

**STATE OF ALASKA DEPARTMENT OF NATURAL RESOURCES
DIVISION OF MINING, LAND AND WATER
SOUTHEAST REGIONAL LAND OFFICE**

Preliminary Decision
Elma Barbara May - ADL 109354
Proposed Tideland Lease
AS 38.05.075(c)

Related Action
Proposed Special Exception to the Central/Southern Southeast Area Plan
AS 38.04.065

Proposed Actions

Preliminary Decision: Elma Barbara May Tideland Lease – ADL 109354

Attachment 1. Development Plan

Attachment 2. Standard Lease Agreement and Special Stipulations

Attachment 3. Special Exception to CSSEAP

Attachment 4. Senior Citizens Exemption

The public is also invited to comment on the proposed related action:

Special Exception to the Central/Southern Southeast Area Plan (CSSEAP)

Primary Proposed Action

The primary proposed action of this Preliminary Decision (PD) is the State’s preliminary finding regarding a proposed disposal of interest in state land. The Department of Natural Resources (DNR), Division of Mining, Land & Water (DMLW) intends to issue a 55-year lease to Elma Barbara May (the Applicant) to allow 1,500 cubic yards of tideland fill, rip rap material, and portions of a private retaining wall placed in 1981 to remain on state-owned tidelands. The total lease boundary requested by the Applicant is approximately 3,700 square feet (0.08 acres). Final acreage and legal description will be determined by an approved survey of the leasehold.

In December of 2023, the Applicant served DMLW with a complaint requesting: (1) quiet title to the land to the pre-fill mean high-water line; and (2) approval of a tidelands lease for the portion of state-owned land that presently holds unauthorized tideland fill, rip rap, and retaining wall.¹ The Applicant followed that complaint with a formal application to DMLW, received January 31, 2024, to lease the tidelands to address the Applicant’s existing improvements.

¹ Complaint to Quiet Title, *Elma Barbara May v. State of Alaska, Dept. of Nat. Resources*, Case No. 1KN-23-00345CI (December 7, 2023).

Therefore, this lease application is being reviewed in the context of litigation. Further, the quiet title portion of that litigation will provide relevant information for the adjudication of the tidelands lease. A development plan is included as Attachment 1.

Lastly, with her lease application, the Applicant also requested a senior citizen exemption pursuant to AS 38.05.098.

Related Proposed Action

DMLW proposes a special exception to the Central/Southern Southeast Area Plan (CSSEAP) as a related but separate action. A special exception is a type of revision to an area plan that allows a one-time, limited-purpose variance of the plan's provisions, without changing the plan's general management intent or guidelines. (AS 38.04.065, 11 AAC 55.030(f)(1)(B)).

The CSSEAP prohibits filling state tidelands for residential purposes.² DMLW proposes a special exception from this prohibition in order to authorize the fill that was placed in state tidelands in 1981, which supports the structure of the adjacent house. A special exception is appropriate because it would be excessively burdensome, impractical, and inequitable to the Applicant to exclude existing improvements and/or remove the tideland fill supporting residential improvements. Refer to the planning and classification subsection of this decision and Attachment 3 for more information on the proposed special exception.

The special exception will be developed separately; however, public notice will be conducted concurrently.

Scope of Decision

The scope of this decision is limited to (1) the determination of whether or not the State will issue a 55-year lease to the Applicant and (2) the determination of whether the Applicant meets the qualifications for a senior citizens exemption. The administrative review for this authorization is defined by AS 38.05.035(e)(1)-(2) and AS 38.05.098 and is limited to (1) reasonably foreseeable, significant effects of the uses to be authorized; (2) applicable statutes and regulations; (3) facts pertaining to the land or resources that are known to the director or knowledge of which is made available to the director during the administrative review; and (4) issues that are material to the determination.

Authority

This lease application is adjudicated pursuant to AS 38.05.035(b)(1) and AS 38.05.035(e) Powers and Duties of the Director, AS 38.05.070 Generally, AS 38.05.075 Leasing Procedures, and AS 38.05.945 Notice. The authority to execute the PD, FFD, and the lease has been

² *Central/Southern Southeast Area Plan, 2-49* (Nov. 2000), available at <https://dnr.alaska.gov/mlw/planning/areaplans/cs-southeast/pdf/csseap-2000-adopt-complete.pdf>.

delegated to the Regional Managers of DMLW. With her lease application, the Applicant also requested a senior citizen exemption pursuant to AS 38.05.098.

For related actions: The authority to revise area plans derives from AS 38.04.065(b); 11 AAC 55.030(f) defines when a revision constitutes a special exception. The authority to approve special exceptions has been delegated from the Director of DMLW to Section Managers and Regional Managers by Department Order 03, in accordance with AS 38.05.035(b)(1).

Administrative Record

The administrative record for the proposed action consists of the CSSEAP and other classification references described herein; and all casefiles related to the application, serialized by DNR as ADL 109354, ADL 107462, and LAS 32013.

Location Information

The parcel is located in Ketchikan, Alaska, on a navigable body of water within the Tongass Narrows. The site is on state tide and submerged land seaward and adjacent to residential property located at 4468 South Tongass Highway in Ketchikan, Alaska.

Municipality: Ketchikan Gateway Borough

Regional Corporation: Sealaska

Village Corporation: Cape Fox Corporation

Federally Recognized Tribes: Ketchikan Indian Corporation, Central Council Tlingit and Haida Indian Tribes of Alaska, Metlakatla Indian Community, Organized Village of Saxman

Property Description

The proposed lease and associated special exception areas are located within Section 3, Township 76 South, Range 91 East, Copper River Meridian and more particularly located seaward and adjacent to Lot A of Nichols View Subdivision as recorded on U.S. Survey 1769, filed as Plat No. 76-5, Ketchikan Recording District. The proposed lease boundary contains approximately 3,700 square feet (0.08 acres), more or less.

Title

The State of Alaska holds title to lands beneath tidally influenced and navigable waterways within its jurisdiction, including lands underlying Tongass Narrows in the section(s) referenced above, on the basis of the Equal Footing Doctrine, the Submerged Lands Act of 1953 (42 U.S.C. §§ 1301 *et seq.*), and AS 38.04.062 (Identification of State Submerged Lands).

Adjacent Landowners

- Daniel and Jennifer Castle: Adjacent to the Northwest and located at 4430 South Tongass Highway
- Lisa Olson Murphy Living Trust: Adjacent to the Southeast and located at 4492 South Tongass Highway

Prior Existing Rights

No prior existing rights to the leasehold location are known at this time. It follows that issuance of the tideland lease will not interfere with prior existing rights to the leased land.

Planning and Classification

The proposed lease area is located entirely within unit KT-61 of the CSSEAP. Unit KT-61 has designations of Waterfront development, Shoreline development, and Recreation, Undeveloped, which converts to classifications of “Settlement land” (11 AAC 55.202), “Waterfront Development land” (11 AAC 55.215), and “Public Recreation land” (11 AAC 55.160).

For Management Intent of KT-61, the CSSEAP provides:

“This parcel, situated south of the City of Ketchikan, contains a diversity of uses, some of which are quite intense. Portions of the parcel are designated Sd (Shoreline Development) and Ru (Recreation, Undeveloped). The areas of the Ru designation coincide with areas of PLI zoning. These areas adjoin the South Tongass Highway and have good views of Annette and other islands. Areas designated Ru are to be managed to insure the continuation of this viewshed. Only authorizations compatible with this intent are appropriate.” (CSSEAP 3-319).

In addition to the site-specific designation, the CSSEAP area-wide land management guidelines for shoreline, stream corridor and coastal area management provides guidelines for filling tidelands for residential purposes. It specifically states that “filling state tidelands and submerged lands for residential purposes will not be allowed.” (CSSEAP 2-49).

The placement of fill, rip rap material, and retaining wall is not compatible with the area-wide land management guidelines of this area because it was placed in the tidelands for a private, residential purpose.

In order to effectuate this action, a special exception will be necessary as required under 11 AAC 55.030. Under this section of regulation, a special exception does not permanently change the provisions of an area plan and is a one-time, limited-purpose action that does not change the classification or general management intent and guidelines for this unit.

DMLW has determined that a special exception is justified because the current use predates the area plan; an authorization will legalize the existing use; and complying with the CSSEAP by removing the fill would be excessively burdensome, impractical, and could ultimately degrade the integrity of the land further than leaving the improvements in place. The issuance of the special exception will not change the basic management intent of the area plan as it is applied to management unit KT-61. The special exception is also consistent with the parcel’s management intent for the Ru designated land in unit KT-61, which is to maintain the viewshed. Because the fill and adjacent house predate the CSSEAP, the special exception would not alter the viewshed from what existed at the time of the CSSEAP’s implementation.

The special exception is under review and attached to this decision as a related action. It intends to exempt only the project area described above from the CSSEAP's prohibition of tideland fill for residential purposes and allows DMLW to lease the tidelands to the upland landowner for tideland fill for residential purposes.

Local Planning: The project area is within the Ketchikan Gateway Borough.

Traditional Use Finding

Before approving a lease in an unorganized borough, DMLW must consider whether the lease could result in potential conflicts with the traditional uses of the land (AS 38.05.830). Because the Applicant's proposed leasehold is located in an organized borough (Ketchikan Gateway Borough), a traditional use finding is not required. The Borough will be notified of this Preliminary Decision.

Access

Physical and legal access to the proposed lease site is provided through the Applicant's adjacent upland property located at 4468 South Tongass Highway, Ketchikan, Alaska.

Access Along Public Waters

The site is located on Nichols Passage. Pursuant to AS 38.05.126(a), the public has a constitutional right to free access to, and use of, navigable or public waters of the State of Alaska. Under 11 AAC 51.045 and AS 38.05.127, DMLW is required to reserve specific public-access easements to and along these waters. Unless comments and other information submitted to DMLW provide justifiable and convincing evidence to do otherwise, this disposal of state interest will be subject to a 50-foot public access easement seaward of the line of mean high water.

Public Trust Doctrine

Pursuant to AS 38.05.126, the proposed lease will be subject to the principles of the Public Trust Doctrine; specifically, the right of the public to use navigable waterways and the land beneath them for: navigation, commerce, fishing, hunting, protection of areas for ecological studies, and other purposes. These rights must be protected to the maximum extent practicable while allowing for the development of this project. As such, DMLW is reserving the right to grant other authorizations to the subject area consistent with the Public Trust Doctrine.

Reservation of Mineral Estate

In accordance with section 6(i) of the Alaska Statehood Act and AS 38.05.125, the State, in this decision, reserves unto itself the mineral estate, including oil and gas, and the rights expressed in the reservation clause of the statute, that being the right to reasonable access to the surface for purposes of exploring for, developing, and producing the reserved mineral resources. Exploration and development, if any, which could occur, would be consistent with AS 38.05.130 and other applicable statutes and regulations.

Mineral Orders

The proposed leasehold does not fall within the areas delineated in an Administrative Mineral Closing Order (MCO). Neither an MCO nor a leasehold location order is necessary or appropriate for this lease.

Hazardous Materials and Potential Contaminants

Hazardous materials will not be stored within the proposed leasehold. The use and storage of any hazardous substances must be done in accordance with existing federal, state, and local laws. Debris (such as soil) contaminated with used motor oil, solvents, or other chemicals may be classified as a hazardous substance and must be removed from the leasehold and disposed of in accordance with state and federal law.

Agency Review

An agency review was conducted from February 12, 2024, to February 26, 2024. Agency review was shortened to 14 days due to the expedited timeline. Agencies were given the opportunity to extend their review time if necessary. An additional agency review was conducted from February 23, 2024, to March 8, 2024, to note the necessary special exception to the area plan.

The following agencies were included in both reviews:

- ADF&G – Wildlife Conservation
- ADF&G – Habitat Division
- DEC – Commissioners Office
- DEC – Water Plan Review Section Manager
- DNR DMLW OHA – Review & Compliance
- DOT&PF – Statewide Right-Of-Way Chief
- AK Association of Conservation Districts

Agency Review Comment and Response:

ADF&G Comment: ADF&G stated that it had no objections to the issuance of the authorization.

DMLW Response: No response needed.

Background

On March 11, 1981, the U.S. Army Corps of Engineers (USACE) granted Herbert Chambers (late husband of the Applicant and owner of Lot A, USS 1769) a permit to place 1,500 cubic yards of fill on state-owned tidelands. After obtaining the USACE permit, Mr. Chambers placed improvements extending beyond the meander line and below the mean high-water line of plat 1964-000898-0. The improvements included tideland fill, rip rap material, and a retaining wall. Portions of the adjacent residence were then built on top of the improvements that extended into state-owned tidelands, as seen on the development plan (Attachment 1). Mr. Chambers did not seek state authorization for the improvements placed on state-owned tidelands.

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Elma Barbara May

In November of 2000, the CSSEAP was adopted. The CSSEAP states that “filling state tidelands and submerged lands for residential purposes will not be allowed” for the area in question. (CSSEAP 2-49).

On April 6, 2006, the Applicant submitted an application, serialized as ADL 107462, to DMLW for purchase of the encroachment area on state-owned tidelands below the mean high-water line.

In response to that application, DMLW informed the Applicant that the State could not sell state-owned tidelands and that the CSSEAP prohibited tideland fill for residential purposes. On September 25, 2006, the applicant submitted an amended application for ADL 107462 to lease the state-owned tidelands. DMLW did not move forward with adjudication of that lease application.

On November 3, 2017, DMLW issued a 25-year Special Land Use Permit (SLUP) to the Applicant. In June of 2021, the Applicant discovered that the terms and conditions of the SLUP were impeding the prospective sale of her home.

In December 2023, the Applicant served DMLW with a complaint requesting: (1) quiet title to the land to the pre-fill, mean high-water line of the 1964 plat; and (2) approval of a lease for the state-owned tidelands that hold the original fill, rip rap, and retaining wall that encroached below the pre-fill, mean high-water line of the 1964 plat.³ On January 31, 2024, the Applicant followed that complaint with a formal application to DMLW to lease the tidelands to address the Applicant’s existing improvements.

Discussion

The Applicant has been working in good faith with DMLW to seek a solution to the tideland encroachment since their original application to lease state land in 2006. ADL 109354 intends to authorize a lease of state tidelands that contain the improvements and provide a disposal of interest in the land to the Applicant.

Pursuant to AS 38.05.075(c)(1), the director must also determine that the lease of tideland “is necessary to facilitate water transportation of goods, services, or resources to or from the owned or leased upland or for another water-dependent purpose.” In this case, the residential structure’s foundation is fundamentally dependent on the existing fill, rip rap, and retaining wall which were placed on state-owned tidelands. Without these improvements, the foundation of the home would be compromised.

³ Complaint to Quiet Title, *Elma Barbara May v. State of Alaska, Dept. of Nat. Resources*, Case No. 1KN-23-00345CI (December 7, 2023).

Pursuant to AS 38.05.075(c)(2), in order to grant a preference right for a lease of tideland without competitive bidding, the director must determine that the proposed use of tideland “is compatible with the classification of the land.” The attached related action is a special exception to the CSSEAP that allows DMLW to exempt the project area from the CSSEAP’s prohibition of tideland fill for residential purposes. Under the special exception, ADL 109354 tideland use will be compatible with the classification of the proposed area.

Lastly, without this authorization from DMLW, the Applicant would be unable to sell her home due to the terms and conditions of the current SLUP. There are no other known alternatives to resolve or further address the encroachment area and needs of the Applicant. Therefore, DMLW intends to authorize ADL 109354 as a 55-year tideland lease to the Applicant.

The lease shall be subject to the standard DMLW Lease Agreement, Special Stipulations, and the terms and conditions set forth therein (Attachment 2).

Development Plan

The Development Plan (DP) attached to this decision (Attachment 1) and dated March 18, 2024, is under consideration by DMLW. No additional developments are intended to be authorized or amended under ADL 109354. Any new improvements will require a full adjudication process by DMLW to determine whether they conform to area guidelines and management intent.

Entry Authorization

Pursuant to AS 38.05.075(f), DMLW will authorize the Applicant’s entry onto state land through the issuance of an Entry Authorization (EA) to allow completion of the required survey described below. The proposed EA is for a term of two years and would be issued after the Final Decision becomes effective. Once the conditions of the EA are met, the lease will be issued. The total lease term is inclusive of the term of the EA.

Performance Guaranty

In accordance with AS 38.05.035, AS 38.05.860, and 11 AAC 96.060(a) Performance Guaranty, the applicant would typically be required to submit performance guaranties for the lease to incentivize performance of the conditions of the lease. This provides a mechanism for the state to ensure that the lessee shares any financial costs associated with noncompliance of the lease agreement for site cleanup, restoration, and any associated costs after termination or expiration of the leases.

In consideration of the low risk associated with the proposed use, the residential structures’ foundational dependence on the use, and with the improvements having been in place since 1981 with no record of site-specific concerns since that time, the performance guaranty requirements are waived for ADL 109354. However, the State of Alaska reserves the right to require one in the future, should the need arise due to changes in statutes or increased use of the area.

Insurance

In accordance with 11 AAC 96.065, after consideration of the low risk associated with the proposed use, insurance is not required at this time. DMLW reserves the right to require insurance during the term of the easement.

Survey

In accordance with AS 38.04.045, the Applicant must complete an approved survey that meets the standards of DMLW's Surveys Section prior to lease issuance. The measurements identified in the approved survey will be used to accurately calculate the total acreage as well as provide an accurate legal description of the leasehold. The survey must be performed by a registered Land Surveyor under survey instructions issued by the Surveys Section. The Applicant is responsible for the cost of the survey. The Applicant shall submit an initial draft of the survey at least one year prior to the expiration of the EA. Within 10 business days of the execution of the EA, the Applicant shall contact the DMLW Surveys Section at (907) 269-8523 to obtain instructions.

Compensation**Annual Land Use Fees:**

Pursuant to AS 38.05.098 Senior Citizens Exemption, the annual land use fee will be waived for this applicant only (see Attachment 4).

Periodic Rate Adjustment:

In accordance with AS 38.05.105, the annual land use fee payment will be subject to adjustment at five-year intervals after the issuance of the lease.

Appraisal

With the waiver of annual land use fees, obtaining a fair market value appraisal will not be necessary or required of this applicant.

Assignment

Upon assignment of the lease, the assignee must consider their qualifications for AS 38.05.098 requirements. If the assignee does not qualify for the AS 38.05.098 exemption, the assignee will be responsible for paying any and all fees associated with the authorization. This may include a minimum rent determination or a fair market value appraisal to determine necessary lease compensation.

For information on eligibility of meeting AS 38.05.098 requirements, contact the Southeast Regional Land Office at:

Department of Natural Resources
Division of Mining, Land & Water
PO Box 111020
Juneau, AK 99811-1020
Phone: 907-465-3400

For information on general appraisal requirements and acceptable appraisers, contact the Chief Review Appraiser at:

Department of Natural Resources
Division of Mining, Land & Water
550 West 7th Ave., Suite 1050-A
Anchorage, AK 99501-3579
Phone: 907-269-8512
Fax: 907-269-8914

Public Notice

Pursuant to AS 38.05.945, this PD and the associated special exception to the CSSEAP will be noticed for a 30-day public comment period, starting on May 15, 2024. In addition, the post office(s) located near the proposed leasehold will be requested to post the notice pursuant to AS 38.05.945(b)(3)(C). The notice will also be posted on the State of Alaska Online Public Notice website pursuant to AS 38.05.945(b)(3)(B) located at: <https://aws.state.ak.us/OnlinePublicNotices/Default.aspx>. In accordance with AS 38.05.946, a municipality or a corporation entitled to receive notice under AS 38.05.945(c) may hold a hearing within 30 days after the receipt of the notice.

Comments

The public is invited to comment on this PD and the special exception to the CSSEAP. All timely, written comments received during the public comment period will be considered in the FFD. If public comments result in significant changes to the PD, additional public notice may be given. A copy of the FFD, along with instructions on filing an appeal, will be sent to all persons who comment on the PD. In accordance with AS 38.05.035(i) and 11 AAC 02.010, only persons who submit written comments during the public comment period and who are affected by the FFD will be eligible to file an administrative appeal of the FFD. An administrative appeal of the FFD must be filed within 20 days after issuance of the FFD.

To submit comments please choose one of the following methods:

Mail: Department of Natural Resources
Division of Mining, Land and Water
Southeast Region Office
ATTN: *Laurel Smith*
400 Willoughby Avenue, 4th Floor
PO Box 111020
Juneau, AK 99811-1020
Email: laurel.smith@alaska.gov
Fax: (907) 500 - 9011

Questions about the lease portion of this project can be directed to *laurel.smith@alaska.gov* at (907) 465-3524.

Written comments about this project must be received in this office no later than 5:00 PM on June 18, 2024, to be considered.

Signature page follows:

Adjudicator Recommendation

Based on the information provided by the applicant and other agencies, as well as review of planning documents, statutes, and regulations, I recommend approving a 55-year lease to the Applicant to allow 1,500 cubic yards of tideland fill, rip rap material, and portions of a private retaining wall to remain on state-owned tidelands for the foundation of the adjacent house. I recommend proceeding to public notice for the purpose of providing the members of the public and those entities identified in AS 38.05.945 an opportunity to review and submit comments.

Laurel Smith
Laurel Smith, Natural Resources Specialist

05/15/2024
Date

Unit Manager Concurrence

Mason Auger
Mason Auger, Natural Resources Manager

5/15/2024
Date

Preliminary Decision

It is the determination of the Division of Mining, Land & Water that the State will issue a 55-year lease to the applicant, as described above. This preliminary decision shall now proceed to public notice.

Kaitlyn Raffier
Kaitlyn Raffier, Southeast Regional Manager

5/15/2024
Date

ATTACHMENTS:

- Attachment 1. Development Plan
- Attachment 2. Standard Lease Agreement and Special Stipulations
- Attachment 3. Special Exception to CSSEAP
- Attachment 4. Senior Citizens Exemption