553 SRES SB 159

MARSHALL K. CORYELL
ATTORNEY AT LAW
TRANSAMERICA TITLE BUILDING
705 WEST SIXTH AVENUE, SUITE 207
ANCHORAGE, ALASKA 99501
TELEPHONE (907) 272-7

July 13, 1976

The Honorable Guy R. Martin
Commissioner
Department of Natural Resources
Pouch M
Juneau, Alaska 99811

Re: My Clients: Don H. Clark, Beth Clark, D. Craig Clark and Bonnie Clark
Subject Land Lease No. 022652-5
Customer I.D. No. 80759
Term of Lease: May 6, 1964 to May 5, 2019
Property Description: Unit L-12: Lots 1, 2, S 1/2 NE 1/4, SE 1/4 of Section 4, Township 24 North, Range 4 West, Seward Meridian, containing 320.37 acres. Subject to right of way reservation 60 feet in width as designated on the records of the Division of Lands, State of Alaska.

Dear Mr. Martin:

Mr. Craig Clark and I conferred with Mr. Bruce Atkinson, Chief Appraiser of Division of Lands a short time ago regarding the above-entitled lease and another lease also. I think a brief recitation of the background on this matter might be of assistance:

The lease was entered into on or about May 6, 1964, and the original lease provided that the annual lease rate would be $40.00 per annum. In or about 1969, the annual lease rate was re-appraised and raised to $155.00 per annum.

In 1976 the Division re-appraised the land and reassessed the annual lease rental to the sum of $4350.00 per year. The first quarterly installment of $1,087.50 due on or about May 10, 1976 has been paid.

The original agreement classified the lands as agricultural on page 1 of the agreement. Also, on page 1 of the lease agreement there is the wording "note special provision on page eight of this agreement." Page 8 of the lease agreement provides as follows:

AGO 885691

"It is understood and agreed between the parties that the rental of $40.00 per annum shall remain in effect from the date of this agreement, May 6, 1964, for a five (5) year period, ending May 6, 1969. On or before the 6th day of May, 1969, the Lessor shall re-appraise the lands herein leased and the annual rental, for the balance of the lease term, shall then be adjusted to reflect an annual rental predicated upon the then current fair market value of the lands herein leased.

It is the intent of this provision to permit the Lessee during the five year period of reduced rental, to clear the land and accomplish such other prerequisites as shall be necessary to bring the land, or portions thereof, into cultivation and thereby make it economically feasible for the Lessee to pay a rental predicated upon the market value of agricultural lands in the area."

This land was classified as University lands from the beginning and the billings for several number of years, specifically indicated that the lands were University lands and classified as agricultural. 11 AAC 58.120 entitled School Lands and University Lands provides as follows:

"(a) School lands or university lands when classified as agricultural lands may be leased at a rental of not less than $0.10 per acre for the first five years of a lease awarded to the highest bidder at public auction for a term of 55 years or less. At the expiration of the first five year term the lands so leased shall be appraised and the lessee shall pay the then current fair market rental on the leased land for the balance of the term. Such appraisal shall not contemplate the improvements made by the lessee during the five-year period.

(b) Th purpose of this provision is to make it economically feasible for a lessee to develop agricultural lands that are not available for purchase. (Eff 7/1/60, Reg. 1;am 8/15/64, Reg. 17;am 3/20/66, Reg. 22)"

AGO 885692

It appears that upon our review of the lease agreement and the supporting regulation, that it was the intent of the Division to comply with this regulation when they granted the original lease. Since one re-appraisal period has gone by, it is Mr. and Mrs. Clark's position that no further re-appraisals are in order or in fact allowed by law. For these reasons Mr. and Mrs. Clark will not make any additional payments as our interpretation of the lease and regulation does not require them to make such increased payments. In fact, the lease payments are prepaid thru mid-year of 1982.

Based upon the foregoing we would request being advised of the position of the Department of Natural Resources in order that we might take appropriate legal action, if necessary. We will appreciate your response.

Sincerely,

Marshall K. Coryell
Attorney for Don H. Clark
and Beth P. Clark and D. Craig Clark and Bonnie Clark

cc: Mr. & Mrs. Don H. Clark
2731 Valley Forge Circle
Anchorage, Alaska 99502

Mr. Bruce Atkinson
Chief Appraiser
Division of Lands
Anchorage, Alaska 99501

Mr. James N. Reeves
Assistant Attorney General
360 "K" Street
Anchorage, Alaska 99501

United States Government?" First, let us realize that corporations are currently only paying about 15% of all tax revenues and the National Dividend Plan sponsors feel this program would be instituted over a five year period with phasing at 20% increase per year. The results would boost personal income tax sufficiently to cover the loss of the corporate taxes. Of course, this is based upon no increase in federal spending.

What are the benefits? According to N D P, the following would occur: 1) A big chunk of extra purchasing power for every family in the nation. 2) The yearly dividends spent for goods and services, or plunked into savings accounts, should increase production, create jobs, and give workers a direct stake in the success of American business; all business, not simply a workers own employer.

3) Thousands of families receiving $1500 or more a year would be lifted above the poverty line. Welfare rolls would be reduced, thereby lessening government spending at a federal, state, and local levels. The goal of the program is to reduce government spending. Individuals needing special help still would get it according to N P D sponsors, but need would diminish as family incomes grew through the Dividend Plan.

Home builders, would this type of program be worthwhile to sponsor? In my opinion, it would be a step in the right direction because it would encourage support of the free enterprise system throughout this country. Further, it would give each and every registered voter in the United States additional tax-free disposable income with which to invest, or increase his standard of living. More particularly it would aid in getting welfare recipients off the rolls. Could we, as an organization, not support such a program? It seems to me that this is an adequate challenge to change our tax structures.

ANOTHER WAY, LEASED LAND

by William Schlegel, Broker

For several years, Anchorage has experienced a large annual increase in housing costs. While a good portion of these costs have come from inflation in the labor field and in material cost, the largest single contribution has been the increases in the cost of land and its development.

In the last five years the land cost has increased about 20% per year. In 1970, good builder lots retailed for $10,000. Today, the same quality lot, if you can find it, goes for $20,000 to $22,000. The land developer who converts raw land into usable city size lots (ie 9000 ft2) invests approximately $13,500 to provide water, sewer, paving and fire hydrant to each lot. These costs do not include such niceties as street lighting, electricity or telephone service.

The obvious solution to these spiraling costs is to reduce the building size and or reduce the lot size to obtain more density. As an alternate innovative, realtor-builder teams have been endeavoring to provide better living and cost control by more imaginative use of the land through town house and condominium developments under the Municipality planned unit development.

A third attraction on reducing sales price has been the leased land concept that was pioneered in Hawaii

(continued from Page 4)

which has proven to be so useful there. Probably the most successful project of this type has been James Wong's 144 unit Mt. Vernon Commons Condominium project in Anchorage. Mt. Vernon Commons combined imaginative land use, the saving in construction inherent in condominium common wall construction concepts, and the reduction in land cost through leasing and the "near fee ownership" created by this 75 year lease.

The cost advantages of leased land are that you substantially reduce your monthly payment yet you enjoy the same basic land use that you would experience if you own the land outright (ie in fee simple). In most aspects a 75 year lease is tandamont to fee ownership because you control the land for over two generations. When you remember that our country is only 200 years old, 75 years represents over a third of the lifetime of our country.

When an owner buys a home, you pay for it out of his home loan at current market rate. If you have a 9½% loan, and your lot costs you $20,000, you would pay $168.00 per month. If you leased the same property at the typical basic 8% lease, your monthly cost would be $133.00, a $35.00 per month saving. In addition to this, your purchase price should be reduced by $20,000 thereby reducing your down payment by $2,000.00. Many times these costs reductions make the difference in qualifying for a loan.

As the buying public becomes more knowledgeable about leasing concepts, we can expect to see more sophisticated uses of leasing. For the first time we now see the leased land concepts used on single family. One builder offering this type of purchase option is Foremost Homes. Their Crestwood project offers 1¼ acre heavily treed estate sized tracts off Birch Road. Because of the tract size, all homes are hidden from each other and offer an unusual park-like setting for rural living within fifteen minutes from town and with a substantial reduction in purchase price.

Buyers; you owe it to yourself to become familiar with the lease concept because of the financial benefits of such purchases.

SUPPORT YOUR ADVERTISERS DO BUSINESS WITH A FRIEND!

Assembly modifies petition ordinance

An ordinance outlining the ground rules for initiative and referendum petitions has been amended and approved by the Anchorage Assembly.

The ordinance sets down the acceptable procedure for the petitions which are the first step for citizen repeal or enactment of ordinances.

UNDER THE REVISED ordinance, individuals have 90 days from the date when the petition was first circulated to procure the number of signatures needed. Under the municipal charter, a petition must be signed by at least 10 per cent of the number of voters casting ballots at the last regular mayoral election.

Some individuals have been vocal in their criticism of the new time limit, claiming it makes petition requirements more difficult to meet, potentially limiting citizen participation.

However at Tuesday's assembly meeting, municipal clerk Mary Coffey noted that the ordinance does not set a time limit on starting a petition, technically allowing individuals to repeatedly attempt to gather the necessary signatures within any given 90-day time frame.

"I think 90 days is a happy medium," Coffey said. "If the referendum is not valid, there is no time limit on starting another petition for a referendum."

ASSEMBLYMAN Ben Marsh agreed, saying, "If seems that only 30 per cent of voters go to the polls. If you can't get those 10 per cent in 90 days, then it's not a very good petition."

Another amendment to the referendum procedure removes the assembly's jurisdiction over whether a petition is acceptable. Under the original ordinance, individuals could appeal to the assembly if the municipal clerk rejected their petition.

However the assembly Tuesday amended that provision to send the appeal directly to the superior court.

ASSEMBLY PRESIDENT Dave Rose introduced the amendment, saying petitions — which were probably started out of dissatisfaction with some assembly action — should be kept clear of the political process.

The other major amendment in the ordinance removed the requirement that petitions embrace "only a single comprehensive subject."

Although Coffey told the assembly the passage was intended to encourage conciseness in petitions, assembly member Tony Knowles questioned how a subject could be both singular and comprehensive.

"Would that we could by ordinance give the entire community clarity by virtue of ordinance," he said. "I would endorse it wholeheartedly."

Irate leaseholders will get to appeal

Mountain View leaseholders who are upset by substantial rent increases will have a chance to appeal at a hearing probably in mid-October, Mike Smith, director of the State Division of Lands, said Tuesday.

The Lands Division will send its standard warning letters soon to some 30 leaseholders on industrial tracts in Mountain View who paid their rent last month at old rates in protest of the increases.

THE WARNING LETTERS also notify leaseholders of the right to appeal, and Smith said a hearing will be set up after responses from the warning letters indicate how many people intend to appeal.

Leaseholders in the Alaska Industrial Subdivision, a state lease area between Commercial Drive and Mountain View Drive, were met with rental increases of 800 per cent and more when the state reappraised the tracts and sent out bills due in early August.

The leases are for 55 years, and the state reappraises them every five years. This year, rent on those leases up for reappraisal rose more dramatically than ever before.

Juneau sawmill proposed

JUNEAU (AP) — A new sawmill with a projected cost of $20 million has been proposed for a 60-acre site on the Gastineau Channel here.

The two-plant mill planned by Alaska Timber Corp. of Klawock would represent an initial investment of nearly $14 million. Alaska Timber has established the Alaska-Juneau Forest Products, Inc., to build and operate the proposed mill.

ED HAD, president of the southeastern firm, said Friday the first plant will mill rough timber and ups for export to Japan. The second mill, equipped with planers and

Kenai Native Association

3rd Annual Stockholders Meeting

...es of Hen

THE FOLLOWING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

Sen. Kay Poland

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

State Land leasing

September 10, 1976

The Honorable Jalmar M. Kerttula
Box Z
Palmer, Alaska 99645

Dear Senator Kerttula:

Attached please find a draft letter to Commissioner Martin which we have prepared for your signature.

We hope this covers the subject matter adequately. However, should you wish to be more detailed and explicit regarding the surface leasing regulations, or if you want to have the matter handled differently, please advise us.

We are also enclosing certain back-up data and working notes which we utilized to come to grips with the sometimes conflicting and/or confusing regulations. We thought they might be helpful to you.

If there is anything further we can do, please let us know.

Sincerely,

Elke Kallab

Elke Kallab
Research Analyst

EK:jm
Enclosures

AGO 885696

DRAFT: Elke Kallab
9/10/76

Dear Commissioner Martin:

While investigating protests of leaseholders regarding recent rent increases, it has come to my attention that the regulations governing surface leasing policy of the state are frequently not only confusing and outdated, but also contradictory and inconsistent.

As chairman of the Administrative Regulation Review Committee I am writing to you to determine what the Department of Natural Resources plans to do to revise its regulations to bring them into compliance with existing statutory authorities and to standardize them so they are consistent and can be more readily understood.

Following is a listing of some of the areas which appear to be in need of attention, particularly as they apply to surface leasing of state lands.

1. The variety of expressions and phrases used throughout Chapter 53 to establish the rental price of state leased lands is, to say the least, confusing and open to erroneous interpretation. Here is a sampling:

   - fair market value
   - appraised price determined by the division

- current fair market rental
- appraised value
- approved appraised annual rental
- change in value
- (Re)Appraisal annual rental value

Only fair market value is defined. It is not surprising that leaseholders should be in disagreement with the Division of Lands over what certain wording means. There is no reason why the language cannot be uniform and consistent throughout, just as there is no reason why significant and special words or phrases cannot be defined in order to prevent misunderstandings and arguments over what means what.

2. Related to the above are the differences of definitions for various classified lands. For instance, definitions of grazing, material, mineral, private recreation, public recreation and timber lands in Chapter 52 are not the same as in Chapter 58. Why should the same lands be defined differently in different chapters?

Along the same lines, classified lands available for leasing, such as industrial, utility, and watershed lands, are not even defined in Chapter 58, although Chapter 52 states that they may be leased "in accordance with regulations issued as Chapter 58..."

3. Another deficiency which applies to several regulations is that the authorities cited are general instead of specific. Sec. 44.62.040(b) states that "...citation of specific statutory sections being implemented, interpreted or made clear, shall follow the text of each regulation submitted..."

By not referring to the specific statutory authority it is most difficult to determine where the specific authority for the regulations derives from.

An excellent example of the above problem can be found in 11 AAC 58.520 which cites as authorities:

38.05.020 - authorities and duties of the commissioner of the Department of Natural Resources.

38.05.035 - authorities and duties of the director of the Division of Lands

38.05.075 - leasing procedure

However, the above regulation deals with the periodic rental adjustment of leased lands for which a specific statutory authority exists, namely 38.05.105-periodic rental adjustments.

Regulation 11 AAC 58.370 is another example where the specific authority should be cited. (AS 38.05.135)

I strongly urge that the applicable specific statutory authorities be cited with each regulation, along with the general authorities provided for in Sec. 44.62.040(b).

4. It seems to me that regulation 11 AAC 58.120 clearly needs to be revised. As the regulation presently reads, four leaseholders who show lease agreements with special provisions regarding the times their leases can be reappraised have a quite reasonable case against the Division of Lands. Since there is no specific statutory authority for regulation 11 AAC 58.120, it appears that at the time the four leases were issued the intent of the Department of Natural Resources (Division of Lands) was to grant these leaseholders special privileges. Otherwise, why write a separate regulation to make it possible? If the provision in the regulation is illegal as has been ruled by the attorney general's office, it should be revised at the earliest opportunity.

The above examples are but a few of the areas which appear to be in need of attention. I suspect that revisions and up-dating for all of Title 11 is in order.

I would appreciate being advised as soon as possible how soon and how extensively you intend to pursue the matter.

Sincerely,

Jay Kerttula

Surface Leasing Regulation

11 AAC 58

(The intent of the surface leasing regulation is "to insure the equitable leasing of AK land in a manner that will encourage development for its highest and best use".)

Regulation 11 AAC 58.040 (b) - Preference Right Grazing Lease and Forest Service Permittee Lease - states that "the director shall offer the land for leasing to the permittee for not less than its fair market value . . ."

Regulation 11 AAC 58.660 (b) - Preference Rights - talks about how land under preference rights is to be leased "at an appraised price determined by the division".

Regulation 11 AAC 58.660 (c) (3) - Preference Rights -states that lands (leased under preference rights for the unexpired term of the lease) is to be leased "at an annual rental to be predicated on the fair market value of (said) lands". This is on lands which have been classified agricultural.

Regulation 11 AAC 58.120 - School Lands & University Lands - refers to "current fair market rental . . ."

Regulation 11 AAC 58.370 - Public and Charitable Use -states that state lands may be leased "for less than appraised value" as determined by director and approved by commissioner to any state, federal or political subdivisions, or public service or function providing agency (utility); also charitable and non-profit organizations--all organizations exempt from federal income tax.

The director may decide, at his discretion, the annual rent considering the financial resources of the applicant for the lease, but such rental may be "no less than one percent of fair market value" on lands primarily acquired for development, or "no less than 5% of the fair market value on school, university, mental health or acquired lands".

Regulation 11 AAC 58.390 - Appraisal - states that no lands shall be leased or renewed unless the land has been "appraised" within 90 days prior to date fixed for leasing. If lands have been offered at public leasing but were not leased, then the land will be available by negotiation "at no less than the approved appraised annual rental". "No reappraisal is required unless the director believes a "change in value" of the lands has occurred".

Regulation 11 AAC 58.410 - Annual Rental - states that "annual minimum rentals shall be computed from the approved appraised market value".

Regulation 11 AAC 58.5 Adjustment of Rental - states that "all leases shall stip. e that the annual rental payment, (which is pegged to the approved appraised market value) shall be subject to adjustment by the director at 5 year intervals and any changes or adjustments shall be based primarily upon the reappraised annual rental value."

When reappraising the annual rental value, the director shall take into consideration the following factors:

- Value of comparable lands in the same or similar areas, exclusive of improvements provided by lessee.

The commissioner may waive rental adjustments or lengthen reappraisal periods when lessee (who is improving the leased property) can show he needs this "special treatment" to obtain financing or loan insurance for development of the leased land.

Regulation 11 AAC 58.740 - Rights-of-Way - states that damages sustained by the lessee as a result of the state granting a right-of-way across the leased land "shall be determined by fair market value".

AGO 885703

Definitions

	11 AAC 52.220	11 AAC 58.910
Agricultural Lands	Those lands which, because of location, adjacent development, physical and climatic features, are or may be made suitable for the production of agricultural crops.	Those lands which, because of location, adjacent development, physical and climatic features, are or may be made suitable for the production of agricultural crops.
Commercial Lands	Those lands which, because of location, physical features or adjacent developments, may best be utilized for non-industrial business purposes.	Those lands which, because of location, physical features or adjacent developments may best be utilized for non-industrial business purposes.
* Grazing Lands	Those lands which have the physical and climatic features that make them primarily useful for the pasturing of domestic livestock.	Those lands which in their natural state have the climatic features that make them primarily useful for the pasturing of domestic livestock. (Forage crops allowed for lessee's own use only - 11 AAC 58.030).
Industrial Lands	Those lands which, because of location, physical features, or adjacent developments, may be best utilized for industrial purposes.	None
* Material Lands	Those lands that are chiefly valuable for materials, including, but not limited, to the common varieties of sand, gravel, stone, pumice, pumicite, cinders and clay and where the removal of the material would seriously interfere with the surface utilization.	Those lands that are chiefly valuable for materials, including, but not limited to, the common varieties of the following: sand, gravel, stone, pumice, pumicite, cinders and clay. (May be leased for purpose other than removal of materials, so long as it is consistent with primary classification - 11 AAC 58.050).
* Mineral Lands	Those lands that are chiefly valuable for minerals, including, but not limited to coal, phosphate, oil shale, sodium, sulphur and potash and where the removal of the material would seriously interfere with surface utilization.	Those lands that are chiefly valuable for minerals, including, but not limited to coal phosphate, oil shale, sodium sulphur, potassium, wherever it appears probable that the surface use for the extraction of such minerals would preclude other utilization.
* Private Recreation Lands	Those lands which, because of location, physical features or adjacent developments, are chiefly	Those lands which, because of [illegible] physical features or adjacent [illegible], are

	11 AAC 52.220	11 AAC 58.910
	valuable as outdoor rural areas and may best be utilized by private non-commercial development.	chiefly valuable as outdoor recreational areas and may best be utilized by private non-commercial development. (One residence per lot leased - 11 AAC 58.070).
* Public Recreation Lands	Those lands which, because of location, physical features or adjacent development, may best be utilized by the public for, but not limited to, natural and developed recreational and historical areas.	Those lands which, because of location, physical features or adjacent development, may best be utilized by the public for, but not limited to, parks, scenic overlooks, campgrounds, historical sites, and fishing-hunting access sites. (May be leased for other purposes than recreation so long as it is consistent with primary classification - 11 AAC 58.110).
Residential Lands	Those lands which, because of location, physical features or adjacent development, may best be utilized for single or multiple unit dwellings.	Those lands which, because of location, physical features or adjacent development, may best be utilized for single or multiple unit dwellings.
* Timber lands	Those lands which, because of physical, climatic and vegetative conditions, are presently or potentially chiefly valuable for the production of timber and other forest products.	Those lands which are primarily useful for production of forest products or watershed protection.
Utility Lands	Those lands which, because of size of tracts, physical features, adjacent developments or location, may be suitable for a variety of uses or which do not lend themselves to classification under the other designations herein contained.	None
Watershed Lands	A drainage area which may best be utilized as a public water source.	None

* Inconsistency between various chapters.

AGO 885705

	11 AAC 56.610(5)	11 AAC 52.220(5) & 11 AAC 5[illegible].910(5)
* Classification	The systematic designation of lands according to their highest and best use.	The designation of lands according to their apparent best use.
Fair Market Value	Means the highest price, estimated in terms of money, which the property would bring if exposed for sale for a reasonable time in the open market, with a seller, willing but not forced to sell, and a buyer, willing but not forced to buy, both being fully informed of all the purposes for which the property is best adapted or could be used. (11 AAC 5[illegible].910(11))	

* Inconsistency between various chapters.

THE FOLLOWING DOCUMENT(S) MAY NOT FILM LEGIBLY BECAUSE OF POOR QUALITY OF THE ORIGINAL.

11 AAC 58.510. LEASE UTILIZATION. [illegible] be utilized for purposes within the [illegible] and land classification. Utilization [illegible] development for other than the allowed uses shall constitute a violation of the lease. A development plan may be required on all leases involving 640 acres or more. Failure to make substantial use of the land, consistent with the development plan, within five years, shall, in the director's discretion, constitute grounds for cancellation. (Eff. 7/1/60, Reg. 1; am 8/15/64, Reg. 17; am 3/22/66, Reg. 22)

Authority: AS 38.05.020
AS 38.05.035
AS 38.05.075

11 AAC 58.520. ADJUSTMENT OF RENTAL. All leases shall stipulate that the annual rental payment shall be subject to adjustment by the director at five-year intervals and any changes or adjustments shall be based primarily upon the reappraised annual rental value. The director shall take into consideration the following factors in reappraising the annual rental value: the value of comparable lands in the same or similar areas exclusive of buildings, structures, appurtenances, equipment, land fill, clearing, leveling or roads owned by the lessee. The commissioner may waive one or more of the periodic rental adjustments or lengthen the reappraisal period, when a lessee who has acquired a tract of land for multiple unit housing, commercial, or industrial development can demonstrate to the satisfaction of the commissioner that such action is essential in order to obtain the primary long term financing or loan insurance required for development of the leased land. In order to qualify, applicants must furnish written evidence that, in requiring a waiver of rental adjustment, the lending or insuring agency is applying a generally applicable rule. Waivers shall remain in effect only during the term of the loan but shall not exceed 40 years. (Eff. 7/1/60, Reg. 1; am 8/15/64, Reg. 17; am 3/20/66, Reg. 22)

Authority: AS 38.05.020
AS 38.05.035
AS 38.05.075

Specific authority → 105

11 AAC 58.530. SUBLEASING. Any lessee [illegible] the lands or portion thereof upon [illegible] has a lease; provided, that before any [illegible] be permitted to sublease any of such [illegible] portion thereof, he shall make application to the director for a permit [illegible] director may issue such permit if he finds it in the best interest of Alaska. Leases [illegible] improvements thereon shall not be sublet. Subleasing shall be allowed of leases or portions thereof that have improvements thereof, where, in the director's opinion, the improvements are substantially the reason for the subleasing. Sublessees shall not be allowed to further sublease their interest. All subleases shall be in writing. (Eff. 7/1/60, Reg. 1; am 8/15/64, Reg. 17; am 3/20/66, Reg. 22)

Authority: AS 38.05.020
AS 38.05.035
AS 38.05.075

11 AAC 58.540. ASSIGNMENTS. Any lessee may assign the lands or portion thereof upon which he has a lease; provided, that before any lessee shall be permitted to assign any of such lands or portion thereof, he shall make application to the director for a permit and the director may issue such permit if he finds it in the best interest of Alaska. Applications for assignment shall be made in writing to the director on form DL-50 "Assignment of Lease" or an image copy thereof. The assignee shall be subject to and governed by the provisions of the lease and regulations applicable thereto. (Eff. 7/1/60, Reg. 1; am 8/15/64, Reg. 17; am 3/20/66, Reg. 22)

Authority: AS 38.05.020
AS 38.05.035
AS 38.05.075

11 AAC 58.550. MODIFICATION. A lease may not be modified orally or in any manner other than by an agreement in writing signed by all parties thereto or their respective successors in interest. (Eff. 7/1/60, Reg. 1; am 8/15/64, Reg. 17; am 3/20/66, Reg. 22)

Authority: AS 38.05.020
AS 38.05.035
AS 38.05.075

11 AAC 58.560. CANCELLATION - FORFEITURE. (a) Leases in good standing may be cancelled in whole or in part, at any time, upon mutual written agreement by the lessee and the director.

(b) A lease is subject to cancellation in whole or in part if improperly issued through

AGO 885706

[illegible] of this title and sec. 380 of this chapter, no [illegible] within or adjacent to an incorporated municipality or other organized community may be leased or a renewal lease issued until the proposed use of the land has been studied and reviewed jointly by the director and the local authorized planning agencies. (Eff. 7/1/60, Reg. 1; am 8/15/64, Reg. 17; am 3/20/66, Reg. 22)

Authority: AS 38.05.020
AS 38.05.035
AS 38.05.075

11 AAC 58.370. PUBLIC AND CHARITABLE USE. (a) The lease, sale or other disposal of any Alaska lands or resources may be made to any Alaska or federal agency or political subdivision, or the lease, sale or other disposal for less than the appraised value as may be determined by the director and approved by the commissioner to be fair and proper and in the best interests of the public, with due consideration being given to the nature of the public services or functions rendered by the said agency, subdivision or utility making application therefor, and of the terms of the grant under which the land was acquired by Alaska.

(b) The director upon application filed by an applicant eligible under this subsection may, by negotiation and without public auction in the manner prescribed in this subsection, lease any lands of the state for a term not in excess of 55 years. Before leasing, the director shall prepare a land use plan and a land classification to insure that the proposed use is compatible with area utilization. Before the land may be leased under this subsection, it must be shown to the satisfaction of the director that the land is to be used for an established or definitely proposed project, and that the eligible applicant, as hereinafter described, has the financial ability to carry out the project. The commissioner may establish limitation on the acreage which may be leased pursuant to this subsection to any applicant.

(c) [illegible] applicants under this section shall be limited to nonprofit corporations, [illegible] clubs, or societies organized and [illegible] exclusively for charitable, religious [illegible] educational purposes, or for the [illegible] of social welfare, if the project for which the land is desired conforms to those [illegible]. In every case the applicant shall submit evidence that it is exempt from payment of federal income tax.

(d) The director may lease such land to an eligible applicant at a reasonable annual rental, taking into consideration the purposes for which the lands are to be used and the financial resources of the applicant, but in no case may such rental be less than one percent of the fair market value on lands acquired primarily for development, or less than five percent of the fair market value on school, university, mental health or acquired lands. Renewal leases may be issued at the discretion of the director upon the expiration of any primary or renewal term. Each lease shall contain a provision for its termination as to all or part of the lands upon a finding by the director that the land or any part of it has not been used by the lessee for the purpose specified in the lease for a period of two years. No lease may be assigned or subleased, except with the consent of the director, and in any case may only be transferred to an applicant eligible under this subsection. A lessee may not change the use specified in the lease to another or additional use except with the consent of the director. If, at any time after the lands are leased, the lessee attempts to assign the lease or transfer control over these lands to another, or if the lands are devoted to a use other than that for which the lands were leased without the consent of the director, the lease automatically terminates. (Eff. 7/1/60, Reg. 1; am 8/15/64, Reg. 17; am 3/20/66, Reg. 22)

Authority: AS 38.05.020
AS 38.05.035
AS 38.05.075

Specific auth → 315

11 AAC 58.380. TERM OF LEASE. Lease may be issued for a period up to 55 years, if it appears to be in the best interests of Alaska and if approved by the commissioner; provided, however, if the intial annual rental of a lease does not exceed $1000, the approval of the commissioner is not required. (Eff. 7/1/60, Reg. 1; am 8/15/64, Reg. 17; am 3/20/66, Reg. 22)

Authority: AS 38.05.020
AS 38.05.035
AS 38.05.075

11 AAC 58.390. APPRAISAL. No land shall be leased, or a renewal lease issued, except in the case of [illegible]

AGO 885707

(c) The lessee may elect to abandon his rights under the cancelled federal lease, as herein provided, and make application to the director for a state lease for a term up to 55 years. If the lessee should elect, he shall be afforded the same preference right as an expiring lessee as provided in sec. 660 of this chapter. (Eff. 7/1/60, Reg. 1; am 8/15/64, Reg. 17; am 3/20/66, Reg. 22)

Authority: AS 38.05.020
AS 38.05.035
AS 38.05.075

11 AAC 58.050. MATERIAL LANDS. Land classified as material lands shall be available for lease under this chapter. Material lands may be leased for purposes other than the removal of materials, provided such proposed use is consistent with the primary classification. (Eff. 6/30/60, Reg. 1; am 8/15/64, Reg. 17; am 3/22/69, Reg. 28)

Authority: AS 38.05.020
AS 38.05.070

11 AAC 58.060. MINERAL LANDS. Land classified as mineral lands shall be available for lease under this chapter. Mineral lands may be leased for purposes other than the removal of minerals, provided such proposed use is consistent with the primary classification. (Eff. 6/30/60, Reg. 1; am 8/15/64, Reg. 17; am 3/22/69, Reg. 28)

Authority: AS 38.05.020
AS 38.05.070

11 AAC 58.070. PUBLIC RECREATION LANDS. Land classified as public recreation land shall be available for lease. Public recreation lands may be leased for purposes other than public recreation, provided such proposed use is consistent with the primary classification. (Eff. 6/30/60, Reg. 1; am 8/15/64, Reg. 17; am 3/22/69, Reg. 28)

Authority: AS 38.05.020
AS 38.05.070

11 AAC 58.080. PRIVATE RECREATIONAL LANDS. Lands classified as private recreational [illegible] and leased for that purpose shall be used for noncommercial recreational purposes. No [illegible] than one residence shall be constructed on [illegible] lease. However, the director may, if [illegible] utilization or construction [illegible] orderly development of the area [illegible] existing development [illegible]

proper notice, cancel the existing lease. (Eff. 7/1/60, Reg. 1; am 8/15/64, Reg. 17; am 3/20/66, Reg. 22)

Authority: AS 38.05.020
AS 38.05.035
AS 38.05.075

11 AAC 58.090. RESIDENTIAL LANDS. Lands classified as residential lands and leased for that purpose shall be used for residential purposes only and in accordance with any applicable building and zoning codes. In the absence of such codes the lessee, shall, at least 30 calendar days prior to commencement of construction or utilization, file with the director a plot plan and a general description of contemplated construction. The director shall reject said plan within 30 calendar days after receipt thereof if he deems such utilization or construction contrary to the orderly development of the area or incompatible with existing development. (Eff. 7/1/60, Reg. 1; am 8/15/64, Reg. 17; am 3/20/66, Reg. 22)

Authority: AS 38.05.020
AS 38.05.035
AS 38.05.075

11 AAC 58.100. RESERVED USE LANDS. Reserved use lands are available for leasing and may be utilized under an Inter-agency Land Management Transfer. Lands transferred to a qualified agency may be utilized by sublease or any other manner, provided such utilization shall be consistent with the function assigned said agency and the provisions of the Land Act and these regulations unless otherwise exempted. (Eff. 6/30/60, Reg. 1; am 8/15/64, Reg. 17; am 3/22/69, Reg. 28)

Authority: AS 38.05.020
AS 38.05.070

11 AAC 58.110. TIMBER LANDS. Timber lands are available for lease. Timber lands may be leased for purposes other than the removal of timber, provided such proposed use is consistent with the primary classification. (Eff. 6/30/60, Reg. 1; am 8/15/64, Reg. 17; am 3/22/69, Reg. 28)

Authority: AS 38.05.020
AS 38.05.070

11 AAC 58.120. SCHOOL LANDS AND UNIVERSITY LANDS. (a) School lands or university lands when classified [illegible]

Lands may be leased at a rental of not less than $0.10 per acre for the first five years of a lease awarded to the highest bidder at public auction for a term of 55 years or less. At the expiration of the first five year term the lands so leased shall be appraised and the lessee shall pay the then current fair market rental on the leased land for the balance of the term. Such appraisal shall not contemplate the improvements made by the lessee during the five-year period.

(b) The purpose of this provision is to make it economically feasible for a lessee to develop agricultural lands that are not available for purchase. (Eff. 7/1/60, Reg. 1; am 8/15/64, Reg. 17; am 3/20/66, Reg. 22)

Authority: AS 38.05.020
AS 38.05.035
AS 38.05.075

11 AAC 58.130. RESOURCE MANAGEMENT LANDS. Resource management lands are available for lease under the terms and provisions of this chapter. (Eff. 3/22/69, Reg. 28)

Authority: AS 38.05.020
AS 38.05.300

11 AAC 58.140. OPEN-TO-ENTRY LANDS. Open-to-entry lands are available for lease subject to the provisions of AS 38.05.077. (Eff. 3/22/69, Reg. 28)

Authority: AS 38.05.020
AS 38.05.077

ARTICLE 2. PERMITS

Section
200 Right-of-way or easement permit
210. Special land use permit
220. Roads to subdivided state lands

11 AAC 58.200. RIGHT-OF-WAY OR EASEMENT PERMIT. (a) The director, without the prior approval of the commissioner, may issue permits for roads, trails, ditches, pipelines, drill sites, log storage, telephone and transmission lines or similar uses or improvements. Application shall be made on Form DL-75 completed in full or an image copy thereof and include therewith the required plats and application fee.

(b) In the granting of any permit or easement on tide or submerged lands, the upland owner shall have the first preference to the use of such land which is contiguous and seaward of the upland property of such upland owner and which is needed by such upland owner for any of the purposes for which the permit or an easement may be granted.

(c) In the event the use authorize under said permit is a hydraulic project, or uses any equipment that will use, divert, obstruct, pollute or change the natural flow or bed of any river, lake or stream or that will utilize any of the waters of the state or materials from any river, lake or stream bed, the applicant shall notify the Commissioner of the Department of Fish and Game and shall obtain his approval prior to the commencement of operations.

(d) In the event the use authorized under said permit shall require navigable water or in any way interfere with navigation, permission of the Corps of Engineers, Department of Army, shall be obtained prior to use. (Eff. 7/1/60, Reg. 1; am 8/15/64, Reg. 17; am 3/20/66, Reg. 22)

Authority: AS 38.05.020
AS 38.05.035
AS 38.05.075

11 AAC 58.210. SPECIAL LAND USE PERMIT. The director, without prior approval of the commissioner, may issue special land use permits on such terms and conditions as he deems to be in the best interests of Alaska. (Eff. 7/1/60, Reg. 1; am 8/15/64, Reg. 17; am 3/20/66, Reg. 22)

Authority: AS 38.05.020
AS 38.05.035
AS 38.05.075

11 AAC 58.220. ROADS TO SUBDIVIDED STATE LANDS. (a) It is the purpose of this section to provide access to subdivided state lands which are programmed for surface disposal, and to provide access roads at the lowest possible cost.

(b) The director of the Division of Lands may contract with private persons for the construction of roads to and on subdivided state lands programmed for surface disposal which are not more than six miles from existing roads or highways.

AGO 885709

MEMORANDUM — State of Alaska

TO: Michael C. T. Smith
Director
Division of Lands

DATE: October 3, 1975

FILE NO:

TELEPHONE NO:

FROM: James N. Reeves
Assistant Attorney General
AGO - Anchorage

SUBJECT: Harry Cummings Lease;
ADL 21928

This is a 1963 lease of University lands classified as agricultural. Two independent legal problems have recently arisen. Over the summer, I gave your office informal advice on these problems, but it was apparently lost and forgotten.

On September 9, Mr. Atkinson of your office delivered the entire file to me and requested that I handle the problems it raises, stating that he and Mr. Hallback regard them as "legal." Charles Tulin, attorney for Mr. Cummings, has since contacted me at the suggestion of your office regarding one of the two problems. I feel that it would be more appropriate for your office to handle this matter on the basis of the legal advice which follows, but I will do it myself if for some reason your office cannot.

This lease was sold at public auction in November, 1973. Cummings was the high bidder. Thereafter, between the signing of Mr. Cummings' conditional receipt and agreement to lease and the issuance of the lease agreement itself, certain "Special Provisions" were added to the lease agreement. These Special Provisions, apparently unique to this lease, give rise to two illegal questions.

1. <u>Is the Division foreclosed by the Special Provisions from raising the rent based upon five year reappraisals?</u>

The statute applicable when this lease was issued was the <u>original unamended</u> Section 105 of the Alaska Land Act, which then read:

> All leases <u>shal</u> tipulate that the annual rental · ment <u>shall</u> be subject to adjustment a five-year intervals and any charges f.. adjustments shall be based primarily on a reappraised annual rental valu.

AGO 885710

The standard lease form used in this transaction is consistent with that statute; it provides that rental payments will be "subject to adjustment at <u>each</u> five-year interval from the effective date" of the lease.

One provision of the Special Provisions could be interpretted as conflicting with that foregoing provision:

> On or before the 19th of November 1968 [the five-year anniversary date] the Lessor shall re-appraise the lands herein leased and the annual rental <u>for the balance of the lease term</u>, shall then be adjusted to reflect an annual rental predicated upon six (6) percent of the then current fair market value of the lands herein leased.

The Special Provisions recite that this procedure was approved in 1963 by the President of the University and by the Commissioner of Natural Resources.

This is a fifty-five year lease with a statutory right of renewal. The original annual rent of the 720 acre parcel was set in 1963 at $300. In 1968, it was reappraised pursuant to the above provisions of the lease and rent was raised to $1,260 per year. In 1973, the Division notified the lessee that it intended to reappraise and raise the rent again. For some reason, reappraisal took 18 months; on May 22, 1975, the Division notified the lessee that the rent had been raised to $10,920 per year.

The lessee and his attorney naturally take the position that no readjustment of rent may occur for the balance of the term. They base this argument upon the Special Provision of the lease which seems to waive the State's power to make five-year rent readjustments. Over the life of the lease, this question is obviously one which could be worth hundreds of thousands of dollars to the parties.

It is my opinion that for at least two reasons the Division should continue to readjust rents at five-year intervals based upon up-dated reappraisals.

In the first place, the statute under which the land was leased <u>required</u> adjustments at five-year intervals. AS 38.05.105 (before 1964 amendment).[2] Therefore, the Special Provision which purports to waive readjustment conflicts with the statute which required it. For that reason the Director acted in excess of statutory authority in attempting to waive the readjustment provision in 1963. Cummings' attorney has taken the position that AS 38.05.105 as it presently reads clearly authorizes such a waiver; what he overlooks or fails to acknowledge is that the waiver authority now found in the second sentence of that statute was not a part of the Land Act when this lease was issued, but was added by an amendment in 1964. See, Chapter 44 SLA 1964. Certainly the 1964 statute did not authorize a waiver in 1963.

There is another, independent reason why the Special Provision purporting to waive rental readjustment is unenforceable. As is required by statute, this lease was sold at public auction. But it appears that the lease was offered to the public at auction without the Special Provision which purports to waive the rental readjustment. Had the Division in 1963 possessed statutory authority to offer a long term lease with a waiver of rental readjustments, it would certainly have been obligated to do so at public auction. Indeed, had this lease been offered at public auction with the waiver, it would almost certainly have brought substantially larger bids. For this reason, it is my opinion that the waiver, even if otherwise authorized by law in 1963, could not legally be engrafted to the transaction by the Division after it had been offered at public auction without that "bonus." Mr. Cummings bid on what was offered, and that is all he got. 1/

2. Is the Special Provision purporting to authorize the commercial harvesting of timber from the leased land valid?

This 720 acre parcel apparently supports a commercially-valuable stand of timber. The Division has asked whether Cummings may be permitted to harvest that timber for economic gain rather than personal use. It is my opinion that he may not.

The Alaska Land Act authorizes the sale of timber on State lands either by sealed bids or public auction. AS 38.05.120. As I understand it, no timber sale has been held with respect to this property; instead, the State has leased the land.

1/ Because these two independent grounds so clearly establish the invalidity of the lease's purported waiver of rent readjustments, I have not addressed the question of whether, had AS 38.05.105 read in 1963 as it does today, the Director could have leased these university lands at public auction with the rental readjustment waiver without violating some fiduciary obligation imposed by 43 U.S.C. § 354 or other laws.

Again, the form lease agreement used by the Division in this case deals specifically with this question. Paragraph five of the lease states that "the lessee shall not sell or remove for use elsewhere any timber, . . . provided, however that material required in the enjoyment of this lease may be used after a written permit therefor has been obtained from the lessor." The lease also provides that "the lessee shall not commit waste or injury upon the lands leased herein." These standard lease provisions are consistent with regulations on the same subject. Although timber lands are leasable for other purposes (11 AAC 58.110), the timber itself may be sold for commercial purposes only under the timber sale regulations, 11 AAC 76.005-.385. Leasing of the surface with unrestricted rights to remove and sell the timber would circumvent the specific statutory limitations upon the sale of timber.

This implicit statutory prohibition of the sale or lease of land as a device to avoid the timber sale provisions of the Land Act is expressly reiterated in the Division's land leasing regulations. 11 AAC 54.110 permits the lease of timber lands, but only "for purposes other than the removal of timber." When timber lands or other lands chiefly valuable for the materials occurring thereon are leased, the lessee of the surface rights is not permitted to "sell or remove for use elsewhere any timber, . . . or any other material valuable for building or commercial purposes [except insofar as that material may be] required for the development of the leasehold." 11 AAC 58.730.

In accord with these statutes and regulations, the standard lease and sale contract forms used for more than a decade by the Division all contain provisions unequivocally prohibiting commercial harvesting of timber. The Cummings lease is a good example. It specifically states that

> the Lessee shall not sell or remove for use elsewhere any timber, . . . or any other material valuable for building or commercial purposes; provided, however, that material required in the enjoyment of this lease may be used after a written permit therefore has been obtained from the Lessor.

Likewise, the lease provides that "the Lessee shall not commit waste or injury upon the lands leased herein."

The misunderstanding concerning Cummings' right to harvest timber, like that concerning rental readjustment, springs from the unique Special Provisions added to this lease following the auction. One of them reads as follows:

> Permission is hereby granted the Lessee to remove all or any portion of the timber now growing on the lands included in this lease agreement and to dispose of the timber so removed in such manner as he shall see fit.

For precisely the same reasons which compel the conclusion that the attempted waiver of the State's right to readjust rents is void, the Special Provision concerning timber harvest is void as well. The law applicable when the sale was he'l forbade the granting of rights to harvest timber for other than personal use as a part of a land lease. Furthermore, even if such a grant were then permitted by law, the lease offered to the public at auction did not contain this valuable right, and therefore it could not be engrafted upon the transaction by negotiation or simple generosity.

I suppose that this opinion will generate problems for the Division of Lands, particularly with regard to the timber problem - for the Division has vacillated on that issue in connection with this lease and ultimately advised Mr. Cummings in 1973 that he was entitled to take the timber. Having reluctantly concluded that that advice was in error, I urge that it be countermanded immediately.

Perhaps the personnel of the Division of Lands should be reminded that they have no _carte blanche_ authority to deal with state lands. Their power derives entirely from the legislature. In some areas, the Commissioner has by regulation limited the Director's ability to implement or use statutory authority by voluntarily imposing additional conditions and limitations upon the powers given him by statute. The Division's personnel must examine every proposed Division action to determine whether the legislature has authorized it by statute and, if so, whether Division regulations permit it. Unless both questions are answered in the affirmative, the proposed action should not be taken.

[illegible]:lj

done to the land by its lessee, or liable for any claims of any third party or to any claims that may arise from ownership. In the event the state does receive title to the land under lease, the conditional lease shall then have the same standing, force and effect as a non-conditional lease issued under the regulations of this chapter. (Eff. 7/1/60, Reg. 1; am 8/15/64, Reg. 17; am 3/20/66, Reg. 22)

Authority: AS 38.05.020
AS 38.05.035
AS 38.05.077

ARTICLE 4. SHORT TITLE AND DEFINITIONS

Section
900. Short title
910. Definitions

11 AAC 58.900. SHORT TITLE. This chapter pertains to the leasing of lands of the State of Alaska and to the jurisdiction of the Division of Lands, Department of Natural Resources and related matters. The intent of this chapter is to insure the equitable leasing of Alaska land in a manner that will encourage development for its highest and best use. (1) This chapter may be referred to as the "Surface Leasing Regulations." (Eff. 7/1/60, Reg. 1; am 8/15/64, Reg. 17; am 3/20/66, Reg. 22)

Authority: AS 38.05.020
AS 38.05.035
AS 38.05.075

11 AAC 58.910. DEFINITIONS. In these regulations the following terms shall have the meaning indicated unless the context clearly requires a different meaning:

(1) "agricultural lands" means those lands which, because of location, adjacent development, physical and climatic features, are or may be made suitable for the production of agricultural crops;

(2) "Act" means the Alaska Land Act, AS 38.05;

(3) "Alaska" means State of Alaska;

(4) "Alaska lands" means all lands including state, tide and submerged lands, or resources belonging to or hereafter in any manner acquired by Alaska;

(5) "classification" means the designation of lands according to their apparent best use; (1)

(6) "commercial lands" means those lands which, because of location, physical features or adjacent developments, may best be utilized for non-industrial business purposes;

(7) "commissioner" means the Commissioner of the Department of Natural Resources;

(8) "department" means the Department of Natural Resources;

(9) "director" means the Director of the Division of Lands, Department of Natural Resources;

(10) "division" means Division of Lands within the Department of Natural Resources. Administrative powers and other delegated duties as prescribed by law or regulations are vested in the director;

(11) "fair market value" means the highest price, estimated in terms of money, which the property would bring if exposed for sale for a reasonable time in the open market, with a seller, willing but not forced to sell, and a buyer, willing but not forced to buy, both being fully informed of all the purposes for which the property is best adapted or could be used;

(12) "grazing lands" means those lands which in their natural state have the physical and climatic features that make them primarily useful for the pasturing of domestic livestock;

(13) "preference right grazing lease" means a grazing lease granted to a lessee whose federal grazing lease was cancelled to allow the land under lease to be selected by the state;

(14) "land" means all lands under the jurisdiction of the division;

(15) "lease" means a surface lease issued or held pursuant to the Act and these regulations;

(16) "material lands" means those lands that are chiefly valuable for materials, including but

C. [illegible]!!!

THE PRECEDING DOCUMENT(S) MAY NOT FILM LEGIBLY BECAUSE OF POOR QUALITY OF THE ORIGINAL.

Problems with Chapter 58

1) Definition of various classifications of lands vary from chapter to chapter in the regulations. They should be consistent at all times. See chapters 56 and 58, for instance.

2) Every chapter ought to have the same number of definitions; i.e., commercial lands should be defined, as should be industrial, not just one or the other. For instance, Chapter 58 dealing with state leases does not have a definition of industrial lands, yet a goodly number of state leases are just that.

3) Commercial-Industrial classification (11 AAC 56.610) no longer exists, yet it still is on the books.

4) a. Public recreation lands classification should be outdoor recreation areas (which include parks, scenic overlooks, campgrounds, etc., etc.): it should be removed from private recreation lands because it conjures up the image of public use.

b. Some more descriptive term (such as cabin site or leisure or recreational purposes) should be substituted for outdoor recreational areas under private recreation lands.

5) Classification of lands is supposedly the systematic designation of lands according to their highest and best use, according to 11 AAC 56.610; yet 11 AAC 58.910(5) says "apparent best use", even though 11 AAC 58.900

AGO 885716

states "highest and best use".

6) Authorizing statutes must be shown in the regulations. Someone ought to check that in minute detail. We came across a couple of omissions just checking on problems with state leases. (Omission of AS 38.05.105 authorizing specifically half of 11 AAC 58.520. Instead, they cite the very general and broad .020, .035 and .075. The same thing is true of AS 38.05.135 which deals specifically with public and charitable uses on leased land, but 11 AAC 58.370 just mentions the old standbys of .020, .035 and .075.)

7) What constitutes the annual rental rate? How it is to be arrived at needs to be spelled out in the regulations.

8) Related to 7) above, annual rental value (which should not be pegged to the fair market value, but in fact is determined by it due to the non-existence of private leases comparable to those offered by the state) should be defined, which it is not now, in the regulations.

9) Watershed Lands/Timber Lands-Classified. Defined separately in Chapter 52; combined in Chapter 58. Must/should be consistent.

10) What is the difference between "may not be disposed by sale" (52.060) and "shall not be sold" (52.080)? If they should be identical, make it one or the other.

AGO 885717

THE PRECEDING PAGES WERE TREATED AS A UNIT IN THE ORIGINAL FILE.

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

M E M O R A N D U M

September 14, 1976

SUBJECT: Surface Leasing Policy of State Owned Lands

TO: The Honorable Kay Poland

FROM: Elke Kallab *Ek*
Research Analyst

This memorandum addresses various issues which have been raised in conjunction with recent rent increases on state leased lands and, as you requested, comments on points brought up by leaseholders protesting the readjustment of their rents on a variety of grounds. Only the area of surface leasing of state owned lands has been investigated.

In summary we found that the rent increases appear to be in compliance of current, applicable statutes. However, we did discover numerous irregularities and inconsistencies in the regulations which govern surface leasing of state lands. We believe that the various shortcomings and ambiguities of the regulations have contributed significantly to the leaseholders' perceptions that the increases are illegal or arbitrary. The information and data pertaining to surface leasing regulations have been submitted to the chairman of the Administrative Regulation Review Committee, as is a copy of this memorandum.

* * * * * * * * * * * * *

I. Rent Increases

Substantial increases of rents in the process of reappraisal did not begin this year. Attached to this report are two lists which show the old and current rental rates on every state lease which came up for reappraisal in 1975 and 1976 as supplied to us by the Division of Lands. As can be seen, some of the steeper increases occurred in 1975.

Records show that the Division of Lands adopted the policy to use "market rental rates" for appraisals and reappraisals of state lands, when and where a comparable private rental market existed, as early as March 10, 1975. This decision was made because the Division of Lands believed that enough private leases existed by then which were comparable to certain types of state leases to institute market rental rates rather than charging contract rents at the rate of six percent of the fair market value of the property as was and continues to be the case when no market exists. So far, this policy has been limited in application primarily to industrial and commercial leases in the Anchorage area, since a private market for other types of leases does not exist at this time. However, a subdivision is presently being built in Anchorage in which the lots are being leased rather than being sold. Therefore, state leased lands in Anchorage which are classified as residential may soon be (re)appraised on the basis of economic rather than contract rental rates as established by the Division of Lands.

Current private market rates in Anchorage are comparable to those charged leaseholders in the Anchorage Industrial Subdivision according to the Division of Lands. (The Alaska Industrial Subdivision is located on Sec. 16 school land in downtown Anchorage.) For instance, we have been advised by the Division of Lands that Alaska Industrial Park, a private industrial subdivision on the southwest corner of C and 44th Streets charges an annual rental of eight percent of the "appraised fair market value," with a periodic five year rent adjustment provision part of the lease. Calais Company and Carr-Gottstein Properties lease their industrial lands at a rate of seven percent. However, unlike Alaska Industrial Park, they will not subordinate their lands; i.e., take a "back seat" to the improvements on the land which have been financed by a third party.

Leaseholders have charged that the Division of Lands has not used comparable parcels or proper appraisal methods when it reappraised certain leases in the Alaska Industrial Subdivision in Anchorage and a utility lease in the Matanuska Valley. However, all attempts to have these charges substantiated by the leaseholders with supporting data have been unsuccessful to date. We have looked at a randomly selected appraisal done by the Division of Lands to familiarize ourselves with appraising methods employed by the Division of Lands. Although we claim no special expertise in this field, the appraisal appeared to be thorough, extensive and impartial.

The Constitution (Article VIII, Sec.2) and various sections of Title 38 direct that state lands shall be selected, sold or leased to provide the maximum benefits to the people of the state. It is therefore difficult to find fault with the Division, in the absence of some other statutory definition, for attempting to maximize the monetary returns on state leased lands. How they set about doing it, however, is another subject.

The decision to use market rental rates was further refined and delineated when the Board of Education instructed the Division of Lands at its August 28, 1975 meeting in Kodiak that henceforth the Division was to obtain "fair market rental" 1/ on all leased school lands. Since Sec. 16 and 36 lands were conveyed to the state to generate school revenues, it is only reasonable to expect that rents should reflect this when they come up for periodic adjustment, particularly in light of the directive issued by the Board of Education to charge market rental value.

The Division of Lands is quite willing to admit that in the past the Appraising Section in the Division of Lands was viewed as a "poor relation", which accounts for the continuing low rents over the years in violation of the law which provides that "... no land may be sold or leased for less than the approved, appraised market value..." (38.05.310). The Division is now applying the law, thereby correcting past neglect which resulted in low rental rates on state leased lands, benefitting the individual leaseholders, but not necessarily the people of Alaska in general.

A legal opinion (copy attached) from the Attorney General's office to Commissioner Martin prevents the Commissioner from waiving or lowering the increases.

II. Rate of Contract Rents

The statutes provide that the initial rent shall be determined based on the "approved, appraised market value" (38.05.310), and that subsequent readjustments of the rents be based on a "reappraised annual rental value" (38.05.105)

Much controversy has arisen over the term "annual rental value". Protesting leaseholders claim that rental value cannot be pegged to the market value, that it is something less. The sources we have checked for a definition of rental value state that rental value is--

> "(T)he monetary amount reasonably expectable for the right to the agreed use of real estate.... Usually, it is established by competitive conditions." 2/

1/ Memo from W. Bruce Atkinson, ADL, to File, dated November 17, 1975.

2/ Real Estate Appraisal Principles and Terminology, Society of Real Estate Appraisers, p. 164; and Real Estate Appraisal Manual, Jerome Knowles, Jr. and Associates, p. 286.

From the above it appears that rental value is established by market conditions. The problem which has and continues to exist in Alaska, though, is that in most instances the state (Division of Lands) makes its own market. There is no private market to speak of for agricultural, grazing, recreational and other classified lands. Therefore, the state historically has used a percentage rate of the fair market value instead of rental value to determine rents on leased lands. As mentioned earlier, where a private market exists the Division is charging market rental value.

Until 1968 this rate was five percent. There is nothing in writing which explains why the rate was set at five percent, but we have been told that the five percent figure was a minimim amount derived from the Public and Charitable Use statute of the Alaska Land Act which stipulates that the rental shall be not less than five percent of the fair market value on school, university and mental health, or acquired lands (38.05.315(d)). Also, the rate of interest on the unpaid balance of contract sales of state lands was five percent at that time, and the reasoning, according to Division personnel, was to standardize the contract sale and contract rent rates. In 1968, then Commissioner of Natural Resources, Tom Kelly, raised the rate to six percent because he felt five percent was too low. Again, there is nothing in writing which would substantiate this. The Division of Lands now charges six percent of the fair market value when there is no private lease market and the lease is of a non-revenue producing nature. The Division charges up to eight and one-half percent (8 1/2%),or the market rental rate, when a private lease market exists and when the land is a potential revenue producer; i.e., land which is classified and/or zoned commercial, industrial, or residential.

The raising of the lease rental percentage rates, in some instances (such as the Alaska Industrial Subdivision), together with reappraising the leases based on fair market value have been responsible for the steep increases. The Division of Lands is quite cognizant of the potential hardships such a policy creates for certain leaseholders, particularly for those individuals who hold non-income producing leases. 3/

Much of the bad feeling that was generated over the rent increases probably could have been avoided if the Division of Lands had been more approachable and open in what it was doing. By not being advised of significant changes in policy, even when they are justifiable and defensible, and by being confused by or ignorant of appraisal terminology as used by the Division of Lands, it is not surprising that leaseholders feel that the Division has been acting arbitrarily and capriciously.

3/ Memo from W. Bruce Atkinson, ADL, to Michael C. T. Smith, ADL, dated November 4, 1975.

III. Special Provisions on Certain Leases Limiting Reappraisal to One Time

According to the Division of Lands, four leases exist which have a special provision on the back side of the last page which indicates that the lease will be reappraised but once five years after issuance of the initial lease. These leases have been reappraised now for a second time, and the four leaseholders are protesting the reappraisals.

A legal opinion issued by the Attorney General's office, dated October 3, 1975, holds that the Division of Lands exceeded its authority granting the special provisions on several grounds.

A. No statutory authority existed to grant the exemption from five year rent adjustments. Apparently all four leases were issued prior to passage of a 1964 bill which amended 38.05.105 providing for waivers due to special conditions.

B. However, even if they had been issued after this amendment became law, the special provision would still be invalid since 38.05.075 stipulates that a lease has to be on a form approved by the attorney general. Clearly, these leases were not on an approved form.

C. Finally, the special provisions are invalid because the leases were offered at public auction without the special provision being part of the terms of the lease.

As a result of the above legal opinion, parts of regulation 11 AAC 58.120, which allows for the special provision on university and school lands, should be changed immediately.

While checking into the above matter, we found that the Division of Lands is apparently in violation of 38.05.075 - Leasing Procedures. This section states that "(T)he director or his representative shall immediately issue a receipt containing a description of the land or interest leased, the price bid, and the terms of the lease." According to Division of Lands personnel this has never been done. It would appear that either the Division of Lands should provide the bidder the "terms of the lease" at the time it issues the receipt, or the reference to the "lease terms" should be removed from 38.05.075.

IV. Improvement to Leased Properties

The charge has been made by several leaseholders in the Alaska Industrial Subdivision that their land has been reappraised improperly because improvements to the land have been taken into consideration, even though the lease states quite clearly that the land is to be reappraised in a state of improvement similar to that of the land described in the lease at the time the lease was issued.

(" .. in a state of improvement similar to that of the land described herein at the time this lease was entered into.").

The Division of Lands maintains that while leaseholders cannot be and, for that matter, have never been penalized for the improvements made to their leased lands, improvements which were made at public expense and which as a consequence raised the value of the area or the lands under lease should be reflected in the reappraisal. We are told that this practice is consistent and standard procedure in the reappraising business. While we are not appraisers, the reasoning seems to make sense.

Short of being provided with data by the leaseholders (which we have asked for but not received) which would bear out their charge that improvements they have made to their properties were being included in the reappraisal, we cannot assume that the Division is not reappraising the properties exclusive of improvements owned by the individual leaseholders, or that they are not applying professional standards when appraising lands.

* * * * * * * * * *

Conclusions

Our investigations indicate that substantive and/or long term relief to the leaseholders regarding the periodic rent adjustment of their leaseholdings is probably not possible under the existing statutes. If it is believed that increases of rents should be limited in some way , or that rents be readjusted on a different basis than percentage of fair market value or fair market rental value as is the practice now, it will be necessary to legislate to that effect.

No new legislation will be necessary to require the Department of Natural Resources (Division of Lands) to bring their regulations into compliance with existing, applicable statutes or to "clean them up" so that the ambiguities regarding meaning and the inconsistencies of the language and definitions used in the regulations are eliminated. While no new legislation is necessary for the revision and up-dating of the regulations, it is recommended that the applicable, authorizing statutes be revised as necessary to be consistent and clear throughout. They are not now, in some instances.

EK:jm
Attachments

cc: The Honorable Jalmar Kerttula

STATE OF ALASKA

JAY S. HAMMOND, Governor

DEPARTMENT OF NATURAL RESOURCES

DIVISION OF LANDS

323 E. FOURTH AVENUE – ANCHORAGE 99501

October 22, 1976

Mr. Milt Barker
Legislative Finance Division
Pouch WF-State Capitol
Juneau, Alaska 99801

Re: Data Request. Land Lease Reappraisal Costs.

Dear Mr. Barker:

This is in reply to your telephone request of October 20, 1976 for data regarding costs of appraising State leases during the last year.

Our records indicate a total number of 661 parcels have been appraised during the last 12 month period, roughly from October, 1975 to October, 1976. Of these 661 units 176 tracts have been reappraisals of leased properties. Considering the percentage of staff time spent on these leases, including salary, per diem, travel expense, appraisal review, and secretarial help, it is calculated that approximately $31,900.00, or roughly $180.00 per parcel, was expended in reappraising these properties.

I hope this data is adequate for your needs. Should you require further information feel free to call on us.

Sincerely

W Bruce Atkinson

W. Bruce Atkinson
Chief, Contracts Administration

AGO 885724

Kay Polina

10/15
copy sent to
Commissioner Martin

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

pew

DEPARTMENT OF NATURAL RESOURCES

DIVISION OF LANDS / 323 E. 4TH AVENUE – ANCHORAGE 99501

RcD 10/15/76

October 6, 1976

J. H. Hogan, Director
Legislative Finance Division
Pouch WF - State Capitol
Juneau, Alaska 99801

Re: Data Request. Land Lease Reappraisal Cost.

Dear Mr. Hogan:

This is a sadly delayed response to your letter of August 25, 1976 requesting information on costs of "the reappraisal program recently conducted by the State for much of its leased land".

Regretably we are unable to send you the data you request as it is not exactly clear what you are seeking. Reappraisal efforts here at the Division of Lands is a continuing process. We handle reappraisals of State lease lands, statewide, as the need (lease anniversary date) arises.

If you could be more explicit regarding the particular appraisal effort perhaps we could help you.

Yours truly,

W Bruce Atkinson

W. Bruce Atkinson
Acting Chief, Lands & Water

Roderick says
Martin or Mike Smith will
respond

AGO 885725

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

11TH FLOOR, STATE OFFICE BLDG.
POUCH M – JUNEAU 99811

February 17, 1977

The Honorable Kay Poland
Chairperson, Senate Resources
Committee
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Senator Poland:

As you are aware, there has been a great deal of concern lately over State land disposal policies and procedures. This is occasioned particularly by the recent problems in reappraisal of certain leases in the Anchorage area.

Responding to this concern, the Governor in October of last year appointed an Ad Hoc Committee on State Land Practices and Procedures which has been meeting since, in an effort to bring together expertise on this continuing problem. Members of that committee include Bill Mack, Chairman of the Alaska Land and Leaseholders Association; John Norman, an attorney with the firm of Cole, Hartig, Rhodes & Norman; Hugh Gellert, President of Bear Fritz, Inc., (a land development company with interests in Anchorage and the Kenai Peninsula); Lidia Selkregg, Anchorage Assemblywoman and Professor of Regional Planning at the Arctic Environmental Information and Data Center; Jamie Love, Director of the Alaska Public Interest Research Group; Grant Geisler, Vice President of Alaska Mutual Savings Bank; Carl Marrs, land manager for Cook Inlet Region, Inc.; David McCabe, professional appraiser representing the Real Estate Appraisers' Association; and Herb Lang, former Anchorage Assemblyman and President of Alaska Sand and Gravel Company. Legislative members appointed to the committee were Senator Mike Colletta and Representative Ted Smith. Upon Representative Smith's resignation he was replaced by Representative Clark Gruening.

This committee has held meetings on a weekly basis since its inception in October and has also convened one evening meeting for the purpose of taking public testimony. We presently anticipate that their deliberations will be complete by the end of February and that they will at that time have a report prepared for delivery to the Governor. We expect this report to include several changes in law, numerous changes in regulatory authority of the Department and a number of policy changes in how those laws and regulations are executed.

We are also proposing that the committee meet with Legislators and other interested parties in Juneau prior to finalizing its report. We look forward to setting a time for that meeting.

We want to assure you that we share your concern over proper administration of the State's resources and look forward to an opportunity to discuss the land disposal policy in detail in the near future.

Sincerely,

Guy Martin

Guy R. Martin
Commissioner

M E M O R A N D U M

March 9, 1977

SUBJECT: CSSB 159, relating to leasing of state lands

TO: Senator John Sackett, Chairman
Senate Finance Committee

FROM: John B. Chenoweth
Legislative Counsel

The above-referenced bill has been referred to the Finance Committee.

Should the committee concur in the changes to the original bill made by the Resources Committee, please amend page 1, line 23 to make reference to "the preceding ten-year period" rather than the five-year period mentioned, to conform to the alteration of the reappraisal period from five to ten years.

JBC:hjd

TELEGRAM

RCA ALASKA COMMUNICATIONS, INC
PHONE: 586-6440
JUNEAU, ALASKA 99801

MAR 2 PM 1 24

IPMAFUB AHG

1-021225M061 03/02/77

TLX BAGOYASOC AHG

169 ANCHORAGE AK MAR 2

PMS SENATOR KAY POLAND

POUCH V 0811

JUNEAU ALASKA 99811

RECEIVED REVISED COPY OF SB159 AND HAVE REVIEWED IT WITH THE LEGISLATIVE COMMITTEE OF THE INDUSTRIAL LEASEHOLDERS ASSOC. THE UNDERSIGNED MAJORITY OF THE COMMITTEE CONCUR WITH THE BILL AS REDRAFTED. WE FEEL IT IS NOT ONLY IN THE BEST INTEREST OF THE EXISTING LEASEHOLDERS, BUT ALSO IN THE BEST INTEREST OF THE STATE OF ALASKA, IN THAT IT CONFIRMS THE STATES DESIRE TO MAKE PUBLIC LANDS AVAILABLE ON A LEASE BASIS.

IN BEHALF OF OUR ASSOCIATION OF LEASEHOLDERS, WE WISH TO EXPRESS OUR THANKS AND APPRECIATION FOR YOUR EFFORTS.

VERY TRULY YOURS

KEN DAVIS

BOB FORD

LOWELL MACNUTT

AGO 885729

Original Sponsor.

Introduced: 2/15/77
Referred: Resources and Finance

The Resources Committee

IN THE SENATE BY POLAND, CROFT AND HUBER

CS SENATE BILL NO. 159

IN THE LEGISLATURE OF THE STATE OF ALASKA

TENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the leasing of state land other than for the extraction of natural resources; and providing for an effective date."

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

* Section 1. AS 38.05.085 is repealed and re-enacted to read:

Sec. 38.05.085. TERM OF LEASE. (a) The lease shall provide that

(1) for the initial 25-year period of the lease, the lessee shall pay the state a fixed base annual rental to be agreed upon by the parties in compliance with the provisions of this chapter; however, this annual rental may not exceed ~~eight~~ TEN per cent of the fair market value of the property as determined in (b) of this section;

25 35 45 55

(2) the fixed base annual rental to be paid by the lessee shall be readjusted when the initial 25-year period of the lease has expired and, thereafter, every ~~five~~ TEN years; and

(3) the readjusted annual rental shall not exceed [eight] TEN per cent of the fair market value of the property as determined in (b) of this section or 50 per cent more than the amount paid each year during the initial period or the preceding five-year period, whichever is ~~[higher]~~ LOWER

(b) When it becomes necessary to determine the fair market value of property as required by (a) of this section, the lessee shall appoint an M.A.I. appraiser and the state shall appoint an M.A.I. appraiser. The two appraisers so appointed shall, within a specified period of time agreed upon by the parties, make their appraisals of the property in

NOTE: This Bill on new renewal figures 9 1/2 times original appraisal value in 55 years

AGO 885730

question. If the two appraisers agree upon the fair market value, the determination is absolutely binding on the parties. In the event the two appraisers are unable to agree, they shall together appoint a third M.A.I. appraiser who shall then make his appraisal of the property in question. When the third appraisal is completed, the two of the three appraisals which are nearest each other in their determination of the fair market value shall be averaged and the resultant sum shall be the fair market value of the matter in question and absolutely binding on the parties. All costs incurred in making the appraisals provided for in this subsection shall be borne by the state and the lessee equally.

(c) The lessee shall make advance payments of the annual rent or portion of it as the director, with the approval of the commissioner, may require.

(d) A preference right lessee of grazing or forest land may follow the payment schedule established in his cancelled federal lease or grazing permit if he so desires.

(e) Notice of all actions by the department affecting the rights of a lease or lessee shall be given to the lessee.

(f) A violation of a provision of this chapter or of a term or provision of a lease subjects the lessee to appropriate legal action, including, but not limited to, a forfeiture of the lease.

* Sec. 2. AS 38.05 is amended by adding a new section to read:

Sec. 38.05.103. RIGHTS OF HOLDER OF SECURITY INTEREST. (a) If there is a breach or default of a term of a lease or of the provisions of this chapter relating to a lease, the division shall provide written notice of the breach or default by personal service or by registered or certified mail to the lessee and to any holder of record having a security interest in the leased property. The notice shall also make demand upon the lessee to cure or remedy the breach or default within 60 days from the date of receipt of the notice and demand. If a lessee fails to cure or remedy the breach or default within 60 days, or within the additional time which the division may allow for good cause, the state may, subject to (b) of this section, exercise any right which it may have at law or as set out in the lease.

(b) If a lessee fails to cure or remedy a breach or default within the time allowed in (a) of this section, a holder of a security interest who has received notice under (a) of this section may cure or remedy the breach or default if the breach or default can be cured by the payment of money or, if this cannot be done, by performing or undertaking in writing to perform the terms, convenants, restrictions and conditions of the lease capable of performance by the holder. The holder shall act within 60 days from the date of receipt of notice under (a) of this section, or within an additional period as the director may allow for good cause.

* Sec. 3. AS 38.05.105 is repealed and re-enacted to read:

Sec. 38.05.105. PERIODIC RENTAL ADJUSTMENTS. (a) Each lease shall stipulate that at the conclusion of the initial ~~10~~ 25-year period of the lease and at intervals of ~~five~~ TEN years thereafter the annual rental payment is subject to adjustment. Charges or adjustments shall be based primarily on a reappraised annual rental value. However, if the director of the division of lands determines that residential development is the best use of the land, the reappraisal period may be lengthened or the readjustment waived in accordance with regulations adopted by the department. Before a waiver of rental adjustment is issued, the land shall have a current reappraisal. A waiver is valid only if residential development actually occurs, and only if necessary for obtaining primary long-term financing. The regulations adopted under this section shall ensure that the state receives a fair return from the land.

AGO 885732

(b) The provisions of sec. 85(b) of this chapter are applicable to reappraisals of leases required by this section.

* Sec. 4. The provisions of this Act are applicable to state leases which are in existence on or before the effective date of this Act if a lessee under a lease elects, in writing, to be bound by this Act. When a lessee elects to be bound by the provisions of this Act, the state shall enter into a new lease with the lessee for a term equal to the full period of the original lease which is being terminated that is consistent with the provisions of this Act. However, for purposes of determining the annual rent by the state, the fair market value of the property which is used to establish the fixed base annual rental for the initial period of the lease may not exceed the fair market value as it was last appraised on or before January 1, 1975, or, if the lease was entered into after January 1, 1975, on the basis of the fair market value at the time the lease was entered into.

* Sec. 5. This Act takes effect immediately in accordance with AS 01.10.070(c).

AGO 885733

NATIONAL
Bank of Alaska
Fifth Avenue Office: P. O. Box 3-3559 • Anchorage, Alaska 99501 • 907/274-1621

See Page 2

February 22, 1977

Mr. R. Ford
Anchorage Camper Center

Re: Senate Bill #159

Dear Mr. Ford,

We have reviewed Senate Bill #159, and feel that if inacted it's passage would seriously hamper long term financing for business affected by the Bill. The reason for this comment Mr. Ford, is that lending institutions would be wary of the repayment knowing what the lease expense would be at a further date without the same guarantee from the business's profits.

I hope this memo will answer your question. My reply is general, but I feel sound. Any further questions on the matter you may have I will try to answer.

Regards,

Ben A. Barrera
Vice President

AGO 885734

The Original

Motor Homes
Truck Campers
Trailers

Sales
Parts
Service

Anchorage Camper Center
Alaska's Recreation Vehicle Supermarket
2756 Commercial Drive Anchorage, Alaska 99501
907-277-0556 907-274-4434

Feb. 22,1977

Mister Chairman

Ladies & Gentleman

My name is Robert Ford, President of Anchorage Camper Center, Vice President of Boysen Investment Corporation - Alaska Excavating Contrs., and owner of R & M Rentals, a company dealing in leasing in the private market.

I am here today to speak on behalf of Anchorage Camper Center, presently holding ADL Lease 003065-7, Lots 15,16,22 and 23 Block 10 Alaska Industrial Subdivision comprising 70,000 square feet. I speak for myself, but I am sure the appreciation for your time and effort in getting our proposed bill in the Legislation is felt by all the leaseholders of Alaska Industrial Subdivision..

In reviewing SB 159, I feel that somewhere along the way we were not able to express our position and also the lending agents position in clear cut terms or you would not have seen fit to change Sec-1 38.05085. Let's explore that change from 25 years level term to ten years.

AGO 885735

Ten years is not acceptable to the bank to protect their loan where there is no subordination of the fee. The state will not subordinate so the only way we can obtain a loan for improvements on lease land is to either have a health bank account yourself, which very few now days have, or have a lease with a long enough level term lease on the front end to convince the lending peop1e that you will be able to amortize the loan and also stay in business.

I feel safe in stating that any loans for improvements in our sector in the last ten years have been made on the financial statement of the man, not on the lease. Therefore I stongly support the twenty five year fixed base annual rental concept so that we may secure long term money for expansion. That way we can improve and upgrade our leases to the best use of the land.

I would like to comment at this time and submit figures to illustrate that the 50% increase every five years after the level term is not in my estimation a viable solution and this is the breakdown of my lease at the appraised value as of January 1,1975

ALASKA INDUSTRIAL BLOCK 10, LOTS 15, 16, 22, 23 and 24

APPRAISED LAND VALUE $61,167.00

TERM	% INC TERM	% ORIG VALUE	NEW APPRAISED VALUE	LEASE PAYMENTS	ACCUMULATED COST TO LEASEE
1-10	0%	100%	$ 61,167.00	$ 48,933.00	$ 48,933.00
10-15	50%	150%	91,750.00	36,700.00	85,633.00
15-20	50%	225%	137,625.00	55,050.00	140,683.00
20-25	50%	337.5%	206,438.00	82,575.20	223,258.20
25-30	50%	506.25%	309,656.00	123,862.40	347,120.60
30-35	50%	759.38%	464,487.00	185,794.80	532,915.40
35-40	50%	1,139.07%	696,731.00	278,692.40	811,607.80
40-45	50%	1,708.61%	1,045,100.00	418,040.00	1,229,647.80
45-50	50%	2,562.92%	1,567,653.00	627,061.20	1,856,709.00
50-55	50%	3,844.38%	2,351,479.00	940,591.60	2,797,300.60

Ladies and Gentleman, I can not comprehend paying the astronomical figure of $2,797,300.00 for 70,000 square feet of land over the next 55 years. I realize inflation is on the rise but God help us all if we are to be faced with figures like these and more, especialy land we can never own.

I thank you for your kind attention.

BEFORE A HEARING PANEL OF
THE ALASKA DIVISION OF LANDS

In the Matter of Protests)
of Various Leaseholders in)
ALASKA INDUSTRIAL SUBDIVISION)

RECEIVED
JAN 24 1977
Matthews, Dunn & Baily

HEARING PANEL PROPOSED DECISION AND RECOMMENDATION

I

INTRODUCTION

Pursuant to a letter of November 2, 1976, written by Michael Smith, Director, Division of Lands, to lessees holding leases in the Alaska Industrial Subdivision, an administrative hearing was held December 14, 15, 20 and 21, 1976. The hearing was called to give the lessees an opportunity to protest the five-year reappraisal of certain state leases within the Alaska Industrial Subdivision, said reappraisal resulting in substantially higher annual rental payments. The hearing panel consisted of George Hollett from the Division of Lands; Kenneth Zamzow, an appraiser with the State Division of Petroleum Revenue; and Timothy C. Middleton, an attorney in private practice.

The Division of Lands (Division) was represented at the hearing by John Gissberg from the Attorney General's Office. Representing various leaseholders was Douglas Baily, and representing leaseholder Groh & Benkert, a partnership, was Clifford Groh.

Testifying as witnesses for the Division were Ronald Bunn, an appraiser with the Division; Robert Hosling, a forester with the Division; and Eugene Harp with the Department of Highways.

Testifying as witnesses for the lessees were Leon Brown, Jim Cristopher, Joe Wilhour, lessees; Fred Ferrara, and Erroll Simmons, appraisers; John Kemper, a banker; Andrew Hoge, an attorney; and Paul Kimball from Lynden Transport, a lessee.

The relevant provisions of the lease form, regulations and statute are set out as follows:

(1) State lease provision calling for reappraisal:

> "[S]uch payments to be subject to adjustment at each five-year interval from the effective date hereof, if the lease term hereof exceeds five years, such adjustment to be based primarily upon a reappraised annual rent l value of land in a state of improvement similar to that of the land described herein at the time this lease was entered into.

(2) Regulations governing rental: 11 AAC 58.520 and 11 AAC 58.410:

> 11 AAC 58.520. ADJUSTMENT OF RENTAL. All leases shall stipulate that the annual rental payment shall be subject to adjustment by the director at five-year intervals and any changes or adjustments shall be based primarily upon the reappraised annual rental value. The director shall take into consideration the following factors in reappraising the annual rental value: the value of comparable lands in the same or similar areas, exclusive of buildings, structures, appurtenances, equipment, land fill, clearing, leveling or roads owned by the lessee. The commissioner may waive one or more of the periodic rental adjustments or lengthen the reappraisal period, when a lessee who has acquired a tract of land for multiple unit housing, commercial, or industrial development can demonstrate to the satisfaction of the commissioner that such action is essential in order to obtain the primary long-term financing or loan insurance required for development of the leased land. In order to qualify, applicants must furnish written evidence that, in requiring a waiver of rental adjustment, the lending or insuring agency is applying a generally applicable rule. Waivers shall remain in effect only during the term of the loan but shall not exceed 40 years.

> 11 AAC 58.410. ANNUAL RENTAL. Annual minimum rentals shall be computed from the approved appraised market value, except in the case of a preference right grazing lease, and shall be the lowest acceptable bid in the event of an auction. Annual rental shall be the basis of bidding for

all surface leases, except as provided in sec. 440 of this chapter. Annual rentals in amounts up to and including $250.00 shall be paid on an annual basis. Annual rentals in amounts above $250.00 shall be paid either annually or in quarterly installments, at the discretion of the lessee. All rentals shall be paid in advance.

11 AAC 58.900. SHORT TITLE. This chapter pertains to the leasing of land of the State of Alaska and to the jurisdiction of the Division of Lands, Department of Natural Resources and related matters. The intent of this chapter is to insure the equitable leasing of Alaska land in a manner that will encourage development for its highest and best use. This chapter may be referred to as the "Surface Leasing Regulations."

(3) Statutory provision dealing with rental adjustments in effect as of May 1, 1976:[1]

AS 38.05.105. PERIODIC RENTAL ADJUSTMENTS. Each lease shall stipulate that the annual rental payment is subject to adjustment at five-year intervals and charges or adjustments shall be based primarily on a reappraised annual rental value. However, when development of the land is not otherwise possible due to special conditions, the reappraisal period may be lengthened or waived under regulati [illegible] pted by the commissioner.

Because the hearing panel is composed of an appraiser, lawyer and a representative of the Division of Lands, it is considered appropriate in formulating recommendations to the Director that the panel exercise independent judgment based on expert testimony presented and exhibits offered. Accordingly, we do not accord the Division's position any special deference which might be applied in an administrative appeal in the judicial process.

The basic question to be resolved in this hearing is the determination of a fair rental for certain lots within the Alaska Industrial Subdivision. This fair rental is to be determined for the five-year period May 2, 1976, through May 1, 1981, the third rental adjustment period since the leases

---

[1] This section has since been amended, §1, Ch. 267 SLA 1976.

AGO 885741

commenced on May 2, 1961. The Division had adjusted the annual rental of the leases in question as of May 1, 1976. This adjustment had been based on a reappraised fair market value and an increase in the rental rate from 6% to 8%. The reappraisal and adjustment were based on the relevant provision of the statute and regulations quoted above. Additionally, the term "fair market value" is defined in 11 AAC 58.910(11) as:

> "Fair market value" means the highest price, estimated in terms of money, which the property would bring if exposed for sale for a reasonable time in the open market, with a seller, willing but not forced to sell, and a buyer, willing but not forced to buy, both being fully informed of all the purposes for which the property is best adapted or could be used.

II

ISSUES

The issues appear to be the following:

(1) An interpretation of the lease, regulatory and statutory provisions, as to the nature of improvements to be included in the appraised value.

(2) Whether or not the term "primarily" as used in the lease, regulations and statute means that the Division should consider other factors in arriving at a reappraised annual rental value.

(3) Whether the Division's appraisal was in accord with the law and consistent with the relevant market conditions, particularly as to (a) use of comparables and (b) determination of original condition.

(4) Whether the 8% rental rate is appropriate in view of market conditions, the provisions of the state lease not found in private leases.

III

DISCUSSION

A. State of Improvements

The lessees represented at this hearing interpret the term "state of improvement" to mean the state of improvement of the entire Alaska Industrial Subdivision. Specifically, the lessees interpret this to mean that any improvements made outside of lot boundaries since 1961, such as roads and utilities, are to be excluded from consideration in the fair market value of the subject lots. The appraisals conducted by Messrs. Ferrara and Simmons for the lessees and presented at the hearing reflected adjustments in value to account for the cost of those improvements, particularly cost of access. This was based on language in the lease indicating value should be based on land in a similar state of improvement as land described in the lease at the time the lease was entered into; thus, the reference to "original condition." The regulations, however, are more explicit in determining what improvements are to be excluded. The Panel believes it would be inappropriate, in view of regulations and principles of equity, to exclude from the value of the leased property improvements off the property, especially when such improvements were paid for by the lessor. When a lessee can demonstrate that such off property improvement was paid for by him or his predecessor in interest, a different approach should be used. Both the State and the lessees agree that any improvements made within lot boundaries by lessees are to be disregarded in the valuation. The Panel finds in favor of the State in interpreting this phrase "state of improvement" to mean only the condition within the subject lots and that all improvements made since the leases were entered into which lie outside of the lot boundaries, specifically roads, water, sewer, power, and any other amenities

AGO 885743

which affect the value of the subject lots are to be included in the fair market value of those lots.

A further disagreement among the parties involving the "state of improvement" is that of the original condition of the lots before any tenant improvements were made. The State's appraisal witness, Mr. Bunn, testified that as far as he could determine after reference to soil maps, aerial photos and consultation with various knowledgeable individuals, that the soils were basically adequate for building development with a minimum of site preparation required for any development, that no substantial amount of overburden needed to be removed. Mr. Bunn admitted his findings in this regard were based largely on the lack of evidence to the contrary. He did not, apparently, attempt to gather evidence from individuals who developed the leased land. Several other witnesses testified as to moderate to severe conditions of peat and unstable soil conditions at the time the leases were originally entered into. The lessees' appraisers, Mr. Simmons and Mr. Ferrara, after thoroughly investigating the original soil conditions with various knowledgeable people indicated that it was still not clear exactly what the soil conditions were on each parcel. There was adequate testimony given that most, if not all, of the subject lots had conditions of unstable peat soils in depths ranging from one to four feet, with testimony given concerning individual spots where the depth of peat extended 14 feet. In Mr. Ferrara's appraisal of Lot 4, Block 2; Lot 12, Block 10; Lot 10, Block 9; Alaska Industrial Subdivision, he stated that soil conditions probably varied from two to three feet of overburden along Commercial Drive on the north with overburden deepening in the area of Rampart Drive and reaching depths of two to three feet

AGO 885744

again along Mt. View Drive. Mr. Ferrara testified that although he was uncertain as to the actual soil conditions at the time the leases were entered into, he felt a realistic condition was that approximately two feet of fill was required on the average for development of those lots which he estimated would cost, at the time of reappraisal, $.50 per square foot. Mr. Simmons' appraisal report and testimony regarding soil conditions were similar to those of Mr. Ferrara. In Mr. Simmons' appraisal of Lots 8 and 30, Block 10, he estimated a current cost of surcharging the peat with gravel in an amount adequate to support parking and storage yards was $40,000, which divided by total site area of 46,021 square feet equals $.87 per square foot. In the Panel's opinion, the investigation and analysis by the lessees' two appraisers were reasonably well supported and much more creditable than the investigation, analysis and testimony given by the Division.

B. Meaning of Primarily

The lessees contended that because the lease, regulation and statute all use the adverb "primarily" to modify the verb in, "such adjustment to be based primarily upon a reappraised annual rental value," that the State should consider other factors in arriving at an annual rental value. The lessees point to 11 AAC 58.900 wherein the intent of the regulations is spelled out, i.e., to "insure equitable leasing" to "encourage development." Accordingly, the lessees presented evidence, unrefuted by the Division, of the difficulty in obtaining financing for development of the leaseholds.

The Division's position was that the word meant nothing now with respect to the leases under question, but that it referred to the since repealed provisions for waiver of five-year adjustments in cases where such a waiver is necessary to obtain long-term financing. The Division stressed the point that the lessees never attempted to obtain the waiver. The Panel finds the Division's argument to be without merit. First of all, the word "primarily" applies, if at all, to the reappraisal. The waiver would mean there would be no reappraisal at all. The suggestion that the lessees should have attempted to get the waiver is also without merit. The date of the reappraisal was May 1, 1976; the date the waiver repeal became effective was June 22, 1976. Assuming that the lessees had notice of the reappraisal simultaneously with the reappraisal, there would be only six weeks in which to get the waiver after reappraisal. The lessees indicated such actual notice of reappraisal came much later, in June and July; this was not rebutted. It is also unrealistic to believe that the State would have agreed to such a waiver.

The word "primarily", taken along with 11 AAC 58.900, is not without meaning. The Panel believes that the Division should consider other factors besides a determination of open market rent. The present state of the lease and regulations makes it difficult to arrive at a readily ascertainable meaning, especially in view of the duty owed to the people of Alaska by its government to obtain a good return from the State land. While principles of legislative interpretation dictate that the word be given meaning, the Panel finds it difficult to do so. Because nothing was presented to resolve this dilemma, the Panel refrains from attempting a definition beyond suggesting that doubts or ambiguities be resolved in favor of the lessee.

C. Appraisal.

11 AAC 58.410 states that annual minimum rentals shall be computed from the approved appraised market value. Rent paid for land in the open market place is typically determined by, and expressed as, a percentage of the market value of the land. Therefore, a reasonable estimate of the fair market value of the land in question must first be made before a market rent can be derived. The generally accepted method of appraising vacant land, and that which was used by all three appraisal witnesses, is the direct market comparison approach. All three of the appraisal witnesses utilized definitions in 11 AAC 59.810(11), and 11 AAC 58.520 regarding the use of comparable land sales. All three appraisers used the same basic techniques in adjusting comparable land sales for differences in comparison with the subject lots. The major factors for which adjustments were made were for increase in price levels between the dates of sale and the date of appraisal, neighborhood location, specific location (corner or inside lot, street improvements, utilities available, zoning, etc.), and physical characteristics of the comparables, including such things as soils, topography, shape and easements. As the panel finds that offsite improvements made since 1961, specifically water, sewer, power and road improvements are to be included in arriving at the fee market value of the land, the Panel addressed itself to the major points of disagreement between the State and the lessees' appraisers which are adjustments for time increment, neighborhood and an electrical transmission line easement.

(1) Time Adjustment

All three appraisal witnesses agreed that a rapidly rising trend of price levels for industrial land was evident

AGO 885747

during the two-year period prior to the appraisal date of May 2, 1976. Mr. Bunn testified his conclusion was that a time increment of 3.5% per month was appropriate; both Mr. Ferrara and Mr. Simmons concluded a time increment of 2% per month was appropriate. Mr. Bunn used 10 comparable sales which indicated a range of time increment from 2.8% per month to 4% per month. One example which tended to limit Mr. Bunn's testimony in this regard was where he compared the sale of one parcel with a later sale of another parcel to arrive at an indication of time trend. Mr. Bunn did not adjust for other factors but compared the two sites as equal in value when actually one of the sale sites had much less utility than the other due to its very odd shape. Also, Mr. Bunn utilized sales in a faster growing area of Anchorage (South Anchorage) in arriving at a time adjustment. The Panel believes a reasonable upward adjustment for time increment to be 2% per month. This belief is based on the fact that Ferrara and Simmons used sales of property more likely to reflect accurately the increase in value in the Mountain View area. The Panel finds the lessees' appraisers more persuasive on this point.

(2) Neighborhood Locations.

Mr. Bunn used 18 comparable land sales with two from the immediate Mountain View area, two from the Anchorage Industrial Park in the Ship Creek area and 14 in the South Anchorage area in the vicinity of International Airport Road. Mr. Bunn's testimony was that the Alaska Industrial Subdivision is comparable in location to the other industrial areas of Anchorage, that price levels for industrial land was similar and that no adjustments were required for neighborhood location to the comparable sales used. Mr. Simmons and Mr. Ferrara both agreed that the Alaska Industrial Subdivision neighborhood was inferior in price levels to either of the Ship Creek or South Anchorage Industrial area. Testimony was given and agreed by all parties that the Alaska Industrial Subdivision is well located in proximity to the downtown business center of Anchorage, is close to transportation facilities, and has good arterial access. However, testimony was given that the type and intensity of uses, as well as the rate of development within the Alaska Industrial Subdivision are inferior to the Ship Creek and South Anchorage Industrial areas. The Panel agrees with the lessees' appraisers in this regard and finds that the prices of comparable land sales from the Ship Creek and South Anchorage Industrial areas should be adjusted downward before arriving at a comparable market value for subject lots in the Alaska Industrial Subdivision.

(3) Electrical Transmission Line Easement.

Testimony was given and evidence presented concerning an electrical transmission line easement 45 feet in width which crosses diagonally through the Alaska Industrial Subdivision. According to testimony, no permanent structures may be built within the easement right-of-way and no structures may be placed closer than 10 feet vertically and horizontally from the electrical wires or supports. Mr. Bunn testified that the transmission line easement was not important and would not result in any loss in value to those lots crossed by the easement.

Mr. Ferrara testified that there is a loss of value in varying degrees caused by the easement, depending upon its location within each affected lot. Although Mr. Ferrara said he did not have time to investigate the effect on value to a sufficient degree to estimate what loss in value would be involved for specific lots, he said one measure of the loss in value would be the cost of relocating the easement either within the public street right-of-way or along the property boundaries.

Mr. Leon Brown, a lessee in the Alaska Industrial Subdivision since May, 1958, to the present, testified as to the problems encountered in developing four lots which were affected by this transmission line easement. The Panel notes here that Mr. Wilhour said he complained to Peanuts Main on the staff of the Division of Lands with a resultant rent reduction because of the effect of the easement.

The Panel believes that the evidence is conclusive, and common sense dictates, that the electrical transmission line easement has an adverse effect on value. The Panel suggests that the testimony of Mr. Ferrara as to the cost to cure method, that is the cost of relocating the transmission line, is only one way of measuring this loss in value and that other appropriate means of estimating loss of value may be used. Before Mr. Ferrara's method is used, an investigation of the feasibility and likelihood of moving the line should be made. The Panel notes that the transmission line affects in a substantial way four of the reappraised lots. One method might be an actual computation of the value of the lost area.

(4) Rental Rate.

The May 1, 1976, adjustment, in addition to using a higher fair market value as a basis for computing the annual rent, also increases the rental rate from 6% to 8%. This, Mr. Dunn testified, was done because his review and analysis of private leases in the community indicated that 8% was the more appropriate rate.

The lessees protested that this increase was unwarranted. They argue that various provisions of the state lease make it less desirable than a private lease and that therefore the rental rate should be lower. The major differences which made the state lease less desirable were asserted as follows:

(a) Lack of subordination. Many private leases allow for subordination of the fee to any encumbrance placed on the property to secure debt financing. The state lease does not provide for this, it only allows the financing agency to step into the shoes of the lessee by way of a "collateral assignment of interest." Mr. Bunn testified that this provision was substantially the same as subordination; thus, no downward adjustment should be made in the rental rates to allow for this. The testimony of Andy Hoge, an attorney heavily involved in lease financing, and John Kamper of Peoples Bank persuade the Panel that Mr. Bunn's perception of subordination is simply wrong. The lack of subordination in the State lease is a very significant factor for which adjustment in rental rate should be made.

(b) Lack of arbitration and rent ceiling. Many private leases provide for arbitration of disputes over rent or rent ceilings or rent payments adjusted in accordance with the cost of living index. The State's lease contains none of these provisions. Mr. Bunn made no attempt to adjust for these provisions. The lessees argue, with considerable merit, that provisions such as rent ceilings, linking adjustments to the consumer price index, and arbitration provisions provide some degree of predictability as to what the rent will be in the future. This predictability is absent in the State leases, which provide for a unilateral adjustment

AGO 885751

of rentals by the lessor.

(c) Option to purchase. Many private leases also provide an option to purchase. The State's lease contains no such provision.

(d) Floating easement. The State's lease contains a floating easement giving the lessor the right to grant easements or rights-of way across the leased land with compensation for improvements damaged or destroyed, but does not provide for consequential damage. The private leases do not reserve this kind of easement.

Most private leases contain one or more provisions which make them more advantageous to the lessee than the State's lease. Contrary to testimony of Mr. Bunn, the State's lease contains no provisions more advantageous to the lessees. Given the long term of the State lease, the Panel does not believe the right to renew is of significant benefit to the lessee. The evidence is overwhelming on this point. The banker, attorney, and lessee's appraisers all testified to the more noxious State lease. Thus, the Panel believes the increase in rental rate to 8% is unjustified. The general market rate for private leases is no doubt in the 8% range; however, some allowance should be made for the less desirable features of the State lease. For the above reasons, the Panel believes a return to the 6% rate would accurately reflect the market rental value for a State lease.

IV

SUMMARY AND FINDINGS OF FACT

In summary, the Panel makes the following findings:

1. The Division incorrectly made no allowance for site preparation to arrive at a fair market value in accord with the lease. The evidence was overwhelming that there was substantial overburden to remove, from one to four feet with some fill required perhaps on most lots.

2. The Division's appraiser incorrectly arrived at a time increment to use for upward adjustment of comparable sales. The Panel finds that the 2% per month time adjustment suggested by the lessees' appraisers to be well founded and the correct one to apply in the appraisal of the subject lots.

3. The Division's appraiser used some 14 sales from the South Anchorage area as comparables in his reappraisal. Only four comparable sales were taken from an area near the subject property. The Panel is cognizant that Mr. Bunn was attempting to find land of the same zoning classification as the subject lots to use as comparables. However, the Panel finds that the rate of development is higher in South Anchorage and that the type and intensity of uses is greater. Some appropriate downward adjustment should be made before arriving at an appraised value of subject lots from these South Anchorage sales. Additionally, the Division's appraiser should consider the comparable sales used by the lessees' appraisers, even though they were of differing zoning classifications.

4. The Division's appraiser should have, but did not, adjust downward the value of the lots which have an electrical transmission line running through them. The Panel finds from the map submitted by the Division that this line has caused a

substantial diminution in the value of at least four of the reappraised lots. Additionally, the Panel finds that the adjustment suggested by Mr. Ferrara to be appropriate only if it were economically feasible to move the line, and likely that such a cure could be consummated.

5. The rental rate of 8% is excessive, considering the private lease market and the disadvantageous provisions in the State lease, including: (a) no subordination of fee, (b) no rent ceilings, (c) unilateral adjustment with no arbitration, (d) floating easements, (e) lack of option to purchase. Specifically, the private leases examined contained one or more of the following advantageous conditions: (a) subordination, (b) an option to purchase, (c) rent ceilings, (d) arbitration; and none contained floating easements provisions.

6. The Panel finds that subordination and collateral assignment are not the same as suggested by the Division's appraiser. The evidence on this point is overwhelming, consisting of the testimony of a disinterested expert, Mr. Koga, that financing of a leasehold interest is typically much more favorable to a lessee when the land lease contains a subordination agreement. Mr. Kamper, Mr. Simmons and Mr. Ferrara agreed with this assertion.

7. The advantages alleged to be present in the State lease are more illusory than real. Any advantages to the right to renew the 55-year State lease and removing improvements is insignificant in relation to the disadvantageous features described in Finding No. 5. This is supported by weight of the testimony of expert witnesses.

8. The lessees had no real opportunity after they had received notice of the reappraisal and before the effective

AGO 885754

date of the repeal of the waiver of adjustment to seek such a waiver. It was unrealistic to think they might have reason to seek such a waiver prior to receiving notice of the reappraisal.

9. The effect of the adjusted rentals is to discourage development of the subject area rather than to further the objective of encouraging development, which is the intent of the leasing regulations (11 AAC 58.990).

10. A new reappraisal by the Division should be conducted.

V

CONCLUSIONS OF LAW

The Panel having heard legal argument and read the memoranda submitted makes the following conclusions of law:

1. The lease and regulations read together require that the Division include in its appraisal of subject lots the increment of value generated by offsite improvements, such as installation of roads and utilities into the subdivision, with the provision that any utility hook-up to a main trunk line which was paid for by the lessee or a predecessor not be included, even if it is off the subject property.

2. The terms "such adjustment to be based primarily upon a reappraised annual rental value of land" and "any changes or adjustments shall be based primarily upon the reappraised rental value" found in the State's lease and 11 AAC 58.520 mean that the Division should consider other factors besides a reappraised annual rental value in arriving at an adjusted rental. This is so because of the use of the adverb "primarily" to modify the verb "based." The principles of interpretation dictate it be given meaning; without the presence of this word the Division would be able to consider only the reappraised annual rental value.

3. The reappraisal of May 1, 1976, the subject of this hearing, was not done consistent with the provisions of 11 AAC 58.900, which expresses the intent of the leasing chapter of the Administrative Code.

4. Subordination of the fee and collateral assignment are substantially different as a matter of law. Subordination of the fee means the fee can be encumbered to secure debt financing for the lessee. The holder of a collateral assignment merely steps into the shoes of the lessee.

VI

RECOMMENDATIONS

Implicit in the above discussion and findings is that the Panel finds the Division's reappraisal unacceptably high. Therefore, the Panel recommends that the subject lots in the Alaska Industrial Subdivison be reappraised by the Division in a manner consistent with the above discussion, findings and conclusions.

In addition, the Panel believes further recommendations are appropriate. The present lease and the present leasing policy should be modified. These modifications should be designed to put the State on a competitive footing to the degree possible with private lessors and are as follows:

1. In accord with the provisions of the lease, the lessees should be encouraged to record expenses incurred in site preparation so that the "original condition" can be more adequately ascertained.

2. The lease language should be clarified to remove any possible inconsistencies with 11 AAC 58.520.

3. To insure some predictability, place some control over the size of the rental increase through utilization of a ceiling

AGO 885/56

on the size of the increase in rental every five years.

4. Provide for arbitration of disputes over the annual rental arrived at after a reappraisal process and overinterpretation of other sections of the lease. This would ameliorate the current unilateral nature of rent adjustments.

5. Eliminate the floating easement. The State could exercise the right of eminent domain to condemn. The condemnation would result probably in greater compensation for damages to the lessee, especially in view of the Supreme Court decision in State v. Hammer, 550 P.2d 820, thus the lease would be more attractive to the leasing market. Additionally, the language in the current lease is ambiguous as to damages compensable. This ambiguity only encourages litigation.

6. These above recommendations, if adopted, would assure the State a competitive position in the lease market, encourage development of the leaseholds consistent with the intent of the leasing regulations, and be equitable to the lessee. The Panel also believes the State should be able to obtain a good return on its land. Accordingly, if the recommendations as to the lease are adopted, the rental rate should be changed to reflect the removal of the undesirable aspects of the State lease.

7. Suggest an amendment as to AS 38.05.105 to eliminate the term "primarily" from the statute, and also eliminate this term from the regulation and the lease. This is ambiguous, and assuming it has meaning, it may encourage individual accommodation of lessees by the Division. This, the Panel believes, is not in the State's best interest in that it could encourage political maneuvering to attempt to obtain this accommodation, and may well mean uses other than the highest and best use would be perpetuated. Also, the presence of such an ambiguity

AGO 885757

could lead to an excess of administrative discretion.

8. Finally, should some or all of the above general recommendations be ultimately adopted, then legislation should be suggested for enactment providing all present lessees the opportunity to negotiate modifications consistent with the changes adopted.

RESPECTFULLY SUBMITTED at Anchorage, Alaska, this 20th day of January, 1977.

TIMOTHY G. MIDDLETON
Hearing Panel Member

KENNETH E. ZAMZOW
Hearing Panel Member

GEORGE K. HOLLETT
Hearing Panel Member

THE FOLLOWING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

COMMENTS AND SUGGESTIONS OF THE ALASKA INDUSTRIAL SUBDIVISION LEASEHOLDERS ON SB 159

By virtue of the fact that the leaseholders of state lands within the Anchorage area designated as the Alaska Industrial Subdivision have a great deal, if not everything, to lose if remedial legislation is not forth coming which would (in some manner) alleviate the untenable situation they presently face, it would seem only befitting that they offer their comments on SB 159 which was introduced in the Legislature on February 15, 1977.

Prior to undertaking a section-by-section analysis or critique of SB 159, the state leaseholders think it may be beneficial to submit a brief outline of the pertinent facts which surround this controversy. Specifically, the purpose of this background material is twofold: first, to familiarize the reader with the dramatic changes which have occurred recently in state land leasing policy and to emphasize how those harsh changes now threaten the economic survival of the state leaseholders in Alaska; second, such facts establish and support the leaseholders' contentions brought out later in the discussion of SB 159.

1. In 1958 the territorial government of Alaska made the policy determination that an area of government-owned land located east of and nearly inaccesible to Anchorage be leased for commercial and industrial purposes. This area of Anchorage was then leased to the highest bidder at public auction for a term of 55 years. The area in question was designated the Alaska Industrial Subdivision, and during subsequent years other lands in it were leased under terms comprable to those written into the initial leases. One of the basic provisions of these leases, and the one bringing this controversy into existence, was codified

into state law in 1959 (S7, art. V, Ch. 169, SLA 1959). This statute (AS 38.05.105) reads in part:

> Each lease shall stipulate that the annual rental payment is subject to adjustment at five-year intervals and charges or adjustments shall be based primarily on a reappraised rental value . . .

2. Upon statehood, the Department of Natural Resources, Division of Lands for the State of Alaska, officially reaffirmed the prior land lease policy mentioned in number 1 above, in adopting its administrative regulations on July 1, 1960. The regulation which set forth the intent behind adopting the "Surface Leasing Regulations" read in part:

> . . . The intent of this chapter is to insure the equitable leasing of Alaska land in a manner that will encourage development for its highest and best use. (Emphasis added) (11 AAC 58.900)

This regulation and its intent still remain on the books, and the state has never changed or attempted to change the highest and best use classification of the Alaska Industrial Subdivision from its original designation as commercial industrial lands.

3. During the period of 1958 through the spring of 1976 the leaseholders in the Alaska Industrial Subdivision developed their lands and established business enterprises at a considerable expense in both money (substantial portions being borrowed) and time. The state Division of Lands during this same period had followed rather consistent and tolerable annual rental readjustment practices under the authority of AS 38.05.105. Annual rentals were adjusted upward from 40% to 100% during this period without undue protest from the leaseholders.

4. In the spring of 1976 numerous leaseholders holding state leases in the Alaska Industrial Subdivision were given notice that their leases were to be reappraised and five-year annual rental readjustments made. Such notice caused no particular concern among the leaseholders because of past state policy.

5. In May and June of 1976 the state Division of Lands advised the leaseholders whose lease rentals had come up for readjustment that their new annual rental payments had increased anywhere from 600% to 800%, and in some cases even more. To say the least, this came as an overwhelming shock to the leaseholders and they immediately registered protests with the Division of Lands. These same protests for an independent appraisal or some form of compromise, however, fell upon deaf ears with the Division of Lands, and the leaseholders in the Alaska Industrial Subdivision were thereby faced with exceedingly harsh possibilities of (a) abandoning all the work, time and money they had devoted to the economic endeavors and have their leases forfeited to the state; (b) trying to salvage what they could from their ongoing businesses and attempt, at great personal and monetary sacrifice, to re-establish their business interests on fee simple land in other parts of Anchorage; or (c) try and have the impossible situation remedied in a fair and equitable manner through the proper judicial and legislative channels. The leaseholders in this case chose the latter option as the only one realistically open to them.

6. The leaseholders of the Alaska Industrial Subdivision demanded and were afforded an administrative hearing (held the 14th, 15th, 20th and 21st of December 1976) before a hearing panel consisting of George Hollett from the state Division of Lands; Kenneth Zamzou, an appraiser with the state Division of Petroleum Revenue; and Timothy G. Middleton, an attorney in private practice in Anchorage. During the four days of administrative hearings tremendous amounts of testimony and other evidence were elicited from both the state and the leaseholders. The Hearing Panel's Proposed Decision and Recommendations in this matter are attached hereto and marked as Attachment "A". While there is no need here to summarize this decision or the recommen-

dation, special attention is directed to the Summary and Findings of Facts (p. 15), Conclusions of Law (p. 17), and Recommendations (p. 18) found therein.

7. By virtue of the fact that the Hearing Panel's decision submitted January 20, 1977 so strongly supported the leaseholders' position, and because of their own personal feelings of indignation, the leaseholders have now decided to bring their case before the members of the First Session of the Tenth Alaska Legislature.

CRITIQUE OF SB 159

While the leaseholders of state land in the Alaska Industrial Subdivision believe the basic format of SB 159 offers a good solid foundation upon which equitable relief could be structured, it contains, in its present form, a number of serious deficiencies which must be changed or altered if the impossible situation being faced by state leaseholders is to be resolved with any degree of certainty.

The specific points of contention and the resolution of them can be basically set forth as follows:

1. *Section 1 of SB 159 provides in AS 38.05.085(a)(1) [p. 1, line 12] that the parties shall agree on a fixed base annual rental to run for an initial ten-year period. While the leaseholders realize and appreciate that this new lease period is double the existing length, it nevertheless completely fails the test of economic reality. What is meant by this is that with a short initial period of ten years before the state can readjust the fixed base annual rental, the financial institutions of this and other states will not loan money to leaseholders to develop and improve their leased property. During the administrative hearing held on this matter the testimony of John Kemper, an Anchorage banker, and Andrew Hoge, an Anchorage attorney having done considerable work in this field, brought out the fact that lending institutions require a high degree of certainty that the

borrower will be able to repay a loan under the terms of a ground lease. It was well established that, under normal economic circumstances, to expect a borrower to lease land, develop commercial establishments and be able to repay the borrowed money with interest within a period of ten years is totally unrealistic. In effect whet lenders require is that before loans can be made on unsubordinated ground leases the rental to be paid annually must be either a level term or a rent which is ascertainable for a period of ten to fifteen (or in some cases even more) years after the term of the loan. Because this is a rather complicated matter, a full and thoughtful discussion is left to pages 5 through 7 of the transcribed testimony of Andrew Hoge which is affixed hereto as Attachment "B". For further discussion on this point, also see pages 12 through 15 and 24 through 29 of the Hoge transcript. From this discussion, which reveals the generally accepted practices of the lenders in this state and elsewhere and the testimony of a practicing attorney who is well versed in the field of ground lease financing, it becomes apparent that a short ten-year initial fixed rental will prohibit the leaseholders from acquiring the financing necessary for developing and improving the leasehold property. In light of these circumstances, the leaseholders cannot see any other answer to their economic plight but to have their fixed base annual rental increased from ten years to at least 25 years during the initial period.

2. *Section 1 of SB 159 further provides in AS 38.05.085 (a)(1) [p. 1, line 15] that the initial fixed base annual rental may not exceed 8% of the fair market value of the property. To demonstrate that this percentage figure is much too high, one only has to consult the Hearing Panel's discussion of the appraisal techniques (see Rental Rate, pages 12 through 14 of Attachment "A") and its Findings No. 5, which states:

> The rental rate of 8% is excessive, considering the private lease market and the disadvantageous provisions in the State lease,

AGO 885763

including: (a) no subordination of fee, (b) no rent ceilings, (c) unilateral adjustment with no arbitration, (d) floating easements, (e) lack of option to purchase. Specifically, the private leases examined contained one or more of the following advantageous conditions: (a) subordination, (b) an option to purchase, (c) rent ceilings, (d) arbitration; and none contained floating easements provisions.

3. Section 1 of SB 159 provides in AS 38.05.085(a)(2) and (3)[p. 1, lines 17-24] that once the initial lease period has expired, the annual rental is to be readjusted every five years thereafter, so long as the new rental does not exceed 8% of the fair market value of the property or 50% more than the amount paid the preceeding period, whichever is higher. These provisions represent a number of major points of contention and disagreement which the leaseholders have with SB 159.

First, the requirement that the annual rental payments be readjusted every five years after the short ten-year initial period has run only compounds many times over the critical problem which has been discussed in number 1 above with regard to obtaining any financing for developing or making improvements on the land. With a statutory provision requiring the rentals to be paid be readjusted eight times after the initial period gives the leaseholders and their potential lenders absolutely no way to estimate the intermediate or ultimate rental payments to be required. As already noted in number 1 above, the lending institutions making development or improvement loans would not do so where the potential rental liability is so uncertain and unascertainable.

Second, the requirement in this provision of SB 159 that the leaseholder pay a readjusted rental every five years after the initial ten-year period which is the higher of 8% of the reappraised fair market value of the property or no more than 50% of the rental he has paid the preceding period not only further contributes to the problem of making the state lease unbankable because the future rental payments cannot be ascertained with any degree of certainty, but it also penalizes the state leaseholder over lessees of privately-owned land throughout the lease period to a point which is nearly beyond comprehension. Just how the state leaseholders would be so severely penalized under this "higher" of two limits or ceiling can be fully appreciated from the computations made in Attachment "C" which is attached hereto.

Third, the leaseholders further contend that the 8% figure [illegible]d in this portion of SB 159 also is unrealistically high considering the unfavorable aspects of state leases in comparison to private commercial leases (see p. 16, Finding No. 5, Attachment "A").

4. Subsection (b) of AS 38.05.085 as proposed in Section 1 of SB 159 (p. 1, line 25 through p. 2, line 10) establishes what the leaseholders believe to be an excellent procedure for appraising state lease land in a fair and certain manner. Further, this provision corresponds with the Hearing Panel's Recommendation No. 4 (see p. 19 of Attachment "A"). The only difficulty the leaseholders have with this proposal is that, because of the frequency of appraisals needed under Section 1 of the bill, they think that the sharing of appraisal costs (p. 2, line 10) would be a highly expensive proposition.

5. The leaseholders earnestly believe that a new section should be inserted between *Section 1 and *Sec. 2 of SB 159. This new section would repeal and reenact AS 38.05.090 and would read as follows:

> Sec. 38.05.090. REIMBURSEMENT FOR FIXTURES AND IMPROVEMENTS. (a) A lessee of state land shall be reimbursed by a succeeding lessee or purchaser for fixtures constructed and installed on the land and improvements made to the land. If the retiring lessee and the new lessee or purchaser do not agree on the fair market value of the fixtures or improvements, or both, then such value shall be determined as provided in (b) of this section.
>
> (b) When it is necessary to determine the fair market value of the property under