

HB

543

9-LS1769R

Bannister

4/17/96

CS FOR HOUSE BILL NO. 543()
IN THE LEGISLATURE OF THE STATE OF ALASKA
NINETEENTH LEGISLATURE - SECOND SESSION

BY

Offered:

Referred:

Sponsor(s): HOUSE TRANSPORTATION COMMITTEE

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to state airports and air navigational facilities."

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

3 * Section 1. FINDINGS AND STATEMENT OF PURPOSE. (a) The legislature finds
4 that

5 (1) it often takes considerable commitment, time, and resources for a lessee
6 to establish a fully developed revenue-producing business or noncommercial enterprise on
7 leased land on an airport owned and operated by the state;

8 (2) a developed business or noncommercial enterprise by an airport lessee
9 produces a stable long-term flow of revenue to the local community and the state in the form
10 of income from jobs created and taxes paid;

11 (3) a developed business by an airport lessee usually has established a positive
12 reputation with its clientele that enhances future tourism and commerce in this state;

13 (4) a developed business by an airport lessee is better positioned to generate
14 more federal passenger entitlement money for the airport and the state;

15 (5) a developed business or noncommercial enterprise on an airport land lease

1 generally maximizes the use of the airport infrastructure, and this maximization makes the
2 airport's operation more economical; and

3 (6) providing a right and option to lessees of airport land to continue to lease
4 the land will encourage and enhance compliance with state law and airport leases, and this
5 compliance will benefit the overall operations of the state airport system.

6 (b) It is the purpose of the legislature to preserve and establish, for qualifying land
7 lessees who are in compliance with state law and airport leases, a right, consistent with sound
8 airport planning, to continue to lease the land in order to continue their businesses and
9 noncommercial enterprises and in order to promote a strong aviation industry in this state with
10 long-term benefits to local communities, the airports, and the state.

11 * Sec. 2. AS 02.15.090 is amended to read:

12 Sec. 02.15.090. OPERATION AND USE PRIVILEGES. (a) In operating an
13 airport or air navigation facility owned or controlled by the state, the department may
14 enter into contracts, leases, and other arrangements covering periods not exceeding 55
15 years with a person, municipality, or the United States, granting the privilege of using
16 or improving an airport or air navigation facility or a portion of it or space in it for
17 commercial, governmental, or other public purposes, including private aviation uses
18 [PLANE TIE DOWN]; or conferring the privilege of supplying goods, commodities,
19 services, or facilities at an airport or air navigation facility. The department may
20 establish the terms and conditions and fix the charges, rentals, and fees for the
21 privileges or services that are reasonable and uniform for the same class of privilege
22 or service. Charges, rentals, or fees authorized by this subsection may be fixed for the
23 international airports by order of the commissioner or by negotiated or competitively
24 offered contract. Notwithstanding AS 37.10.050(a), the fixing of charges, rentals, or
25 fees as permitted under this subsection is not subject to the adoption of regulation
26 provisions of AS 44.62 (Administrative Procedure Act). The terms, conditions,
27 charges, rentals, and fees shall be established with due regard to the property and
28 improvements used and the expense of operation to the state. However, use of state
29 land and buildings by the Alaska Wing, Civil Air Patrol and its squadrons shall be
30 permitted without rental charges. The department shall provide for public notice and
31 an opportunity to comment before a charge, rental, or fee is fixed by order of the

1 commissioner as permitted under this subsection. The public may not be deprived of
2 its rightful, equal, and uniform use of the airport, air navigation facility, or a portion
3 of them.

4 (b) The department may by contract or other arrangement, upon a
5 consideration fixed by it, grant to a qualified municipality or person for a reasonable
6 period of time the privilege of operating, as agent of the state or otherwise, an airport
7 owned or controlled by the state. A municipality or person granted that privilege may
8 not operate the airport other than as a public airport or enter into any contract, lease
9 or other arrangement in connection with the operation that the department may not
10 have undertaken under [(a) OF] this section.

11 * Sec. 3. AS 02.15.090 is amended by adding new subsections to read:

12 (c) Notwithstanding the right of the public to rightful, equal, and uniform use
13 under (a) of this section, before the expiration of a land lease, including the
14 termination of a lease in holdover status, entered into under this section, the lessee may
15 apply for a new lease, or for an extended term under the existing lease, for the same
16 land. The commissioner shall approve the application for a new land lease or an
17 extended term under this section without offering the land to other persons for leasing
18 if

19 (1) the lessee is in compliance with the terms and conditions of the
20 existing or holdover lease; and

21 (2) the continued use of the leasehold is consistent with written airport
22 operation policies and is in the state's best interest.

23 (d) A land lessee owns title to the permanent improvements that the lessee
24 constructed or purchased during the term of the lease, unless the lease expressly
25 provides that the state is the owner of the permanent improvements.

26 (e) At the expiration, termination, or cancellation of a land lease entered into
27 under this section,

28 (1) a lessee who owns the improvements under (d) of this section shall
29 continue to own the permanent improvements that the lessee constructed or purchased
30 on a leasehold if the lessee is granted under (c) of this section a new lease or an
31 extended term for the same land;

1 (2) a lessee may sell the permanent improvements owned by the lessee
2 to a succeeding lessee of the same land;

3 (3) at the option of the lessee, the permanent improvements owned by
4 the lessee may be sold by the state at public auction with the proceeds from the sale
5 of the improvements going to the lessee, less administrative costs of the auction and
6 obligations owed under the lease to the state; the successful bidder has the same right
7 to enter into a new lease under (c) of this section without the department offering the
8 land to other persons for leasing;

9 (4) after notice by the department, the permanent improvements owned
10 by the lessee shall be removed at the lessee's sole expense if

11 (A) the permanent improvements do not comply with written
12 airport operational policies or are not in the state's best interest;

13 (B) the permanent improvements are not sold under (e)(2) or (3)
14 of this section; or

15 (C) the department makes written findings that the permanent
16 improvements are a hazard to the public health and safety;

17 (5) title to the permanent improvements vests in the department if the
18 state purchases or otherwise contracts for the ownership of the permanent
19 improvements, or if the lessee abandons the permanent improvements.

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Part Author.
Environ.

New & extend air lease
to improve on leases
dispos.

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8 not operate the airport other than as a public airport or enter into any contract, lease
9 or other arrangement in connection with the operation that the department may not
10 have undertaken under [(a) ●F] this section.

11 * Sec. 3. AS 02.15.090 is amended by adding new subsections to read:

12 (c) Notwithstanding the right of the public to rightful, equal, and uniform use
13 under (a) of this section, the department shall offer the holder of an existing lease of
14 land entered into under this subsection or (a) of this section a new lease of the same
15 land ^{or an extension of the existing lease} if the lessee is in compliance with the terms and conditions of the expiring lease
16 and if the continued use of the land is consistent with state law sound airport
17 operations and policies, ^{AN APPLICABLE APT MASTER PLAN} and otherwise in the best interest of the public. The offer shall
18 be made for a reasonable period of time before the department offers or leases the
19 same land to another party or to the general public. The term of the new lease offered
20 under this subsection may not exceed 55 years. In this subsection, "existing lease"
21 includes a holdover lease.

22 (d) Ownership of leasehold improvements made under a lease entered into
23 under this section shall be retained by the leasee who constructed them, by any
24 successor who purchases them, or by any other lawful successor or assignee of the
25 lessee. However, in limited circumstances clearly defined by regulations, the
26 department may acquire ownership by financing the improvements, by purchasing the
27 improvements, by abandonment by the owner, by condemnation, or by judicial
28 proceedings.

Alaska State Legislature

House of Representatives



Transportation Committee

SPONSOR STATEMENT

HB 543

"An Act establishing a preference when entering into State airport land leases."

In the past decade, the Alaskan aviation industry has made significant progress and investment in developing a system which better meets the transportation needs of our vast state. Alaska's aviation system is considerably different than other states.

Regulations have recently been proposed that could have a negative impact on Alaska's aviation industry. The changes suggested may threaten aviation infrastructure in Alaska by discouraging investment and development. Specifically, private aviators stand to lose any physical improvements added to airport structures at the conclusion of their lease. In some cases, the lessees have developed their leasehold to the tune of several thousands of dollars.

This potential loss could foster reluctance by the private sector to continue improving the infrastructure at aviation sites across the state. In addition, aviation operators would be left with no assurances that improvements and investments would be protected through continuing agreements with the state.

The purpose for state involvement in airport management should be to promote, encourage, and develop aviation in Alaska. It is important that airport leasing policy and practice in Alaska remain on a first come/first served basis.

House Bill 543 gives the current lessee preference if they are in compliance with the terms of the existing lease and have made substantial financial investments in developing the land.

ALASKA COALITION OF AIRPORT USERS**Resolution 95-1****RESOLUTION OPPOSING STATE OF ALASKA DOT/PF'S PROPOSED AIRPORTS REGULATIONS (17 AAC 45 and 17 AAC 40)**

WHEREAS the purpose for State involvement in airport management is to promote, encourage, and develop aviation (Alaska Statute 02.15.010); and

WHEREAS airport leasing policy and practice in Alaska has fostered this development by means of the first come-first served leasing requirement (Title 17, AAC section 40.320 (c) (1)); and

WHEREAS the State's purpose is not profit-oriented, but service-oriented--service to aviation; and

WHEREAS the State under AS 002.15.010 should encourage private enterprise and private investment, so that aviation can develop and serve the needs of the community and the State; and

WHEREAS Alaskans rely on the aviation industry as their primary transportation source, for persons, mail, food, shelter, health care, and goods and services in general; and

WHEREAS in the past decade the Alaska aviation industry has made significant progress and investment in developing a system which better meets the transportation needs of our vast state; and

WHEREAS the proposed changes to Title 17 Leasing Regulations threaten to destroy the aviation infrastructure by discouraging private investment and airport and facilities development; and

WHEREAS recent policy changes by the Knowles Administration have led the State to abandon the first come, first-served leasing rule--such policy changes having been developed without benefit of fair and open debate; and

WHEREAS public testimony during the Governor's Special Commission on Airport Leasing and public response to the rural leasing proposal clearly demonstrates the public's opposition to the proposed regulations and recent policies based on the threats they pose to the aviation industry in Alaska; and

WHEREAS the Governor's Special Commission on Airport Leasing recommends the adoption of a leasing policy to include provisions as described in what is commonly referred to as the "Barton Policy"; and

WHEREAS the plight of the industry, nationwide as well as across Alaska, is well documented and nearly 120,000 U.S. airline employees have lost their jobs since 1990; and

WHEREAS a \$900,000 fiscal note is required for implementation of the proposed regulation changes; and

WHEREAS never before has the entire Alaska aviation community been so galvanized in its opposition to policy and regulation changes; and

THEREFORE BE IT RESOLVED the undersigned associations, groups, and individuals do hereby request the Knowles Administration to adhere to the purposes set forth in AS 02.15.010 and honor the policies established by previous administrations which support and foster aviation development by private industry, and be it


FURTHER RESOLVED the aforementioned parties oppose the adoption of the State of Alaska DOT/PF's Proposed Airports Regulations (17AAC 45 and 17 AAC 40) and any State regulation or policy which increases public control or ownership of existing private aviation businesses and facilities.

RESOLUTION 99-1

The undersigned oppose the adoption of the State of Alaska DOT/PF's proposed airports regulations 17 AAC 45 and 17 AAC 40:

Kimberly S Daniels
Kimberly S. Daniels
Alaska Air Carriers Assn.


Kimberly S. Daniels
Executive Director
ALASKA AIR CARRIERS ASSN.


Philip K. Livingston, CCIM
VICE PRESIDENT
ALASKA AIRMEN'S ASSN.

Philip K. Livingston, CCIM
Vice President
ALASKA AIRMEN'S ASSN.

John W. Spalding
John W. Spalding
President
ALASKA AIRMEN'S ASSN

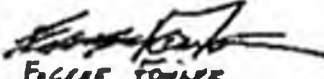
John W. Spalding
President
ALASKA AIRMEN'S ASSN.


Gene Zerke
President
ALASKA AIRCRAFT SALES

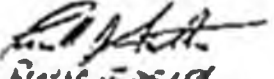
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Howard Fowler
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*Michael Petrie
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Michael Petrie
Chugiak, AK

*Eric E. Johnson
Eagle River AK 99577-0011*

Eric E. Johnson
Eagle River, AK

*Alan Damkoebler
Wasilla AK 99654*

Alan Damkoebler
Wasilla, AK

*Rodney W. Wiland
RM Aircraft Services
Chugiak AK 99567*

Rodney W. Wiland
RM AIRCRAFT SERVICES

*Stephen W. Anderson
Arctic Circle Air SVC. Inc.
Wasilla AK 99654*

Stephen W. Anderson
ARCTIC CIRCLE AIR SVC. INC.

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Melitta White
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ALASKA BUSH CARRIER, INC.

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Lake Hood Leaseholders Assn.

David Klosterman
LAKE HOOD LEASEHOLDERS ASSN.

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AIRLINE SUPPORT INC.

Alaska State Legislature

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Fairbanks Alaska 99701
(907) 456-8161State Capitol
Juneau Alaska
99801-1182
(907) 465-2327

House District 31

House Of Representatives

August 1, 1995

The Honorable Tony Knowles
Governor, State of Alaska
P.O. Box 110001
Juneau, Alaska 99811-0001

Dear Governor Knowles,

The Interior Delegation is writing to express our concern regarding the regulation package establishing new lease policies on Airport land in Alaska. You have inherited this package of regulations from the Hickel administration, and may not have reviewed the policy consequences of the Department of Transportation's substantial changes in 17 AAC 45.

We believe these changes will severely damage the long term development and maintenance of our Airports. The use of competitive bids to renew private individuals leases, potentially depriving them of their improvements, is particularly egregious. The specter of this policy is already having a traumatic impact on the natural growth and improvement of our existing airports. This Hickel-era proposal may appear to increase short term revenue by leasing to whomever is willing to bid exorbitant rates in order to pirate the improvements of the prior lessee. In practice, it involuntarily deprives individuals of their improvements and directly contravenes Alaska's land use policy under Article VIII, Sections 1 & 16 of the Alaska Constitution.

We also wish to clearly state our continued support for the pre-Statehood policy of first-come, first-served leasing as currently provided under 17 AAC 40.320(c)(1). Overriding this historical policy is simply unjustified.

Alaskans rely heavily upon air travel and airports. We believe these regulations create uncertainty among the service providers at our airports, and stand to severely harm the proper functioning of these facilities. Please review these regulations for consistency with your direction and vision for the State.

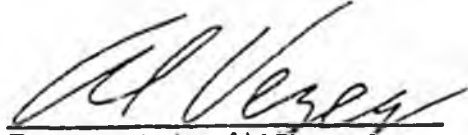
Sincerely Yours,


Representative Pete Kelly
Interior Delegation Chairman

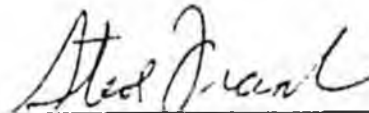
ADOT Regulations.
Page 2.



Senator Mike Miller
Chairman Senate Rules



Representative Al Vezey
House Majority Leader



Senator Steve Frank
Co-Chairman Senate Finance




Representative Jeanette James
Chairman House State Affairs



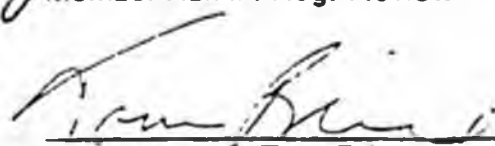
Senator Bert Sharp
Chairman Senate State Affairs



Representative Gene Therriault
Member, House Finance



Representative John Davies
Member Admin. Reg. Review



Representative Tom Brice
Member, House Transportation

cc: Senator Randy Phillips, Chairman Administrative Regulation Review Committee
Representative Norm Rokeberg, Vice-Chairman, Admin. Reg. Review

Alaska State Legislature



Official Business
Fax : (907) 465-3472

Speaker of the House of Representatives

State Capitol
Juneau, Alaska 99801-1182
(907) 465-3720
(907) 465-2689

August 9, 1995

Dear Rural Airport User:

Recently, I became aware of proposed Department of Transportation and Public Facilities (DOT) regulations which may affect your operations as a rural airport user. The proposed regulations have been under consideration since last year; however, changes made following last year's public comment period have prompted the agency to reissue the proposed regulations for additional public review.

DOT is proposing to amend 17 AAC 40 so that it will apply only to the Anchorage and Fairbanks International Airports. At the same time, DOT is proposing to adopt a new chapter to the administrative code, 17 AAC 45, regarding operation and management of rural airports.

Some of the provisions in the proposed regulations for rural airports are similar to those in existing 17 AAC 40. However, significant new elements which require your careful review include provisions:

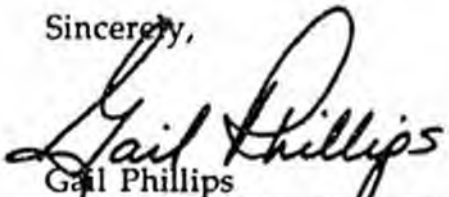
- * imposing commercial passenger vehicle fees and requiring airport use permits;
- * imposing aircraft parking fees and establishing rules for aircraft use of airport facilities;
- * addressing environmental issues;
- * revising airport land rental rates;
- * establishing competitive lease award procedures;
- * increasing filing fees for lease related applications; and
- * expanding regulations for setting lease terms.

Copies of the proposed regulations were mailed by DOT to an extensive list of airport users early in July. If you did not receive a copy of the proposed regulations, one can be obtained by contacting Stephen Pavish, Statewide Leasing Coordinator for DOT, at (907)266-1666. I also have copies of the proposed regulations which I would be happy to provide for your review.

After you have had an opportunity to review DOT's proposed regulations, please let me know how they may affect your operations. Kyle Parker of my staff has been working with me on this issue. Kyle can be reached at (907)258-8164.

Please note that written comments on the proposed regulations must be submitted to DOT by 4:30 PM on August 25, 1995. I urge your prompt attention to this matter.

Sincerely,


Gail Phillips
SPEAKER OF THE HOUSE

cc Stephen Pavish



Era Aviation, Inc.

August 25, 1995

VIA TELECOPIER, No. 243-1512
(Hard copy via mail.)

Mr. Stephen L. Pavish
Statewide Leasing Coordinator
Department of Transportation and Public Facilities
Statewide Aviation
P.O. Box 196900
Anchorage, Alaska 99519-6900

Ref: Rural Airports Proposed Regulations (17 AAC 45); Notice Dated
July 7, 1995.

Dear Mr. Pavish,

Era is responding to the Department's Notice, dated July 7, 1995, "Rural Airports Proposed Regulations (17 AAC 45)" (the "Notice").

These Proposed Regulations should be scrapped in their entirety, and the State should start over again – this time from the perspective that the State holds airport lands in trust for the benefit of the citizens of Alaska.

The Department has solemn duties to foster and promote air transportation. These include responsible stewardship of airport lands owned by the State. The Proposed Regulations are everything but responsible. They are devoid of common sense or reasonable balance. They are onerous to the extreme for users, and terribly one-sided in favor of Department personnel. "At the discretion of" (the department, the commissioner, the airport manager) must appear well over a hundred times.

All parties should readily agree that safe, reliable air transportation is crucial for the health and welfare of Alaskans. All parties should also readily agree that sound, stable and commercially reasonable airport land use policies are essential for continued growth and development of air transportation in Alaska. We at Era commit to assisting in developing such policies.

Mr. Stephen L. Pavish
page 2 of 4

There are three "lifeblood" issues that are of particular concern to us in these Proposed Regulations: (i) Lease Renewals; (ii) Ownership of Leasehold Improvements; and (iii) Environmental Liabilities and Other Unreasonable Lease Terms and Conditions.

Some renewal preference must be given to existing leaseholders who have fully and faithfully performed their lease obligations. The current provisions of 17 AAC 40.320(c) are a good place to start. On the other hand, proposed 17 AAC 45.305(d) states that renewal would be discretionary, and proposed 45.305(h) provides that the Department may "in its discretion" reject a renewal application and offer the lease "at public auction, sealed bid, or competitive proposal." The idea of going to competitive bid is unwise, and would lead to all manner of mischief.

The State holds these lands in trust for the common welfare; it is entitled to recover only fair and reasonable rents, related to costs of state maintenance and state improvements. The State should not be allowed to profiteer in cases of competing applications. Nor should one competitor be allowed to drive out another at renewal time, or bid the other's land rents above those of his neighbors. We have heard the arguments from State personnel that the Alaska Constitution somehow prevents reasonable renewal policies - we remain unpersuaded.

We take little comfort in the "appeal rights" under proposed 45 AAC 45.910 for redress of State wrongs in cases of "denial or rejection of an application or the cancellation or termination of a lease ...". It states only that, "The regional director or his designated appeals person will, *in that person's discretion*, hold a hearing to consider the appeal" (Emphasis added.)

Reasonable provisions must be made for the leaseholder to retain ownership interests in leasehold improvements. Again, mischief would result were it otherwise: There would be no incentive to erect quality structures, or to maintain them - no incentive to create or maintain quality businesses, and jobs, at State airports. Again, the State should not be allowed to profiteer at the expense of leaseholders and other citizens by laying claim to these improvements.

The idea of set schedules for lease terms or renewal terms based on dollar values of new improvements is artificial and unworkable (proposed 45 AAC 45.310). Many factors other than new investment are important in

Mr. Stephen L. Pavish
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determining appropriate lease terms. As just one example, costs to preserve and maintain improvements are as important as new investment.

Reasonable renewal rights and retention of ownership rights are related and vitally important in at least one other respect: Financing for new investments, refinancing, and the related creation and retention of jobs would not be possible without these rights.

Of course, reasonable renewal rights and ownership rights mean nothing if the leaseholder may be driven from the airport (or into bankruptcy) "at the discretion of the department" by unreasonable environmental liability regulations, imposed "in its discretion" (e.g., proposed 45 AAC 45.055 and 45.020). Under proposed 45 AAC 45.020, if some "other hazardous substance" is spilled, the Department may "in its discretion, respond to or perform the cleanup"; and "the person responsible for the spill is liable to the department for all associated costs, including clean up costs, legal fees, and interference with airport operations." (Emphasis added.) This could ruin a citizen, and his business, even if he were only slightly responsible, the State was more at fault, and the State was completely unreasonable in responding, conducting clean up, incurring legal fees, and failing to ameliorate interference with airport operations. There is no valid reason for the State to include overbearing environmental requirements in these regulations; the State's legitimate interests are sufficiently protected simply by relying upon the other environmental laws, as in effect from time to time.

Apart from environmental matters, the lease documents should contain commercially reasonable terms and conditions throughout. The State should not be allowed to abuse its monopoly powers over airport lands to inflict unreasonable terms on tenants. As examples, in the past we have seen provisions where a leaseholder is asked to hold the State harmless from the State's own wrongdoing, or forced to comply with unreasonable State requests by threats of selective enforcement. Sound public policy and common sense require that all lease terms and conditions be fair and reasonable - to landlord and tenant alike.

We turn to rates and fees. Most of these have been debated for years and years. The Department has heard the valid arguments time and time again. These proposed rates and fees are not at all well considered. We suggest the Department take a fresh look at all these rates and fees, and propose only those which can be credibly defended as "reasonable and uniform" (AS § 02.15.090).

Mr. Stephen L. Pavish
page 4 of 4

Our comments have been limited due to the press of time. The Notice contains over 100 pages. The Notice period has, once again, been scheduled during most Alaskans' busiest time of the year. We are all working long hard hours to meet the needs of our customers and the special challenges of providing air transportation in Alaska. We cannot comment in detail on these Proposed Rules in the short time allowed. We urge the Department to extend the comment period by at least 90 days.

Moreover, we suggest the Notice may be invalid under the Executive Order signed by Governor Knowles June 5, 1995. (Anchorage Daily News, June 6, 1995, page B4.) We do not see the requisite "clear and concise language" or "consideration of costs". We do not see any explanation for "what and how the rules are being changed as well as why".

As a closing matter: The Department, (as well as the Commissioner's Special Commission on Airport Leasing Policy, for ANC and FAI), knows well of the considerable efforts from last year and before to address these same leasing policy issues. Countless days and hours of hearings and meetings have already been held. Much time has already been spent analyzing and debating legitimate concerns. The Department should make good use of the fruits of these previous labors, giving due consideration to facts already developed and evaluations already made. In particular, the Department should seek the counsel of the former State officials involved, and give special consideration to the Memorandum dated August 26, 1994, from the Deputy Commissioner to the Commissioner, on the subject of, Aviation Leasing Policy.

If you have any questions, please do not hesitate to call.

Sincerely,



Jack Birmingham
Vice President

FEB 13 1996



SERVING GENERAL AVIATION 40 YEARS (1951-1991)

U of A Aviation Complex
1515 East 13th Avenue Anchorage, Alaska 99501-4814
907 272-1251 — 24 Hour Phone/Fax

COPY

FEBRUARY 6, 1996

REP RICHARD FOSTER
ALASKA STATE LEGISLATURE
State Capitol Room 410
JUNEAU AK 99801-1182

443 2162

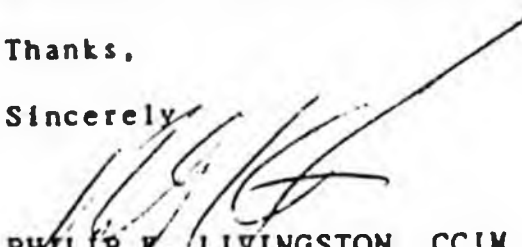
REF: ALASKA AIRMEN'S ASSOCIATION LETTER
TO REPRESENTATIVE GAIL PHILLIPS
2/6/1996 REQUESTING LEGISLATIVE ACTION
(17 ACC 40/45)

In the interest of eliminating further debate on the issue at the administrative level, The Alaska Airmen's Association requests that the legislature provide direction to DOT/PF by amending AS 02.15.090 to grant a lease renewal preference.

The Alaska Airmen's Association Inc. would appreciate your help.

Thanks,

Sincerely,



PHILIP K. LIVINGSTON, CCIM
VICE PRESIDENT
ALASKA AIRMEN'S ASSOCIATION INC.

cc: ltr Rep Gail Phillips 2/6/96



SERVING GENERAL AVIATION 40 YEARS (1951-1991)

U of A Aviation Complex
1515 East 13th Avenue Anchorage, Alaska 99501-4814
(907) 272-1251 — 24 Hour Phone/Fax

FEBRUARY 6, 1996

THE HONORABLE GAIL PHILLIPS
SPEAKER OF THE HOUSE
STATE CAPITOL, ROOM 208
JUNEAU, ALASKA 99801-1182

REF: LETTER OF 1/16/1996 FROM
COMMISSIONER JOSEPH L. PERKINS, P.E.
(17 ACC 40/45)

REPRESENTATIVE PHILIPS:

Contrary to Commissioner Perkins' assertions, the concerns of the aviation community are not based on "false assumptions".

Although the proposed rural airport regulations have been under consideration for over two years, DOT/PF has still not developed a sound leasing policy that will encourage investment and protect aviation businesses in Alaska.

The Commissioner does not address the real question: will adopting a policy granting leaseholders a renewal preference on their leases help maintain a stable business environment and thereby encourage long term investment in the aviation industry?

The answer to that question is obviously YES. This answer was reached by both former DOT/PF Commissioner Barton and the Special Commission on Airport Leasing.

Further, there has been no concern shown by the department for either:

1. The costs to the state associated with managing an increasing inventory of obsolete and poorly maintained forfeit leaseholder properties.

2. The ability of leaseholders to sell capital improvements or business interests deprived of their leasehold.

In the interest of eliminating further debate on the issue at the administrative level, The Alaska Airmen's Association requests that the legislature provide direction to DOT/PF by amending AS 02.15.090 to grant a lease renewal preference.



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Renewal preferences are granted under Title 38 in instances in which the state seeks to encourage investment in public lands.

Lease renewal preferences have been enacted in a number of statutes governing the leasing of lands by the Department of Natural Resources (DNR) under Title 38, including AS 38.05.102 (leasing of lands other than for the extraction of natural resources), AS 38.05.073 (g) (leasing of land for recreation facility development), AS 38.05.079 (d) (leasing of remote cabin sites) and AS 38.05.083 (a) (leasing of tidelands for aquatic farming and hatchery sites).

Shore fisheries leases for set gill nets are not awarded by competitive bid, but to the most qualified applicant, and may be extended. See AS 38.05.082 (b) and (d), AS 38.05.102, and 11 AAC 64.391.

Unless it is the conclusion of DOT/PF that the above leasing preferences are invalid, airport lessees who make improvements should be afforded the same kind of protection as other users of public lands.

Any concern on the part of DOT/PF or the Department of Law that a lease renewal preference would violate the equal protection provisions of the Alaska constitution is unfounded. The statutes governing renewal of DNR leases were approved by the Department of Law and have not been challenged on constitutional grounds.

The Department of Law has advised DOT/PF that no statute currently authorizes DOT/PF to give a preference right for lessees to renew their leases. This advice is based on the language of AS 02.15.090 (a), which provides in relevant part: "[i]n no case may the public be deprived of its rightful, equal and uniform use of the airport." The Department of Law interprets this language to mean that airport leases may not be renewed without being subject to competing applications. A further extension of that idea is that under equal protection requirements airports must treat "all similarly situated" persons equally.

We question whether the Department of Law's interpretation of AS 02.15.090 (a) is correct and suggest that an investor with substantial capital improvements or established business interests at risk is not "similarly situated" as a newcomer in a competitive bid.



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As stated above, The Alaska Airmen's Association requests that the legislature provide direction to DOT/PF by amending AS 02.15.090 to grant a lease renewal preference.

I have enclosed draft language that could be incorporated into a bill to confirm that lessees who have invested in improvements at rural airports shall be granted a renewal preference at the expiration of their leases, and that improvements constructed by lessees shall remain the property of the lessees.

Thank you for your support.

Sincerely

JOHN SPALDING
PRESIDENT
ALASKA AIRMEN'S ASSOCIATION

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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Mail Stop 3101

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

MEMORANDUM

February 21, 1996

SUBJECT: Airport and set-net leasing policies (Work Order 9-LS1596)

TO: Representative Beverly Masek
Attn: Dave

FROM: *TB*
Theresa Bannister
Legislative Counsel

This memo responds to several questions that you have asked regarding state airport land leases and set-net leases.

1. Do both the regulations and statutes governing airport leases require the Department of Transportation and Public Facilities to follow a policy of re-offering state airport land leases on an impartial basis? You have provided a copy of a June 21, 1995, memo from the Attorney General to the Commissioner of the Department of Transportation and Public Facilities ("DOT/PF") that discusses whether DOT/PF must re-offer airport leases on an impartial basis. I have reviewed the memo in light of your question. It is my understanding that you are concerned about whether DOT/PF can give a current lessee of state airport land a preference when offering the land for a lease at the end of the current lease.

A. Statutes. Although not stated as clearly as it could be on this specific point, the statutes that govern the leasing of state airport land appear to require DOT/PF to offer new leases on an impartial basis and without a preference for the current lessee. There are two main reasons for this conclusion. They are (1) there is no preference expressly provided by the governing statutes for the current lessee, and (2) the statutory leasing provisions contain general language that could be interpreted to require that the leases be offered on an impartial basis.

(1) No preference provided. To give a preference to the existing lessee, DOT/PF must have some form of authority to do so. The authority can be express or implied. The leasing of state airport land is governed by AS 02.14.090.¹ AS 02.15.090 does not contain any

¹The leasing of state airport land is generally not covered by the state procurement code (see AS 36.30.850(b)(8)) or by the state lands act (see AS 38.05.030(d)).

language expressly directing DOT/PF to give a preference to current lessees when offering the land for a new lease.

On the other hand, the department is given express authority under AS 02.15.090(a) to establish terms and conditions for the leases and under AS 02.15.020 to adopt regulations to implement its other powers. These authorizations could conceivably be interpreted to include reasonable preferences necessary to carry out the leasing. However, in this case, this possibility seems unlikely since AS 02.15.090(a) also contains general language that requires equal access and uniform treatment.

(2) General language requiring equal access and uniform treatment. AS 02.15.090(a) contains two expressions relating to equal and uniform treatment. The most significant reads

The public may not be deprived of its rightful, equal, and uniform use of the airport, air navigation facility, or a portion of them.

The interpretation of this sentence is not clear, and there is not much legislative history on it. If it were interpreted to require lessees to keep their leased premises and services open to the public, then the sentence would not act as a limitation on DOT/PF's authority on reoffering leases. However, the sentence can also be read to require that the actual leasing procedures must be on an equal and uniform basis. It is not clear which interpretation would prevail.

The second provision reads:

The department may establish the terms and conditions and fix the charges, rentals, and fees for the privileges or services that are reasonable and uniform for the same class of privilege or service.

Once again the interpretation is not clear and there is not much legislative history on it. It is not clear whether the clause "that are reasonable and uniform for the same class of privilege or service" only modifies "terms and conditions." If it does, then the authority to establish terms and conditions does not include the authority to give preferences. If it does not, then only the charges, rentals, and fees must be uniform within the same class, and there is more room in the terms and conditions to include reasonable preferences necessary for the leases. Notwithstanding this, the phrase does allow for some differences among the categories of leases offered. As with the other sentence, it is not clear which interpretation would prevail.

(3) Conclusion. Although the statutes are not explicit, it appears that without an express provision of preference, and in light of the language in AS 02.15.090(a) speaking to equality and uniformity, the better interpretation is that the statutes seem to require that airport land leases be offered on an impartial basis, at least within the same categories.

Representative Beverly Masek

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B. Regulations. The regulations governing the granting of state airport land leases require impartial reoffering of leases in some cases, allow impartial offerings in others, and are somewhat contradictory in other cases. Except to the extent that they give priority to certain uses of the land, the regulations do not provide an express preference for current lessees to re-lease the land.

With regard to lease offerings, there is a general requirement of impartiality. 17 AAC 40.320(c) recites the requirement of impartiality found in AS 02.15.090(a) by stating: "Uniform and Equal Rights. Leases or privileges will be granted on a uniform and equal basis." However, this statement of policy is made subject to certain significant and somewhat confusing provisions.

The first significant provision is that leases for aviation functions and leases for auxiliary functions are to be granted on a "first come-first served" basis (17 AAC 40.320 (c)(1) - (2)) unless public auction or competitive proposals are (1) required by law or (2) DOT/PF determines them to be in the best interests of the public. Notwithstanding this, if the land is available and not needed for aviation use, public auction is to be used for leases for leases for auxiliary functions. Finally, a public auction is required for nonaviation leases. (17 AAC 40.320(c)(3), (8)(C)).

It is not clear what is meant by the "first come-first served" requirement. It is possible that this provision could be interpreted to provide a preference for current lessees, since they would certainly qualify as arriving first. However, as discussed in section I of this memo, the governing statutes may not provide the authority to extend a preference to current lessees; if they do not, then they cannot authorize a regulation to do so, since under AS 44.62.020 a regulation must be within the scope of authority conferred and in accordance with the statutory standards. The renewal provision in 17 AAC 40.360(13) does not establish a preference for the current lessee, and pretty much leaves DOT/PF free to grant or reject the renewal request.² Unless "first come-first served" is interpreted to create a preference for current lessees, the regulations do not appear to provide for a lessee's preference.

²17 AAC 40.360(13) reads as follows:

(13) At the expiration of the term of the lease, if the lessee desires a renewal, he shall within 30 days before the expiration make application in writing for a renewal, stating the purpose for which he desires a renewal and such other information as the lessor may require. The lessee shall deposit with such application the sum equivalent to 100 percent of the next rental payment which will be due if the lease is renewed. Such application, when fully conforming to the requirements herein stated, will extend the lease until such time as the lessor gives written notice to the lessee that the

(A) request for renewal has been granted;

(B) request for renewal has been rejected, stating the reasons for such rejection; or

(C) lessor has determined it to be in the best public interest or is required by law or regulation to offer the lease at public auction.

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The only preference created by the regulations appears to be for the type of function. If there are two or more applications for the same land for different classes of use, aviation functions¹ are given priority over auxiliary functions,⁴ and both aviation functions and auxiliary functions have preference over nonaviation functions.⁵ (17 AAC 40.320(c)(5)).

In addition to the above provisions, there is a requirement that a public auction is required when two or more persons apply for the lease. (17 AAC 40.320(c)(8)(C)). It is one of the provisions to which the uniform and equal rights provision referred to above is made subject. However, in light of the specific provisions in 17 AAC 40.320(c)(1) - (3), including the "first come-first served" provisions, it is not clear just when and how this provision is intended to be used. I cannot say whether this provision is as broad as it sounds.

Therefore, as you can see, although the regulations governing state airport land leases appear to generally approach leases in an impartial manner, there is an existing "first come-first served" provision that appears to contradict this approach and that is not clear as to its application. I do not believe, in light of the governing statutes, that this provision would be interpreted to provide a preference to existing lessees.

2. If the statutes and regulations governing state airport land leases require DOT/PF to follow a policy of reoffering state airport land leases on an impartial basis, why aren't shore-based commercial set net fishing site leases administered under the same impartial policy?

As stated above, the state airport land lease provisions do not seem to provide a preference to current lessees when offering the leases. Commercial shore-based set net fishing site leases do provide a preference to current lessees. The reason for this apparent inconsistency in the handling of state leases is that the granting of shore-based set net leases are governed by a different set of statutory provisions, and these provisions include an express preference for current lessees.

The preference for current lessees is authorized by AS 38.05.102. That section reads as follows:

Sec. 38.05.102. LESSEE PREFERENCE. If land within a leasehold created under AS 38.05.070 - 38.05.105 is offered for sale or long-term lease at the termination of the existing leasehold, the director may, upon a finding that it is in the best interest of the state, allow the holder in good standing of that leasehold to purchase or lease the land for its appraised fair market value at the time of the sale or long-term lease.

¹"Aviation function" is defined at 17 AAC 40.320(b)(1).

⁴"Auxiliary" functions are defined at 17 AAC 40.320(b)(2).

⁵"Nonaviation" functions are defined at 17 AAC 40.320(b)(3).

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As you can see, the preference is based on a finding by the director of the Division of Lands in the Department of Natural Resources that releasing to the current lessee is in the best interest of the state. The regulation that interprets this statutory preference reads as follows:

11 AAC 64.391. EXTENSION OF LEASE. 90 days before the expiration of a valid lease, the lessee may request an extension of the lease. The director will, in his or her discretion, extend the lease for a period of up to 10 years if no changes in site or tract location have occurred, the beach has remained stable, the lease is in good standing with the department, the lessee remains qualified under 11 AAC 64.230, and no protest of the extension is received. A nonrefundable filing fee, as established by the department's approved fee schedule, must accompany a request for an extension.

These provisions provide the necessary authority to provide the preference as long as they do not violate the federal equal protection requirements under the 14th amendment to the federal constitution) or the state's equal protection requirements (art. I, sec. 1, Constitution of the State of Alaska).

Since this would probably be considered economic legislation and since federal courts apply a minimal rational basis standard to such economic legislation, the provision will not present a federal equal protection problem if the classification is rationally related to a legitimate state interest. Since I am not familiar with the reasons behind this preference I cannot determine whether the preference is meeting this goal. However, the federal courts generally defer to the legislature's determinations as to the desirability of particular statutory discriminations. Since this does not appear to be a suspect classification or to affect fundamental personal rights, it is unlikely that the provision would be overturned under the federal equal protection provision. See Commercial Fisheries Entry Com'n. v. Apokedak, 606 P.2d 1255, 1263-1264 (Alaska 1980).

With regard to the state's equal protection provision, the preference would probably be subject to a low level of scrutiny, since this preference deals with legislation of economic and commercial interest. See Herrick's Aero-Auto-Aqua Repair v. State, Department of Transportation, 754 P.2d 1111, 1114 (Alaska 1988) and Isakson v. Rickey, 550 P.2d 359, 363 (Alaska 1976). Although it is possible that the interest would be considered as more important and requiring a more stringent level of scrutiny by the court (see State v. Enserch Constr. Inc., 787 P.2d 624, 632 Alaska 1989), Enserch directly involved actual employment, which is not the case here. Under a low level of scrutiny, the court would use the rational basis test. The rational basis test questions whether the classification is "reasonable, not arbitrary" and rests "upon some ground of difference having a fair and substantial relation to the object of the legislation." Isakson, 550 P.2d at 362. Essentially, there must be a rational basis for allowing a preference for the current lessee. I do not have enough information on the parameters and reasons for the preference that you are interested in to provide you with a conclusion whether the preference provision would meet this standard.

Representative Beverly Masek

February 21, 1996

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3. If the statutes and regulations allow the state to treat shore-based set net site leases differently, can DOT/PF change its regulations to do the same or must the legislature change the statutes? In my opinion, it would be advisable and probably necessary to amend the applicable statutes rather than the regulations. As indicated in question 1 above, although there is broad regulatory authority given to DOT/PF for establishing the terms and conditions of leases and other aspects of the airport land leases, there are two express statements in AS 02.15.090(a) that require uniformity and equality. These statements seem to prevent DOT/PF from providing a preference for current lessees in regulation. Therefore, I recommend that you amend the statutes.

4. What changes would be needed if they are required in statute? The changes needed to establish the preference are enactment of language that (1) establishes the preference that you want, and (2) clarifies that the references in AS 02.15.090(a) to uniformity and equality are subject to the new preference. You may want to use AS 38.05.102 as a jumping-off point for starting to design your section. In addition, the language (and reasons behind the preference) must satisfy, to the extent foreseeable and feasible, equal protection requirements.

I do not have enough information on the parameters and reasons for the preference that you are interested in to provide you with a conclusion whether the preference provision would meet the equal protection standard. If you can provide me with this information, I could review it for you.

5. Draft of changes. As indicated above, I do not have very much information on the parameters and reasons for the preference that you are interested in. If you can provide me with the necessary information, the language can be drafted for you.

If I may be of further assistance, please advise.

TLB:glc
96-106.glc

(7)

HOUSE COMMITTEE REPORT

Date Referred to Committee: March 14, 1996

FURTHER REFERRALS:

Date of Committee Action: 4/3/96

The TRANSPORTATION Committee considered:

HB 543

HOUSE BILL NO. 543

STATE AIRPORT LAND LEASE PREFERENCE

"An Act establishing a preference when entering into state airport land leases."

recommends it be replaced with the following committee substitute CS HB 543 (TRA) [] the same title [X] a new title

[] additional referral to _____ Committee [] attached amendment(s)

ADOPTS: _____ Letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept) APPROVES PREVIOUS: (Dept/Date) [] fiscal note(s) [] fiscal note(s) [] zero fiscal note(s) [] zero fiscal note(s)

Table with columns: SIGNING WITH RECOMMENDATIONS, DP, DNP, NR, AM. Rows include signatures: W. B. William, Ann Brice, Ernest James, Hal L. Linn, and Jerry Sanders.

CHAIR'S SIGNATURE Hal L. Linn