

MEMORANDUM

State of Alaska

Department of Law

TO: Joseph L. Perkins
Commissioner
DOT&PF

DATE: June 21, 1995

FILE NO.: 661-95-0421

TEL. NO.: 465-3600

SUBJECT: Legal issues concerning
airport leases at the
international airports

FROM: Bruce M. Botelho
Attorney General
Juneau

You have requested our opinion on (1) whether the Alaska Constitution requires that the public be given an equal opportunity to lease state airport land and, if so, whether a competitive bid procedure is required when existing leases expire; and (2) whether there are any constitutional, statutory, or regulatory changes needed to implement the "Barton Leasing Policy"? In summary, the Alaska Constitution states that all persons are entitled to equal opportunities under the law, which the Alaska Supreme Court has interpreted to mean that any preference given a particular class of persons under state law must satisfy the court's "sliding scale" analysis for equal protection. As more fully discussed below, there are certain legal impediments to implementing the "Barton Leasing Policy."

BACKGROUND

Former Commissioner Michael A. Barton issued a memorandum on November 17, 1994 that attempted to establish new policies and procedures for noticing, issuing, amending, extending, and terminating tenant leases at the Anchorage and Fairbanks International Airports. In an opinion issued on December 12, 1994, we concluded that because the "Barton Leasing Policy" addressed a variety of essential terms and conditions which affected the public, the department would have to comply with the Alaska Administrative Procedure Act and formally adopt the policies as regulations. We specifically did not address any underlying legal issues contained in the Leasing Policy, but indicated that there were potential legal problems. A copy of that opinion is attached.

On May 19, 1995, Commissioner Joseph L. Perkins appointed a Special Commission on Airport Leasing Policy to address leasing policies, procedures, and requirements at the international airports. For additional background on airport leasing see the attached copy of the May 23, 1995, briefing memorandum provided to the Commission. The Special Commission met on May 30th and 31st and requested that we issue an opinion addressing the issues mentioned above.

EQUAL OPPORTUNITY TO LEASE AIRPORT PROPERTY

INTRODUCTION: You asked first whether the Alaska Constitution requires that the public be given an equal opportunity to lease state airport land and, if so, if a competitive bid procedure is required when existing leases expire.

Alaska does not have a statute granting any preferences in leasing airport land, and the legislature has not given the commissioner discretion to create them.¹ The legislature could enact a statute that creates leasing preferences, but any enactment would have to pass judicial scrutiny under the Alaska Supreme Court's equal protection analysis. Following is an explanation of how the Supreme Court would analyze such legislation.

LEGAL ANALYSIS: The Alaska Constitution recognizes that all people have equal rights, opportunities, and protection under state law:

This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protections under the law; and that all persons have corresponding obligations to the people and to the State.

Alaska Const. art. I, • 1. Equal protection does not mean that all persons must be treated alike; it means that those similarly situated have a right to equal treatment. Shepherd v. State of Alaska, 1995 WL 306830 *10 (Alaska 1995); Alaska Pacific Assurance Co. v. Brown, 687 P.2d 264, 271 (Alaska 1984). The Alaska Supreme Court applies a sliding scale approach to equal protection questions arising under the Alaska Constitution. Pan-Alaska Construction, Inc. v. State, Dep't of Admin., 892 P.2d 159, 162 (Alaska 1995). Under this method, "[a]s the right asserted becomes 'more fundamental' or the classification scheme employed becomes 'more constitutionally suspect,' the challenged law is subjected to more rigorous scrutiny at a more elevated position on [the] sliding scale." Id., (quoting State v. Ostrosky, 667 P.2d 1184, 1192-93 (Alaska 1983)).

Specifically, the Court engages in a three-part analysis to determine whether a statute survives equal protection scrutiny. First, the Court determines the importance of the individual interest impaired by the challenged enactment. State v. Enserch Alaska Const., Inc., 787 P.2d 624 (Alaska 1989). Second, the

¹ The commissioner has discretion to designate particular uses of lease space, i.e. for aviation use, nonaviation use, and auxiliary services, and to establish terms and conditions for leases. AS 02.15.090(a).

Court examines the importance of the state interest underlying the enactment, that is, the purpose of the enactment. Depending upon the importance of the individual interest, the state may be required to show only that its objectives are legitimate, at the low end of the continuum, or, at the high end of the scale, that the legislation was motivated by a compelling state interest. Williams v. State of Alaska, 1995 WL 306841 *5 (Alaska 1995).

Finally, the Court examines the nexus between the state interest and the state's means of furthering that interest. Again depending upon the importance of the individual interest, the equal protection clause requires that the nexus fall somewhere on a continuum from substantial relationship to least restrictive means. Id.

ANALYSIS OF LEASE PREFERENCES: How a court would analyze legislation granting preferences for airport leases depends on its purposes and effects. For example, individuals excluded from the preference might be disadvantaged financially. The Alaska Supreme Court has found economic and commercial interests to be subject to the lowest level of scrutiny by the court. See, e.g., Herrick's Aero-Auto-Aqua Repair v. State, Dep't of Transportation, 754 P.2d 1111, 1114 (Alaska 1988) (holding that the requirement that airplane mechanics have insurance and a permit implicated purely economic interests subject to the lowest level of scrutiny). When the individual's interest is at the low end of the spectrum, the state need only show that its objectives are legitimate, id., and that the relationship between the classification and the governmental objective is fair and substantial, Wilson v. Municipality of Anchorage, 669 P.2d 569, 572 (1983). The fair and substantial relationship test does not require a perfect fit between a legislative classification and the government objective it is intended to further. Williams v. State, 1995 WL 306841 *5.

On the other hand, the scrutiny might be more rigorous if individuals excluded from a leasing preference are thereby deprived of the opportunity to pursue a particular livelihood. The Court has held that the right to engage in an economic endeavor within a particular industry is an "important" right for state equal protection purposes. State v. Enserch Constr., Inc., 787 P.2d 632, (citing Commercial Fisheries Entry Comm'n v. Apokedak, 606 P.2d 1255, 1266 (Alaska 1980)). If the right affected is an "important" one, then the court applies close scrutiny. Enserch, 787 P.2d 633. Close scrutiny of enactments impairing the important right to engage in an economic endeavor requires that the state's interest be not only legitimate, but important, and that the nexus between the enactment and the important interest it serves be close. Id.

CONCLUSION: Absent specific suggested legislation, we can not definitively state whether a preference would violate the equal protection provision of the Alaska Constitution. Clearly, the chances that statutory leasing preferences would withstand constitutional challenge are best if the interests of excluded persons are of a nature that the court considers less significant, the state's interest in pursuing the goals of the legislation is

substantial, and the legislation is drafted in the narrowest manner possible to accomplish the state's goals.

You also asked whether the constitution requires a competitive bid procedure when existing leases expire. The equal protection provision requires that all persons similarly situated have a right to equal treatment. Therefore eligible applicants in the same class should be given an opportunity to apply for the same leasehold. If more than one eligible applicant applies, a competitive procedure has traditionally been followed for awarding airport leases. Under the existing framework different competitive procedures are available: competitive bid, public auction, and competitive proposal. 17 AAC 40.340(d) and (e).

BARTON LEASING POLICY IMPEDIMENTS

Finally, you asked whether any constitutional, statutory, or regulatory changes are needed to implement the "Barton Leasing Policy." A copy of that memorandum is attached to this opinion. On December 12, 1994, we advised the department that any policy that affected the public and was used by the airport in dealing with the public had to be adopted under the Alaska Administrative Procedure Act as a regulation. That opinion addressed only the procedures that must be followed to legally adopt policies such as those contained in the Barton memorandum.

In response to the department's request, we now address the substance of the Barton memorandum and whether any apparent legal impediments prevent adoption of the policies as regulations, if that is the department's wish. The department may only implement regulations consistent with and reasonably necessary to carry out the provisions of the Alaska Aeronautics Act of 1949. AS 02.15.020. It is important to note that existing leases are subject to the specific terms and conditions contained in those individual leases and will be unaffected by any future revisions to the statutes or regulations, unless effectively amended by the parties.

1. Leasing zones. Under existing statutory authority, contained at AS 02.15.090(a), leasing zones may be established at the international airports. A regulation must be adopted that supports differential treatment between zones including lease term guidelines and other provisions for different classes of aviation users of the airport because the zones would affect the public and be used by the airport in dealing with the public. AS 44.62.640(a)(3).

2. Lease term guidelines. Under existing statutory authority, contained at AS 02.15.090(a), lease term guidelines may be established at the international airports. Standard lease terms based on mandatory capital investments or any other criteria must be adopted as a regulation because the terms would affect the public and be used by the airport in dealing with the public. AS 44.62.640(a)(3).

3. Lease renewal options. Under existing law, no lease

may exceed 55 years in duration. AS 02.15.090(a). Guidelines for lease renewal options should be implemented as a regulation because the renewal would affect the public and be used by the airport in dealing with the public. AS 44.62.640(a)(3). No statute currently authorizes DOT&PF to give a preference right for lessees to renew their leases without being subject to competing applications. See AS 02.15.090(a) ("The public may not be deprived of its rightful, equal and uniform use of the airport, . . .") As addressed above, the legality of such a preference contained in state statute would depend upon whether a court would find that a legitimate state purpose supports the preference.

4. Disposition of improvements. The Barton leasing policy which provides that the state will not take title to improvements at the expiration of a lease is contrary to existing regulation 17 AAC 40.330(c) that makes improvements state property unless the lease provides otherwise. This regulation would have to be amended if this policy were adopted. No statutory basis supports a mandatory requirement that a succeeding tenant purchase existing improvements from an incumbent tenant, and thus legislative enactment would be necessary if this policy is adopted.

5. Standardized lease language. Lease provisions that are generally applied to the public should be adopted as regulations. AS 44.62.640(a)(3).

6. Lessee cancellation of leases. This provision directs staff to eliminate any current lease provision that permits a lessee to unilaterally cancel the lease on 30 days notice. The 30-day cancellation provision is not currently in regulations form and would not require a regulation to eliminate its use. However, the direction to eliminate this provision from existing contracts would conflict with 17 AAC 40.360(29) that provides a lease modification may not act to reduce the rights or privileges granted the lessee by the lease nor act to cause the lessee financial loss. In addition, existing contracts would have to be amended by agreement of the parties.

7. Competitive bid situation. Existing regulations already allow the airport to award leases competitively by public bid, public auction, or competitive proposals. 17 AAC 40.340(d) and (e). Any modification, clarification, or revision to these procedures must be implemented as a regulation.

8. Public notice. Public notice of leases should be meaningful and reasonably inform the public of the general terms and conditions contained in a lease. Under current statute, the notice should adequately provide sufficient information so that the public is not deprived of its right to lease the airport property. AS 02.15.090(a). Under current regulation, the notice should inform the public that competing applications may be submitted. 17 AAC 40.330(c)(8)(C).

9. Environmental issues. The direction to add language making the tenant responsible to comply with all environmental

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laws and regulations is consistent with an existing regulation that generally requires a lessee to comply with all laws and regulations. 17 AAC 40.360(27). No separate regulation is necessary to make the tenant responsible for complying with environmental laws and regulations. However, a standard contract provision regarding how the tenant complies with environmental laws and regulations should be in regulation form because it would be used by the airport in dealing with the public. AS 44.62.640(a)(3).

CONCLUSION

We hope that this adequately addresses the questions raised by the Special Commission on Airport Leasing Policy.

BMB: dky

enclosures