John F. Bennett

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Sent: Thursday, August 29, 2002 12:09 PM
Subject: access to right of way

I am faxing an opinion by Bill Cummings relative to a Riparian access issue in Haines. The opinion lended quite a bit of clarity on rights of access to state land/ROW. Bill used case law derived from the Steese Highway, Seward Highway and Egan Drive. Mike and Bill thought additional examples might be worthwhile for us to expand his work (as a tool for us, not this particular case). Does anyone have examples, real or hypothetical, that they might want to include for Bill? Bill is retiring the end of September so they would have to come in soon. Pat.

MEMORANDUM

State of Alaska
Department of Law

TO: Pat Kemp, P.E.
Preconstruction Engineer
Southeast Region
DOT&PF

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

DATE: July 17, 2002

FILE NO.: 663-03-0008

TELEPHONE NO.: 465-3600

SUBJECT: Riparian Access/ATS 229

ATTORNEY CLIENT COMMUNICATION/ATTORNEY WORK PRODUCT

INTRODUCTION

Riparian property owners adjoining the Haines Ferry Terminal on its easterly side have argued that, if the state constructs its project to replace two existing mooring dolphins and install a third new mooring dolphin, the state will have taken their riparian access for which the state must render compensation. They support their argument with citation to *Wernberg v. State*, 516 P.2d 1191 (Alaska 1974) (*Wernberg I*). In that case, the state built a highway across tidelands in Anchorage and restricted the flow of a creek, which the property owner used for access to Cook Inlet, to a six-foot culvert. *Wernberg v. State*, 519 P.2d 801, 804 (Alaska 1974) (on rehearing). Their arguments ignore the case law that developed since 1974. Under the facts of their particular circumstance they are not entitled to compensation, if the state builds its project, and installs the new dolphin.

1. The adjoining tidelands and uplands

Erwin Hertz and Albert Schafer (Hertz and Schafer) have owned land in Section 10, Township 030S, Range 59E, Cooper River Meridian (the Uplands) since 1977. Upon issuance of a tidelands patent, their predecessor granted them a warranty deed to ATS 229 in 1979. In 1992 the state filed an eminent domain proceeding to acquire a small portion of Lot 9, Section 10, Township 30S, Range 59E Cooper River Meridian from them. Under the final order of condemnation issued in those proceedings, a portion of Lot 9, laying seaward of Lutak Road, and accretions to it, were vested in the state. This taking was necessary for a project to expand the Haines Ferry Terminal and is not an issue in the current dispute.

The Haines Ferry Terminal occupies portions Lots 7, 8, and 9, Section 10, Township 30S, Range 59E Cooper River Meridian, which are seaward of Lutak Road, and ATS 1464. This parcel of land includes the ferry terminal as it is presently configured. Two of the three dolphins (the replacement dolphins) in DOT&PF's proposed project are located within ATS 1464. The third dolphin (the new dolphin), if constructed, would be located outside of ATS 1464. DOT&PF acquired the right to use additional tidelands, from the Department of Natural Resources, described as ATS 1512 for the construction of the third dolphin. ATS 1512 measures 70 feet by 150 feet. Its southerly boundary, 70

feet in length, is approximately 88 feet from the northerly, or seaward boundary, of ATS 229. The new mooring dolphin, and catwalk providing access for mooring operations, are approximately 125 feet from ATS 229's northerly property line. The project will not increase the use of the ferry terminal or the traffic on Lutak Road. There will also be no increase in noise, light, or noxious odors. The area is zoned for water front development.

ATS 229 is irregularly shaped and contains approximately 47,250 square feet. If the project proceeds forward to construction, there is no physical taking from ATS 229. ATS 229 has 327 feet of frontage on Lutak Inlet. The state's new mooring dolphin and related structures will extend in front of the westerly 70 feet of the frontage, though approximately 125 feet away. *See* Exhibit 1 attached to this memorandum.

2. Riparian property owners have significant rights under Alaska law

The Alaska Constitution speaks broadly to the rights of riparian property owners. Under Alaska Constitution, article VIII, section 13:

> All surface and subsurface waters reserved to the people for common use, except mineral and medicinal waters, are subject to appropriation. Priority of appropriation shall give prior right. Except for public water supply, an appropriation of water shall be limited to stated purposes and subject to preferences among beneficial uses, concurrent or otherwise, as prescribed by law, and to the general reservation of fish and wildlife.

It further provides in Art. VIII, Sec. 14:

> Free access to the navigable or public waters of the State, as defined by the legislature, shall not be denied any citizen of the United States or resident of the State, except *that the legislature may by general law regulate and limit such access for other beneficial uses or public purposes.*

(Emphasis added).

Wernberg v. State, 516 P.2d 1191, rehearing denied 519 P.2d 801 (Alaska 1974) summarized the rights of riparian owners under these constitutional provisions. The Supreme Court formulated these constitutional provisions as the rights to:

> (1) use the water for general purposes such as bathing and other domestic activities; (2) have access to navigable waters; (3) build wharves and piers to deep water if this can be done without interfering with navigation; (4) take title to accretions and alluviums; and (5) make other beneficial use of the water even though the water level is lowered, so long as the use does not unreasonably interfere with similar rights of other riparians.

Wernberg v. State, 516 P.2d at 1194 (citations omitted). There is a body of Alaska law that addresses the rights that riparian owners have.[1] Under *Wernberg I*, the right of access to navigable water may be eliminated for a public purpose, which requires the payment of just compensation.[2] *Wernberg v. State*, 591 P.2d at 1201. The dispute with the owners of ATS 229 concerns a subset of their riparian rights, i.e. the right of access to navigable waters and the right to build wharves and piers to deep water. There is ample guidance from the Supreme Court to address these issues.

3. If riparian owners may make reasonable use of their riparian rights, no taking has occurred

In *Wernberg* I, the Supreme Court found that there was a right to compensation when a highway cut off the access of a riparian owner to navigable waters. It did so by applying the right to compensation from land access cases to riparian access cases. It said:

> We must question the validity of a restricted definition of the private right of access in water cases, especially in view of the more realistic right of access recognized in land access cases. A property owner on a public street has a private right of access to the intersecting public streets on either side of him. We see little difference between land access and water-access situations, at least where the facts establish actual use of water access.

Wernberg, 516 P.2d at 1200 (citations omitted).

The Supreme Court next addressed the right of riparian owners to access to the navigable waters in *Grant v. State*, 560 P.2d 36 (Alaska 1977). *Grant* arose from the construction of Egan Drive here in Juneau. The project's design called for the construction of culverts north of Aurora Basin that allowed access to the Gastineau Channel from adjoining uplands. Egan Drive was constructed in tidelands and eliminated riparian access by adjoining riparian owners to the navigable channel. Access was maintained by constructing two large culverts though which small craft could pass. During construction, one of the culverts failed near uplands owned by Grant and the state decided not to replace the culvert. Grant brought suit against the state when it did not replace the culvert. The court reasoned that the property owner had a right to expect that the state would follow its design plans in force when he bought the property. Because the state changed its mind and did not install the culvert providing access to the navigable water, the court found a compensable taking of riparian access had

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[1] See also, Honsinger *v. State*, 642 P.2d 1352 (Alaska 1982) holding that land formed as a result of glacioisostatic rebound is treated like accretion under Alaska law; *Classen v. State*, 621 P.2d 15 (Alaska 1980) regarding a riparian owner's use of a river for aircraft operations; *Pankratz v. State*, 652 P.2d 68 (Alaska 1982) regarding a riparian owner's construction of a dike in navigable waters; *Grant v. State*, 560 P.2d 36 (Alaska 1977); *Pankratz v. State*, 538 P.2d 984 (Alaska 1975) regarding a riparian owner's right to accretions; and 1959 Op. Att'y Gen. No. 1(Jan. 15), which addresses the rights of riparian owners to build wharves and piers to deep water. This recitation of cases is not meant to be exhaustive.

[2] The Alaska Const. art. I, section. 18 provides: "Private property shall not be taken or damaged for public use without just compensation."

occurred. This is the same result that the court reached in *State v. Alsop*, 586 P.2d 1236 (Alaska 1978) (a land access case).

Alsop arose out of the construction of a new intersection at Dowling Road and the Seward Highway in Anchorage. Alsop had settled an earlier condemnation case with the state. As a condition of the settlement, the parties had agreed that there would be an at grade intersection at Dowling Road and the Seward Highway and the state would install a two-way frontage road. Later, the state determined an at grade intersection with the Seward Highway was not appropriate. Instead, it proposed the construction of an overpass and the change of the frontage road to one-way traffic.

The Supreme Court found that this was a compensable taking in reliance upon *Grant* and *Wernberg* I. It reasoned that if the property owner had relied the state's representations that it would build particular design features when settling a condemnation claim, and when the state changed the design, a second taking had occurred. *Alsop v. State*, 586 P.2d at 1239-1241.[3]

The Supreme Court next addressed land access in *B&G Meats, Inc. v. State*, 601 P.2d. 252 (Alaska 1979). This case arose from the same changes in the design of the Seward Highway as *Alsop*. B&G Meats operated a butcher shop and access was from the Seward Highway via a two-way frontage road. There was no earlier litigation with B&G Meats. The change to a one-way frontage road required that customers south bound on the Seward Highway needed to travel to the next intersection and double back on the frontage road. The increased distance to reach the property was 2.3 miles. This change in the traffic pattern greatly reduced business, and B&G Meats filed suit alleging that a taking occurred.

The court said:

> In determining whether B&G Meats has established a proper claim for recovery it is necessary to distinguish between damage to access, which, if unreasonably curtailed can result in a taking, and regulation of traffic, which is an exercise of the state's police power and is not compensable. Courts have universally recognized that one of the incidents of ownership of property abutting a public highway is the right of reasonable access to that highway. That right may not be taken or damaged without just compensation. On the other hand, it is also well established that a state may regulate the highways within its boundaries pursuant to its inherent police power. The difference between a noncompensable exercise of the police power and a compensable taking is often one merely of degree.

B&G Meats, Inc. v. State, 601 P.2d at 254. The court then proceeded to consider the nature of the change to B&G Meats' access. It found that there had not been a deprivation of access, but rather access was more circuitous than before. In other words, B&G Meats had not lost access to the highway, but rather diminished traffic flow, which is a not a compensable loss.

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[3] *Alsop* is useful because it illustrates riparian access cases and land access cases are interchangeable.

The Supreme Court came to a similar conclusion in *Triangle, Inc. v. State*, 632 P.2d 965 (Alaska 1981). In *Triangle*, the state took .079 acres (3441 square feet) from a tract in Fairbanks for the reconstruction of the Steese Highway. Before the taking, the property had direct access to the Steese Highway and Farmer's Loop Road. After the taking there was no direct access to the Steese Highway from the property. Instead, to get to the property, a driver would turn off the Steese Highway on to a frontage road to Farmer's Loop Road, and proceed down to Farmer's Loop Road to a cul-de-sac, which was at Triangle's driveway. This new access was .5 mile longer than the former direct access off the Steese Highway. The court found this fact pattern to be a diversion of traffic flow, and not a deprivation of access. It was a valid exercise of the state's police power and not a taking. The court in reaching this conclusion said:

> We reject Triangle's argument that because the change in accessibility to its property diminished the value of the property, the loss is necessarily compensable. Government activity in pursuit of social goals often has a detrimental effect upon the value of some real property. Unless this detriment rises to the level of a "taking" or "damage" within the meaning of art. I, § 18 of the Alaska Constitution, however, there is no right to compensation.

Triangle, Inc. v. State, 632 P.2d at 969, n. 9.

In *Classen v. State*, 621 P.2d 15 (Alaska 1980), the Supreme Court dealt with a riparian owner in a similar fashion. In *Classen* a riparian owner on the Chena River in Fairbanks operated a floatplane service from his dwelling. Classen's usual practice was to taxi under the University Avenue Bridge and then take off from the river. However, in 1975 the state began construction of a bridge across the Chena River for the Parks Highway downstream from his home. He argued that the new bridge made his aircraft operations from his home on the Chena River impractical and unsafe, which required him to move his operations to the float plane pond at the Fairbanks International Airport. *Classen v. State*, 621 P.2d at 16, n. 1. The Supreme Court found that these circumstances were not a taking. The court reasoned

> Classen still has unlimited access to the river itself, for whatever use he chooses to make of it. His decision to move his floatplane operation was based upon consideration of cost and convenience to himself. While construction of the Parks Highway bridge may have made his floatplane operation more expensive and difficult, by making it necessary for him to taxi farther in order to take off safely with a heavy load, it did not actually prevent his use of the river for that purpose. And, while Classen's property may have lost some of its value as a result, not all of such unfortunate consequences of public projects are compensable. *See, e.g. B&G Meats, Inc v. State*, 601 P.2d 252 (Alaska 1979) (loss in business resulting from two-way to one-way road not compensable).

Classen v. State, 621 P.2d at 17.

4. Hertz and Schafer have a reasonable right of access to navigable water and may still build wharves and piers to deep water

With these principles in mind, it is fairly clear that Hertz and Schaefer would have a reasonable right of access to the navigable waters after the construction of the project. Before DOT&PF gained management authority over ATS 1512, Hertz and Schafer's tidelands (ATS 229) had approximately 327 feet of frontage on Lutak Inlet with unobstructed access to the navigable water. Assuming that the state builds its project, including the new mooring dolphin in ATS 1512, there will be an obstruction of approximately 70 feet of that frontage by a structure 125 feet from ATS 229's frontage on Lutak Inlet. ATS 229 would still have 257 feet of frontage on Lutak Inlet that is unobstructed. Under the criteria found in *Wernberg I, B&G Meats, Inc.*, and *Triangle, Inc.* there has not been a change in access to the navigable waters that requires a payment of just compensation. That is, ATS 229 still has reasonable access to the navigable waters.

No one disputes that landowners adjoining state highways have a right of access to those intersecting highways. However, a property owner's right of access is not completely unfettered. DOT&PF regulates driveways entering a state highway with the issuance of driveway permits under AS 19.25.200 through 19.25.250 and 17 AAC 10.020 through 17 AAC 10.095. This is a police power function that the department exercises to protect the traveling public and ensure safe operation of its highawys. An analogous regulatory system exists to regulate the state's tidelands.

Hertz and Schafer, through counsel, have argued that they have lost their right to build piers and wharves to deep water from ATS 229. If DOT&PF were to construct the third mooring dolphin, they would not be able to build a wharf or a pier to deep water from the 70 feet of frontage obstructed by ATS 1512. DOT&PF occupies ATS 1512 under a permit issued by the Department of Natural Resources, which owns tidelands and submerged lands below the mean high water line. Hertz and Schafer could, however, still receive a tidelands lease from the Department of Natural Resources, which would allow access from the remaining 257 foot of frontage. That department's policy regarding the use of tidelands is set out in generally in 17 AAC 62.

Regarding non-preference tidelands, such as those seaward of ATS 229, 11 AAC 62 .690 provides: "[w]hen in the best interest of the state, the director may grant leases or permits for the use of state owned tidelands." The remainder of 11 AAC 62 sets out a very simple regulatory regime for leasing state owned tidelands, which presents no great burden upon applicants seeking a use them. Even if Hertz and Schafer might lease tidelands from the state, they are still required to comply with regulations of the U.S Army Corps of Engineers adopted under 33 U.S.C §404, which relate to the use of the navigable waters. The fact that the state would construct a mooring dolphin in ATS 1512 does not somehow render the process to lease state tidelands more difficult or increase the scrutiny of the Corps of Engineers. These are regulatory standards that Hertz and Schafer would need to meet even if the ferry terminal was not the adjoining land use.

That the Department of Natural Resources granted DOT&PF a permit for the construction of the new mooring dolphin was a valid exercise of the police power. Furthermore, there is no indication that Hertz and Schafer would not be successful in getting a tidelands lease to allow the construction of a wharf or pier out to deep water. Hertz and Schafer will have an opportunity to build as they did before did the issuance of the state's permit. While their property may lose value, ". . . not all unfortunate consequences of public projects are compensable." *Classen v. State*, 621 P.2d at 17.

5. Hertz and Schafer are not entitled to compensation under the takings clause of the state constitution nor can the City of Haines deny a permit based upon economic impact

The legislature has imposed upon DOT&PF two requirements in regard to local land use planning. AS 35.30.010(a)(1) subjects state projects to planning and zoning approval. This statute provides:

> (a) Except as provided in (b) of this section, before commencing construction of a public project,
> (1) if the project is located in a municipality, the department shall submit the plans for the project to the planning commission of the municipality for review and approval[;].

In a subsequent statue DOT&PF is required to "comply with local planning and zoning ordinances and other regulations to the same extent as other land owners." AS 35.30.030. The department has been subjected to these requirements for 25 years. *See* ch 43 SLA 1977. I have reviewed correspondence between the state and the City of Haines. I found correspondence between DOT&PF project personnel and the City of Haines, but no communications that met the requirements of AS 35.30.010 and 35.30.020.

Hertz and Schafer began corresponding with the Southeast Region after the department issued its ITB for the dolphin project in early 2002. They argued the department's project took their riparian rights, which entitled them to compensation from the state. The department disputed this argument.

The City of Haines became aware of the matter and weighed in by informing the state that it needed a development permit, which is required of anyone improving real property in the City of Haines. The local ordinance, in part, is intended to limit the impacts of noise, odors, light, and traffic. The ordinance also provides that it is also to prevent economic injury to surrounding properties. Because of the latter provisions, the City of Haines required that DOT&PF provide a third party valuation that there were no damages to Hertz and Schafer's adjoining property, which includes tidelands and uplands across Lutak Road from the tidelands. Because of the lengthy delay necessary to accomplish the third party review, and the scheduled March 2002 bid opening, DOT&PF canceled the invitation to bid and is reassessing the project in light of changed program requirements, which occurred after the completion of the design.

If DOT&PF desires to go forward with the project, I would recommend the following course of action. First, DOT&PF should submit the application for the development permit required by the local planning and zoning ordinance. The department should also pay the required fee. AS 35.30.020 requires that DOT&PF comply with the ordinance like a private developer. Then, when the city asks again for the third party review, the department's response should be to decline that request and state that DOT&PF does not believe that there is any legally cognizable damage to Hertz and Schafer's property. If the city denies DOT&PF's application, the department could then appeal to the superior court, after exhausting its administrative remedies.

I have set out above that the reasoning why DOT&PF's project does not result in a cognizable taking. It would seem that the city's planning and zoning ordinance, which allows it to consider economic injury to surrounding properties, is beyond its powers under AS 29.40. Its exercise of land use powers, based upon economic impact upon other land owners, would very likely be a regulatory taking, if the same sort of demands were made upon a private party trying to get a development permit. I reach this conclusion because the dolphin project will not increase the use of the ferry terminal or the traffic on Lutak Road. There will also be no increase in noise, light, or noxious odors. Furthermore, the area is zoned for water front development, which is precisely the use which the state makes of the Haines ferry terminal. *See Dolan v. City of Tigard*, 512 U.S. 374 (1994) and *Nolan v. California Coastal Commission,* 483 U.S. (1987).

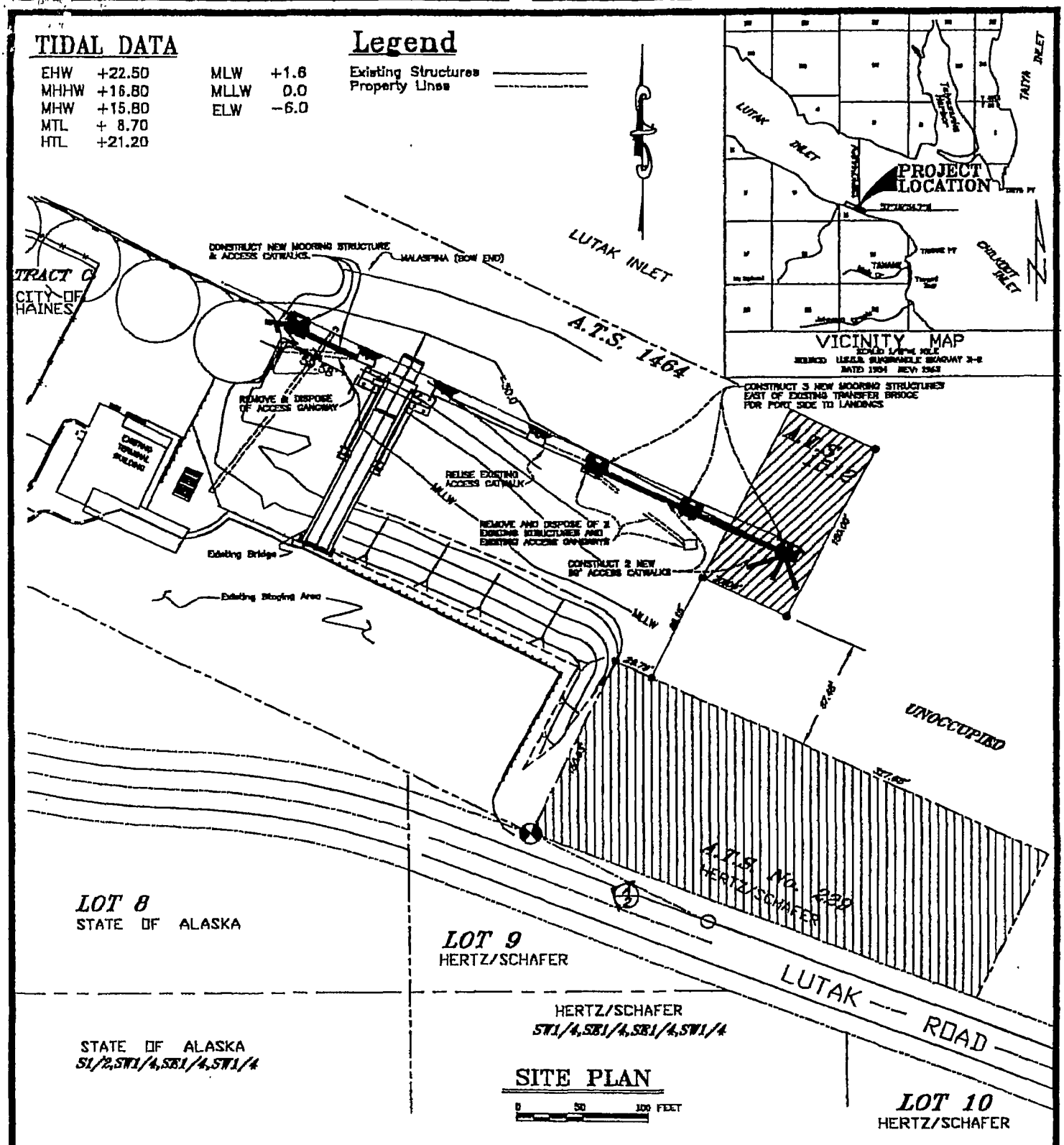
There are two other options that DOT&PF could take. It could proceed forward with its project without meeting the requirements of the planning and zoning ordinance. The result would likely be an injunction action by the city against the state, which the state would not win because it had not complied with the requirements of AS 35.30.020. Even if DOT&PF does determine that the dolphin project is necessary to meet program requirements, another approach would be to do nothing. Neither of these options is particularly attractive.

CONCLUSION

Riparian property owners, like as Hertz and Schafer, have significant property rights that accrue because of their location. The state may not take any of those rights without rendering just compensation. However, if DOT&PF proceeds forward with its dolphin project, there does not appear to be a compensable taking of Hertz and Schafer's riparian rights. Furthermore, while DOT&PF is required to seek approval of the local planning and zoning authorities and to comply with such local ordinances to the same extent as private developers, the City of Haines' effort, to condition the issuance of a development permit upon the lack of economic injury to Hertz and Schafer, is contrary to law. If DOT&PF determines to pursue the dolphin project, it should apply for the required development permit and perfect a judicial appeal if the permit is denied or unreasonably conditioned.

If you have any questions on these matters, please contact me at your earliest convenience.

WFC:pvp



PROPOSED: REMOVE TWO EXISTING MOORING STRUCTURES AND TWO EXISTING GANGWAYS. CONSTRUCT FOUR NEW MOORING STRUCTURES AND FOUR NEW CATWALKS.

ADJACENT PROPERTY OWNERS: HERTZ/SCHAFER

HAINES FERRY TERMINAL MOORING – PHASE B

STATE OF ALASKA
DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES
6860 GLACIER HIGHWAY
JUNEAU, ALASKA 99802

IN: LUTAK INLET
AT HAINES ALASKA

PROJECT NO.: 75249
DATE: MARCH 2002
REVISED: JUNE 2000

SHEET 1 OF 1

Exhibit 1 page 1 of 1