ROW Legal: Miscellaneous Notes

Agency Interpretations of Law

Statutory Interpretations

- The APA requires advance notice of a regulation before it can be applied in agency interactions with the public. (AS 44.62.190)
- Common sense statutory interpretations by agencies do not require regulations. (*See Squires v. Alaska Bd. of Architects, Eng'rs & Land Surveyors, 205 P.3d 326, 334-35 (Alaska 2009); Alyeska Pipeline Serv. Co. v. State, Dep't of Envtl. Conservation, 145 P.3d 561, 573 (Alaska 2006); Alaska Ctr. for the Env't v. State, Office of the Governor, Office of Mgmt. & Budget, Div. of Gov't Coordination, 80 P.3d 231, 243-44 (Alaska 2003).)*
- By contrast, if a statutory interpretation is "expansive or unforeseeable," the agency may be required to promulgate its interpretation through a regulation. (*Alyeska Pipeline, 145 P.3d at 573.)*

Regulatory Interpretations

- The "reasonable basis" test applies when we review questions of law involving agency expertise; under this test, we defer to the agency's statutory and regulatory interpretation unless it is unreasonable. [*Rose v. Commercial Fisheries Entry Comm'n*, 647 P.2d 154, 161 (Alaska 1982) (citing *United States v. RCA Alaska Commc'ns, Inc.*, 597 P.2d 489, 498 (Alaska 1978)); *Weaver Bros., Inc. v. Alaska Transp. Comm'n*, 588 P.2d 819, 821 (Alaska 1978) (giving agency interpretation deference if it has a "reasonable basis in law and in fact").]

Land Disposal, Vacations and Abandonment

Alaska State statute and administrative code provide the only means for vacating public easements and highways, all of which require specific formal actions. These specific statutes supersede any common law principles that would vacate public rights-of-way or state highways. *19.05.070(a) "Vacating and disposing of land and rights in land", 17 AAC 10.100 "Land Disposal" and 11 AAC 51.065 "Vacation of Easements".*

AS 19.05.070(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."

"[L]and or rights in land acquired for State highway purposes can only be vacated by the Department of Transportation and Public Facilities." *Safeway v. State, 34 P.3d 336, 339 (Alaska 2001)*

62 ALR 5th 219: "An easement is an interest in land which entitles the easement holder to limited enjoyment over another person's property. The vast majority of cases take the position that an easement, whether by grant or by prescription, cannot be lost by mere

nonuse, however long continued, unless accompanied by an affirmative act on the part of the owner of the easement indicating an unequivocal intention to abandon it, and the acts claimed to constitute the abandonment must be of a character so decisive and conclusive as to indicate a clear intent to abandon the easement."

The Law of Easements and Licenses in Land – Bruce & Ely – Termination of Easements § 10:18 Abandonment – General Principles "As a general proposition, nonuse alone does not constitute abandonment. Abandonment occurs when an easement holder ceases to use the servitude with the intent to relinquish it and manifests that intent by affirmative conduct. The party claiming abandonment must generally establish the easement holder's intent to abandon by clear and convincing evidence."

The Alaska Supreme Court has rejected land title claims based on the theory that the State abandoned or "sat on its rights" with respect to a public right of way. In *Tetlin Native Corp. v State*, 759 P.2d 528 (Alaska 1988), the Court held that the State did not "abandon" a sand and gravel materials easement through inaction with respect to the easement.

Adverse Possession & Easements by Prescription

Our Supreme Court has specifically held that prescriptive rights may be claimed against a leaseholder such as OSK leasing property from the State: "Because a prescriptive easement may be obtained where the holder of the servient property does not own the property in fee simple, but rather holds a lesser interest in the property, [citation omitted] Eastham's easement claim does not violate AS 38.95.010. A prescriptive easement may be claimed against an individual who holds less than a fee simple interest in the land, such as a leaseholder. *Price v. Eastham, et al, 75 P.3d 1051, 1057 (Alaska 2003)*

State land may not be acquired by adverse possession or prescription, or by any other manner except by conveyance from the State. *AS 38.95.010.*

By contrast, the State may acquire highway land through a history of maintenance and public use. *State v. Alaska Land Assn.*, 667 P.2d 714, 722 (Alaska 1983).

School Land Reservation

Before statehood Congress set aside land in Section 36 of each township for schools. *Schultz v. Dep't of the Army*, 10 F.3d 649, 656 (9th Cir. 1993) *withdrawn* (without affecting the law) 96 F.3d 1222 (1996). In 1978 the school set aside was rescinded by the Alaska Legislature. Exhibit J, sec. 2 ch. 182 SLA 1978

Pursuant to the Act of March 4, 1915, 38 Stat. 1214, when public lands in the Territory of Alaska are surveyed, secs. 16 and 36 in each township shall be reserved from sale or

settlement for the support of the common schools in the Territory. Under the Alaska Statehood Act, Sec. 6, par. K, 48 U.S.C. Prec. § 21 (1976), title to these reserved school lands passed to the State of Alaska as of the date of the State's admission into the Union. The Statehood Act further provided that title did not pass as to any such school sections which were appropriated by the United States prior to the date of admission of Alaska into the Union. *IBLA 78-69 – 035IBLA257, Sharp, Frank W. 5-31-1978*

Estoppel & Laches

In order for the doctrine of laches to be applicable, the moving party must show unreasonable delay and unreasonable harm or prejudice. *Breck v. City and Borough of Juneau , 706 P.2d 313, 315 (Alaska 1985) .*

Nor can the State be estopped from asserting its interest in a public highway where the State recorded its legal interest and the party claiming estoppel knew or should have known of the State's ownership. *Safeway*, 34 P.3d at 340-341.

See State v. Alaska Land Title Ass'n, 667 P.2d 714, 725-26, holding that published land orders impart constructive notice of easements, barring "innocent purchaser" estoppel claims.

As the Alaska Supreme Court held in *Keener* v. *State* "at most" the state is required to bring suit within a reasonable time after its right-of-way is challenged. *Keener v. State, 889 P.2d 1063/ 1066 (Alaska 1995).*

The property owners in *State v. Simpson* argued that equitable estoppe184 precluded the government from requiring them to move their improvements. The Alaska Supreme Court reversed the trial court stating: "We hold that the right of way dedication along Charcoal Boulevard, now known as Tongass Avenue, was held in trust for the public. The failure of municipal and other governmental officers to affirmatively assert governmental rights where the dedicated but as yet unused street was being occupied by appellee and his predecessors cannot serve as a basis for equitable estoppel." *Simpson, 397 P.2d 288*

Dedication

The Nikishka Beach road from the North Kenai Spur Highway **to the beach** was effectively dedicated as a public road by the quitclaim deed from the federal government to the State, "there is a dedication when the owner of an interest in land transfers to the public a privilege of such interest for a public purpose, and that the intention of the land owner to dedicate

must be clearly and unequivocally manifested by acts that are decisive in character." *Olson v. McRae, 389 P.2d 574, 576 (Alaska 1964) citing Hamerly v. Denton, 359 P.2d 121, 125 (Alaska 1961)*

Deeds

When interpreting servitudes, the intent of the party creating the servitude controls. The restatement (Third) Prop:Serv. § 4.1 (2000) provides the following guidance:
"A servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created."

The "touchstone of deed interpretation is the intent of the parties." *Norken Corp. v. McGahan, 823 P.2d 622, 625 (Alaska 1991).*

Even if the public rights-of-way were not expressly called out by the quit claim deeds from the Borough, this would not allow aSK to prevail. As the Court noted in *Girves v. Kenai*
Peninsula Borough, "the absence of an express reservation of easement does not preclude the borough from showing that a right-of-way was established prior to the issuance of these documents." *Girves v. Kenai Peninsula Borough, 536 P.2d 1221, 1224 (Alaska 1975) .*

In Alaska, ". . . from the time a document is recorded in the records of the recording district in which land affected by it is located, the recorded document is constructive notice of the contents of the document to subsequent purchasers . .
." AS 40.17.080(a). Where an interest in land has been recorded, a party challenging the interest may not argue that his lack of knowledge of the interest estops the holder of the interest from asserting its rights. *Dressel v. Weeks*, 779 P.2d 324, 330 (Alaska 1989).

North Star Terminal and Stevedore Co., Inc. v. State 857 P.2d 335 Alaska,1993. [11] In the present case, the State issued Tidelands Patent No. 10 to the City of Anchorage in 1961. *[FN7]* A patent operates as a deed of the government. "As a deed, its operation is that of a quitclaim.... It passes only the title the government has ... on the date of the patent." *63A Am.Jur.2d, Public Lands § 77, at 575 (1984)*. It follows as a general rule that government patents are "without any covenants of warranty whatever; and it is clear also that the doctrine of estoppel does not apply thereto so as to pass an after-acquired title." *Id.*

ROW/Easement Location

The location of any easements not located by the Borough are located where necessary to serve the purpose of the easement. The Alaska Supreme Court stated in *Andersen v. Edwards: "*If, however, the width, length and location of an easement for ingress and

egress are not fixed by the terms of the grant or reservation the dominant estate is ordinarily entitled to a way of such width, length and location as is sufficient to afford necessary or reasonable ingress and egress." *Andersen v. Edwards, 625 P.2d 282, 286 (Alaska 1981)*

Additional support for locating the public rights-of-way over currently constructed roads is found in other jurisdictions. The Supreme Court of Appeals of Virginia noted: "When a right of way is reserved over a tract of land without any designation of the location, if there be in fact at the time of the reservation a well-defined road over the land which is in actual use by the persons in whose favor the right is reserved, the way in use will be treated as the one by which the parties contemplated." *Eureka Land Co. v. Watts, 89 S.E. 968, 1969 (Virginia 1916) .*

The Texas Court of Appeals stated: "The location of the right of way granted by the instrument was not fixed therein. Under such circumstances the location of such easement or right of way will be held to be fixed as the only road or right of way which was located on the land which fits the general description in the instrument and which was used as a road or right of way at the time the instrument was executed." *Waller v. Stanwood, 227 S.W.2d 266, 270 (Texas Court of Civil Appeals, 1949)*

The easements once created, shift with subsequent improvements and changes in the existing roads. The Restatement (Third) Prop:Serv § 4.8 (2000) provides that the easements move with the relocation of the roads serving the same purpose as originally contemplated in the easements: "Except as where the location and dimensions are determined by the instrument or circumstances surrounding the creation of a servitude, they are determined as follows:

(1) The owner of the servient estate within a reasonable time to specify a location that is reasonably suited to carry out the purpose of the servitude

(2) The dimensions are those reasonably necessary for enjoyment of the servitude.

(3) Unless expressly denied by the terms of an easement as defined in Sec. 1.2 the owner of the servient estate is entitled to make reasonable changes in the location and dimensions of an easement, at the servient owners expense, to permit normal use or development of the servient estate, but only if the changes do not

(a) Significantly lessen the utility of the easement,

(b) Increase the burdens on the owner of the easement in its use and enjoyment, or

(c) Frustrate the purpose for which the easement was created.

[emphasis added]

Omnibus Act QCD

At statehood, the Federal government conveyed all rights and interest in Alaska's highway lands to the State under the Alaska Omnibus Act of June 24, 1959, Public Law No. 86-70, 73 stat. 141, 145. *Simon v. State*, 966 P.2d 1211, 1213 (Alaska 2000).

Merger of Title

Once a public road is created over the public domain any title acquired thereafter is subject to the right-of-way for such road. *Myers v. United States, 210 F.Supp. 695, 700 (D. Alaska 1962), aff'd 323 F.2d 580 (9th cir. 1963).*

The State holds rights-of-way in trust for the people of the state. *State v. Simpson, 397 P.2d 288, 291 (Alaska 1964)*

"No merger will occur if the easement benefits several estates and the owner of one parcel acquires a portion of the easement." *Restatement (Third) of Prop: Servitudes § 2.8 (2000)*.

The Supreme Court of California has also emphasized, "[i]t is fundamental that all roads committed to the care of a county belong, ultimately, to the people of the state." *County of Marin v. Superior Court of Marin County, 349 P.2d 526, 529 (Cal. 1960).*

History of Highway Management in Alaska

Pursuant to the Act of January 27, 1905, 33 Stat. 616, as amended by the Act of May 14, 1906, 34 Stat. 192, Congress authorized the Secretary of War to administer the roads and trails in Alaska. In 1932, Congress transferred administration over those roads and trails to the Secretary of the Interior pursuant to the Act of June 30, 1932, 47 Stat. 446.

Effective August 10, 1949, the Secretary promulgated Public Land Order (PLO) 601, 14 FR 5048 (Aug. 10, 1949), which divided all roads under his jurisdiction in Alaska into three classes: through roads, feeder roads, or local roads. In that same order, he withdrew from all forms of appropriation under the public land laws public lands within 150 feet of each side of the center line of all through roads, 100 feet of each side of the center line of all feeder roads, and 50 feet of each side of the center line of all local roads and reserved them for highway
purposes.

On October 19, 1951, PLO 757 amended PLO 601 by revoking the general withdrawal for local and feeder roads (16 FR 10749, 10750 (Oct. 19, 1951)), and simultaneously, the Secretary issued Secretarial Order (SO) 2665 establishing easements for, rather than withdrawals of, 50 feet on each side of the center of each local road and 100 feet on each side of the center line of each feeder road. 16 FR 10752 (Oct. 19, 1951). Section 3(c) of SO 2665 also provided for "floating easements" which would "attach as to all new construction involving public roads in Alaska when the survey stakes have been set on the ground and notices have been posted at appropriate points along the route of the new construction specifying the type and width of the roads."

The Secretary of the Interior's jurisdiction over the Alaskan road system ended in 1956 when Congress enacted section 107(b) of the Federal-Aid Highway Act of 1956, 70 Stat. 377, which transferred the administration of the Alaskan roads to the Secretary of Commerce. This change in authority was reiterated on August 27, 1958, when Congress revised, codified, and reenacted the laws relating to highways as Title 23 of the United States Code. See 23 U.S.C. § 119 (1958). The Commerce Department's Bureau of Public Roads reclassified and renumbered the Alaskan roads under its jurisdiction as primary, secondary "A," and secondary "B" routes, but did not specify the widths of those classes of roads.

Section 21(a) of the Alaska Omnibus Act, 73 Stat. 145 (1959), enacted on June 25, 1959, directed the Secretary of Commerce to convey to the State of Alaska all lands or interests in lands "owned, held, administered by, or used by the Secretary in connection with the activities of the Bureau of Public Roads in Alaska." Section 21(d) (3) and (7) of that Act repealed 23 U.S.C. § 119 (1958), and the Act of June 30, 1932, 47 Stat. 446, effective July 1, 1959. 73 Stat. 145-46 (1959).

On June 30, 1959, pursuant to section 21(a) of the Alaska Omnibus Act, the Secretary of Commerce issued a quitclaim deed to the State of Alaska, in which he "devise[d], release[d], and quitclaim[ed] * * * all rights, title, and interest of the Department of Commerce in and to all of the real properties * * * which properties are now owned, held, administered, or used by the Department of Commerce in connection with the activities of the Bureau of Public Roads in Alaska." *Lloyd Schade, 116 IBLA 203, 204, (1990), 1990 WL 308009 (I.B.L.A.)*

Miscellaneous
A public access right of way may be proven through evidence of historical public use coupled with action by appropriate State authorities manifesting an intent to treat the road as a public access. *See State v. Alaska Land Title Ass'n*, *supra,* 667 P.2d at 722.

Reasonable Alternative Access
Triangle, Inc. v SOA – September 4, 1981 – Additional distance of one-half mile that potential customers of tenant would have to travel to gain access to tenant's business establishment was no so unreasonable as to constitute taking.

Encroachments – Sign Removal – Equal Protection

SOA v. Shawn W. Stephan and United Rentals - Case No. 3AN-02-08186CI

United Rentals does argue briefly that there are issues of fact regarding the State's enforcement of the sign statute. Specifically, it claims that some businesses along the same stretch of road have been allowed to place advertisements within the easements while others have not. As support for this assertion, it attaches three affidavits from people who own businesses in the area. It then argues that this selective

*enforcement may violate the **equal protection** standards delineated in the state constitution.*

As the State points out in its reply, however, United Rentals has not provided the proper support for an equal protection challenge. In Barber v. Municipality of Anchorage,
*776 P.2d 1035 (Alaska 1989), the court held that selective enforcement of a statute only raises equal protection concerns when it is part of **"a deliberate and intentional plan to discriminate based on an arbitrary and unjustifiable classification."** The court went on to hold that the party alleging the equal protection violation has the burden of providing evidence supporting a claim that the State was motivated by discriminatory intent, in this case, United Rentals has provided no such evidence.*