

Memorandum of Agreement
Between the Haines Borough
& the Alaska Department of Transportation & Public Facilities
for the Haines – Beach Road Widening and Front Street Intersection
Improvements
(AKDOT&PF Project # 69316)

I. Introduction and Acknowledgments

This is an agreement between the State of Alaska, Department of Transportation and Public Facilities (DOT&PF) and the Haines Borough (Borough) regarding the *Haines – Beach Road Widening & Front Street Intersection Improvements* (Project No. 69316) (“the Project”). Attachment “A” is a schematic description of the Project. A portion of the Project involves improving the intersection of Front Street and Beach Road by re-aligning the intersection.

The parties acknowledge that the Borough has historically maintained Front Street between Main Street and the Beach Road intersection.

The parties acknowledge that the improvements to Front Street will include repaving and improvements to drainage.

The parties acknowledge that portions of Front Street, including sidewalks, are outside of the right of way as it is currently platted.

The parties also acknowledge that the Project will include a modification of the intersection with Beach Road, which will require the inclusion of tidelands owned by the Borough.

II. Project Scope

DOT&PF will plan, design, and construct roadway improvements on Front Street, including the realignment of the Front Street intersection with Beach Road. This Project will use cruise ship related state funds for planning, design, and construction.

The Borough will dedicate rights of way for the proposed improvements and provide temporary construction easements to complete the work to the State as needed for the

Project at no cost to the State, replat Front Street to conform the right of way corridor to the actual street and sidewalk, and continue to maintain Front Street.

III. Planning, Design, Construction, and Ownership of the Project and Improvements

A. Project Developed in Stages or Phases

The Project will be broken down into two phases (preliminary engineering through final PS&E, and construction).

B. DOT&PF's Responsibilities

DOT&PF shall:

- Ensure that the state funds appropriated for the Project are expended in accordance with State laws and regulations.
 - Plan, design, and construct the Project.
 - Donate necessary rights of way to the Borough, with reversionary interests.
 - Obtain NEPA documentation as needed, and keep an interested parties list.
 - Develop Requests for Proposals ("RFPs") and enter into contracts for engineering services to develop the Project.
 - Execute and manage any professional services agreements as necessary.
 - Keep the Borough point-of-contact informed of Project status.
 - Charge staff time and expenses to the Project.
 - Submit plan set to the Borough for review when design is approximately 35% complete.
 - When design is 95% complete, submit to the Borough for review and comment on the plans, specification and estimate (PS&E) that will go to advertisement for bid solicitation.
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- Submit the final Plans, Specifications and Estimate package to the Borough for approval prior to advertising the project for bids.
 - Cooperate with the Borough's replatting of the Front Street right of way including

vacating existing rights of way held by the DOT&PF as needed to realign and replat the right of way.

C. The Borough's Responsibilities

The Borough shall:

- Provide project management staff for coordination and review as needed with no cost to the Project.
- Authorize the DOT&PF and its contractors on the Project to conduct the necessary work within the Borough road rights-of-way, and provide the DOT&PF with construction easements and such other interests as required to meet state right-of-way certification requirements.
- Inspect the Project right-of-way and property prior to Project closeout. The Borough may perform an environmental assessment of that property for the purpose of determining whether any hazardous material contaminates the property. For purposes of this agreement, a "hazardous material" is any chemical, metal, petroleum product, or other substance (or any combination of hazardous materials) that is designated as "hazardous" by the U.S. Environmental Protection Agency and that is regulated by any government agency in any quantity as a contaminant, hazardous material, or threat to health or safety.
- Accept full ownership and complete responsibility for each phase or stage of the Project, and all improvements thereon, upon substantial completion of each phase or stage. The Borough will accept ownership for the Project by Deed of Relinquishment, substantially similar to that found at Attachment D, the adequacy of which is acknowledged by this MOA. The Borough acceptance of ownership is not a direct or implied waiver of a contractor's responsibility to satisfactorily complete the work.
- Dedicate portions of the tideland and upland parcels, depicted in Attachments B & C, in perpetuity as a transportation and utility corridor right of way.
- The Borough will replat Front Street so that certain areas, owned by the Borough, which are in fact a part of the street and sidewalk, but outside of the currently depicted right of

way, will accurately be included in the realigned, replatted right of way. These areas are shown by Attachment "C" to this agreement.

IV. PROJECT ADMINISTRATION

Except as otherwise expressly stated in this MOA, the DOT&PF shall be solely responsible for all Project procurements.

Except as otherwise expressly stated in this MOA, the DOT&PF will be solely responsible for the administration of all Project contracts, in accordance with its contract(s) with the contractor(s) ("construction contract(s)"). The Borough has no direct or implied right to enforce any terms or conditions of any professional services or construction contracts against either the DOT&PF or the contractor(s) except where there is alleged Project mismanagement premised upon the DOT&PF's gross negligence, recklessness, or intentional misconduct. Nothing herein shall be read to modify the scope of AS 09.50.250 or to waive any provisions thereof.

V. FINAL INSPECTION

Representatives of the Borough and the DOT&PF may jointly conduct final inspections of each phase or stage of the Project's construction. The DOT&PF shall, however, determine when each such phase or stage of the Project reaches the point of substantial completion. The term "substantial completion" as used in this MOA means that the construction is sufficiently completed to allow the owner or a person authorized by the owner: A) to occupy the phase or stage constructed and improvements thereon; or B) to use the phase or stage constructed and improvements thereon in the manner for which they were intended.

The DOT&PF shall provide the Borough with an "As Built" of the Project and all improvements at Project closeout.

VI. THE BOROUGH'S RIGHT-OF-WAY, OPERATIONS, AND MAINTENANCE OBLIGATIONS

The Borough's right-of-way, operations, and maintenance duties for any stage or phase of the Project shall commence on the date of substantial completion of that stage or phase. The Borough agrees that its obligations with regard to the Project's right-of-way, operations, and maintenance include the following:

A. The Borough agrees to perform, at its own expense, those right-of-way, operations, and maintenance obligations required by the use of State funds. In carrying out these obligations, the Borough's duties include:

1. Those identified in 23 C.F.R. §1.23 ("Rights-of-Way") and 23 C.F.R. §1.27 ("Maintenance"), which would otherwise be required of the DOT&PF if the DOT&PF owned the facility and improvements constructed under this MOA;

2. Management of the right-of-way and any utilities in accordance with relevant sections of 23 CFR Part 710 ("Right-of-Way and Real Estate") and 23 C.F.R. Part 645 ("Utilities");

3. Complying with the DOT&PF's Right-of-Way Manual;

4. Conducting oversight and management of utilities located in any Project right-of-way consistent with the DOT&PF's Utility Manual, and complying with the utility policies and requirements set forth in AS 19.25.010-020 and 17 AAC 15;

5. Allowing no encroachments within the right-of-way of the Project without the prior consent of the DOT&PF;

6. Restraint from selling or conveying any portion of the right-of-way without prior consent from the DOT&PF. In the event that the DOT&PF gives its consent to the disposal of any portion of right-of-way acquired with state funds for the Project, the Borough shall pay proceeds of the sale to the DOT&PF, which the DOT&PF will credit to the appropriate State accounts, based on the percentage of State match;

7. Issuing permits as required by the foregoing duties, and assuming sole responsibility for enforcement of all terms and conditions of such permits.

B. The Borough agrees to maintain and operate the Project consistent with 23 C.F.R. §1.27 and the DOT&PF's Alaska Highway Maintenance and Operations Manual ("AHMOM"). In the event of conflict between 23 C.F.R. §1.27 and AHMOM, the more

stringent provisions will establish the minimum standards with which the Borough must comply.

C. The Borough shall perform all operation and maintenance activities required by this MOA at its own expense and without reimbursement from the DOT&PF. Maintenance activities include, but are not limited to:

1. Planning, scheduling, administration, and logistics of maintenance activities;
2. Traffic control and safety;
3. Embankment protection, including erosion control, to as-built conditions;
4. Roadside management;
5. Guardrails and guardrail end treatments;
6. Snow and ice control, including all plowing, sanding, culvert and storm sewer thawing, snow hauling, winging, opening of shoulders, ice scraping, drift control, snow slide removal, and associated tasks as may be required for the safe and timely passage of the public;
7. Maintaining signs and delineators in an as-built condition and their replacement, including posts and foundations, when damaged, unreadable, or worn out;
8. Highway marking and repainting as required to maintain performance of their intended function;
9. Removal of debris, rubbish, and dead animals;
10. Signing of seasonal weight restrictions as may be required by local conditions;
11. Pothole repair using the appropriate asphalt or concrete products on an as-needed basis;
12. Annual crack sealing;

1. VII. TERM

2. This MOA shall become effective on the date of the last signature and shall

apply in perpetuity.

3.

VIII. INCORPORATION CLAUSE

The Borough shall comply with all applicable Federal and State laws, regulations, executive orders, stewardship agreements, and applicable DOT&PF manuals and guidelines, including those provisions that would apply to the DOT&PF if the DOT&PF were to perform those tasks to be performed under this MOA by the Borough. This obligation is in addition to compliance with any law, regulation, or executive order specifically referenced in this MOA.

1. IX. INDEMNIFICATION

1. After acceptance of the Project, The Borough shall hold the DOT&PF, the State, its officers, employees, and agents (collectively, "the State") harmless from and defend and indemnify the State for liability, claims, or causes of action arising out of this MOA or relating to the Project or property and facilities being transferred and the obligations being assigned.

(a) Notwithstanding the foregoing, the Borough shall have no obligation to hold harmless and indemnify the State for breach of contract claims arising out of the construction contract between the State and the general contractor for the Project and for other claims related to the Project to the extent the State is determined to be liable for its own acts or omissions, except that:

(i) to the maximum extent allowed by law, the Borough shall hold the State harmless from and indemnify the State for liability, claims, or causes of action arising from an alleged defect in the design or construction of any facility transferred to the Borough pursuant to this MOA, regardless of negligence or other fault, if such liability, claim, or cause of action arises out of an incident that occurs more than two years after the DOT&PF transfers ownership and maintenance responsibilities for the facility.

(b). The Borough's duty to defend shall apply regardless of whether it is also alleged that the State's acts or omissions contributed to the injury (including injury to personal

property, real property or persons, including fatal injury).

(c) Neither liability, claims or causes of action arising from injuries which occurred prior to the date of a transfer, nor liabilities imposed by or claims or causes of action arising from or asserted under AS 46.03.822, shall be governed by this paragraph.

2. The DOT&PF shall add a special provision to its bid documents extending the protections of Standard Specification 107-1.13 to the Borough. The DOT&PF shall add a special provision to its bid documents requiring the Borough to be listed as an additional insured in all instances where the successful bidder would be required to add the DOT&PF as an additional insured. The Borough shall have the right to enforce these provisions against the successful bidder.

X. EACH PARTY IS AN INDEPENDENT CONTRACTOR

For the purposes of this Agreement and all services to be provided hereunder, each party shall be, and shall be deemed to be, an independent contractor and not a partner, agent, or employee of the other party. Neither party shall have authority to make any statements, representations, or commitments of any kind, or to take any action, which shall be binding on the other party, except as may be explicitly provided for herein or authorized by the other party in writing.

XI. CANCELLATION REMEDIES

1. If the Borough requests cancellation of any professional services, consultant or construction contracts entered into by the DOT&PF, the Borough shall be responsible for those costs not accepted for reimbursement by the State, amounts the State expects to be reimbursed for, and any other costs or expenses incurred by the Borough or the DOT&PF in the Project to the date of cancellation or related to finalizing cancellation and Project termination.

2. If the DOT&PF was the sole cause of the cancellation, the DOT&PF shall bear those costs not accepted for reimbursement by the State, amounts the State expects to be reimbursed for, and any other costs or expenses incurred by the Borough or the DOT&PF in

the Project to the date of cancellation or related to finalizing cancellation and Project termination.

3. If it is determined that the cancellation was caused by third parties or circumstances beyond the control of the DOT&PF or the Borough, the Borough shall be responsible for those costs not accepted for reimbursement by the State, amounts the State expects to be reimbursed for, and any other costs or expenses incurred by the Borough or the DOT&PF for the Project to the date of cancellation or related to finalizing cancellation and Project termination.

4. The foregoing remedies are in addition to any other remedies referenced in this MOA, and do not bar or limit the DOT&PF from resorting to any other remedy available at law or equity.

XII. PENALTY FOR BREACH OF MAINTENANCE OBLIGATIONS

1.

A. Notification and Opportunity to Cure

If either party is notified by the other party in writing that it is in violation of any of the terms, conditions, or provisions of this Agreement, the party receiving the notice shall have thirty (30) days from the date of such notification to remedy the violation; or, if the remedy will take in excess of thirty (30) days to complete, the party receiving the notice shall have thirty (30) days to commence implementation of a satisfactory remedy.

Expiration of the thirty (30) days and failure by the party receiving the notice to remedy is a breach of this MOA. If the party receiving the notice is in substantial breach, the other party may elect to terminate this MOA. If the breaching party is the Borough, failure to implement a satisfactory remedy will also result in the DOT&PF not considering any Borough contribution in evaluating the Borough's municipal capital improvement project nominations in the six years after breach (17 AAC 05).

B. Remedies

In the event of breach of the Borough's obligations to own, maintain and operate the Project or its improvements, damages shall include, but are not limited to:

1. Return of the State funds expended on the Project under this MOA;
2. Reimbursement to the DOT&PF for any costs incurred by the DOT&PF which are directly or indirectly related to fulfilling any of the Borough's contractual commitments; and
3. Withholding of approval of future state-funded projects until such time as the Borough puts the Project in a state of compliance with this MOA.

XIII. MISCELLANEOUS PROVISIONS

1. A. **Amendment or modification of Agreement:** This MOA may only be modified or amended by written agreement signed by authorized representatives for both Parties.

2. B. **The Whole Agreement:** This MOA constitutes the entire agreement between the Parties. There are no other understandings or agreements between the Parties, either oral or memorialized in writing regarding the matters addressed in this MOA. This MOA may not be amended by the Parties unless an amendment is agreed to in writing, with the both Parties signing through their authorized representatives.

3. C. **Assignment:** Without the written consent of the DOT&PF, this MOA is not assignable by the Borough either in whole or in part.

D. **Third Parties and Responsibilities for Claims:** Nothing in this MOA shall be construed as conferring any legal rights, privileges, or immunities, or imposing any legal duties or obligations, on any person or persons other than the Parties named in this MOA, whether such rights, privileges, immunities, duties or obligations be regarded as contractual, equitable, or beneficial in nature as to such other person or persons. Nothing in this MOA shall be construed as creating any legal relations between the DOT&PF and any person performing services or supplying any equipment, materials, goods, or supplies for the Project.

E. **Duty of Cooperation:** Each party agrees to provide reasonable access to the Project and to relevant Project records, to any authorized representatives of the other party or U.S. Government. The Borough and DOT&PF further agree to cooperate in good faith

with inquiries and requests for information relating to the Project or its obligations under this MOA.

F. **Necessary Approvals:** In the event that any election, referendum, ordinance, approval, permit, notice, or other proceeding or authorization is requisite under applicable law to enable the Borough to enter into this MOA or to undertake the Project, or to observe, assume or carry out any of the provisions of the MOA, the Borough will initiate and consummate, as provided by law, all actions necessary with respect to any such matters so requisite.

G. **Joint Drafting:** This MOA has been jointly drafted by the Parties, and each party has had the ability and opportunity to consult with its legal counsel prior to signature. The MOA shall not be construed for or against either party.

K. **Third Party Beneficiary Status:** The Borough is not an intended beneficiary of any contracts between the DOT&PF and any contractors, subcontractors or consultants or any other third parties, and has no contractual rights with respect to such contracts or any provisions thereof, unless expressly stated otherwise.

XIV. CONTACTS

1.

The DOTPF's contact is Keith Karpstein (keith.karpstein@alaska.gov; 465-1796), Engineering Manager for the Southeast Region, or as may be re-designated in writing from time to time. The Borough's contact is Mark Earnest (mearnest@haines.ak.us; 766-2231), Borough Manager, or as may be re-designated in writing from time to time.

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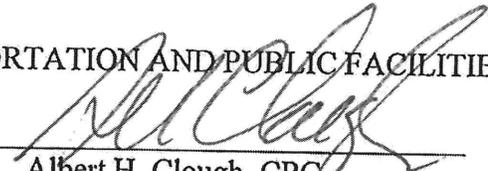
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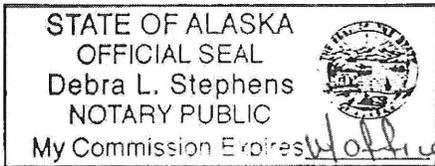
The undersigned agree to the terms of this Memorandum of Agreement:

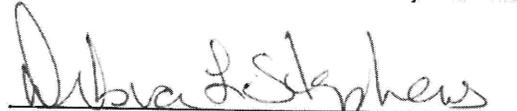
STATE OF ALASKA,
DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

Dated: 5.25.2012

By: 
Albert H. Clough, CPG
Regional Director, Southeast Region

SUBSCRIBED AND SWORN TO OR AFFIRMED before me by Albert H. Clough, who is Regional Director for the Southeast Region of the Alaska Department of Transportation & Public Facilities, an agency established under Alaska law, on this 25th day of May, 2012.



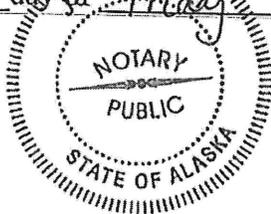

Notary Public, State of Alaska
My commission expires: w/office

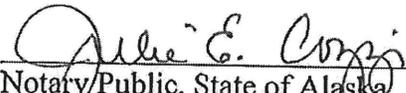
HAINES BOROUGH

Dated: 05/09/2012

By: 
Mark Earnest
Borough Manager, Haines Borough

SUBSCRIBED AND SWORN TO OR AFFIRMED before me by Mark Earnest, who is Borough Manager of the Haines Borough, a Municipality established under Alaska law, on this 9th day of May, 2012.




Notary Public, State of Alaska
My commission expires: 1-29-2013

HAINES BOROUGH
RESOLUTION No. 12-05-356

Adopted

A Resolution of the Haines Borough Assembly approving a proposed Memorandum of Agreement with the State of Alaska Department of Transportation and Public Facilities for the Beach Road Widening & Front Street Intersection Improvements project.

WHEREAS, state funding is available to improve Beach Road and Front Street, including the Beach Road/Front Street intersection ("the Project"); and

WHEREAS, the Haines Borough has previously maintained Front Street between Beach Road and Main Street; and

WHEREAS, in order to accomplish the Project it will be necessary to replat existing rights of way; and

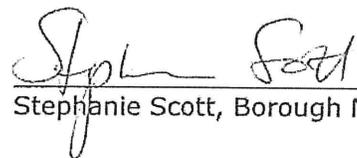
WHEREAS, the State of Alaska Department of Transportation and Public Facilities ("DOTPF") is willing to construct the Project provided the Borough is willing to maintain the Project after it has been completed,

NOW, THEREFORE, BE IT RESOLVED, as follows:

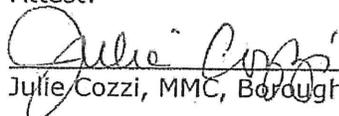
1. The Assembly approves the proposed memorandum of agreement between the Borough and DOTPF, and

2. The Borough Manager is authorized to sign all documents and take all action to finalize the memorandum of agreement between the Borough and DOTPF substantially in the form attached to this Resolution.

Adopted by a duly-constituted quorum of the Haines Borough Assembly on the 8th day of May, 2012.


Stephanie Scott, Borough Mayor

Attest:


Julie Cozzi, MMC, Borough Clerk

