

MEMORANDUM

State of Alaska Department of Law

TO: Ron B. Lind
Acting Commissioner
Department of Transportation
and Public Facilities

DATE: December 12, 1994

FILE: 993-89-0123

TEL.NO.: (907)465-2133

SUBJECT: Procedure for revising
airport leasing policy

FROM: Bruce M. Botelho
Attorney General

You have requested our opinion on whether the proposed Leasing Policy for International Airports, dated November 17, 1994, concerning tenant leases at the Anchorage and Fairbanks International Airports must be adopted as regulations under AS 44.62, the Alaska Administrative Procedure Act (APA). The answer is yes, as further explained below.

DISCUSSION

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. Today, we only address the procedures that must be followed to legally adopt policies such as these that affect the public. There may be legal concerns with the underlying policies or procedures contained in the proposed Leasing Policy, but those will be addressed at a later time.

We have determined that the Leasing Policy addresses a variety of essential terms and conditions including lease terms, lease renewal, disposition of improvement, cancellation and renewal of leases, competitive bid procedures and public notice requirements. Existing lessees and future applicants for leases will be affected by these policies and procedures.

Certain of these policies directly conflict with existing regulations, such as the provision on disposition of improvements. Currently, 17 AAC 40.330(c) provides that improvements to leaseholds become state property at the expiration of a lease, unless the lease provides otherwise. Under the proposed policy, the state would not take title to improvements at the expiration of any lease. Regardless of other legal concerns, 17 AAC 40.330(c) would need to be amended through the APA for this policy to be effective.

Another procedure concerning disposition of improvements at the expiration of a lease requires new tenants to purchase the prior tenants' improvements. This provision, if

legal, would have to be adopted as a regulation. Competitive bid procedures are addressed, but not fully explained in the Leasing Policy, and we are not able to completely address the extent to which 17 AAC 40.340 would have to be revised. From our review of the existing regulations and the Leasing Policy, it is clear that a revision of 17 AAC 40.340 is necessary to adequately address competitive bid procedures.

There are other policies and procedures contained in the Lease Policy that need to be adopted as regulations or by reference, such as the Lease Term Guidelines attached to the Leasing Policy.

To determine whether a policy, guideline, rule or other measure must be properly adopted as a regulation depends on whether the public is affected by the action. The Alaska Statutes broadly define regulation:

"regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of a rule, regulation, order, or standard adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one that relates only to the internal management of a state agency; "regulation" does not include a form prescribed by a state agency or instructions relating to the use of the form, but this provision is not a limitation upon a requirement that a regulation be adopted under this chapter when one is needed to implement the law under which the form is issued; "regulation" includes "manuals," "policies," "instructions," "guides to enforcement," "interpretative bulletins," "interpretations," and the like, that have the effect of rules, orders, regulations, or standards of general application, and this and similar phraseology may not be used to avoid or circumvent this chapter; whether a regulation, regardless of name, is covered by this chapter depends in part on whether it affects the public or is used by the agency in dealing with the public;

AS 44.62.640(a)(3). Anything that affects the public or its rights must be adopted under the APA as a regulation. If an agency is in doubt, the agency should err on the side of adopting regulations under the APA.

The Alaska Supreme Court has consistently interpreted

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this definition broadly and invalidated state action taken in the absence of necessary regulations. See Wickersham v. State Commercial Fisheries Entry Comm'n, 680 P.2d 1135, 1140 (Alaska 1984); United States Smelting, Refining & Mining Co. v. Local Boundary Comm'n, 489 P.2d 140 (Alaska 1971).

We trust that this answers your question.