

MEMORANDUM

State of Alaska
Department of Law

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

DATE: July 3, 1996

FILE NO.: 661-96-0908

TELEPHONE NO.: 269-5165

John D. Horn
Regional Director
DOT&PF, Central Region

SUBJECT: Land Use Planning

FROM: Carolyn E. Jones
Supervising Attorney
Transportation Section, Anchorage

You have asked this office to help clarify what are the obligations of the State of Alaska, Department of Transportation and Public Facilities (DOT&PF) to comply with Municipality of Anchorage (MOA) ordinances regarding the Urban Design Commission and its “public facility project landscaping review” process. For the reasons discussed more fully in the remainder of this memorandum, we conclude that there currently exists a planning agreement between the State of Alaska and the Municipality of Anchorage with regard to state public highways or road projects, and within the meaning of AS 35.30.010(b). Therefore, compliance with the Urban Design Commission review process under AMC 21.15.025(A) is not required with respect to the planning of a state public highway or road project within the MOA. We further conclude that compliance with the Urban Design Commissioner review process for public facility project landscaping is not required as to state-owned or -occupied buildings because the process does not apply equally to public and private landowners as required by AS 35.30.020.¹

BACKGROUND

The Municipality of Anchorage has adopted an ordinance that requires the Urban Design Commission (UDC) to review and make recommendations regarding public facility project landscaping before a building permit or land use permit is issued for a public facility project. AMC 21.15.025(A). The ordinance further defines a public facility as

¹ Our analysis addresses your overriding question regarding the state’s obligations with respect to submitting its project landscaping plans to the Urban Design Commission for review. We have not addressed the issues you raised about the origin of the UDC’s authority, the submission of project landscaping budgets to the Assembly, or the lack of an appeal from the UDC review. These issues were collateral to your main question and not within the scope of your request for advice. Should you want to revisit these questions, we would be happy to do so in a separate memorandum.

buildings and structures, including streets and highways subject to chapter 24.15, owned or occupied by a government agency not exempt by law from municipal land use regulation.

AMC 21.15.025(E)(2).

DOT&PF and the Urban Design Commission have engaged in lengthy correspondence and oral discussions regarding whether DOT&PF is obligated to comply with this ordinance with respect to planning its highway, road, and building projects. The UDC asserts that it has the authority to require DOT&PF to submit these respective plans to UDC for its review and recommendations before DOT&PF obtains a building or land use permit. On the other hand, DOT&PF believes that certain exemptions under state law may make it unnecessary for DOT&PF to seek this approval regarding planning for highway or building projects. Because the basis for our opinion differs with respect to these two types of projects, we discuss them separately in the remainder of this opinion.

OPINION

A. UDC review under AMC 21.15.025(A) not required for state highway or road projects

AS 35.30.010 generally provides that DOT&PF shall submit plans for a public project located in a municipality to the planning commission of the municipality for review and approval. AS 35.30.010(a). However, prior approval by the municipality is unnecessary if DOT&PF and the municipality have entered into an agreement for planning the project that satisfies the terms of AS 19.20.060 or AS 19.20.070, and the project's plans comply with the provisions of the agreement. AS 35.30.010(b)(1). In this respect, AS 19.20.060 authorizes DOT&PF and a municipality to

enter into a agreement with each other or with the federal government for the financing, planning, establishment, improvement, maintenance, use regulation, or vacation of controlled-access facilities or other public ways in their respective jurisdictions.

In fact, the April 3, 1986, Letter of Understanding and Concurrence issued by J. David Norton, Municipal Engineer, is an agreement within the meaning of AS 35.30.010 and AS 19.20.060. (A copy of the Letter of Understanding is attached here as Exhibit A, for your convenience.) The agreement was the product of meetings between DOT&PF design personnel and MOA staff from Community Planning and Public Works Engineering to establish a procedure for review of DOT&PF road projects by MOA. The procedure was intended to clarify and

streamline the review cycle within the municipality, and even includes an opportunity for the UDC to participate in the review. *See* Exhibit A at 2, 4-5.

The MOA Municipal Attorney's Office concurs with our conclusion. In an April 22, 1994, memorandum, Deputy Municipal Attorney Ann Waller Resch wrote that the April 1986 agreement between DOT&PF and the MOA complied with AS 19.20.060, "and, hence, allows construction to begin without a planning commission approval." (A copy of the Memorandum is attached here as Exhibit B, for your convenience.) She further noted that the generic language "municipal planning commission" included both the Planning and Zoning Commission and the Urban Design Commission.

You have not provided us with any evidence DOT&PF and MOA have rescinded this 1986 agreement. Moreover, there now exists a more extensive and elaborate planning agreement that may also satisfy the meaning of AS 19.20.060, *i.e.*, *Transportation and Air Quality Planning Operating Agreement* ("the Agreement") dated December 7, 1993. In order to receive federal highway funding, the State of Alaska, through DOT&PF, and the Municipality of Anchorage entered into this agreement to satisfy federal transportation planning statutes requiring the state and the municipality to "coordinate the planning and construction of all urban transportation facilities with a continuing, cooperative, and comprehensive transportation planning process." *See* Agreement, Sec. 2.1. The Agreement designates the MOA Planning and Zoning Commission to review transportation plans and programs and prepare advisory recommendations to the AMATS Policy Committee and the Municipal Assembly. Although the parties did not enter into the AMATS agreement to satisfy AS 19.20.060, the Agreement arguably satisfies the requirements of the state provision because it is an agreement between the state and the municipality for the financing, planning, establishment, improvement, maintenance, and use of public ways within the Municipality of Anchorage. In conclusion, there is at least one—if not two—agreement between the state and the municipality that excuses the state from the requirement of submitting its state highway and road project plans to the UDC for its review.

B. UDC review under AMC 21.15.025(A) not required for state-owned or -occupied building projects

You have not provided us with any agreements between the state and the municipality with regard to planning state-owned or -occupied building projects. Therefore, we cannot conclude that the state is excused from submitting plans for building projects to the UDC under the exemptions contained in AS 19.20.060. However, we do still conclude that the state is excused from submitting these plans to the UDC for its review and approval on other grounds.

Article X, section 11, of the Alaska Constitution authorizes a municipality to exercise all legislative power not prohibited by law or charter. With regard to planning and

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zoning, a municipality's legislative power extends to state public facilities to the same extent as to private facilities. AS 35.30.020 specifically provides that:

[a] department shall comply with local planning and zoning ordinances and other regulations in the same manner and to the same extent as other landowners.

(Emphasis supplied.) In this respect, it appears that AMC has exceeded its constitutional authority. AMC 21.15.025, the ordinance providing for UDC review of public project landscaping, provides for and requires UDC project landscaping review only with regard to public facility projects. By definition, all private individuals who plan and construct buildings are not required to submit their plans to the UDC for a like review. Given this disparate treatment, the state is not required to submit its project landscaping plans for a public building project to the UDC because the local ordinance is inconsistent with state law that a municipality apply its local planning and zoning ordinances to the state in the same manner and to the same extent as other landowners. *See Simpson v. Municipality of Anchorage*, 635 P.2d 1197, 1200 (Alaska 1981).

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CONCLUSION

DOT&PF is not required to submit its project landscaping plans for state public highways and roads to the Municipality of Anchorage Urban Design Commission under AMC 21.19.025(A) because it has provided by separate agreement for local review. DOT&PF is not required to submit its project landscaping plans for state public buildings to the UDC under AMC 21.15.025(A) because the local requirement is not applied evenhandedly to all landowners in the municipality.

CEJ:bg

Atts.