,' 'guides to enforcement,' 'interpretive bulletins,' 'interpretations,' and the

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[1](...continued)

. . .

Alaska Statutes 19.05.040 states:

> Sec. 19.05.040. POWERS OF DEPARTMENT. The department may
>
> . . .
>
> (4) acquire rights-of-way for present or future use;
> (5) control access to highways;
> (6) regulate roadside development;
> (7) preserve and maintain the scenic beauty along state highways;
> . . .; and
> (12) exercise any other power necessary to carry out the purpose of AS 19.05 - AS 19.25.

Alaska Statutes 44.42.020(a) states:

> (a) The department shall
> (1) plan, design, construct and maintain all state modes of transportation and transportation facilities and all docks, floats, breakwaters, buildings and similar facilities;
>
> . . .
>
> (6) cooperate and coordinate with and enter into agreements with federal, state and local government agencies and private organizations and persons in exercising its powers and duties;
> (7) manage, operate, and maintain state transportation facilities and all docks, floats, breakwaters and buildings, including all state highways, vessels, railroads, pipelines, airports, and aviation facilities;
>
> . . .

[2] Alaska Statutes 19.25.200(a) states:

> An encroachment may be constructed, placed, changed, or maintained across or along a highway, but only in accordance with regulations adopted by the department. An encroachment may not be constructed, placed, maintained, or changed until it is authorized by a written permit issued by the department, unless the department provides otherwise by regulation. The department may charge a fee for a permit issued under this section.

like that have the effect of rules, orders, regulations or standards of general application". AS 44.62.640(a)(3); emphasis added. The Alaska Supreme Court has identified two indicia of a regulation. First, a regulation implements, interprets, or makes specific the law enforced or administered by the agency. Kenai Peninsula Fisherman's Cooperative Association, Inc. v. State, 628 P.2d 897, 905 (Alaska 1981). The standards utilized by DOTPF for the issuance of an airspace lease do implement and make specific the law enforced by the department under AS 19 and AS 44.42. Second, a regulation affects the public or is used by the agency in dealing with the public. Id. The standards for airspace leases clearly affect the public and are used by the DOTPF in its dealings with the public regarding airspace leases.

It is my conclusion that the policy for issuing airspace leases have the effect of regulations and standards of general application for the issuance of airspace leases. Thus, the policy is a regulation and must be adopted as a regulation in accordance with AS 44.62.

Because the policy has not been adopted as regulations, the policy is invalid and unenforceable. Id. at 906; Gilbert v. State Department of Fish and Game, 803 P.2d 391, 397 (Alaska 1990). DOTPF cannot rely upon the policy as a basis for issuing airspace leases until the department has complied with the regulation adoption procedures of AS 44.62. Kenai Peninsula, 628 P.2d at 906.

The procedures and standards set out in the policy for issuance of airspace leases for business signs seem to be consistent with DOTPF's authority to regulate use of highway rights-of-way under AS 19.05.010, 19.05.030, 19.05.040, AS 19.25.200, and AS 44.42.020. DOTPF could adopt the policy as a regulation by complying with AS 44.62 and thus overcome the current invalidity of the policy. However until regulations implementing the policy take effect, the policy is unenforceable.

In addition to violating provisions of the Administrative Procedure Act, DOTPF's airspace leasing policy probably violates AS 19.25.200(a).[3/] Under AS 19.25.200(a) an encroachment is permitted on a highway or highway right-of-way, if, and only if, the encroachment is in accord with regulations adopted by the department and the department has issued a written permit authorizing the encroachment. The department may adopt regulations waiving the requirement for a written encroachment permit. The current regulations regarding encroachment permits, for uses other than public utilities and railroads, are found at 17 AAC 10.010 - 050. The provisions of 17 AAC 10.010 apply to encroachments in general, while 17 AAC 10.020 - 050 are applicable to driveways and road approaches. Encroachment permits for business signs are subject to the general provisions of 17 AAC 10.010 which provides, in essence, that encroachments may be permitted within highway rights-of-way under

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3/ See, footnote 2.

certain conditions if the department has authorized the encroachment in writing and if the encroachment satisfies applicable federal regulations.[4/]

Because the airspace leasing policy has the effect of allowing an encroachment to be placed in a highway right-of-way, the policy is subject to the provisions of AS 19.25.-200(a) and thus must be adopted by regulation. DOTPF has not adopted the airspace leasing policy as regulations, so the policy is not in compliance with AS 19.25.020(a). Until DOTPF adopts regulations implementing the airspace leasing policy, DOTPF may issue authorizations for business signs within highway rights-of-way only in accordance with the provisions of 17 AAC 10.010.[5/]

If I may be of further assistance, please advise.

GU:lmb:gc
92-178.lmb

4/ 17 AAC 10.010 states:

ENCROACHMENTS. Encroachments may be installed or permitted within highway lands, or rights-of-way, under certain conditions, when they have been the subject of a previously secured written authorization issued by the [D]epartment [of Transportation and Public Facilities] and, in respect to all highways acquired or constructed in whole, or in part, with federal-aid funds, in accordance with the federal regulations governing the future use and occupation of such highways. (Effective 6/25/69)

5/ Under 17 AAC 10.010, DOTPF may authorize encroachments within highway rights-of-way "under certain conditions". Though it may be argued that the phrase "under certain conditions" allows the department to administratively establish conditions and procedures as policies under which it may authorize encroachments, the requirements of the Administrative Procedure Act as discussed earlier in this memorandum preclude the possibility that DOTPF can supersede or amplify upon the provisions of 17 AAC 10.010 by administratively establishing a policy for issuing airspace leases.

Department of Transportation & Public Facilities
Commissioner's Office
Voice Telephone: (907) 465-3900
Text Telephone: (907) 465-3652
Fax Number: (907) 586-8365

FAX

TO: John Miller Phone: _____

FROM: Bo Brownfield Phone: _____

Number of Pages (Including this Cover Sheet): _____

Comments: per email

Author: Boyd Brownfield at JNUHQ1
Date: 2/25/97 2:10 PM

John, I just got through talking to Bob Ruby regarding a telephone testimony at last Friday's hearing from a Ted Smith. Ted was very, VERY irrate and upset with the DOTPF for illegally taking land. His problems stem from about eight to none years ago when we developed an agreement with FHWA for air space leases. He also sent us a letter with an attached legal position which will give you the details of his complaints with DOT.

Bob believes he is one of many who have in their possession unrestricted deeded land upon which the department constructed Parks highway and took possession of 300 feet ROW. Since he was there first our easement lies under his deed.

What he doesn't realize and what his deed does not identify is that there exists a Public land Order (PLO) (during the Territorial days) that has not yet been recorded by the department which does give us first and full control of ROW established as a result of building the highway.

To resolve the issue once and for all Bob suggests that we record the PLO's. Then send all owners a certified copy of the recorded PLO so it can be so noted on their deed. While they will not like it - they at least have be made officially aware our rights as keeper of state ROW and we can squeltch the issue.

Please talk among yourselves and let me know what you think.
Thanks, Bo

Author: JohnF Bennett at FAIBWR-CCMAIL
Date: 2/25/97 2:52 PM
Priority: Normal
TO: John Miller
Subject: Re: ROW issues

The state supremes have stated in several opinions that the PLO's as filed in the federal register constituted constructive notice to purchasers that the land was encumbered by a right of way. The court went on to say that this was no different than filing a notice at the recorder's office and that title companies were liable for reporting such encumberances. (Typically it is now noted as an exclusion on a title policy).

I'm not sure of the value of recording the plo's at this time. First, we do not have an original or even a very legible copy. As filed in the federal register they are printed in a newpaper column format. The best we could do is transcribe from the copy. What to file it as? It was not a conveyance, it was a federal administrative action. The best we could probably do is file an affidavit that we believe this to be a correct transcription of the PLO. What good will it do? None. Since it can't reference a grantor or grantee or even specifically under a property description, (It applies to the whole state to road that we haven't even mapped yet.) it will not show up in any particular chain of title.

If this becomes a real problem...not just one person but say more than 10 or 20 complaints per month...we could have a ROW page on the DOT homepage explaining property management issues and encumberance (PLO & other) issues. If someone doesn't have internet access, we can just send the a copy which would explain (but never to their satisfaction) the issues.

You might want to explain to Bo that at statehood, we took title to 5400 miles of road which primarily consists of PLO rights of way. I would be more than happy to develop a program to contact and discuss this problem with every affected property owner in the state, except that the size of the organization necessary to complete such a task would require that I be promoted to at least a range 26.

PS: I would also like an expense account and a command car commensurate with my new appointment.

Reply Separator

Subject: ROW issues
Author: John Miller at FAIBWR-CCMAIL
Date: 2/25/97 2:18 PM

Please give me your thoughts. I'll attempt to compile a consensus answer (I'll show it to all of you before I send it).

Thanks,

JAM

Forward Header

Subject: ROW issues

Author: JohnF Bennett at FAIBWR-CCMAIL
Date: 8/10/95 7:51 AM
Priority: Normal
Receipt Requested
TO: John Miller
CC: Rod Platzke at FAIPM1
Subject: Encroachment Permit - Howk's Greenhouse - Richardson Highway
---------- Message Contents ----------

ON 8/8/95 Property Management recieved a call from Rep. Gene Therriault regarding an encroachment permit request from Howk's Greenhouse. Howk's originally called M&O wanting to plant chokecherry trees in the ROW. M&O referred them to us for a permit. Our intern, Paul Wallis handled the request. Paul explained the process but when he mentioned the fee for such a permit, Howk went ballistic. He called Therraiult's office.

Therriault's assistant, Shara ? called Paul Wallis to inquire as to the Department's legal authority to charge fees for such activities. The question was forwarded to me.

We've been concerned for some time that this question was going to be asked and that we did not have a good answer. The fee structure was implemented by HQ a couple of years ago and was written into our ROW Manual. Given our past experience (Airport lease rates) and a basic interpretation of the statutes, I believe that fees cannot be imposed except by regulations which were developed through the Adminstrative Procedures Act. This issue was raised in 1994 when the AGO recommended that we develop regulations for relocation. A 2/1/94 memo from Otteson to Schuyler Steven acknowledges that externally directed procedures must be adopted by APA, therefore our procedures (relocation/property mgt.) not established in regulation are illegal. The defense to continuing this practice was that it was practical and we haven't been caught yet. I check with Central Region and they are in agreement with this.

I called for Loren (off in Virginia) and got to Rod Wilson on Wednesday morning and discussed the issue. He researched the issue further and met with the Commissioner to discuss the Department's response. Rod called back and said that his reading of the statutes suggests that there are more grounds for requiring regulations than not and that the issue was fuzzy. He though the issue could be resolved if the Department could obtain legislative authority for the Department's Policy's to carry the same weight as regulation without going through the process. (highly unlikely). For the time being he suggested referring Therriault's office to Sam Kito.

I called Kito to give him a heads up on the referral. He also recognized the problem but believes that it is limited to the collection of fees. Both Kito and Wilson referred to a recent memo from Bothelo to the Commissioner stating that by avoiding formal adoption of regulations, the Department was setting itself up for a big fall. (Sounds like an advance I told you so.)

Kito called back after talking to Therriault's office. He said that they are more interested in obtaining results for Howk at this time than in pursuing the issue of fees and regulations.

Howk has not formally applied for a permit at this time. Fees are waivable by the D&C Director (See next cc:mail to Kito)

Author: JohnF Bennett at FAIBWR-CCMAIL
Date: 8/10/95 8:31 AM
Priority: Normal
Receipt Requested
TO: Sam Kito III at JNUHQ1
CC: John Miller
CC: Rod Platzke at FAIPM1
Subject: Howk's Encroachment Permit - Rep. Therriault's inquiry
---------- Message Contents ----------

Howk initially asked M&O about planting chokecherry trees in the right of way. M&O referred them to ROW for an encroachment permit. Howk contacted one our our Property management agents by phone. The process as outlined in the ROW manual was explained however the disucssion broke down when the issue of fees was raised. Howk has not yet submitted a written application for a permit. Howk did however, contact Therriault's office to complain about the fees.

This type of permit is covered under section 9.09.01 of the ROW manual. A "beautification planting" may be considered a permissable encroachment. The encroachment can be permitted under a revocable airspace permit if approved by the Regional D&C Director and FHWA.

Section 9.09.00 provides for a $200 permit fee unless waived by the D&C Director. Also an application processing fee of $100 is required. This fee in mentioned in Section 9.08.01 in reference to Airspace Leases and has been applarently applied across the board to all types of airspace applications.

Our guidelines for processing require that the application be in writing and state the purpose of the proposed permit. A sketch of the proposed area with dimensions along with photos. We generally hand out a 1 page summary of guidelines listing what is required in the application, what the fees are and a list of the appropriate addresses and phone numbers for our offices.

Although we have not issued a great number of permits for beautification since the fees were implemented, a waiver of fees would likely be based upon a subjective evaluation of the ROW impact and public benefit derived from such an encroachment.

On one end of the spectrum, an individual may want to extend their lawn or plant a few flowers in the ROW, on the other end the request might entail significant landscaping with planter boxes etc., which in this case might be construed as advertising the product that Howk's business wishes to sell. In either event, it is the Director's decision to waive the fees.

If you are to contact Therriault's office again, (or if you want me to), we need to tell them to have Howk submit an application for an airspace easement. Preferably he will first request a copy of the guidelines so that his application will be complete. I'll let you decide what to tell them on fees. Either tell them to request a waiver of fees or tell them not to submit them at all. If you tell them not to submit them, you will probably want to advise Platzke as to the Department's weak position in requiring fees for any of these procedures.

GUIDELINES FOR APPLYING FOR AN AIRSPACE PERMIT

The Airspace Permit is issued for a specific purpose and is renewable at five year intervals unless a shorter time is specified. An Airspace Permit is appropriate for uses benefiting the general public and for access to adjoining property, as well as temporary placement of banners and flags.

To apply for an Airspace Permit please:

Send a letter requesting an Airspace Permit to:

Department of Transportation and Public Facilities
Attn: John A. Miller, Chief Right of Way Agent
2301 Peger Road, M.S. 2553
Fairbanks, Alaska 99709-5399

-- State the purpose of the proposed permit and provide a sketch of the proposed use showing its dimensions.

-- Enclose three (3) photographs of the area where the proposed use will be located in relation to the highway and the right of way boundary copies of right of way maps are available at the Right of Way Section Office.

-- Enclose a map showing the distance of the proposed use area from the highway centerline (or from the edge of pavement); include the right of way boundary. Copies of right of way maps are available at the Right of Way Section Office.

-- State why the use of the right of way is needed.

-- A processing fee of $100 payable to the Department of Transportation and Public Facilities is to be sent to:

Department of Transportation & Public Facilities
Attn: Nancy Herning Finance/Revenue
2301 Peger Road
Fairbanks, Alaska 99709-5399

-- If requesting an Airspace Permit for placement of banners or flags enclose a processing fee of $100 **plus** $10 for each additional banner or flag.

-- Once Airspace Permit is ready for PERMITTEE'S signature a permit fee of $200 will be due and payable to the Department of Transportation and Public Facilities.

If you have any questions or need assistance, please call 474-2400, Property Management.

WALTER J. HICKEL, GOVERNOR

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES
NORTHERN REGION, RIGHT OF WAY

2301 PEGER ROAD, MAIL STOP 2553
FAIRBANKS, ALASKA 99709-5316
PHONE: (907) 474-2400

May 17, 1993

Re: 11 AAC 53 rewrite
Review comments

Department of Natural Resources
Division of Land
P.O. Box 107005
Anchorage, AK 99510-7005

Attn: Jerome A. Pape

Dear Jerome,

After the ASPLS meeting on May 15, in which we further discussed the 11 AAC 53 rewrite, I decided to put in writing my comments regarding the vacation of RS 2477 rights of way.

My primary concern is with the validation requirements under 11 AAC 53.256 for the vacation of an RS 2477 trail right of way. Under the current draft regulations, the RS 2477 right of way must be validated and accepted under the terms of 11 AAC 51.010 before a vacation of the right of way can be granted.

In my opinion, this process has two primary problems. The first problem arises when there is marginal documentary evidence to establish that a trail easement exists. For example, consider the case of a property owner who has an apparent historic trail crossing his property. It has not been used for decades but represents a possible cloud on the owners title and a restriction to development until any potential public right of access is vacated. The lack of documentary evidence may make it difficult to obtain a validation. Unless a failure to meet the validation requirements has the same effect as a vacation, the cloud will still remain. What we don't want to do is to create a situation where "you can't get there from here". There is also the issue that the RS 2477 validation regulatory process may not be binding in court, therefore allowing a validation or negative finding to be overruled.

Unlike a subdivision dedication where the offer and acceptance of a right of way are clearly defined as are the process to vacate those dedications, the existence of RS 2477 trail and Public Land Order rights of way can at times be a fairly fuzzy issue. Because of this problem our Commissioner's Deed of Vacation uses the terms "conveys, quitclaims, and otherwise vacates"..."all interest of whatsoever nature which is has, in the following described real property...". Essentially, what we have executed is a quitclaim vacation. Once we have decided that the easement is no longer necessary, our document extinguishes the claim of an easement whether it actually existed or not.

The second problem is primarily economic. The validation process requires that a lot of state time and money as well as property owner fees be spent validating an easement that we are trying to extinguish. No public interest is served in this kind of paper chase and in times of tight budgets we need to utilize common sense solutions in dealing with situations such as these.

In summary, I am proposing that validation of an RS 2477 easement not be required in order to obtain a vacation of that potential easement.

If a single trail easement passes through a property, it can be described with respect to the property boundaries. If several potential trails pass through a property, then a survey and plat would be required to define which is being vacated. I do agree that if alternate access is required, that it should be surveyed, platted and recorded.

If you have any questions on my comments, I can be reached at 474-2413.

Sincerely,

John F. Bennett, PLS
Right of Way Engineering Supervisor

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES

DIVISION OF LAND

3601 C STREET
P.O. Box 107005
ANCHORAGE, ALASKA 99510-7005

June 23, 1993

To: John F. Bennett, RLS
3123 Penguin Lane
Fairbanks, AK 99712

Subject: 11 AAC 53

Dear Mr. Bennett:

Please excuse the informality of this letter. You are being sent this correspondence because you are representative of a professional society or have provided us assistance in the survey regulation review process.

The survey regulations have now been sent to the commissioner's office for approval prior to forwarding to the attorney general's office for approval and filing by the lieutenant governor. Accompanying this you will find a summary of comments that were received during the last review and changes that were made to the final version of the regulations. Not all of the recommendations were adopted and some were adopted partially, but all were considered. I've tried to explain the rationale as to why changes were, or were not, made.

While the revised regulations won't be everything to everybody, we hope they will generally be considered an improvement. We greatly appreciate the time you have given to assist us in this process. Please share this information with your fellow professionals you feel are interested.

Sincerely,

Jerome A. Pape

Jerome A. Pape
Chief Cadastral Surveyor

11 AAC 53.250(d) The next to last sentence of this paragraph has been changed to "...send to the petitioner and surveyor a copy of the recorded plat...".

11 AAC 53.250(e)(5) The need for a certificate of payment of taxes was questioned. This is a statutory requirement.

11 AAC 53.250(e)(6) Minor modifications were made to the wording for clarification.

11 AAC 53.256 The requirement for validation of an RS 2477 right of way prior to vacation was seen as a needless, time consuming imposition. The requirement for validation was removed in favor of public notice of possible RS 2477 status. Additionally, survey may be required if the proposed route to be vacated is not clearly identifiable.

11 AAC 53.255(b) has been changed to refer to vacation requests that overlap state and municipal platting authorities.

11 AAC 53.256 At borough request, this has been amended to require borough concurrence with vacation of an RS 2477 within an organized borough.

11 AAC 53.260 This has been amended to include borough platting authority concurrence when amending plats within their authority.

11 AAC 53.440(b) It was suggested the retained easement should be a minimum of 30 feet, rather than 20 feet, in keeping with FNSB requirements (Mat-su also requests 15 feet either side of the lot lines for a minimum of 30 feet). This has been changed to a 30 feet.

Dist:Ron Swanson
Marty Welbourn
Cadastral Surveyors

AS 09.55.310 Hearing

Notes to Decisions

Vezey v. State Sup. Ct. Op. 3575

"State's vacation of its preexisting right of way was not a special benefit which could be set off, and could not be considered part of the just compensation to which condemnee was entitled."

Article 3. Eminent Domain.

Sec. 09.55.275. Replat approval. No agency of the state or municipality may acquire property located within a municipality exercising the powers conferred by AS 29.35.180 or 29.35.260(c) that results in a boundary change unless the agency or municipality first obtains from the municipal platting authority preliminary approval of a replat showing clearly the location of the proposed public streets, easements, rights-of-way, and other taking of private property. Final approval of replat shall be similarly obtained. However, if a state agency clearly demonstrates an overriding state interest, a waiver to the approval requirements of this section may be granted by the governor. The platting authority shall treat applications for replat made by state or local governmental agencies in the same manner as replat petitions originated by private landowners. (§ 2 ch 96 SLA 1975; am § 23 ch 74 SLA 1985)

Effect of amendments. — The 1985 amendment substituted "AS 29.35.180 or 29.35.260(c) that" for "AS 29.33.150 — 29.33.245 which" in the first sentence.

Sec. 09.55.310. Hearing.

NOTES TO DECISIONS

II. JUST COMPENSATION.

B. Damages to Remainder.

Alteration of original construction plan. — When an owner settles or receives a condemnation award in reliance on a construction plan which is implemented and later altered, the owner is entitled to just compensation for any resultant economic damage to the property, provided that a portion of the property was taken for the original construction project, and the remaining property decreased in value as a result of the alteration. The owner's reliance must be objectively reasonable, based on the documents prepared to resolve the original condemnation action. State v. Lewis, 785 P.2d 24 (Alaska 1990).

Inconsistent verdict. — State was entitled to a new trial on the amount of just compensation required for the taking of an abutting landowner's right of access to a controlled access highway, where the jury's answers to special interrogatories were internally inconsistent and inconsistent with the general verdict and the jury's conclusion that the remaining property was worth more after the taking than the entire parcel was worth before the taking was irreconcilable with its conclusion that the remainder received no special benefit from the highway project. State v. Lewis, 785 P.2d 24 (Alaska 1990).

C. Benefits to Remainder.

State's vacation of its pre-existing

right-of-way was not a special benefit which could be set off, and could not be considered part of the just compensation to which condemnee was entitled. Vezey v. State, 798 P.2d 327 (Alaska 1990).

Sec. 09.55.330. Compensation and damages.

NOTES TO DECISIONS

I. General Consideration.

I. GENERAL CONSIDERATION.

Cited in City of Valdez v. 18.99 Acres, 686 P.2d 682 (Alaska 1984).

Sec. 09.55.350. Time for paying compensation or damages and bond to build railroad fences and cattle guards. The plaintiff shall, within 30 days after final judgment, pay the sum of money assessed. If the use is for railroad purposes, the plaintiff may, at the time of or before the payment, elect to build the fences and cattle guards. If the plaintiff so elects, the plaintiff shall execute to the defendant a bond, with one or more sureties to be approved by the court, in double the assessed cost of the same to build such fences and cattle guards within eight months from the time the railroad is built on the land taken. If the bond is given, the plaintiff need not pay the cost of the fences and cattle guards. In an action on the bond, the plaintiff may recover reasonable attorney fees. (§ 13.12 ch 101 SLA 1962)

Editor's notes. — This section is set out above to correct a minor error in the main pamphlet.

Sec. 09.55.370. Final order of condemnation. When payments have been made and the bond given, if the plaintiff elects to give one as required by AS 09.55.350, the court shall make a final order of condemnation, which shall describe the property condemned and the purposes of the condemnation. A copy of the order shall be recorded in the office of the recording district where the land is located, at which time the property described in the order vests in the plaintiff for the purposes specified in the order. (§ 13.14 ch 101 SLA 1962)

Revisor's notes. — Minor word changes related to the recording of documents were made in this section in 1988 under sec. 42, ch. 161, SLA 1988.

Sec. 09.55.430. Contents of declaration of taking.

Editor's notes. — Arco Pipeline Co. v. 3.60 Acres, More or Less, annotated in the title pamphlet, was decided prior to the 1976 amendment which added paragraph (7).

Note on proposed revisions to Commissioner's Deed of Vacation documents:

The recording requirement that we provide the name and address of the Grantee has put us in the position of possibly creating wild deeds when the title is questionable and we name the Grantee erroneously.

Prior to the recording requirement, a Grantee was not named and the CDV when executed had the effect of releasing our easement interest. No title interest was conveyed and the full use of the underlying fee estate would return to the vested owner of that estate.

The Trout Lake Loop line vacation is a good example in that we know that there are multiple claims to the fee estate and in prior acquisitions for the Chitina East project we had to condemn for title.

John Athens has recommended that we submit the next CDV to his office for review. He had suggested that the grantee provide title insurance with the State as beneficiary if there are problems. This may not be politically correct in this situation since we are in the middle of processing this CDV and a new requirement would likely raise a protest.

This CDV should be forwarded to the AGO with a recommendation to review A.S. 19.05.070 Vacating and disposing of land and rights in land. and A.S. 40.17.030 Formal requisites for recording. and the appropriate regulations in order to advise us as to revised or additional wording in the CDV that can protect the State from future liability claims.

Perhaps, we need only add a disclaimer to the document stating that the Grantee named is the ostensible owner and is named for recording indexing only and that unencumbered use of the land underlying our vacated easement reverts by operation of law to the owner of the fee estate, whomever that may be.

2/26/93 - jfb

Copper River Highway at Chitina
Vacation of Trout Lake Loop Line Right of Way
February 26, 1993/jfb

A tract of land lying within Sections 23, 24, & 13, Township 4 South, Range 5 East, Copper River Meridian, Third Judicial District, Chitina Recording District, State of Alaska, to wit:

The right of way for the Trout Lake Loop Line according to the "Map of Definite Location of the Copper River & Northwestern Railway Loop Line Around Trout Lake at Town of Chitina, Alaska, Mile 0.00 to Mile 0.58", filed with the U.S. Department of the Interior in Juneau as serial number 01436 and approved on April 29, 1914.

- EXCEPTING THEREFROM -

Any portion of the aforementioned loop line right of way which lies within an area 100.00 feet on each side of the centerline of the Copper River and Northwestern Railroad according to the "Map of Amended Location from station 1553+53.9 = 3685+18.7 (Wood Canyon), to station 3294+00 (Chitina)", filed with the U.S. Department of the Interior in Juneau as serial number 01419 and approved on February 21, 1914.

- ALSO EXCEPTING THEREFROM -

Any portion of the aforementioned loop line right of way which lies within the right of way for Project S-0850(6), Chitina East filed as Plat Number 76-8 on August 19, 1976 at the office of the Chitina Recording District.

Said tract of land contains 7 acres more or less.

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

NORTHERN REGION, REGIONAL DIRECTOR

2301 PEGER ROAD
FAIRBANKS, ALASKA 99709-5316
PHONE: (907) 451-2210

May 21, 1991

Re: Vacation of Highway Rights of Way

Rex A. Nutter, Director
Department of Community Planning
Fairbanks North Star Borough
P.O. Box 1267
Fairbanks, AK 99707

Dear Mr. Nutter:

In your letter of May 14, 1991, you state that the Department of Transportation and Public Facilities may be in violation of AS 29.40.140.(b) which requires a hearing and determination by the local platting authority in order to vacate existing platted rights of way. We believe your interpretation of this statute to be in error.

The requirement for a hearing and determination relates to AS 29.40.120. Alteration or replat petition. This statute states that "A **platted street** may not be vacated, except on petition of the state, the borough, a public utility, or owners of a majority of the land fronting the part of the street sought to be vacated."

Very few of the highway rights of way managed by the Department were created by a public dedication on a subdivision plat. In fact, the majority of highway rights of way in Alaska were created by a Public Land Order or were purchased in fee by the State of Alaska.

There are two methods by which a member of the public can receive title to excess right of way held by the Department. In the case where the State owns the right of way in fee, the property is transferred by a Commissioner's Quitclaim Deed. The requestor must pay for the cost of an appraisal, a replat if applicable, and the fair market value of the land. In the case of an easement, where the requestor owns the underlying interest, the State issues a Commissioner's Deed of Vacation. Both of these actions are taken under the authority of AS 19.05.070. Vacating and disposing of land and rights in land. This statute states that "The department may vacate land, or part of it, or rights in land acquired for highway purposes, by executing and filing a deed in the appropriate recording district.....in the manner and proportion considered equitable by the commissioner and set out by him in the deed."

The Department does not hold the position that it is exempt from complying with AS 29.40.140.(b) where it is applicable. The Department does hold that it is only applicable where the right of way was created by virtue of a dedication to the public on a subdivision plat. In these situations where a dedicated street right of way is to be vacated, the Department has and will continue to comply with the Statute.

The vacation of the Old Airport Road on the Fred Meyer property was based upon an 80 foot wide right of way according to the right of way plans for the new Airport Road. Executive Order 2665, Amendment No. 2 which established a 300 foot wide right of way for Airport Road was subject to prior existing rights. Therefore, a prior entry could have prevented the EO 2665 right of way from attaching to the road in that area. When a member of the public requests a vacation of right of way, the Department requires the requestor to provide a title report to verify the ownership of the underlying interest and also to reveal any anomalies which could affect the vacation. If Fred Meyer's title insurer feels that there is still a cloud on the title due to the ambiguity of the width of the old right of way, they can request a blanket vacation of whatever right of way existed within their boundaries.

In closing, the Department does not believe there is any need for a change in policy regarding vacations of rights of way. The Department will continue to operate according to the statutes regarding vacations of right of way as they apply to specific situations.

Sincerely,

John D. Horn, P.E.
Regional Director

JB/kfl

cc: John Miller, Chief Right of Way Agent, Northern Region

Sec. 29.40.120. Alteration or replat petition. A recorded plat may not be altered or replatted except by the platting authority on petition of the state, the borough, a public utility, or the owners of a majority of the land affected by the alteration or replat. A platted street may not be vacated, except on petition of the state, the borough, a public utility, or owners of a majority of the land fronting the part of the street sought to be vacated. The petition shall be filed with the platting authority and shall be accompanied by a copy of the existing plat showing the proposed alteration or replat. (§ 11 ch 74 SLA 1985)

Sec. 29.40.130. Notice of hearing. The platting authority shall fix a time for a hearing on an alteration or replat petition that may not be more than 60 days after the petition is filed. Notice shall be published by the platting authority stating when and by whom the petition was filed, its purpose, and the time and place of the hearing. The notice shall generally describe the alteration or replat sought. The platting authority shall also mail a copy of the notice to each affected property owner who did not sign the petition. (§ 11 ch 74 SLA 1985)

Sec. 29.40.140. Hearing and determination. (a) The platting authority shall consider the alteration or replat petition at a hearing and make its decision on the merits of the proposal.

(b) Vacation of a city street may not be made without the consent of the council. Vacation of a street in the borough area outside all cities may not be made without the consent of the assembly. The governing body shall have 30 days from the decision of the platting authority in which to veto a vacation of a street. If no veto is received by the platting authority within the 30-day period, consent is considered to have been given to the vacation. (§ 11 ch 74 SLA 1985)

Sec. 29.40.150. Recording. If the alteration or replat is approved, the revised plat shall be acknowledged and filed in accordance with AS 40.15.010 — 40.15.020. (§ 11 ch 74 SLA 1985)

Sec. 29.40.160. Title to vacated area. (a) The title to the street or other public area vacated on a plat attaches to the lot or lands bordering the area in equal proportions, except that if the area was originally dedicated by different persons, original boundary lines shall be adhered to so that the street area that lies on one side of the boundary line shall attach to the abutting property on that side, and the street area that lies on the other side of the boundary line shall attach to the property on that side. The portion of a vacated street that lies inside the limits of a platted addition attaches to the lots of the platted addition bordering on the area. If a public square is vacated,

the title to it vests in a city if it lies inside the city, and in the borough if it lies inside the borough but outside all cities. If the property vacated is a lot, title vests in the rightful owner.

(b) If the municipality acquired the street or other public area vacated for legal consideration or by express dedication to the municipality other than as a subdivision platting requirement, before the final act of vacation the fair market value of the street or public area shall be deposited with the platting authority to be paid to the municipality on final vacation.

(c) The provisions of (a) and (b) of this section apply to home rule and general law municipalities.

(d) The council of a second class city located outside a borough may vacate streets, alleys, crossings, sidewalks, or other public ways that may have been previously dedicated or established when the council finds that the streets, alleys, crossings, sidewalks, or other public ways are no longer necessary for the public welfare, or when the public welfare will be enhanced by the vacation. If the council determines that all or a portion of the area vacated under this subsection should be devoted to another public purpose, title to the area vacated and held for another public purpose does not vest as provided in (a) of this section but remains in the city. (§ 11 ch 74 SLA 1985)

Sec. 29.40.170. Delegations. The planning commission and the platting authority may, as authorized by ordinance, delegate powers to hear and decide cases under this chapter, including, but not limited to, delegations to

(1) one or more members of the planning commission or platting authority;

(2) other boards or commissions;

(3) a hearing officer designated by the planning commission or platting authority. (§ 11 ch 74 SLA 1985)

Sec. 29.40.180. Violations. It is unlawful for the owner of land located in a subdivision to transfer, sell, offer to sell, or enter into a contract to sell land in a subdivision before a plat of the subdivision has been prepared, approved, and filed in accordance with this chapter. It is unlawful for a person to file a plat or other document depicting subdivided land in a public recorder's office unless the plat or document has been approved by the platting authority. For the violation of a provision of this chapter, a subdivision regulation adopted under this chapter, or a term, condition, or limitation imposed by a platting authority in the exercise of its powers under this chapter, a municipality may by ordinance prescribe a penalty not to exceed a fine of $1,000 and imprisonment for 90 days. (§ 11 ch 74 SLA 1985)

★ Fairbanks North Star Borough

809 Pioneer Road · P.O. Box 1267 · Fairbanks, Alas

MAY 16 P4:

ROUTE	COPY	
		D & C DIRECTOR NORTHERN REGION
		DIRECTOR
		DESIGN
		CONST
X	X	ROW 5-17
	Y	PROJ CONT
		REG DIR
		PLANNING
		ADMIN
		M & O
		RETURN

I'd rather reply for John Horn signature If we don't have to do it under the law, let's not start jumping thru more hoops just for fun Steve

May 14, 1991

John Horn, Regional Director
Northern Region, DOT&PF
600 University Ave
Fairbanks, AK 99709-3695

Dear Mr. Horn;

The FNSB Planning Dept. has become aware of a recent instance in the vacation of a public right of way that seems to be a violation of AS 29.40.140.(b) Hearing and determination . The matter was discovered in conjunction with a subdivision application submitted for Platting Board consideration on the Fred Meyer property at the intersection of Airport Way and South University Ave. While researching the title documents submitted with the preliminary plat, it was discovered that a portion of Old Airport Way had been vacated by Commisioner's Deed recorded as instrument # 89-23769 FRD on November 22, 1989 at Book 644, Pages 717-720. FNSB Platting has no record of any public hearing on the vacation of that portion lying within Government Lot 74, Sec. 7, T1S, R1W, F.M. A question arose as to the determination by DOT that the former right of way was 80' in width. The file at DOT Right of Way for the Commissioner's Deed of Vacation only referenced Executive Order 2665, Amendment #2 of Sept. 15, 1956 as establishing a 150' ROW. Nowhere in the file was there a reference to the reduction of that ROW to 80'. The plats of Fairwest and North Fairwest subdivisions in Sec. 8 to the east of University Ave. did dedicate 80' for Old Airport Way in June 27, 1960 and November 10, 1962 but that dedication did not extend across the former BLM property which was later conveyed to CIRI in 1986 as Government Lot 74.

An inquiry with John Bennett at DOT ROW regarding the exclusion by DOT of complying with the FNSB Platting Regulations for the vacation resulted in an affirmation by him that DOT was exempt from complying with AS 29.40.140.(b) by virtue of authority expressed in AS 19.05.070. Vacating and disposing of land and rights in land . It is our contention that this portion of AS 19.05.070.(b) does not relieve DOT from compliance with the appropriate portions of AS 29 which requires public hearing and local platting authority approval on vacations of public rights of way. This apparent oversight by DOT in recording a vacation without FNSB Assembly approval leaves open the question of the remaining width of the former 150' ROW for the Old Airport Way across the Fred Meyer property that is being replatted currently. The existing construction for the new Fred Meyer's building may be affected by the possible remnant ROW for Old Airport Way.

We strongly urge you to examine your policy of executing Commissioner's Deeds of Vacation within the FNSB without the required approval referenced in AS 29.40.140(b) strictly on the basis of the authority given to DOT under AS 19.05.070.

If you have any questions please contact me at the FNSB Department of Community Planning, 459-1000.

Sincerely,

Rex A. Nutter, Director
Department of Community Planning

RAN/rp

published by the platting authority stating when and by whom the petition was filed, i purpose, and the time and ace of the hearing. The notice shall generally describe the alteration or replat sought. The platting authority shall also mail a copy of the notice to each affected property owner who did not sign the petition. (§ 11 ch 74 SLA 1985)

Sec. 29.40.140. Hearing and determination. (a) The platting authority shall consider the alteration or replat petition at a hearing and make its decision on the merits of the proposal.

(b) Vacation of a city street may not be made without the consent of the council. Vacation of a street in the borough area outside all cities may not be made without the consent of the assembly. The governing body shall have 30 days from the decision of the platting authority in which to veto a vacation of a street. If no veto is received by the platting authority within the 30-day period, consent is considered to have been given to the vacation. (§ 11 ch 74 SLA 1985)

Sec. 29.40.150. Recording. If the alteration or replat is approved, the revised plat shall be acknowledged and filed in accordance with AS 40.15.010 — 40.15.020. (§ 11 ch 74 SLA 1985)

Sec. 29.40.160. Title to vacated area. (a) The title to the street or other public area vacated on a plat attaches to the lot or lands bordering the area in equal proportions, except that if the area was originally dedicated by different persons, original boundary lines shall be adhered to so that the street area that lies on one side of the boundary line shall attach to the abutting property on that side, and the street area that lies on the other side of the boundary line shall attach to the property on that side. The portion of a vacated street that lies inside the limits of a platted addition attaches to the lots of the

Sec. 19.05.060. Sale of obsolete equipment and material. The department may sell, exchange or otherwise dispose of obsolete machinery, equipment and material no longer needed, required or useful for construction or maintenance purposes. Money derived from the sale of the property shall be credited to the funds from which the purchase was originally made. (§ 3 art IV title IV ch 152 SLA 1957)

Sec. 19.05.070. Vacating and disposing of land and rights in land. (a) The department may vacate land, or part of it, or rights in land acquired for highway purposes, by executing and filing a deed in the appropriate recording district. Upon filing, title to the vacated land or interest in land inures to the owners of the adjacent real property in the manner and proportion considered equitable by the commissioner and set out by him in the deed.

(b) If the department determines that land or rights in land acquired by the department are no longer necessary for highway purposes the department may:

(1) transfer the land or rights in land to the Department of Natural Resources for disposal, or

(2) sell, contract to sell, lease, or exchange land or rights in land according to terms, standards and conditions established by the commissioner.

(c) Proceeds received from disposal of land or rights in land as authorized by this section shall be credited to the funds from which the purchase of the land was made originally. (§ 4 art IV title IV ch 152 SLA 1957; am § 4 ch 35 SLA 1971)

Article 2. Acquisition of Property

Sec. 19.05.080. Acquisition of land, rights-of-way, and materials by purchase or eminent domain. The department on behalf of the state and as part of the cost of constructing or maintaining a highway may purchase, acquire, take over, or condemn under the right and power of eminent domain land in fee simple or easements

A-7777 1S1W

BOOK 644

PAGE 0717

COMMISSIONER'S DEED OF VACATION

The GRANTOR, the STATE OF ALASKA, acting by and through its DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES, 2301 Peger Road, Fairbanks, Alaska 99709, acting under the authority of the Alaska Statutes, Section 19.05.070, conveys, quitclaims and otherwise vacates unto COOK INLET REGION, INC., P.O. Box 93330, Anchorage, Alaska 99509-3330, all interest of whatsoever nature which it has, in the following described real property:

A parcel of land situate in a portion of the Southeast One Quarter (SE¼), Southeast One Quarter (SE¼), Section 7, Township 1 South, Range 1 West, Fairbanks Meridian, Fairbanks Recording District, Fourth Judicial District, State of Alaska, to wit:

COMMENCING at a found Section Corner common to Sections 7, 8, 17 and 18, Township 1 South, Range 1 West, Fairbanks Meridian;

THENCE N 02°34'47" W a distance of 700.22 feet to the intersection of the West right of way line for University Avenue and the South right of way line for Alaska Project F-037-1(26) Airport Spur/Parks Highway;

THENCE N 88°23'25" W along said South right of way line for Alaska Project F-037-1(26) Airport Spur/Parks Highway a distance of 161.11 feet to the "TRUE POINT OF BEGINNING" said point being 110.00 feet right and opposite Centerline Station "L" 271+85.04 POINT ON TANGENT;

THENCE southwesterly along a 02°01'42" curve to the left having a central angle of 01°53'40", a radius of 2824.79 feet, an arc distance of 93.40 feet to a POINT OF TANGENT;

THENCE S 72°44'45" W along the South right of way line for Old Airport Road a distance of 993.04 feet to the East right of way line for Sportsman's Way;

THENCE N 01°30'54" E along said right of way line a distance of 84.49 feet to the North right of way line for Old Airport Way;

THENCE N 72°44'45" E along said right of way line a distance of 820.58 feet to the South right of way line for Alaska Project F-037-1(26) Airport Spur/Parks Highway;

THENCE S 88°23'25" E along said right of way line a distance of 252.21 feet to the "TRUE POINT OF BEGINNING"

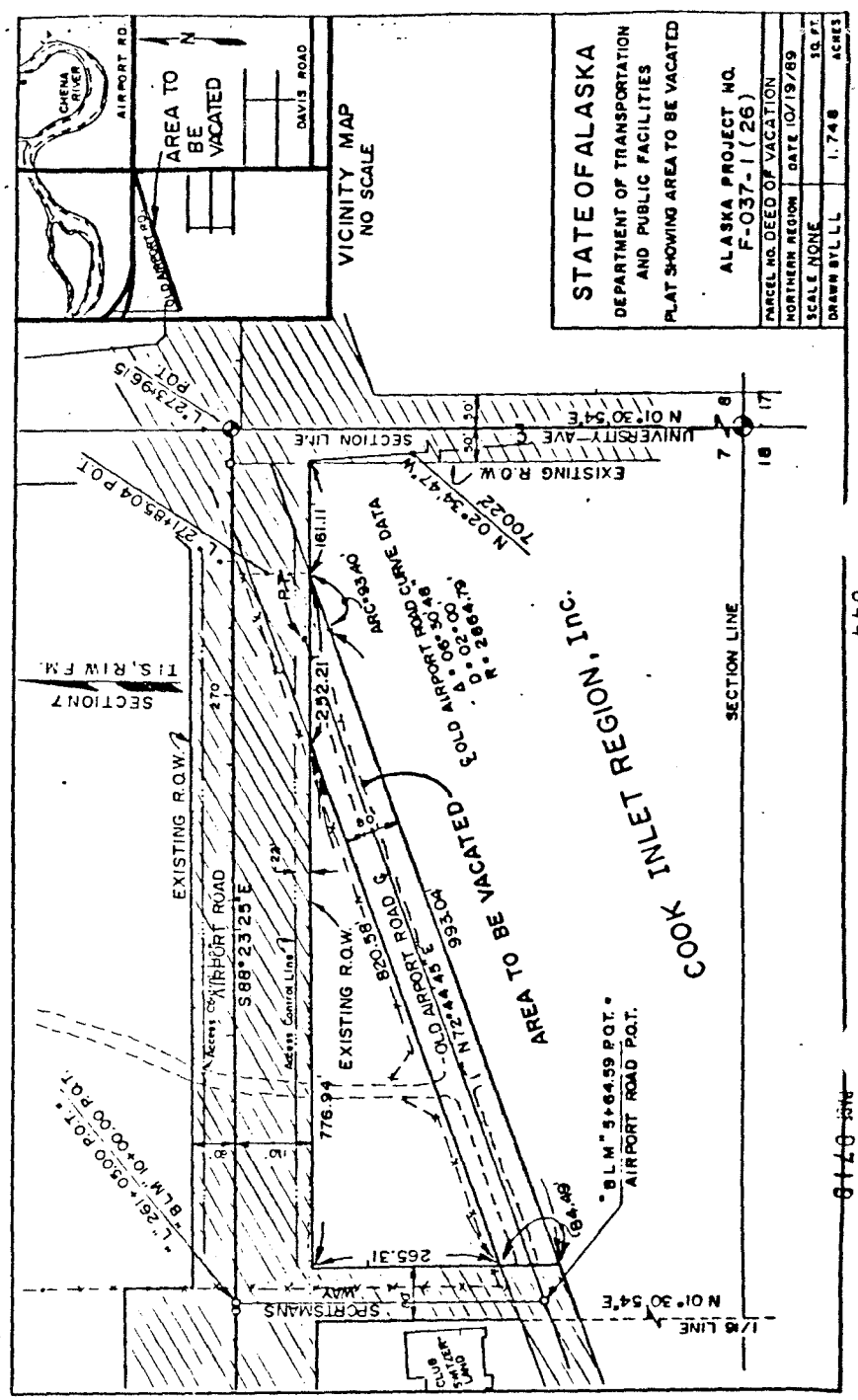
The above tract of land contains 1.748 acres.

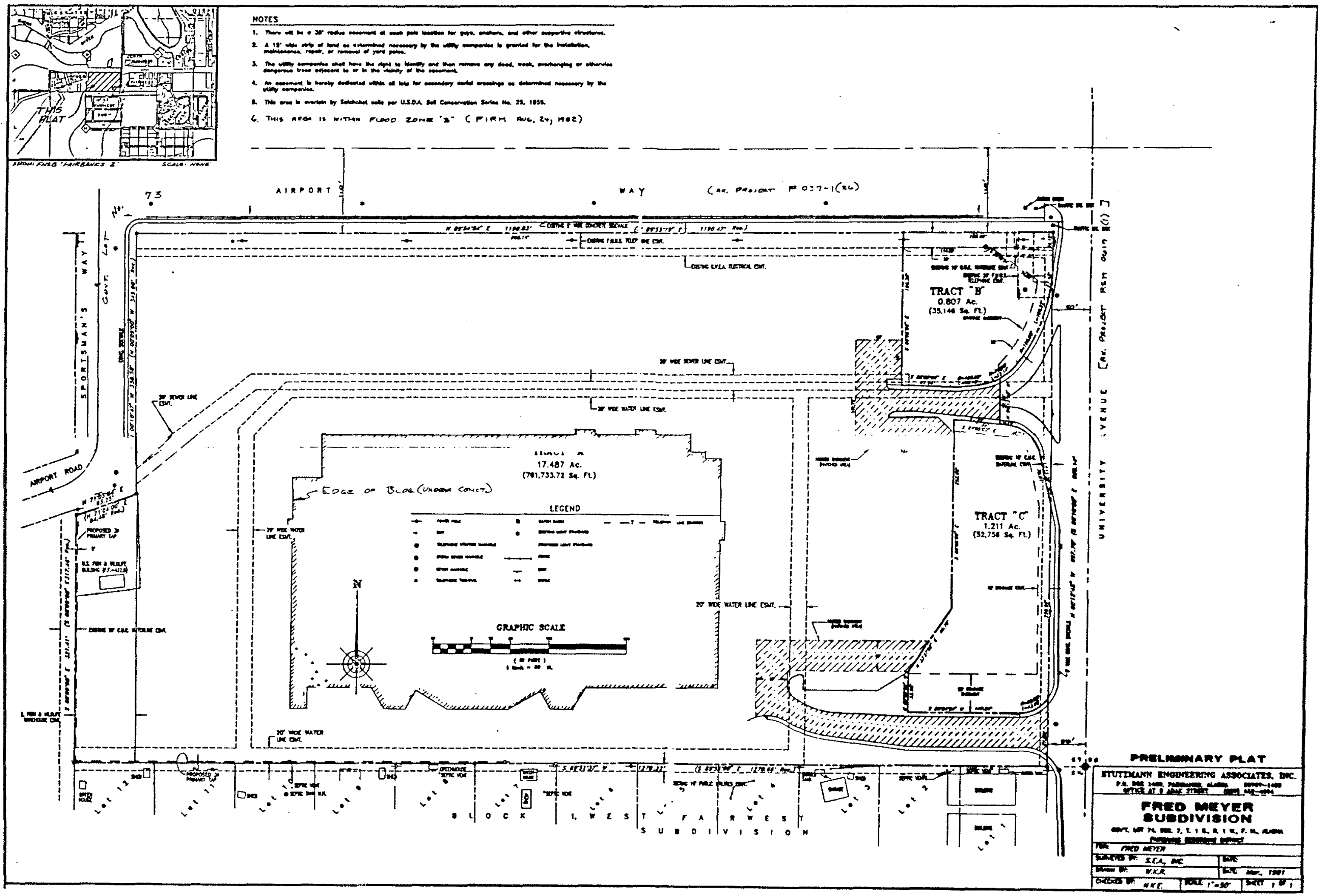
Dated this 30th day of October, 1989.

STATE OF ALASKA
DEPARTMENT OF TRANSPORTATION
AND PUBLIC FACILITIES
600 University Avenue, Suite F
Fairbanks, Alaska 99709-3695

By: _____
Regional Director
Northern Region

State Business
(R/5/86)





NOTES
1. There will be a 30' radius easement at each pole location for guys, anchors, and other supportive structures.
2. A 15' wide strip of land as determined necessary by the utility companies is granted for the installation, maintenance, repair, or removal of yard poles.
3. The utility companies shall have the right to identify and then remove any dead, weak, overhanging or otherwise dangerous trees adjacent to or in the vicinity of the easement.
4. An easement is hereby dedicated within all lots for secondary aerial crossings as determined necessary by the utility companies.
5. This area is overlain by Salchaket soils per U.S.D.A. Soil Conservation Series No. 25, 1959.
6. THIS AREA IS WITHIN FLOOD ZONE "B" (FIRM AUG. 24, 1982)
THIS PLAT
AIRPORT WAY
SPORTSMAN'S WAY
AIRPORT ROAD
UNIVERSITY AVENUE
TRACT "A"
17.487 Ac.
(761,733.72 Sq. Ft.)
EDGE OF BLDG (UNDER CONST.)
TRACT "B"
0.807 Ac.
(35,146 Sq. Ft.)
TRACT "C"
1.211 Ac.
(52,756 Sq. Ft.)
LEGEND
GRAPHIC SCALE
N
20' WIDE SEWER LINE ESMT.
20' WIDE WATER LINE ESMT.
BLOCK 1, WEST FARWEST SUBDIVISION
PRELIMINARY PLAT
STUTZMANN ENGINEERING ASSOCIATES, INC.
FRED MEYER
SUBDIVISION
FOR: FRED MEYER
SURVEYED BY: S.E.A., INC.
DATE
DRAWN BY: W.K.R.
DATE: Mar., 1991
CHECKED BY: W.K.E.
SCALE: 1" = 50'
SHEET 1 OF 1

TRANSALASKA TITLE
201 First Ave., Suite 102
Fairbanks, AK 99701

MEMORANDUM

Date: June 17, 1991

To: Stutzmann Engineering Association

From: Bill Standard

Re: Fred Meyer Subdivision/Airport Road R.O.W.

****

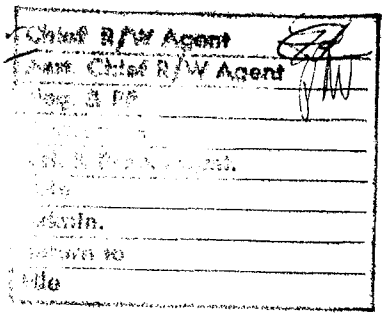
With regard to Note #8 on the proposed plat of said subdivision please be advised TransAlaska Title will not show a cloud on the title for any title policy issued due to ambiguity of the width of the old right-of-way and further, feels the relinquishment of Alaska Department of Transportation's interest by Commissioners Deed was in compliance with AS 19.05.070.

CC: John Horn/Department of Transportation

DORIS LOENNIG
A PROFESSIONAL CORPORATION
ATTORNEY AT LAW

SUITE 206, 613 CUSHMAN STREET - FAIRBANKS, ALASKA 99701
907 452-2005

April 13, 1983



Mr. Paul Wilde
Right of Way Section
Department of Transportation and Public Facilities
2301 Peger Road
Fairbanks, Alaska 99701

Re: Alley v. Davis
Our file # 01-35-01

Dear Paul:

I represent Michael and Patricia Alley who recently purchased a parcel of land from Virginia Davis, bordering on the Old Richardson Highway. I believe that at the time Mr and Mrs Alley were negotiating for the purchase of the property they and the real estate agent, Bruce Cooke, conferred with you concerning the status of the strip of land which lies between the boundary line of the property they purchased and the present right of way of the highway.

On September 30, 1981 the Commissioner of Transportation and Public Facilities executed a Commissioners Deed of Vacation pursuant to A.S. 19.05.070. However, in examining the Deed it is my opinion that the deed is not properly drafted in that it conveys: "unto those person or their heirs, successors or assigns in whom the following property was vested at the time of the acquisition by the State of Alaska". Underscores indicate the recitals with which I disagree. As I read § (a) of A.S. 19-05-070 title should revest in the owners of the adjacent real property which I would interpret to mean present owners.

Would it be possible to obtain a corrected Commissioners Deed of Vacation granting title to "the present owners of the adjacent real property, their heirs, successors and assigns." The assessors office has interpreted the deed as issued by the State to vest title in the Harold Mattonen Estate. I do not believe that

this was the intent of the Statute to revest title in prior owners thus leaving a strip of comparatively useless land in third parties and causing access problems to the present owners of the adjacent land in whom the Statute intended that the title be vested. The offending words in the Commissioners Deed are "in whom the following property was vested at the time of the acquisition by the State of Alaska". I believe the Statute is clear that the intent be that the deed run to the present adjacent owners.

Very truly yours,

DORIS LOENNIG, P.C.

By: Doris Loennig
DORIS LOENNIG

DL:dcm

cc: Mike and Patricia Alley
P.O. Box 81986
Fairbanks, Alaska 99708

COMMISSIONER'S DEED OF VACATION

The **GRANTOR**, the **STATE OF ALASKA**, acting by and through its **DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES,** acting under the authority of the Alaska Statutes, Section 19.05.070, conveys, quitclaims and otherwise vacates unto ***ERLING N. HEM, P.O. BOX 74844, FAIRBANKS, ALASKA 99701** all interest of whatsoever nature which it has, in the following described real property:

A tract of land lying within Sections 23, 24, & 13, Township 4 South, Range 5 East, Copper River Meridian, Third Judicial District, Chitina Recording District, State of Alaska, to wit:

The right of way for the Trout Lake Loop Line according to the "Map of Definite Location of the Copper River and Northwestern Railway Loop Line Around Trout Lake at Town of Chitina, Alaska, Mile 0.00 to Mile 0.58", filed with the U.S. Department of the Interior in Juneau as serial number 01436 and approved on April 29, 1914.

EXCEPTING THEREFROM

Any portion of the aforementioned loop line right of way which lies within an area 100.00 feet on each side of the centerline of the Copper River and Northwestern Railroad according to the "Map of Amended Location from station 1553+53.9 = 3685+18.7 (Wood Canyon), to station 3294+00 (Chitina)", filed with the U.S. Department of the Interior in Juneau as serial number 01419 and approved on February 21, 1914.

ALSO EXCEPTING THEREFROM

Any portion of the aforementioned loop line right of way which lies within the right of way for Project S-0850(6), Chitina East filed as Plat Number 76-8 on August 19, 1976 at the office of the Chitina Recording District.

Said tract of land contains 7 acres more or less.

Dated this 13th day of APRIL, 1993.

STATE OF ALASKA
DEPARTMENT OF TRANSPORTATION
AND PUBLIC FACILITIES
2301 Peger Road, Mail Stop 2553
Fairbanks, Alaska 99709-5316

By: _____
Regional Director
Northern Region

Project No. S-0850(6)
Chitina East to Copper River

* The Grantee named is the ostensible owner and is named for recording indexing only. The unencumbered use of the land underlying the vacated easement reverts by operation of law to the owner of the fee estate, whomever that may be.

Note on proposed revisions to Commissioner's Deed of Vacation documents:

The recording requirement that we provide the name and address of the Grantee has put us in the position of possibly creating wild deeds when the title is questionable and we name the Grantee erroneously.

Prior to the recording requirement, a Grantee was not named and the CDV when executed had the effect of releasing our easement interest. No title interest was conveyed and the full use of the underlying fee estate would return to the vested owner of that estate.

The Trout Lake Loop line vacation is a good example in that we know that there are multiple claims to the fee estate and in prior acquisitions for the Chitina East project we had to condemn for title.

John Athens has recommended that we submit the next CDV to his office for review. He had suggested that the grantee provide title insurance with the State as beneficiary if there are problems. This may not be politically correct in this situation since we are in the middle of processing this CDV and a new requirement would likely raise a protest.

This CDV should be forwarded to the AGO with a recommendation to review A.S. 19.05.070 Vacating and disposing of land and rights in land. and A.S. 40.17.030 Formal requisites for recording. and the appropriate regulations in order to advise us as to revised or additional wording in the CDV that can protect the State from future liability claims.

Perhaps, we need only add a disclaimer to the document stating that the Grantee named is the ostensible owner and is named for recording indexing only and that unencumbered use of the land underlying our vacated easement reverts by operation of law to the owner of the fee estate, whomever that may be.

2/26/93 - jfb