MEMORANDUM

State of Alaska
Department of Law

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

DATE: December 11, 2001

A.G. FILE NO: 665-99-0090

SUBJECT: Rural Schools and Airport Land Title

FROM: Leone Hatch
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You have asked whether a regional school board[1] (hereinafter "RSB") which operates on airport property may require the Department of Transportation and Public Facilities (hereinafter "the department") to transfer title to the land and buildings which it occupies to the RSB pursuant to AS 14.08.151(b). While there is some uncertainty, the better answer to your question is no. Title may not be transferred on demand. We have reached this conclusion because the Alaska Legislature could not have intended to create a conflict with federal funding requirements, risk federal enforcement, and place federal participation in the state's airport system at risk.[2]

A mandatory title transfer of airport property (which is subject to FAA grant assurances) to an RSB pursuant to AS 14.08.151(b) would violate AS 2.15.020(c) and would breach federal grant agreements. This is so because the department would be

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[1] The Alaska Supreme Court has noted that RSBs "are independent entities which have been given broad powers." *Northwest Arctic Reg'l Educ. Attendance Area v. Alaska Public Service Employees Local 71*, 591 P.2d 1292, 1298 (Alaska 1979), *overruled on other grounds, Alaska Commercial Fishing & Agric. Bank v. O/S Alaska Coast*, 715 P.2d 707, 709 n.5 (Alaska 1986); *see also, U.S. ex rel. Norton Sound Health v. Bering Strait School Dist.*, 138 F.3d 1281 (9th Cir. 1998). A title transfer to an RSB is not a mere administrative change of title between sister state agencies.

[2] It is also possible that AS 14.08.151(b) could be held to be federally preempted insofar as it applies to airports subject to federal grants. In general, when the federal government legislates in an area in which it is constitutionally entitled, directly conflicting local legislation is preempted through the operation of the Supremacy Clause of the United States Constitution. U.S. Const. art. VI, cl. 2. *E.g., Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992). However, there are issues with this approach that make the outcome in this situation uncertain.

required to transfer title to property which the Department, acting as sponsor for federal funding, has assured to the FAA that it would retain in state ownership for airport purposes, including the fiscal support of the airport. Automatic transfer of airport land to an RSB could subject the state to federal liability and enforcement as well as endanger future federal funding. If the department cannot in good faith make title assurances to the FAA, there may be no future grant funding for airports vulnerable to RSB defeasance.

Background

Various RSBs operate facilities situated on airport property. In 1978, the legislature granted RSBs the option of acquiring title to state property being used by a school.[3] The department has informed me that many, if not most, of these school facilities were constructed on airport property prior to the 1978 legislation. These schools are occupied under lease, use permit, or are in holdover status. AS 02.15.090; AS 14.08.151(a). The Yukon-Koyukuk RSB has made an administrative claim for Bettles airport property. That claim is under consideration pending the issuance of this opinion.

Statutory Authority

Two state statutes essentially frame the potential conflict: AS 02.15.020(c) and AS 14.08.151(b). The older statute, AS 02.15.020,[4] essentially authorizes (and compels) the state to conform to federal requirements if the state wishes to participate in federal grants:

> (c) The department may accept federal money and money from other public and private sources to accomplish in whole or in part any of the purposes of this chapter. All federal money accepted under this chapter shall be accepted and expended by the department upon the terms and conditions prescribed by the United States.[5]

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[3] § 2 ch 124 SLA 1975; am §§2, 3 ch 147 SLA 1978; am § 46 ch 6 SLA 1984 (codified at AS 14.08.151). The relevant language was adopted into subsection (b) in 1978.

[4] § 4A – C ch 123 SLA 1949; am § 1 ch 14 SLA 1968 (codified at AS 02.15.020). The relevant language was adopted into subsection (c) in 1949, with slight revisions in 1968 recognizing that the Territorial Commission had become a department of the state.

[5] *See*, footnote 4.

The more recently enacted is AS 14.08.151.[6] In Subsection (b) of this statute, the legislature authorized RSBs a means by which to obtain title to some state property. Subsection (b) provides as follows:

> (b) A regional school board may, by resolution, request, and the commissioner of the department having responsibility shall convey, title to land and buildings used in relation to regional educational attendance area schools. If the state holds less than fee title to the land, the commissioner of the department having responsibility shall convey the entire interest of the state in the land to the regional school board.

Statutory Construction

"Interpretation of a statute begins with an examination of its language construed in light of its purpose."[7] Even if a statute appears clear on its face, it is interpreted in the context of the legislature's purpose. The Alaska Supreme Court recently repeated its holding that, "[i]n ascertaining the legislature's intent, we are obliged to avoid construing a statute in a way that leads to a glaringly absurd result."[8]

Alaska statutes in apparent conflict must be read together in the context of legislative intent. If possible, the statutes should be harmonized. If the statutes cannot be reasonably harmonized in light of statutory intent, the earlier statute may be held to have been repealed by implication.[9] However in this case, if the earlier statute is impliedly repealed, there will be direct and adverse consequences to the state's ability to maintain federally funded rural airports.

While the Alaska Legislature clearly intended to generally allow RSBs the option of greater autonomy and control of their facilities through the acquisition of title, there is no indication or record that the legislature intended to do so at the cost of federal liability, significant loss of federal funding, and a degraded airport system.

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6 *See,* footnote 3.

7 *Beck v. State of Alaska,* 837 P.2d 105, 116-17 (Alaska 1992).

8 *Sherbahn v. Kerkove*, 987 P.2d 195, 201 (Alaska 1999) (quoting *Underwater Constr., Inc. v. Shirley,* 884 P.2d 150, 155 n.21 (Alaska 1994) (quoting *Sherman v. Holiday Constr. Co.* 435 P.2d 16, 19 (Alaska 1967))).

9 *E.g., Progressive Insurance Co. v. Simmons,* 953 P.2d 510, 516 (Alaska 1998).

In this case, the earlier statute, AS 02.15.020(c), enables the Department of Transportation to apply for, accept, and utilize FAA grants for state airport facilities. Alaska Statute 14.08.151(b) cannot be read to apply to airport land without implying that the legislature intended to at least partially repeal AS 2.15.020(c)'s mandate that the state accept federal funds and be bound by the conditions thereon. It is unlikely that the legislature intended to repeal this statute and subject the state to federal enforcement. Nor is it likely that the legislature intended to endanger either current or future grant funding. The partial repeal of AS 02.15.020(c) in favor of AS 14.08.151(b) is necessary to allow RSBs the right to claim title to airport property (discussed below) is an illogical and absurd result, unlikely to have been intended by the legislature. To avoid the illogical and unintended result, AS 14.08.151(b) should not be read to apply to airport land.[10]

The Alaska Supreme Court, in its only interpretation of AS 14.08.151(b), has suggested a method of construing this statute that will allow it to be harmonized with AS 02.15.020(c) and the state's need to control public airports, maintain federal funding eligibility, and honor its federal commitments. S*tate v. Bering Strait Regional Attendance Area*, 658 P.2d 784 (Alaska 1983). In *Bering* the court held that AS 14.08.151(b) is inapplicable to property which the RSB shared with another user. This opinion rests on the court's reluctance to create a shared title interest without specific legislative directive.

In *Bering*, the Nome City School District occupied a state-owned building which it primarily used for the Nome High School. It sublet an unused portion of the facility to the Bering Strait Regional Educational Attendance Area School District (hereinafter "Bering"). Both entities requested title under AS 14.08.151(b). The state chose to transfer title to the Nome City School District. Bering appealed and the matter eventually rose to the Alaska Supreme Court. The court was troubled by the shared use of the same property and was reluctant to either read AS 14.08.151(b) to require a partial conveyance, or to impose a novel and complex condominium-type relationship upon Nome City School District and Bering in the absence of specific statutory authority. The court held:

> In effect, this will result in the creation of a condominium public facility.
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> There are two problems with this interpretation.
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> First, it is a departure from the literal language of the statute. The statute refers to buildings, not portions of buildings . . . .

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[10] The bulk of the controversy with its attendant potential for litigation could be resolved if the Alaska Legislature would revisit the issue and clarify its intentions.

> Second, a condominium public facility would be an innovation in this state. Creation of a condominium is legally complex, requiring detailed legal documents specifying, among other things, the responsibilities of the various owners. We believe that if condominium ownership had been intended by the legislature in enacting AS 14.08.151(b) the statute would have expressly so provided and would have furnished some guidance as to the division of responsibilities among the owners.
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> We thus hold that that the superior court erred in interpreting AS 14.08.151(b) to require a partial conveyance of the complex to Bering Strait.

Bering, 658 P.2d at 786 (footnotes omitted).[11]

Specifically, the *Bering* court refused to create a condominium interest when two parties shared a building. If applied to airport land, AS 14.08.151(b) would bifurcate airport land title by effectively subdividing the airport and subjecting it to potentially conflicting uses and hostile management objectives. This result is not consistent with the holding in *Bering*. It is likely that the Alaska Supreme Court would extend *Bering* to include airport land if given the opportunity.

Airport land must by its nature be committed primarily to aviation purposes and uses. The department, as sponsor, must maintain an indefeasible fee in land to which the FAA requires a fee interest. *Infra at 7.*

While secondary non-aviation uses can be supported in some circumstances, they are necessarily subordinate to the primary purpose of aviation. In the case of an RSB usage on airport land, there is a double occupancy even more complex than that which the *Bering* court refused to split. In the framework of *Bering*, AS 14.08.151(b) should not be interpreted to allow the bifurcation of title to an active airport, thus creating a condominium-like interest.

Pragmatically, AS 14.08.151(b) can be harmonized with AS 02.15.020(c) in the context of *Bering*. *Bering* suggests that before an RSB may obtain title pursuant to AS 14.08.151(b), the RSB usage must be exclusive to avoid a bifurcated title. Because the

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[11] The Alaska Legislature has not moved to alter the statute in response to the Alaska Supreme Court's 1983 interpretation. *Talancon v. State*, 721 P.2d 764, 768 (Nev. 1986) (failure of legislature to amend statute after judicial interpretation of legislative intent inferred ratification of judicial action) *cited* in *Todd v. State*, 884 P.2d 668, 680 (Alaska App. 1994).

airport land is subject first to the requirements of transportation and safe aviation usage, the RSB's occupation of airport land is not exclusive, and thus, under *Bering*, not subject to fee title transfer pursuant to AS 14.08.151(b).

Federal Grant Requirements

The FAA[12] maintains an interest in aviation safety, efficient and non-discriminatory airport management in support of the national transportation system, and the fiscal responsibility and self sufficiency of grant-supported airports. It furthers these interests through both direct regulation and grant conditions.[13] The FAA is specifically authorized by federal statute to attach conditions to FAA grants.[14]

The State of Alaska, acting as a sponsor under federal law, makes extensive use of federal grant funding for airport construction and improvement. Pursuant to the Spending Clause of the federal constitution[15] (hereinafter "Spending Clause"), the federal government can and does impose enforceable grant conditions on the recipients of federal funds.[16] The adoption of what is now AS 2.15.020 in 1949 allowed the Territory and later

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[12] "The FAA is responsible for the administration and management of the Federal Airport grant-in-aid program under the Airport and Airway Development Act of 1970, as amended, 49 U.S.C. §§ 1701 et seq. (superseded by the Airport and Airway Improvement Act of 1982, 49 U.S.C. §§ 2201 et seq.)." *U.S. v. County of Westchester*, 571 F. Supp. 786, 789 (S.D.N.Y. 1983) (citations omitted). The 1970 Act was further amended in 1994 and 1996.

[13] A recent Tenth Circuit Court of Appeals decision noted, "indeed, it is 'difficult to visualize a more comprehensive scheme of combined regulation, subsidization, and operational participation than that which congress has provided in the field of aviation.'" *Arapahoe County Public Airport Auth. v. F.A.A.*, 242 F.3d 1213, 1220 (10th Cir. 2001) (quoting *New England Legal Found. v. Massachusetts Port Auth.*, 883 F.2d 157, 172-73 (1st Cir. 1989)).

[14] 49 U.S.C. § 47108(a) (West 1997).

[15] U.S. Const. art. I, sec. 8, cl. 1.

[16] E.g., South Dakota v. Dole, 483 U.S. 203 (1987); Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1, 17 (1981); U.S. v. Miami University, 91 F. Supp. 2d 1132, 1142 (S.D. Ohio 2000). The Miami court observed:

> Federal grants authorized by Congress create binding contracts between the United States and the recipient, and the United States has the authority to fix the terms and conditions upon which federal funds will be disbursed. Accordingly, acceptance of a federal grant to which conditions are attached "creates an obligation to perform the conditions on the part of the recipient."

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the state to bind itself to federal funding requirements, and therefore enjoy the benefit of federal grants.

As a condition of acceptance, the state is required both by this statute and federal case law to expend federal grant funds only in strict accordance with federal terms and conditions. The FAA has a number of title requirements for airports receiving grants.

Conflicts with Specific Federal Title Requirements

The primary transportation function of the airport is degraded if airport property is not subject to direct airport management and control. The FAA requires the department to issue and certify[17] assurances that as the sponsoring agency it has a "satisfactory property interest" in the airport to obtain these necessary federal grants.[18] Grant assurances are incorporated into the grant contract. The Seventh Circuit Court of Appeals has noted that discretion to determine what constitutes a "satisfactory property interest" rests with the FAA.[19] Federal regulations specifically provide that land identified in the sponsor's application which is (or is to be) held in fee must be:

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Miami University, 91 F. Supp.2d at 1142 (quoting in part U.S. v. Frazer, 297 F. Supp. 319, 322 (M.D. Ala 1968)) (footnotes and citations omitted).

[17] A person who knowingly and with intent to defraud makes a false statement on a certification required to obtain a federal airport development grant is subject to criminal penalties including fines and imprisonment of up to five years. 49 U.S.C. § 47126(3) (West 1997).

[18] 49 U.S.C. § 47107(c) (West 1997); 14 C.F.R. § 152.103(a)(4)(ii) (2001); 14 C.F.R. § 152.3 (2001) ("Satisfactory property interest" and "Sponsor" defined); 14 C.F.R. § 151.26(d) (2001) ("land" defined in the context of the sponsor's application, which must identify property as either currently or anticipated to be subject to a satisfactory property interest).

[19] *Aircraft Owners and Pilots Ass'n v. Hinson*, 102 F.3d 1421, 1424, 1426 n.2 & n.3 (7th Cir. 1996). The *Hinson* court considered claims that FAA grant assurances were violated when a sponsor, the City of Chicago, lost its lease on land underlying an airport when the lessor, a park district, declined to renew the lease after its expiration. The State of Illinois, as an intervenor, argued that the federal grant requirements required the city to obtain the airport (through condemnation or otherwise) to protect the grant-funded improvements and to continue to operate the airport. The court held that the grant provisions for this particular airport included a specific requirement for reimbursement in the event the lease was lost. The FAA had contemplated the possibility of lost title in this individual case and provided a contractual option other than specific performance. Therefore, the court reasoned, the FAA had acted reasonably and within

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> free and clear of any . . . other encumbrance that, in the opinion of the [FAA] would create an undue risk that it might deprive the sponsor of possession or control, interfere with its use for public airport purposes, or make it impossible for the sponsor to carry out the agreements and covenants in the application . . .. [20]

A title interest that is essentially a statutorily defeasible[21] fee created by AS 14.08.151(b) can certainly "deprive the sponsor of possession." The significance of the defeasance will vary with the location of the RSB's facilities on the airport and the FAA's corresponding willingness, or unwillingness, to declare the property to be excess.[22] However, the FAA's requirement for stable, predictable title is manifestly incompatible with a statutorily created defeasible fee which is not under the sponsor's control.

Excess property initially purchased or developed with an FAA grant may be sold (after approval) at fair market value and the FAA reimbursed proportionately.[23] The FAA may demand reimbursement of its proportion of full fair market value if title is transferred below market, as would be the case with a transfer to an RSB which occupies land which

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its discretion in choosing not to seek to force the city to acquire and maintain the airport. While the court recognized the FAA's power to enforce title assurances, it refused to second guess the FAA's enforcement discretion. The *Hinson* court specifically noted that had the FAA wanted to force the sponsor defendant to maintain its title interest, it could well have done so by originally imposing the grant provisions it had employed at nearby Midway Field. *Id.*

[20] 14 C.F.R. § 151.25(c)(1) (2001).

[21] "Defeasible" is defined as:

> Subject to be defeated, annulled, revoked, or undone upon the happening of a future event or the performance of a condition subsequent, or by a conditional limitation. An estate which is not absolute, i.e., one which is determinable or subject to an executory limitation or condition subsequent. Usually spoken of estates and interests in land. For instance, a mortgagee's estate is defeasible (liable to be defeated) by the mortgagor's equity of redemption.

Black's Law Dictionary.

[22] In Bettles, for instance, the facility in question is over the "building restriction line." Defeasance in that case will be a serious matter, potentially implicating airport safety issues as well as more general management and fiscal control.

[23] 49 U.S.C. § 47107(c) (West 1997).

the FAA agrees is excess.[24] Likewise, any alterations to a grant-aided airport's layout plan must be approved by the FAA.[25] An unapproved alteration may cause the FAA to require the department, at state expense, to restore the airport to its prior utility, even if this requires moving the airport facilities.[26] An "airport layout plan" includes the identification of the airport's boundaries, location of aviation and non-aviation uses, and delineation of the sponsor's title.[27]

A loss of title to airport property which is subject to grant assurances without compensation, and without FAA concurrence, may breach title assurances. Such a breach could cause the FAA, at its discretion, to demand reimbursement, to demand that the

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[24] *Id.*

[25] 49 U.S.C. § 47107(a)(16) (West 1997).

[26] *Id.*

[27] 14 C.F.R. § 151.5(a) (2001) reads:

> (a) Airport layout plan. As used in this part, "airport layout plan" means the basic plan for the layout of an eligible airport that shows, as a minimum--
> (1) The present boundaries of the airport and of the offsite areas that the sponsor owns or controls for airport purposes, and of their proposed additions;
> (2) The location and nature of existing and proposed airport facilities (such as runways, taxiways, aprons, terminal buildings, hangars, and roads) and of their proposed modifications and extensions; and
> (3) The location of existing and proposed non-aviation areas, and of their existing improvements.

alteration or loss be ameliorated at the sponsor's expense, to refuse further funding, and to take direct legal action against a state in federal court.[28]

Conclusion

There being no indication of legislative intent to compel the State of Alaska to breach FAA grant agreements in violation of AS 2.15.020(c), the best interpretation of AS 14.08.151 limits its application to non-airport lands. The legislature could not have reasonably intended to repeal AS 2.15.020(c) by implication and thus endanger federal funding of airports, potentially subject the state to significant federal enforcement, and actually discourage the department from allowing RSBs access to appropriate property when it is otherwise in the best interest of the state and the airport to do so. Therefore it is our opinion that AS 14.08.151(b) should not be interpreted to require conveyance to an RSB of the state's interest in a state airport.

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[28] 49 U.S.C. § 47111(f) (West 1997). The Inspector General of the FAA has investigated other FAA regions and criticized them harshly for failure to insure strict compliance with grant conditions. The FAA has successfully sued sponsors for specific performance and withheld grant funding when confronted with breached grant conditions. For instance, when a New York airport attempted (by statute) to close at night in violation of a grant requirement, the FAA obtained an injunction to force the airport to remain open in the evening. *U.S. v. Westchester County*, 571 F. Supp. 786 (S.D.N.Y. 1983). The FAA also lawfully refused to re-certify the same airport for commercial aircraft until the breach was corrected. *New York v. FAA*, 712 F.2d 806, 809 (2nd Cir. 1983). When the San Francisco Airport violated its grant assurances with respect to non-discrimination, the FAA lawfully rejected its grant applications during the years of non-compliance. *City and County of San Francisco v. FAA*, 942 F.2d 1391 (9th Cir. 1991), *cert. denied*, 503 U.S. 983 (1992). A Colorado airport recently had a similar experience. *Arapahoe*, 242 F.3d at 1220.