

SB

142

STATE OF ALASKA

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

STATEWIDE AVIATION

FRANK MURKOWSKI, GOVERNOR

4111 AVIATION AVENUE
P.O. BOX 196900
ANCHORAGE, ALASKA 99519-6900
(907) 269-0730 Fax (907) 269-0489

May 2, 2005

The Honorable Mark Neuman
Alaska House of Representatives
State Capitol, Room 400
Juneau, AK 99801

Dear Representative Neuman:

Thank you for your questions on SB 142 - ownership of land by regional school boards.

The intent of the Department of Transportation and Public Facilities (DoT/PF) in requesting this legislation is to eliminate a conflict between AS 14.08.151 and our assurances made to the FAA in order to receive Airport Improvement Program (AIP) funding.

AS 14.08.151 has been cited by regional educational attendance area (REAA) schools and school boards as justification for requesting airport land title. Because this request conflicts with our assurance to the FAA to retain "satisfactory property interest," DoT/PF has had to obtain Attorney General's opinions in order to show that there was no legislative intent to compel the State to breach FAA grant agreements.

DoT/PF has leases or letters of non-objection with school entities at the following airports:

Aniak
Anvik
Cold Bay
Betties
Galena
Kaltag

Lime Village
Noatak
Pilot Station
Unalakleet
Willow

These facilities, ranging from fuel line rights of way to hangars to schools, can be divided into two categories – those which pose some risk to aviation operations, and those posing no risk.


School buildings at Aniak, Bettles and Noatak have been identified as encroaching on aviation operation areas outlined in FAA advisory circulars. DoT/PF has made verbal and written commitments to the FAA to work with REAAs, school boards and the Department of Education to mitigate and/or remove these encroachments when reasonably possible.

All other school facilities are located on land outside of those areas required specifically for aviation operations per FAA advisory circulars, or have been approved by FAA to remain in place in aviation operations areas. At all of the communities listed above, DoT/PF has a contractual relationship with the school entity and has regulatory limitations in causing the facility to be removed from airport property. Additionally, the DoT/PF has no policy, and expects no change that policy, requiring the removal of school facilities from airport land.

While DoT/PF does have a policy restricting new schools or additions to be built in areas encroaching on aviation operating areas, it does allow school entities to lease airport land outside of aviation operation areas if necessary.

We expect the primary benefit of SB 142 will be an end to the bureaucratic entanglements that stem from conflicting statutes. Thank you for your time on this issue.

Sincerely,



Kip Knudson
Deputy Commissioner for Aviation

REAAAs where Airport/DOT needs may overlap:

- **In Northern Region** there are schools or school-owned buildings on the following airports:
Anvik, Bettles, Galena, Noatak, Pilot Station and Unalakleet

- **In Central Region** schools or school outbuildings may be on the following airports:
Aniak, Cold Bay, Iliamna, Lime Village and Willow

Data provided by:

Pamela A. Lewis, SR/WA

Statewide Chief, Aviation Leasing and Airport Land Development

Alaska DOT&PF



Alaska State Legislature

Senator Con Bunde
Senate District P

Vice Chair: Senate Finance Committee
Chair: Senate Labor & Commerce Committee

SB 142 SPONSOR STATEMENT

Lands & Buildings used by Regional School Boards (updated 4/25/05)

"An Act relating to ownership of land by regional school boards; and providing for an effective date."

Currently there exist conflicting statutes regarding ownership of land for state airports. AS 02.15.020 requires that the Department of Transportation and Public Facilities (DOT&PF) conforms to federal requirements if the state wishes to participate in federal grants. A newer statute, AS 14.08.151(b) gives a regional school board the opportunity to receive title to land used in relation to regional educational attendance area schools.

While the Alaska Legislature clearly intended to allow regional school boards the option of greater control of their facilities through acquisition of title, there is no record that the Legislature intended to do so at the cost of federal liability, significant loss of federal funding, and a degraded state airport system.

Several regional schools are located on state airport properties, some in very close proximity to active runways and airport infrastructure. At various times, regional school boards have requested that DOT&PF convey full title of the airport land to the schools. This has caused confusion, staff time in both the Departments of Education and DOT&PF, as well as attorney costs, to defend DOT&PF's title to its airport property.

DOT&PF, acting as a sponsor under federal law, makes extensive use of federal grant funding for airport construction and improvements. The Federal Aviation Administration imposes enforceable grant conditions on the recipients of federal funds. As a condition of acceptance, DOT&PF is required to expend federal grant funds in strict accordance with those federal conditions. FAA requires DOT&PF to certify assurances that it has "satisfactory property interest" in the airport to obtain these necessary federal grants. Under AS 14.08.151(b), a mandatory title transfer of airport property that is subject to FAA grant assurances would violate AS 02.15.020(c) and would breach federal grant agreements. This is because DOT&PF would be required to transfer title to property that the department has assured to the FAA that it would retain in state ownership *for airport purposes*, including the fiscal support of the airport.

There being no indication of legislative intent to compel the State of Alaska to breach FAA grant agreements in violation of AS 02.15.020(c), the best interpretation of AS 14.08.151 limits its applicability to non-airport lands.

This bill will benefit the public, the regional school boards, the Department of Education and DOT&PF by clarifying the intent of the conveyance language to exclude airport properties.

Fact Sheet: SB 142

Sponsor: Senate Labor & Commerce Committee

Contact: Jane Alberts, 465-4843

Summary:

- Excludes airport properties from AS 14.08.151(b), which directs the state to convey title to lands used in relation to regional educational attendance area schools when requested to do so by the regional school board.

Benefits:

- Resolves a conflict between AS 02.15.020, which requires the Department of Transportation & Public Facilities to retain "satisfactory property interest" in airport facilities in order to participate in federal grant programs, and AS 14.08.151, which gives regional school boards the opportunity to obtain title to land/structures for regional educational attendance area (REAA) schools.
- Saves the departments of Transportation and Education time, effort and money needed to settle conflicting claims.
- Ensures that DOT&PF will be able to meet Federal Aviation Administration requirements and obtain federal funding for airport projects in REAAs.
- Conforms statute to legislative intent.

Background:

- AS 02.15.020 requires DOT&PF to conform to federal requirements in order for the State to participate in federal grants. The Federal Aviation Administration requires DOT&PF to certify assurances that it has "satisfactory property interest" in the airport to obtain these necessary federal grants. A newer statute, AS 14.08.151(b) gives a regional school board the opportunity to receive title to land used in relation to REAAs. Several regional schools are located on state airport properties, some in close proximity to active runways and airport infrastructure. At various times, regional school boards have requested that DOT&PF convey full title of the airport land to the schools. A mandatory title transfer of this type would violate AS 02.15.020 and breach federal grant agreements. While the Alaska Legislature clearly intended to allow regional school boards the option of greater control over facilities through acquisition of title, no record exists that the Legislature intended to do so at the cost of federal liability, significant loss of federal funding and a degraded state airport system.

STATE OF ALASKA

DEPARTMENT OF TRANSPORTATION
AND PUBLIC FACILITIES
OFFICE OF THE COMMISSIONER

FRANK H. MURKOWSKI, GOVERNOR

3132 CHANNEL DRIVE
JUNEAU, ALASKA 99801-7898

TEXT : (907) 465-3652
FAX : (907) 586-8365

PHONE: (907) 465-3900

March 24, 2005

The Honorable Con Bunde
Chair, Senate Labor & Commerce
Alaska State Legislature
State Capitol, Room 506
Juneau, Alaska 99801-1182

Dear Senator Bunde:

Senate Bill 142, as proposed, will clarify the intent of existing statute regarding land title conveyance in order to prevent airport properties from being transferred to regional school boards. By rectifying this disparity, SB 142 would exclude airport properties and in-boundary airport perimeters from being transferred to regional school districts applying for title conveyance.

AS 14.08.151(b) reads as follows: *A regional school board may, by resolution, request, and the commissioner of the department having responsibility shall convey, title to land and buildings used in relation to regional educational attendance area schools. If the state holds less than fee title to the land, the commissioner of the department having responsibility shall convey the entire interest of the state in the land to the regional school board.*

An example of the confusion caused by current statute can be cited as when the Yukon-Koyukuk Regional School Board made an administrative claim for school property on the Bettles Airport in 2001. The school in Bettles, constructed in the 1970's, is very close to the active runway, and is, in fact, partially in front of the building restriction line (BRL). A BRL limits construction of improvements near a runway for safety purposes. The school is actually located in an area identified by DOT&PF and the FAA as being needed for future aviation purposes.

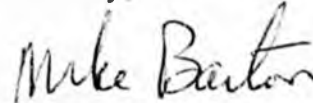
DOT&PF obtained an Attorney General's Opinion, copy enclosed, when it received the claim for title from the Y-K Regional School Board. Said opinion, dated 12/11/01, concluded that there was no indication of legislative intent to compel the State of Alaska to breach FAA grant agreements in violation of AS 02.15.020(c). The opinion further stated: "...AS 14.08.151(b) should not be interpreted to require conveyance to an RSB of the State's interest in a State airport." Our estimate of staff time devoted to this task, as well as to the AG's involvement, is approximately 250 hours. The costs for staff time and the AG's opinion is approximately \$17,500.

The difficulty encountered in 2001 is not exclusive. In 1986 the Aleutian Region School District requested conveyance of the existing school site at the Cold Bay Airport. Eight years later, in 1994, the Lake and Peninsula School District requested conveyance of the school site at Iliamna Airport. In both cases, DOT&PF required the assistance of the Attorney General's Office to deny the RSBs' requests for title.

DOT&PF has been working with the legislature to resolve the conflict between these statutes since 1987. Passage of this legislation would solidify the ability of the department to protect the integrity and safety of the State's 258 rural airport properties as well as maintain, operate, expand and manage airports according to FAA guidelines and federal grant requirements.

I urge your prompt and favorable action on this measure.

Sincerely,

A handwritten signature in cursive script that reads "Mike Barton".

Mike Barton
Commissioner

Enclosure

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: SB142-EED-ESS-03-18-05
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Education & Early Development
 Title An act relating to ownership of land, buildings, RDU ESS
and other structures by regional school boards; and providing Component School Finance & Facilities
 Sponsor Labor and Commerce
 Requester Labor and Commerce Component No. 2736

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type-Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2005) cost: 00
 Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

There is no financial impact related to this legislation with the Department of Education & Early Development. Rather this legislation clarifies other structures in transfer of title. And remove the ability to transfer land, buildings, and other structures, located within the boundaries of state airport.

Prepared by: Eddy Jeans, Director Phone 465-8679
 Division School Finance Date/Time 3/18/05 12:44 PM
 Approved by _____ Date 03/18/2005
 Agency Education & Early Development

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: SB142-DOT-CO-4-4-05
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: DOT&PF
 Title Regional School Board Land/ RDU Administration & Support
Building Ownership Component Commissioner's Office
 Sponsor Senate Labor and Commerce
 Requester Senate Labor and Commerce Component No. 530

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2005) cost: 0.0
 Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Nona Wilson Phone 465-3904
 Division Legislative Liaison, DOT&PF Date/Time 4/4/05 6:17 PM
 Approved by: Mike Barton Date 4/4/2005
 Agency Commissioner, DOT&PF

STATE OF ALASKA

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES



STATEWIDE OFFICE
AVIATION LEASING AND
AIRPORT LAND DEVELOPMENT

FRANK H. MURKOWSKI, GOVERNOR

2301 PEGER ROAD
FAIRBANKS, ALASKA 99709-5399
PHONE (907) 451-2216
FAX (907) 451-2253
TDD (907) 451-2363

FAX TRANSMITTAL

DATE: 3/24/05

TO FAX #: 586-8365

TO: Nona Wilson

SUBJECT: SB 142

FROM: Pamela A. Lewis, SR/WA
Statewide Chief

PHONE: 451-5266

MESSAGE: Here's the AGO opinion dated 12/11/01. Please look at the footnote on page 4 about resolving the conflict!

Number of pages sent: 11 (including transmittal page)

MEMORANDUM

State of Alaska
Department of Law

TO: Joseph L. Perkins, P.E., Commissioner
Department of Transportation and
Public Facilities

DATE: December 11, 2001

FILE NO: 665-99-0090

SUBJECT: Rural Schools and Airport
Land Title

FROM: Leone Hatch **LA.**
Assistant Attorney General
Transportation - Fairbanks

You have asked whether a regional school board¹ (hereinafter "RSB") which operates on airport property may require the Department of Transportation and Public Facilities (hereinafter "the Department") to transfer title to the land and buildings which it occupies to the RSB pursuant to AS 14.08.151(b) (Lexis 2000). While there is some uncertainty, the better answer to your question is no. Title may not be transferred on demand. We have reached this conclusion because the Alaska Legislature could not have intended to create a conflict with federal funding requirements, risk federal enforcement, and place federal participation in the State's airport system at risk.²

A mandatory title transfer of airport property (which is subject to FAA grant assurances) to an RSB pursuant to AS 14.08.151(b) would violate AS 2.15.020(c)

¹ The Alaska Supreme Court has noted that RSB's "are independent entities which have been given broad powers." *Northwest Arctic Reg'l Educ. Attendance Area v. Alaska Public Service Employees Local 71*, 591 P.2d 1292, 1298 (Alaska 1979), *overruled on other grounds, Alaska Commercial Fishing & Agric. Bank v. D/S Alaska Coast*, 715 P.2d 707, 709 n.5 (Alaska 1986); *see also, U.S. ex rel. Norton Sound Health v. Bering Strait School Dist.*, 138 F.3d 1281 (9th Cir. 1998). A title transfer to an RSB is not a mere administrative change of title between sister state agencies.

² It is also possible that AS 14.08.151(b) could be held to be federally preempted insofar as it applies to airports subject to federal grants. In general, when the federal government legislates in an area in which it is constitutionally entitled, directly conflicting local legislation is preempted through the operation of the Supremacy Clause of the United States Constitution. U.S. Const. art. VI, cl. 2. *E.g., Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992). However, there are issues with this approach that make the outcome in this situation uncertain.

Joseph L. Perkins, P.E., Commissioner
Department of Transportation and Public Facilities
Subject: Rural Schools and Airport Land Title

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(Lexis 2000) and would breach federal grant agreements. This is so because the Department would be required to transfer title to property which the Department, acting as sponsor for federal funding, has assured to the FAA that it would retain in State ownership for airport purposes, including the fiscal support of the airport. Automatic transfer of airport land to an RSB could subject the State to federal liability and enforcement as well as endanger future federal funding. If the Department cannot in good faith make title assurances to the FAA, there may be no future grant funding for airports vulnerable to RSB defeasance.

Background

Various RSB's operate facilities situated on airport property. In 1978, the Legislature granted RSB's the option of acquiring title to state property being used by a school.³ The Department has informed me that many, if not most, of these school facilities were constructed on airport property prior to the 1978 legislation. These schools are occupied under lease, use permit, or are in holdover status. AS 02.15.090 (Lexis 2000); AS 14.08.151(a) (Lexis 2000). The Yukon-Koyukuk RSB has made an administrative claim for Bettles airport property. That claim is under consideration pending the issuance of this opinion.

Statutory Authority

Two state statutes essentially frame the potential conflict: AS 02.15.020(c) and AS 14.08.151(b). The older statute, AS 02.15.020,⁴ essentially authorizes (and compels) the State to conform to federal requirements if the State wishes to participate in federal grants:

(c) The department may accept federal money and money from other public and private sources to accomplish in whole or in part any of the purposes of this chapter. All federal money accepted under this chapter shall be

³ § 2 ch 124 SLA 1975; am §§2, 3 ch 147 SLA 1978; am § 4-6 ch 6 SLA 1984 (codified at AS 14.08.151 (Lexis 2000)). The relevant language was adopted into subsection (b) in 1978.

⁴ § 4A - C ch 123 SLA 1949; am § 1 ch 14 SLA 1968 (codified at AS 02.15.020 (Lexis 2000)). The relevant language was adopted into subsection (c) in 1949, with slight revisions in 1968 recognizing that the Territorial Commission had become a department of the State.

Joseph L. Perkins, P.E., Commissioner
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accepted and expended by the department upon the terms and conditions prescribed by the United States.⁵

The more recently enacted is AS 14.08.151.⁶ In Subsection (b) of this statute, the legislature authorized RSB's a means by which to obtain title to some state property. Subsection (b) provides as follows:

(b) A regional school board may, by resolution, request, and the commissioner of the department having responsibility shall convey, title to land and buildings used in relation to regional educational attendance area schools. If the state holds less than fee title to the land, the commissioner of the department having responsibility shall convey the entire interest of the state in the land to the regional school board.

Statutory Construction

"Interpretation of a statute begins with an examination of its language construed in light of its purpose." Even if a statute appears clear on its face, it is interpreted in the context of the legislature's purpose. The Alaska Supreme Court recently repeated its holding that, "[i]n ascertaining the legislature's intent, we are obliged to avoid construing a statute in a way that leads to a glaringly absurd result."⁷

Alaska statutes in apparent conflict must be read together in the context of legislative intent. If possible, the statutes should be harmonized. If the statutes cannot be reasonably harmonized in light of statutory intent, the earlier statute may be held to have been repealed by implication.⁸ However in this case, if the earlier statute is impliedly repealed, there will be direct and adverse consequences to the State's ability to maintain federally funded rural airports.

While the Alaska Legislature clearly intended to generally allow RSB's the option of greater autonomy and control of their facilities through the acquisition of title,

⁵ See, footnote 4.

⁶ See, footnote 3.

⁷ *Beck v. State of Alaska*, 837 P.2d 105, 116-17 (Alaska 1992).

⁸ *Sherbahn v. Kerkove*, 987 P.2d 195, 201 (Alaska 1999) (quoting *Underwater Constr., Inc. v. Shirley*, 884 P.2d 150, 155 n.21 (Alaska 1994) (quoting *Sherman v. Holiday Constr. Co.* 435 P.2d 16, 19 (Alaska 1967))).

⁹ E.g., *Progressive Insurance Co. v. Simmons*, 953 P.2d 510, 516 (Alaska 1998).

Joseph L. Perkins, P.E., Commissioner
Department of Transportation and Public Facilities
Subject: Rural Schools and Airport Land Title

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there is no indication or record that the legislature intended to do so at the cost of federal liability, significant loss of federal funding, and a degraded airport system.

In this case, the earlier statute, AS 02.15.020(c), enables the Department of Transportation to apply for, accept, and utilize FAA grants for state airport facilities. AS 14.08.151(b) cannot be read to apply to airport land without implying that the Legislature intended to at least partially repeal AS 2.15.020(c)'s mandate that the state accept federal funds and be bound by the conditions thereon. It is unlikely that the Legislature intended to repeal this statute and subject the State to federal enforcement. Nor is it likely that the Legislature intended to endanger either current or future grant funding. The partial repeal necessary of AS 02.15.020(c) in favor of AS 14.08.151(b) to allow RSB's the right to claim title to airport property (discussed below) is an illogical and absurd result, unlikely to have been intended by the Legislature. To avoid the illogical and unintended result, AS 14.08.151(b) should not be read to apply to airport land.¹⁰

The Alaska Supreme Court, in its only interpretation of AS 14.08.151(b), has suggested a method of construing this statute which will allow it to be harmonized with AS 02.15.020(c) and the state's need to control public airports, maintain federal funding eligibility and honor its federal commitments. *State v. Bering Strait Regional Attendance Area*, 658 P.2d 784 (Alaska 1983). In *Bering* the court held that AS 14.08.151(b) is inapplicable to property which the RSB shared with another user. This opinion rests on the court's reluctance to create a shared title interest without specific legislative directive.

In *Bering*, the Nome City School District occupied a State-owned building which it primarily used for the Nome High School. It sublet an unused portion of the facility to the Bering Strait Regional Educational Attendance Area School District (hereinafter "Bering"). Both entities requested title under AS 14.08.151(b). The State chose to transfer title to the Nome City School District. Bering appealed and the matter eventually rose to the Alaska Supreme Court. The court was troubled by the shared use of the same property and was reluctant to either read AS 14.08.151(b) to require a partial conveyance, or to impose a novel and complex condominium-type relationship upon Nome City School District and Bering in the absence of specific statutory authority. The court held:

In effect, this will result in the creation of a condominium public facility.

¹⁰ The bulk of the controversy with its attendant potential for litigation could be resolved if the Alaska Legislature would revisit the issue and clarify its intentions.

Joseph L. Perkins, P.E., Commissioner
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There are two problems with this interpretation.

First, it is a departure from the literal language of the statute. The statute refers to buildings, not portions of buildings

Second, a condominium public facility would be an innovation in this state. Creation of a condominium is legally complex, requiring detailed legal documents specifying, among other things, the responsibilities of the various owners. We believe that if condominium ownership had been intended by the legislature in enacting AS 14.08.151(b) the statute would have expressly so provided and would have furnished some guidance as to the division of responsibilities among the owners.

We thus hold that that the superior court erred in interpreting AS 14.08.151(b) to require a partial conveyance of the complex to Bering Strait.

Bering, 658 P.2d at 786 (footnotes omitted).¹¹

Specifically, the *Bering* court refused to create a condominium interest when two parties shared a building. If applied to airport land, AS 14.08.151(b) would bifurcate airport land title by effectively subdividing the airport and subjecting it to potentially conflicting uses and hostile management objectives. This result is not consistent with the holding in *Bering*. It is likely that the Alaska Supreme Court would extend *Bering* to include airport land if given the opportunity.

Airport land must by its nature be committed primarily to aviation purposes and uses. The Department, as sponsor, must maintain an indefeasible fee in land to which the FAA requires a fee interest. *Infra* at 7.

While secondary non-aviation uses can be supported in some circumstances, they are necessarily subordinate to the primary purpose of aviation. In the case of an RSB usage on airport land, there is a double occupancy even more complex than that which the *Bering* court refused to split. In the framework of *Bering*, AS

¹¹ The Alaska Legislature has not moved to alter the statute in response to the Alaska Supreme Court's 1983 interpretation. *Talancon v. State*, 721 P.2d 764, 768 (Nev. 1986) (failure of legislature to amend statute after judicial interpretation of legislative intent inferred ratification of judicial action) cited in *Todd v. State*, 884 P.2d 668, 680 (Alaska App. 1994).

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14.08.151(b) should not be interpreted to allow the bifurcation of title to an active airport, thus creating a condominium-like interest.

Pragmatically, AS 14.08.151(b) can be harmonized with AS 02.15.020(c) in the context of *Bering*. *Bering* suggests that before an RSB may obtain title pursuant to AS 14.08.151(b), the RSB usage must be exclusive to avoid a bifurcated title. Because the airport land is subject first to the requirements of transportation and safe aviation usage, the RSB's occupation of airport land is not exclusive, and thus under *Bering*, not subject to fee title transfer pursuant to AS 14.08.151(b).

Federal Grant Requirements

The FAA¹² maintains an interest in aviation safety, efficient and non-discriminatory airport management in support of the national transportation system, and the fiscal responsibility and self-sufficiency of grant-supported airports. It furthers these interests through both direct regulation and grant conditions.¹³ The FAA is specifically authorized by federal statute to attached conditions to FAA grants.¹⁴

The State of Alaska, acting as a sponsor under federal law, makes extensive use of federal grant funding for airport construction and improvement. Pursuant to the Spending Clause of the federal constitution¹⁵ (hereinafter "Spending Clause"), the federal government can and does impose enforceable grant conditions on the recipients of federal

¹² "The FAA is responsible for the administration and management of the Federal Airport grant-in-aid program under the Airport and Airway Development Act of 1970, as amended, 49 U.S.C. §§ 1701 et seq. (superseded by the Airport and Airway Improvement Act of 1982, 49 U.S.C. §§ 2201 et seq.)." *U.S. v. County of Westchester*, 571 F. Supp. 786, 789 (S.D.N.Y. 1983) (citations omitted). The 1970 Act was further amended in 1994 and 1996.

¹³ A recent Tenth Circuit Court of Appeals decision noted, "indeed, it is 'difficult to visualize a more comprehensive scheme of combined regulation, subsidization, and operational participation than that which congress has provided in the field of aviation.'" *Arapahoe County Public Airport Auth. v. F.A.A.*, 242 F.3d 1213, 1220 (10th Cir. 2001) (quoting *New England Legal Found. v. Massachusetts Port Auth.*, 883 F.2d 157, 172-73 (1st Cir. 1989)).

¹⁴ 49 U.S.C. § 47108(a) (West 1997).

¹⁵ U.S. Const. art. I, sec. 8, cl. 1.

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funds.¹⁶ The adoption of what is now AS 2.15.020 in 1949 allowed the Territory and later the State to bind itself to federal funding requirements, and therefore enjoy the benefit of federal grants.

As a condition of acceptance, the State is required both by this statute and federal case law to expend federal grant funds only in strict accordance with federal terms and conditions. The FAA has a number of title requirements for airports receiving grants.

Conflicts with Specific Federal Title Requirements

The primary transportation function of the airport is degraded if airport property is not subject to direct airport management and control. The FAA requires the Department to issue and certify¹⁷ assurances that as the sponsoring agency it has a "satisfactory property interest" in the airport to obtain these necessary federal grants.¹⁸ Grant assurances are incorporated into the grant contract. The Seventh Circuit Court of Appeals has noted that discretion to determine what constitutes a "satisfactory property

¹⁶ *E.g., South Dakota v. Dole*, 483 U.S. 203 (1987); *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981); *U.S. v. Miami University*, 91 F. Supp. 2d 1132, 1142 (S.D. Ohio 2000). The *Miami* court observed:

Federal grants authorized by Congress create binding contracts between the United States and the recipient, and the United States has the authority to fix the terms and conditions upon which federal funds will be disbursed. Accordingly, acceptance of a federal grant to which conditions are attached "creates an obligation to perform the conditions on the part of the recipient."

Miami University, 91 F. Supp.2d at 1142 (quoting in part *U.S. v. Frazer*, 297 F. Supp. 319, 322 (M.D. Ala 1968)) (footnotes and citations omitted).

¹⁷ A person who knowingly and with intent to defraud makes a false statement on a certification required to obtain a federal airport development grant is subject to criminal penalties including fines and imprisonment of up to five years. 49 U.S.C. § 47126(3) (West 1997).

¹⁸ 49 U.S.C. § 47107(c) (West 1997); 14 C.F.R. § 152.103(a)(4)(ii) (2001); 14 C.F.R. § 152.3 (2001) ("Satisfactory property interest" and "Sponsor" defined); 14 C.F.R. § 151.26(d) (2001) ("land" defined in the context of the sponsor's application, which must identify property as either currently or anticipated to be subject to a satisfactory property interest).

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interest" rests with the FAA.¹⁹ Federal regulations specifically provide that land identified in the sponsor's application which is (or is to be) held in fee must be:

free and clear of any . . . other encumbrance that, in the opinion of the [FAA] would create an undue risk that it might deprive the sponsor of possession or control, interfere with its use for public airport purposes, or make it impossible for the sponsor to carry out the agreements and covenants in the application²⁰

A title interest that is essentially a statutorily defeasible²¹ fee created by AS 14.08.151(b) can certainly "deprive the sponsor of possession." The significance of the

¹⁹ *Aircraft Owners and Pilots Ass'n v. Hinson*, 102 F.3d 1421, 1424, 1426 n.2 & n.3 (7th Cir. 1996). The *Hinson* court considered claims that FAA grant assurances were violated when a sponsor, the City of Chicago, lost its lease on land underlying an airport when the lessor, a park district, declined to renew the lease after its expiration. The State of Illinois, as an intervenor, argued that the federal grant requirements required the City to obtain the airport (through condemnation or otherwise) to protect the grant-funded improvements and to continue to operate the airport. The court held that the grant provisions for this particular airport included a specific requirement for reimbursement in the event the lease was lost. The FAA had contemplated the possibility of lost title in this individual case and provided a contractual option other than specific performance. Therefore, the court reasoned, the FAA had acted reasonably and within its discretion in choosing not to seek to force the city to acquire and maintain the airport. While the court recognized the FAA's power to enforce title assurances, it refused to second guess the FAA's enforcement discretion. The *Hinson* court specifically noted that had the FAA wanted to force the sponsor defendant to maintain its title interest, it could well have done so by originally imposing the grant provisions it had employed at nearby Midway Field. *Id.*

²⁰ 14 C.F.R. § 151.25(c)(1) (2001).

²¹ "Defeasible" is defined as:

Subject to be defeated, annulled, revoked, or undone upon the happening of a future event or the performance of a condition subsequent, or by a conditional limitation. An estate which is not absolute, i.e., one which is determinable or subject to an executor limitation or condition subsequent. Usually spoken of estates and interests in land. For instance, a mortgagee's estate is defeasible (liable to be defeated) by the mortgagor's equity of redemption.

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defeasance will vary with the location of the RSB's facilities on the airport and the FAA's corresponding willingness, or unwillingness, to declare the property to be excess.²² However, the FAA's requirement for stable, predictable title is manifestly incompatible with a statutorily created defeasible fee which is not under the sponsor's control.

Excess property initially purchased or developed with an FAA grant may be sold (after approval) at fair market value and the FAA reimbursed proportionately.²³ The FAA may demand reimbursement of its proportion of full fair market value if title is transferred below market, as would be the case with a transfer to an RSB which occupies land which the FAA agrees is excess.²⁴ Likewise, any alterations to a grant-aided airport's layout plan must be approved by the FAA.²⁵ An unapproved alteration may cause the FAA to require the Department, at state expense, to restore the airport to its prior utility, even if this requires moving the airport facilities.²⁶ An "airport layout plan" includes the identification of the airport's boundaries, location of aviation and non-aviation uses, and delineation of the sponsor's title.²⁷

Black's Law Dictionary *available in Westlaw* (2001).

²² In *Bettles*, for instance, the facility in question is over the "building restriction line." Defeasance in that case will be a serious matter, potentially implicating airport safety issues as well as more general management and fiscal control.

²³ 49 U.S.C. § 47107(c) (West 1997).

²⁴ *Id.*

²⁵ 49 U.S.C. § 47107(a)(16) (West 1997).

²⁶ *Id.*

²⁷ 14 C.F.R. § 151.5(a) (2001) reads:

(a) Airport layout plan. As used in this part, "airport layout plan" means the basic plan for the layout of an eligible airport that shows, as a minimum--

(1) The present boundaries of the airport and of the offsite areas that the sponsor owns or controls for airport purposes, and of their proposed additions;

(2) The location and nature of existing and proposed airport facilities (such as runways, taxiways, aprons, terminal buildings, hangars, and roads) and of their proposed modifications and extensions; and

(3) The location of existing and proposed non-aviation areas, and of their existing improvements.

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A loss of title to airport property which is subject to grant assurances without compensation and without FAA concurrence, may breach title assurances. Such a breach could cause the FAA, at its discretion, to demand reimbursement, to demand that the alteration or loss be ameliorated at the sponsor's expense, to refuse further funding, and to take direct legal action against a state in federal court.²⁴

CONCLUSION

There being no indication of legislative intent to compel the State of Alaska to breach FAA grant agreements in violation of AS 2.15.020(c), the best interpretation of AS 14.08.151 limits its application to non-airport lands. The Legislature could not have reasonably intended to repeal AS 2.15.020(c) by implication and thus endanger federal funding of airports, potentially subject the State to significant federal enforcement, and actually discourage the Department from allowing RSBs access to appropriate property when it is otherwise in the best interest of the State and the airport to do so. Therefore it is our opinion that AS 14.08.151(b) should not be interpreted to require conveyance to an RSB of the State's interest in a State airport.

²⁴ 49 U.S.C. § 47111(f) (West 1997). The Inspector General of the FAA has investigated other FAA Regions and criticized them harshly for failure to insure strict compliance with grant conditions. The FAA has successfully sued sponsors for specific performance and withheld grant funding when confronted with breached grant conditions. For instance, when a New York airport attempted (by statute) to close at night in violation of a grant requirement, the FAA obtained an injunction to force the airport to remain open in the evening. *U.S. v. Westchester County*, 571 F. Supp. 786 (S.D.N.Y. 1983). The FAA also lawfully refused to re-certify the same airport for commercial aircraft until the breach was corrected. *New York v. FAA*, 712 F.2d 806, 809 (2nd Cir. 1983). When the San Francisco Airport violated its grant assurances with respect to non-discrimination, the FAA lawfully rejected its grant applications during the years of non-compliance. *City and County of San Francisco v. FAA*, 942 F.2d 1391 (9th Cir. 1991), cert. Denied, 503 U.S. 983 (1992). A Colorado airport recently had a similar experience. *Arapahoe*, 242 F.3d at 1220.

Amendment #1
To
SENATE BILL NO. 142
Offered in Senate Labor and Commerce Committee

Delete lines one and two and replace with:

“An Act relating to ownership of land by regional school boards; and providing for an effective date.”

Delete lines 12 – 14 and replace with:

“and provided to the commissioner of the department, assume ownership of all land and buildings used in relation to the schools in the educational attendance area, **as provided for in AS 14.08.151(b)**”

Delete lines 26 – 29 and replace with:

26 (b) **Except for land located within the boundaries of a state airport, a** [A] regional school board may, by resolution, request, and the commissioner of the department having responsibility shall convey, title to land and buildings



Alaska State Legislature

Senator Con Bunde
Senate District P

Vice Chair: Senate Finance Committee
Chair: Senate Labor & Commerce Committee

MEMORANDUM

DATE: Monday, April 25, 2005

TO: Representative Kurt Olson, Community & Regional Affairs Committee

FROM: Senator Con Bunde

Jane Alberts for Senator Bunde

RE: Hearing Request for **SB 142** Regional School Board Land/Ownership

I respectfully request a hearing before the House C&RA Committee on **SB 142, Regional School Board Land/Ownership**.

This bill resolves a conflict between **AS 02.15.020**, which requires the Department of Transportation & Public Facilities to retain "satisfactory property interest" in airport facilities in order to participate in federal grant programs, and **AS 14.08.151**, which gives regional school boards the opportunity to obtain title to land/structures for regional educational attendance area (REAA) schools.

It will save the DOT/PF and Department of Education and Early Development time, effort and money needed to settle conflicting claims while ensuring that DOT&PF will be able to meet Federal Aviation Administration requirements and obtain federal funding for airport projects in REAAs. Passing this bill will conform our statute to its legislative intent.

Attached you will find:

- 1) The original SB 142
- 2) CS for SB 142 (L&C)
- 3) Fact Sheet for SB 142
- 4) Sponsor Statement
- 5) A Memorandum from former DOT Commissioner, Joseph L. Perkins
- 6) Fiscal Notes
- 7) Listing of REAAs where conflict re: land ownership could exist

Please contact Jane Alberts in my office for any questions regarding this request. 465-3844.