

SB

152

SENATE COMMUNITY AND REGIONAL AFFAIRS COMMITTEE

Senator Joe Orsini
Chairman

Senate Bill No. 152

Croft

Prime Sponsor

Resolution No. _____

This Bill is currently in the Senate Community and Regional Affairs Committee for consideration. Your response, as prime sponsor, to the following questions will serve to hasten Committee action on this Bill.

1. What is the need for your proposed legislation; what is the goal you are trying to accomplish?

Last year's budget appropriated money for this road. However, the only appropriation was Federal money, and Federal money is unavailable without a state match. This bill corrects that defect.

2. Are there any other viable ways of accomplishing this same goal?

We could insist on the municipality coming up with the money, but this provides access to a state park and it seems to be a state responsibility.

3. Persons or groups you know of who are supporting the legislation.

The Municipality of Anchorage.

4. Persons or groups you know of who are opposing the legislation.

None that I know of, even though the owner of the property to be condemned, Bertha Mae Tabbytite, might be opposed.

5. Can you foresee any new problems that might be caused as a result of enactment of your bill?

None of any substance.

6. What is the earliest time you would like the Senate Community and Regional Affairs Committee to consider your bill?

I would be happy for the Committee to consider it at any time, but I would like for the Committee to pass it out next week since (over)

the bill also has a Finance referral and the C & RA Chairman is also a member of that Committee.

To: Senator Orsini

DATE: Feb. 18, 1977

FROM: Paul Conger

RE: SB 152

I spoke to Ted Berns this morning regarding SB 152. Ted commented that he was quite suprised that this bill had been introduced and requested that this Committee delay any action on this bill until he gets back to us.

The circumstances behind this bill are as follows: Ted stated that the road in question is an old road that leads up to the community called Glen Alps which is composed of approximately 15-20 families. In addition, this road feeds into Chugach Park and is used extensively by backpackers. There is another feature of this road which has stimulated the request by the city to condemn this road. The road runs across an Indian lady's property and the lady has initiated a trespass action against the city. The litigation is currently in Federal Court and the Federal Judge has not rendered a decision in this case. However, the judge has stated that whatever the outcome is, the City will have to condemn the property.

Ted states that the entire cost for facilitating the condemnation of the property will be around \$80,000. He stated that what they are attempting to do is to get the Feds to provide matching funds in this case, therefore each level of government will share in the burden of the expense.

Ted states that an attempt was made last year to appropriate money for this condemnation procedure and it passed, both houses. However, the money was to be appropriated from "other funds" (which apparently meant Federal money) and for one reason or another the money never became available. So they are making another stab at getting the money.

Ted emphasized that he wants to request that action on this Bill be DELAYED because it has taken him completely by surprise and he did not realize that it was going to be introduced.

PC/js

**Municipality
of
Anchorage**



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GEORGE M. SULLIVAN,
MAYOR

OFFICE OF THE MUNICIPAL ATTORNEY

March 29, 1977

The Honorable Joseph Orsini
Chairman, Senate Committee on Community & Regional Affairs
Alaska State Senate
Pouch V
Juneau, Alaska 99811

Re: \$40,000 Appropriation to Reimburse the Municipality of
Anchorage for Acquisition of Road Right-of-Way to the
Glen Alps Entrance of Chugach State Park

Dear Joe:

The Municipality urgently requests that an appropriation in the amount of \$40,000 be made to reimburse it for acquiring road right-of-way necessary to provide public access to the Glen Alps entrance to the Chugach State Park and to the former City of Glen Alps. According to statistics provided by the Division of Parks, the Glen Alps entrance is the most heavily used access point to Chugach State Park in the Anchorage hillside area. In addition, approximately twelve families live year-round in the area immediately south of the State Park entrance, in what is known as Glen Alps.

Since February, 1976, the right of the public to use the road to the park entrance and to Glen Alps has been in jeopardy as a consequence of a decision by the Ninth Circuit Court of Appeals in United States and Tabbytite v. Clark, an action which has been in litigation in the U.S. District Court in Anchorage since 1969. The Ninth Circuit ruled that no legal access existed for the road across Mrs. Tabbytite's land enroute to the park entrance. The history of the dispute is set forth fully in the letter of agreement which was signed on May 7, 1976, between Russ Cahill, Director of the Division of Parks, and me.

Since February, a year ago, I have been engaged in strenuous litigation to keep the United States Government and Mrs. Tabbytite from securing an injunction which would prohibit the Glen Alps road from being used. However, the Municipality and Division of Parks agree that it would be inequitable to require the twelve families who live in Glen Alps to bear the entire cost of right-of-way acquisition considering the extensive use which the Glen



Alps entrance to the park attracts. We sought an appropriation from the last Legislature in the amount of \$40,000 to cover the cost of right-of-way acquisition and believed that such an appropriation had been made until we learned otherwise in December. Apparently, someone in the free conference committee goofed and made an appropriation for \$40,000 of Federal matching highway funds; however, no state funds were provided.

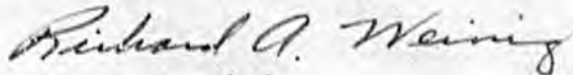
The Municipality is a party to the lawsuit because, upon unification, it succeeded to all interests and liabilities of the former City of Glen Alps, which had been a party. The suit is rapidly evolving into one inverse condemnation and, if I am to prevent the road from being closed by Federal injunction, I will probably have to make a deposit in court of the estimated just compensation for the right-of-way. Between May, 1975, and February, 1976, more than 39,000 people used the hillside entrance to Chugach State Park. Over 44% of these used the Glen Alps entrance. Because of this heavy public use, it would be grossly unfair to require the twelve year-round residents in the service area of Glen Alps to bear the cost of procuring this right of way.

Therefore, I request that your committee recommend appropriation of \$40,000 to reimburse the Municipality for whatever action may be necessary to procure a legal right-of-way from the switch backs on upper Huffman to the State Park entrance and Glen Alps. I believe that \$40,000 should be adequate to do the job.

If you have any questions, Ted Berns of our office should be helpful. Also, feel free to call me at 264-4320. Many thanks for your help in this endeavor.

Would you have time to do some kayaking this summer?

RICHARD W. GARNETT III
Municipal Attorney



Richard A. Weinig
Assistant Municipal Attorney

RAW:ljc
Enclosure

Municipality
of
Anchorage



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GEORGE M. SULLIVAN,
MAYOR

OFFICE OF THE MUNICIPAL ATTORNEY

May 7, 1976

The Honorable Helen Bierne
Alaska State House of Representatives
Pouch V
Juneau, Alaska 99811

Dear Representative Bierne:

On February 4, 1976, the Ninth Circuit Court of Appeals rendered a decision in United States and Tabbytite vs. Clark, No. 74-1659 which endangers all legal access to the former City of Glen Alps and to Glen Alps entrance to Chugach State Park. Several families live in the Glen Alps area year round. According to statistics of the State Division of Parks, more than 39,000 people used the hillside entrances to Chugach State Park between May, 1975 and February 1976. The Glen Alps entrance is the most heavily used entrance of the park in the hillside area around Anchorage. The use pattern is as follows:

Glen Alps - 44%
Prospect Heights - 30%
Upper O'Malley - 15%
Upper Huffman - 11%

The Ninth Circuit held that the only road providing access to the Glen Alps community and Glen Alps Park entrance illegally crosses certain Indian allotment lands held in trust by the United States for Bertha Mae Tabbytite. It remanded the case to the United States District Court in Alaska for issuance of an injunction against use of the road.

Undoubtedly, an injunction will be issued prohibiting any use of the road across Mrs. Tabbytite's land unless the Municipality of Anchorage, successor in interest to the former City of Glen Alps, or the State acquires right-of-way for the road through negotiation or condemnation.

The suit arose out of a dispute between two homesteaders, Mr. Clark and Mrs. Tabbytite. The Ninth Circuit described



the history of this dispute as follows:

Tabbytite's 160 acres of land are located in the Chugach Mountains southeast of Anchorage, Alaska. In November, 1956, she filed a homestead application for the land with the Department of the Interior. A year and a half later, in June, 1958, Glen Clarke, the principal named defendant, applied for a homestead on an adjoining 80-acre parcel. To secure access to a public highway, Clark constructed a road across Tabbytite's land in the late summer of 1958. The district court held that his doing so and using the road was a continuing trespass, for which it awarded damages. It is undisputed that Clarke never obtained a grant of an easement from anyone.

After securing his patent in 1961, Clarke subdivided his property into 40 parcels, most of which he sold before this suit commenced. Tabbytite was not as fortunate. Between 1958 and 1966, Clarke and his former wife filed three separate contests to Tabbytite's patent application. Clarke admitted at trial that he was aware of 23 U.S.C. § 125 which gives a successful contestant a preference to the cancelled homestead. Although Tabbytite prevailed in these contests, she could not get her patent while the contests were pending. Apparently despairing of ever securing the land via the homestead route, she elected to abandon her homestead application and take the land as an Indian trust allotment. However, there was no break in her possession.

During this same period Tabbytite made several attempts to bar those whom she considered trespassers from crossing her property. She posted "no trespassing" signs, and once, in 1967, sought to block the road physically. On this occasion, Clarke told her that Alaska law prohibited the blocking of a public highway and warned that she would be arrested if she persisted. She did not, choosing instead to notify the Bureau of Indian Affairs in Anchorage of her problem. On the advice of the Bureau, the United States, which holds legal title to Tabbytite's trust allotment, filed this action in 1969.

The suit was brought against a class of defendants which included anyone using the road. The plaintiffs sought a permanent injunction against use of the road and damages for trespass. Judge von der Heydt of the District Court denied the injunction, finding that the defendants had an easement by necessity across Mrs. Tabbytite's land but awarded the plaintiffs \$3,500 in compensatory damages -

\$2,000 for past trespasses and \$1,500 for future trespasses. The Ninth Circuit reversed, finding that no easement of necessity existed across Mrs. Tabbytite's land. It remanded the case to the District Court, strongly suggesting that the injunction be issued.

ALTERNATIVES

Acquisition of public right-of-ways over Indian allotment lands is allowed in either of two ways:

1. Through negotiations by either the Municipality or State and the Secretary of the Interior. (25 U.S.C.A. 311)
2. By exercise of eminent domain by the State or the Municipality. (25 U.S.C.A. 357)

Both the State and the Municipality, which succeeded to all interests of the former second class City of Glen Alps as a consequence of unification, can exercise the power of eminent domain. It would probably be more economical for the Municipality to do so since it has become a defendant in the existing suit as a consequence of unification. A key issue is who should bear the cost of acquiring right-of-way for the road and road maintenance: 12 families who live year round in the Glen Alps area as residents of a Municipal service area or the State, which attracts thousands to the area with Chugach State Park?

The area encompassed in the existing roadway is between one and two acres in size. Probably the highest valuation for land in that area is \$20,000 per acre. \$40,000 would probably acquire the right-of-way necessary to provide legal access to Glen Alps and the State park entrance. Since the Tabbytite case was brought in Federal Court, the just compensation is determined by subtracting the value of the land with the road crossing it from the value of the land without the road crossing it.

AGREEMENT BETWEEN THE MUNICIPALITY OF ANCHORAGE AND
THE STATE DIVISION OF PARKS
STATE OF ALASKA

The Municipality and State Division of Parks agree that it is desirable to maintain legal access to the Glen Alps entrance to Chugach State Park and for the 12 families who reside in Glen Alps to go from and return to their homes. The twelve families who reside in Glen Alps are willing to pay for part of the cost of acquiring right-of-way across Mrs. Tabbytite's land as residents of a Municipal service area, but the service area's financial base is limited because there are only 12 or so families within it. Therefore, the Municipality and State Division of Parks requests that the

legislature appropriate \$40,000 to cover the cost of acquiring legal road right-of-way across Mrs. Tabbytite's land. If the acquisition of costs is less than \$40,000, the appropriated funds will not be spent.

The Division of Parks recognizes that the Glen Alps park entrance is the most heavily used entrance in the hillside portion of the park above Anchorage. It would like to have the right-of-way procured so that legal access is possible, but is unable to do so without an appropriation from the legislature.

The parties further recognize that the road in question is used daily by residents of Glen Alps and primarily on weekends by visitors to the State Park. For this reason, both the Municipality and the Division of Parks feel it equitable to divide the cost of routine road maintenance and snow removal.

If the property interest is acquired as proposed above the Municipality and the Division of Parks will enter into bonafide, good faith, negotiations to establish the portion of the cost of routine road maintenance and snow removal based upon present use of the road by residents of the service area of Glen Alps and non-residents of the service area. This amount will be requested as a specific priority item in future parks budgets. The Division of Parks agrees that it will use its best professional efforts to urge the legislature to appropriate this amount. If appropriated, this amount will be paid to the Municipality on a contractual basis to do this work. Maintenance shall be by the Municipality. If the road is relocated the Division of Parks shall not be responsible for any costs caused in such relocation.

The Municipality and Division of Parks further agree to renegotiate the share of routine road maintenance and snow removal costs which each is to bear if the proportionate use of the road between residents of Glen Alps service area and users of the Glen Alps entrance to the State park changes significantly from that which presently exists. A bona fide good faith effort to effect such renegotiations shall occur at least every 5 years.

MUNICIPALITY OF ANCHORAGE

DIVISION OF PARKS

BY Richard A. Weinig
Richard A. Weinig
Assistant Municipal Attorney

BY Russell W. Cahill
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Director
Department of Natural Resources
State of Alaska