

MEMORANDUM**State of Alaska
Department of Law**

To: John F. Bennett
Chief Right of Way Agent
Interior Region
DOT&PF

DATE: December 28, 2000

FILE No.: 663-00-0031



TELEPHONE No.: 465-3600

FROM: William F. Cummings
Assistant Attorney General
Transportation Section- Juneau

SUBJECT: The definition of aggrieved
party under 17 AAC 85

CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATIONS

Last spring DOT&PF adopted regulations relating to encroachment permits, driveway permits, and land disposals. It also adopted regulations, codified as 17 AAC 85, that address parties aggrieved by “. . . decisions of the department to deny, modify, or revoke a permit or privilege under 17 AAC 10.010 - 17 AAC 10.016 (Encroachment Permits), 17 AAC 10.020 - 17 AAC 10.090 (Driveway and Approach Road Permits), 17 AAC 10.100 - 17 AAC 10.130 (Land Disposal), and 17 AAC 60 (Highway Signs for the Traveling Public).” (Emphasis added.)

There is no definition of the term “aggrieved party” in 17 AAC 85. In the regulations DOT&PF submitted to the Regulations Attorney, the term “aggrieved party” was defined. The regulations finally adopted, and submitted to the Lieutenant Governor, deleted the definition, but included a regulation codified as 17 AAC 10.950 that states: “[a]n applicant aggrieved by the department's denial of a permit under this chapter, or by ~~any condition attached to a permit, may appeal the department's decision under 17 AAC~~ 85.” The intent behind this drafting was to grant a substantive right to administrative appeals to applicants for permits or privileges.

The administrative process for the issuance of encroachment permits and driveway permits does not provide for public notice followed by a public comment period. This approach was taken because neither of these permits conveys an interest in land, which would require public notice. Because there is no public notice, it is unlikely that a non-

applicant would file an appeal and, in the typical case, no legitimate objections should be expected.

In general, whether a party has standing to object to an agency's actions has been the subject of a fair amount of litigation over the years. In many cases a party is found to have standing to litigate a matter if, the issue is one of significant public concern, the party wishing to assert standing is adverse to the agency on the issue or the person seeking to establish standing is an appropriate person to litigate the matter.

There is an important an important exception to this broad standing rule for land use decisions. In Earth Movers of Fairbanks, Inc. v. Fairbanks North Star Borough, 865 P.2d 741 (Alaska 1993), a property owner wished to continue a gravel operation under grandfather rights available under local zoning ordinances. The local planning and zoning authorities agreed. Earth Movers, the owner of a gravel pit in another part of town, and a business competitor, sought to appeal that decision. The Fairbanks North Star Borough Planning Commission refused to accept the appeal because it believed that Earth Movers lacked standing to appeal the decision. That decision has upheld by the Superior Court and affirmed by the Supreme Court. In reaching its conclusion to deny standing to Earth Movers, the Supreme Court said:

The prevention of competition is not a proper element of zoning. A person whose sole interest for objecting to the zoning board's action is to prevent competition with his business is not a person aggrieved. It is not the function of ordinances to provide economic protection for existing enterprises, and the fact that such businesses may suffer reduced incomes or that the property would depreciate in value will not confer standing upon these owners. . . .

(citation omitted), 865 P.2d at 744. In my mind Earth Movers of Fairbanks, Inc. has application to the events unfolding in "Glitter Gulch." I have read the December 21, 2000, letter from Don McClintock, representing John White, a competitor to Denali Rafting. From my review of that letter, serious questions can be raised whether John White has standing to object to Denali Rafting's permit application, or the administrative review officer's decision on the appeal.

Regulations adopted to implement AS 19.25.200 through 19.25.250 control land use within the state's highway right of way. There is little that distinguishes them from planning and zoning ordinances addressed in Earth Movers of Fairbanks, Inc.. If John

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White is to have a valid objection to the permit under this rationale, then he will need to arrive at some sort of legitimate objection to the issuance of the permit, not just the fact that he is a business competitor. In other words, the objection must be rooted in the impact upon him, other than the impact that granting the permit will have on competition.

The only correspondence on behalf of John White is Don McClintock's December 21, 2000, letter, which lacks substance. It does not articulate any specific factual or legal basis for White's appeal as required by 17 AAC 85.020. I have attached for your use a letter to Mr. McClintock that asks him to articulate the factual and legal basis for his appeal. Please note that it tolls, until January 8, 2001, the running of the appeal time under 17 AAC 85.040, while he is providing you the legal and factual basis for his appeal. It may be that under the rationale of his appeal, he does not have standing under either standard. That is, alternatively, he may not be an appropriate person to bring the appeal, or the issue he raises may not be of significant public concern to justify him proceeding forward, or his objections may relate to the fact that he is a competitor of Denali Rafting. In either instance he would not have standing to object to the review officer's decision. Please note that the draft letter urges him to participate in the notice and comment process for Denali Rafting's encroachment permit.

If you have any questions on this matter, please contact me at your earliest convenience.

WFC:bw

Attachment

December 28, 2000

Donald W. McClintock
Asburn and Mason
1130 West Sixth Avenue, Suite 100
Anchorage, AK 99501-5914

RE: Appeal on request for permit renewal of Lease 88-02-004

Dear Mr. McClintock:

Please refer to your letter of December 21, 2000, regarding the department's administrative review officer's determination that further processing was necessary for Denali Raft Adventures application for an encroachment permit to occupy approximately 33,000 square feet of highway right of way. From your letter, I can not tell what aspect of the review officer's decision you are appealing.

Before I can deal with your client's concerns, I need the information that is required by 17 AAC 85.020, namely the regulatory or statutory basis for the appeal, the factual arguments supporting those allegations, and the specific relief that your client seeks. Without that information I cannot render a conclusion on your client's standing to appeal, much less the merits of such a claim.

In your letter you said that your client is appealing the review officer's ~~determination under 17 AAC 85.040(a). That provision is related to a person that~~ initiates an appeal under 17 AAC 85.020, and there has been a review of the issues raised by an administrative review officer under 17 AAC 85.030. The administrative review officer's decision has required that the process for the permit application proceed forward. A part of the permit application process will be public notice of Denali Rafting Adventure's pending permit application, which will solicit public comment. I recommend that you submit any comments that you might wish to make during our public comment process. I will make sure that you will receive notice of our opening of a

public comment period for this encroachment permit application. I strongly recommend that your client participate in that process.

When you provide me with the information regarding your client's factual and legal objections to the permit application, we will be able to determine what steps the department should take, consistent with its regulations, on your client's concerns. If your client responds by January 8, 2001, the department, if it concludes that your client has standing to file an appeal of the review officer's decision, will not dismiss the appeal under 17 AAC 85.040(b) for failure to comply with the 15 day rule, if we find that rule is even applicable.

Sincerely yours,

John F. Bennett
Chief Right of Way Agent
Interior Region