

**SB**

**183**

## CHUGIAK COMMUNITY COUNCIL

P.O. Box 671350  
Chugiak, Alaska 99567

April 21, 2005

TO: Distribution

SUBJECT: Chugiak Community Council Recommendations Regarding HB 279 and SB 183 - An A Relating to Encroachments in the Right-of-Way of a Highway

At the monthly meeting of the Chugiak Community Council (Council), held on April 21, 2005, the Council discussed proposed House Bill 279 and proposed Senate Bill 183. These bills both propose that an encroachment permit be issued to a property owner who has a right-of-way (ROW) encroachment if the encroachment does not pose a risk to the traveling public, the encroachment was erected in good faith, and if denial of the encroachment permit would pose a hardship on the property owner. Furthermore, these bills propose that a ROW encroachment cannot be removed until it is determined that the encroachment does not qualify for an encroachment permit. Furthermore, these bills propose that a fee may be charged for an encroachment permit.

The Council voted unanimously to support this legislation as it would reduce negative impacts to many Chugiak property owners due to the proposed construction of the Old Glenn Highway Rehabilitation Project (ADOT&PF State Project No. 52515). The Old Glenn Highway is an arterial running between Eagle River and Peters Creek; and, this project will add shoulders, an adjacent trail, and additional lighting at the major intersections. The project is currently in the ROW acquisition phase with construction expected to commence in May 2007.

The Old Glenn Highway Rehabilitation Project is a federally-funded project; therefore, the Federal Highway Administration (FHWA) will require that the state certify there are no encroachments within the ROW before the state can be reimbursed for its share of expenses. Property owners who own residences and businesses adjacent to the Old Glenn Highway and who have ROW encroachments, through no fault of their own, will be impacted by the removal of their encroachments as a result of this project.

If enacted, this legislation would allow some ROW encroachments to remain provided the encroachments would not impact the above-ground road improvements, for example, water wells, lift-stations, septic fields, parking spaces, etc. If such ROW encroachments were permitted, this would greatly reduce potential personal and business impacts to the property owners. Allowing such encroachments to exist seems sensible especially if the encroachment is located within a ROW that is much wider than required for the planned roadway improvements. Please note that the Old Glenn Highway's ROW width varies between 60 and 300 feet.

This legislation might also reduce potential impacts to the Chugiak Volunteer Fire Department's Latimer Fire Station and parking lot as well as to the Chugiak Benefit Association's community center buildings, parking lot, basketball court, and fenced play area .

The Council encourages the public to continue to voice their opinions to their elected representatives about HB 279, SB 183, and the Old Glenn Highway Rehabilitation Project.

Please call me at 907-688-6575 if you have questions.

Sincerely,

Merten Bangemann-Johnson  
President  
Chugiak Community Council  
mertenbj@chugiakcouncil.org

## Distribution

State of Alaska:

The Honorable Con Bunde, Alaska Senator;  
The Honorable Fred Dyson, Alaska Senator;  
The Honorable Charlie Huggins, Alaska Senator;  
The Honorable Nancy Dahlstrom, Alaska Representative;  
The Honorable Mike Hawker, Alaska Representative;  
The Honorable Pete Kott, Alaska Representative;  
The Honorable Bill Stoltze, Alaska Representative

Cc. Michael Barton/Commissioner ADOT&PF;  
Gordon Keith/Central Region Director ADOT&PF;  
Carl Nelson/ADOT&PF;  
Kenneth W. Chapman/ADOT&PF;  
Al Burton/ADOT&PF;  
Dave Yanoshek/CRW Engineering Group, LLC;  
The Honorable Mark Begich, Mayor, MOA;  
The Honorable Municipality of Anchorage Assembly;  
Lance Wilber, Director, MOA Traffic;  
Craig Lyon/AMATS;  
CBERRRSA Board;  
CFSA Board;  
ERCPRSA Board;  
CBA Board;  
Birchwood Community Council;  
Eagle River Community Council;  
Eagle River Valley Community Council;  
Eklutna Valley Community Council;  
South Fork Community Council;  
Chugiak/Eagle River Chamber of Commerce

# ALASKA STATE LEGISLATURE

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**Charlie Huggins**  
**Senator**

24-LS0937G

## SPONSOR STATEMENT

### Senate Bill 183

*"An Act relating to encroachments in the right-of-way of a highway."*

Under the Department of Transportation & Public Facilities there are regulations that allow permits to be issued for encroachments in the right-of-way. However, when a construction project begins there is a federal law requiring all encroachments be removed from the right-of-way. Areas designated as part of the project may not even have any direct contact with the construction project but those encroachments are still required to be removed. Senate Bill 183 will, by statute, allow existing encroachments in the right-of-way to remain if they qualify for a permit granted to them by the Department of Transportation & Public Facilities.

The provisions of SB 183:

- Inserts an exception into statute that will grandfather current encroachments in the right-of-way of a highway by obtaining a permit by the Department of Transportation & Public Facilities.
- The permit may be issued to a private person, a government agency acting in a business capacity, or an owner or lessee of land contiguous to the right-of-way.
- In order to qualify for the permit, the encroachment must:
  1. Not pose a risk to the traveling public.
  2. The erection of the encroachment occurred in good faith.
  3. The denial of the encroachment permit would pose a hardship on landowner.



## Chugiak-Eagle River Chamber of Commerce

"Place of Many Places"

April 22, 2005

Senator Charlie Huggins  
Chair, Senate Transportation  
Alaska State Legislature  
Juneau, AK 99801

RE: SB183 / "An Act Relating to Encroachments in the right-of-way of a highway

At the April 22, 2005 Board meeting of the Chugiak-Eagle River Chamber of Commerce, the Board Members voted to support SB183 "An Act Relating to Encroachments in the right-of-way of a highway." This legislation is essential in order to provide relief for road projects caught up in funding mandates under the Federal Highway Administration. These mandates require vacating right-of-ways when they are outside the footprint of the project in order to receive federal funding. With respect to the Old Glenn, right-of-way easements vary dramatically (from 60 to 300 feet) and the State is demanding vacating every ROW encroachment equally. Some of these required vacations will have a profound effect on property owners and important community organizations and yet do not impact the footprint of this project.

The Board supports this legislation and views it as a correcting mechanism allowing greater flexibility under the mandates of federal law as they relate to federal highway funding.

Respectfully submitted,

Susan Gorski  
Executive Director

(907) 694-4702 PHONE • (907) 694-1205 FAX

**SENATE COMMITTEE REPORT  
First Committee of Referral**

DATE: 4/20/05

FURTHER: Finance

Date of 5-Day Notice: 4/21/05  
(in accordance with Uniform Rule 23)

DATE TURNED IN TO OFFICE: 4/29/05

Transportation Committee considered SENATE BILL NO. 183

**SB 183 OUTDOOR ADVERTISING; ENCROACHMENTS**

"An Act relating to encroachments in the right-of-way of a highway."

and recommends:

- be replaced with \_\_\_\_\_ CS SB 183 (TRA)
- adopt previous \_\_\_\_\_ CS \_\_\_\_\_ (\_\_\_\_\_)
- attached amendment(s)
- adopt Letter of Inten<sup>t</sup> by \_\_\_\_\_ Committee
- further referral to \_\_\_\_\_ Committee

<b>CS Senate Bill:</b>	
<input checked="" type="checkbox"/>	Same Title
<input type="checkbox"/>	New Title
<b>SCS House Bill:</b>	
<input type="checkbox"/>	Same Title
<input type="checkbox"/>	Technical Title Change
<input type="checkbox"/>	New Title w/ SCR # _____

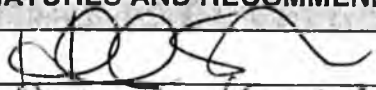

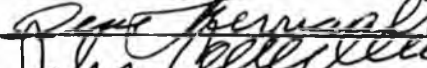
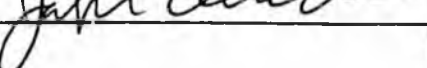
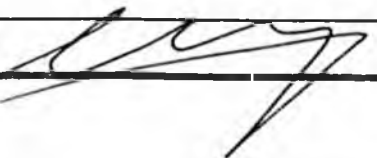
**NEW FISCAL NOTE(S):**

Department	Date	Fiscal	Indet.	Zero	FN#
DOT	4/28/05	✓			1

**PREVIOUS FISCAL NOTE(S):**

Department	Date	Fiscal	Indet.	Zero	FN#

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC	AMEND
 French			X	
 Kookesh			X	
 Theriault			X	
 Cowdery	✓			
CHAIR:  Huggins				



## Chugiak-Eagle River Chamber of Commerce

"Place of Many Places"

April 22, 2005

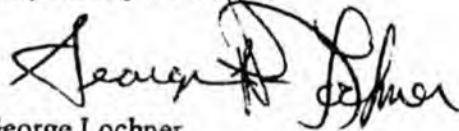
Representative Bill Stoltze  
Representative Nancy Dahlstrom  
Representative Pete Kott  
Representative Mike Hawker  
Alaska State Legislature  
Juneau, AK 99801

RE: HB 279 / "An Act Relating to Encroachments in the right-of-way of a highway

At the April 22, 2005 Board meeting of the Chugiak-Eagle River Chamber of Commerce, the Board Members voted to support HB 279 "An Act Relating to Encroachments in the right-of-way of a highway." This legislation is essential in order to provide relief for road projects caught up in funding mandates under the Federal Highway Administration. These mandates require vacating right-of-ways when they are outside the footprint of the project in order to receive federal funding. With respect to the Old Glenn, right-of-way easements vary dramatically (from 60 to 300 feet) and the State is demanding vacating every ROW encroachment equally. Some of these required vacations will have a profound effect on property owners and important community organizations and yet do not impact the footprint of this project.

The Board supports this legislation and views it as a correcting mechanism allowing greater flexibility under the mandates of federal law as they relate to federal highway funding.

Respectfully submitted,



George Lochner  
President

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### **17 AAC 10.010. Encroachments**

An encroachment may be installed within a highway right-of-way if the encroachment has been permitted by the department under this chapter.

**History:** Eff. 6/25/69, Register 30; am 4/20/2000, Register 154

**Authority:** AS 19.05.020

AS 19.05.070

AS 19.05.200

AS 44.42.030

### **17 AAC 10.011. Types of encroachments authorized**

(a) The department may issue at no cost an encroachment permit for use of a highway right-of-way by a municipality, state agency, or federal agency, subject to any conditions imposed under 17 AAC 10.014, if the municipality or agency is not acting in a business capacity. The permit will be issued on a form that the department prescribes. Permitted uses include

(1) flags of states or nations;

(2) decorative banners; and

(3) signs, without logos or names of sponsors, that are intended to inform motorists that they are entering a municipality, community, or state.

(b) The department may issue an encroachment permit for the use of a highway right-of-way by a private person, or by a government agency acting in a business capacity, to an owner or lessee of land contiguous to the highway right-of-way where the owner or lessee's primary activity occurs, if the use complies with the requirements of 17 AAC 10.012, and the use is allowed under (c) of this section. The department may impose permit conditions under 17 AAC 10.014. An encroachment permit issued under this subsection is valid for a term of no more than five years for a specific use. The department may renew the permit for additional subsequent terms of no more than five years each. The permit will be issued on a form that the department prescribes. A permit applicant must pay a \$200 nonrefundable application fee. In addition, the permittee must pay economic rent established under 17 AAC 10.013, or \$100 annually, for the use of the land, whichever amount is greater. A permittee must pay a nonrefundable \$100 reapplication fee each time the permittee files a request to renew the permit. Upon renewal of the permit, the permittee must pay economic rent, as established under 17 AAC 10.013 as of the date of extension, or \$100 annually, whichever amount is greater. The department may revoke an encroachment permit before the end of its term, after notice issued to the permittee at least 30 days before the date of revocation. The issuance

of a permit under AS 19.25, or this chapter does not entitle the permittee to a payment of just compensation or relocation benefits under AS 34.60, if a permit is revoked or a request for renewal is denied.

(c) An encroachment permit issued under (b) of this section allows any lawful use except the following:

- (1) any permanent structure located partially or completely in the right-of-way;
- (2) water and sewer facilities that the department has not permitted under 17 AAC 15;
- (3) a tank of any size;
- (4) fueling facilities;
- (5) repealed 3/1/2002;
- (6) a use not in the best interest of the state; and
- (7) a land use on a highway right-of-way that allows development on contiguous land that would not otherwise be possible without the use of the highway right-of-way.

(d) The land area described in the encroachment permit may not be used to meet minimum requirements for a contiguous land use under applicable municipal land use standards or under regulations adopted by the Department of Environmental Conservation. The contiguous land use must meet those minimum requirements without regard to the land contained within the encroachment permit. The use of the land described in the encroachment permit must be an accessory use to the contiguous land use.

(e) After the completion of construction of a highway, the department may, subject to 17 AAC 10.014, issue at no cost an encroachment permit in the form of a beautification permit to a government agency, a municipality, an individual, or a non-profit organization to allow planting of trees, shrubs, grasses, or flowers, and any structures necessary to support the plants, that do not endanger motorists, bicyclists, or pedestrians within the highway right-of-way. A beautification permit will be issued on a form that the department prescribes. The department may attach to a beautification permit any condition that is necessary to protect the integrity and safety of a highway's design, and to protect the traveling public or the persons planting trees, shrubs, grasses, and flowers within the highway right-of-way. The department may remove trees, shrubs, grasses, or flowers planted in a highway right-of-way, or structures supporting the plants, under a beautification permit that become a hazard to the traveling public, interfere with a highway's maintenance or operation, interfere with construction on a highway, or threaten to damage a highway embankment.

(f) The department may issue an encroachment permit on a form it prescribes, at no cost to a government agency for the installation in highway rest stops or pullouts of commemorative plaques, historical or interpretive markers, and informational signs. The plaques, markers, and signs may be permitted only if they cannot be read from the highway.

(g) The provisions of this section do not apply to driveway permits issued under 17 AAC 10.020, utility permits issued under 17 AAC 15, or the installation of mail boxes, including newspaper boxes, within a highway right-of-way.

(h) The department may issue under (b) of this section an encroachment permit for an existing structure or a portion of that structure or for existing water or sewer facilities for which the department has not issued a utility permit issued under 17 AAC 15, if

- (1) the encroachment does not present a risk to the health or safety of the public;
- (2) the construction of the encroachment occurred in good faith; and
- (3) the denial of the permit would create a hardship for the owner of the encroachment.

**History: Eff. 4/20/2000, Register 154; am 3/1/2002, Register 161**

**Authority: AS 19.05.020**

AS 19.05.070

AS 19.25.200

AS 44.42.030

**17 AAC 10.012. Approval requirements for encroachments**

The department will, in its discretion, grant an encroachment permit under 17 AAC 10.011, if the department determines that

- (1) the integrity and safety of the highway is not compromised;
- (2) the issuance of the permit will not cause a break in access control for the highway;
- (3) the land will not be necessary for a highway construction project during the initial term of the permit; and
- (4) issuing the permit is in the best interest of the state.

# ALASKA STATE LEGISLATURE

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## Charlie Huggins Senator

4/27/05

### **SB 183 – "An Act relating to encroachments in the right-of-way of a highway."**

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SB 183 was introduced to reduce negative impacts to many property owners, in a number of areas of the state, due to proposed road construction projects. These property owners have existing encroachments in the right of way and under federal guidelines the FHWA requires that all encroachments be removed.

This legislation allows the state Department of Transportation and Public Facilities, under certain conditions, to issue an encroachment permit to property owners who have an EXISTING encroachment. The conditions are outlined in the legislation.

SB 183 creates a sensible solution to grandfather existing encroachments that do not interfere with a road construction project.

John MacKinnon, Deputy Commissioner of DOT is available for questions and he can further discuss the this legislation.

However, Senator, before that Debbie Osiander is on teleconference and under time constraints, if the members could hold their questions until she gives a brief statement that would be appreciated and then we can bring John to the table.

# STATE OF ALASKA

DEPARTMENT OF TRANSPORTATION  
AND PUBLIC FACILITIES  
OFFICE OF THE COMMISSIONER

FRANK H. MURKOWSKI, GOVERNOR

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3132 CHANNEL DRIVE  
JUNEAU, ALASKA 99801-7898

TEXT: (907) 465-3652  
FAX: (907) 586-8365  
PHONE: (907) 465-3900

May 5, 2005

The Honorable Lyda Green  
Co-Chair, Senate Finance  
State Capitol, Room 516  
Juneau, Alaska 99801

The Honorable Gary Wilken  
Co-Chair, Senate Finance  
State Capitol, Room 518  
Juneau, Alaska 99801

Dear Senators Green and Wilken:

The Department of Transportation and Public Facilities (DOT&PF) is requesting three amendments to CSSB 183(TRA) "An Act relating to encroachments in the right-of-way of a highway."

The Department supports the intent of the bill and has worked closely and cooperatively with the sponsors of both the Senate and House versions to ensure the final version addressed the issue at hand, did not expose the State to any undue liability and was within the parameter under which the Department operates.

The following two pages include specific amendments that we feel need to be included for purposes of clarification and to address a potentially significant liability issue.

If you have any questions or need further information, please contact Deputy Commissioner John MacKinnon, or Nona Wilson, Legislative Liaison at 465-3900.

Sincerely,



Mike Barton  
Commissioner

Enclosure

cc: Senator Charlie Huggins  
Representative Mike Hawker  
Representative Bill Stoltze  
Kevin Jardell, Legislative Liaison, Office of the Governor  
Kris Knauss, Policy Director, Office of the Governor

**Proposed Changes to SB 183/HB 279 – Encroachment Permits**

**1. Change “Fee” To “Application Fee” in Sec 2(d)**

The department currently charges “economic rent” for the use of the right-of-way in which it is the fee owner. The existing language in AS 19.25.200(d) could be read to restrict the department to collection of \$100 total. We want to ensure that “fee” is not confused with “economic rent.” Where we own the underlying fee, we have an obligation to collect “economic rent”. Presently our regulations have a \$200 application fee, a requirement for “economic rent” or \$100 per year, whichever is greater, a five-year permit term, and a \$100 permit renewal fee.

The department estimates that its annual lost revenue would be in excess of \$100,000 if the department is restricted to a maximum \$100 per encroachment.

**2. Correct the liability issue in Sec 2 (g)**

SB 183 effectively opens up state ROW because of hardship to landowners. At the same time, the liability clause invites litigation against the State of Alaska. It makes no sense to increase state liability where the legislation directly benefits private landowners, and not the state. Since the department will be permitting the encroachments, plaintiffs could always argue that the state was somehow negligent in granting the permit to begin with.

The bill, as presently drafted, would effectively subject the state to liability for private citizen use of the state right-of-way, and could be read to place an obligation of on-going monitoring, maintenance, etc., in order to avoid charges of “reckless” or “grossly negligent” behavior. Obviously, the department does not have the resources to constantly monitor all of the right-of-way in the state. Nevertheless, that would not prevent plaintiffs from arguing that the department was “grossly negligent” not to perform at least yearly monitoring, or that it was grossly negligent not to notice that an encroachment had deteriorated in condition from the date of initial permitting. The existing language invites plaintiffs to make precisely these kind of arguments, and to embroil the department in ongoing litigation.

The original language in SB 183 should be adopted as follows:

**(g) The state is not liable for damage to, or damage or injury resulting from the presence of, an encroachment in the right-of-way of a state highway.**

If the foregoing language is not used, then language more closely approximating existing statutory language should be used, such as follows:

**(g) The state is not liable for damage to the encroachment, or damage, injury, or death resulting from the presence of an encroachment in the right-of-way of a state highway. This section**

**does not apply to a civil action for damages as a result of a permitted encroachment resulting from intentional misconduct within the course and scope of employment or agency and with complete disregard for the safety and property of others.**

**3. Modify Good Faith Language Sec. 2 (c)(2)**

The existing "good faith" requirement is too vague. There is no real way to determine "good faith." To clarify this ambiguity, the department suggests replacing (c)(2) with the following language: **"The applicant has demonstrated the encroachment was erected with the good faith belief it was lawful to erect and maintain the encroachment in its location."**