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September 10, 2013

MEMORANDUM

To: Haines Borough Planning Commission

Re: Ocean Beauty Seafoods utility easements on Borough-
selected land (Excursion Inlet, ASLS 95-35)

From: Thomas E. Meacham, Attorney at Law
Retained counsel, Haines Borough
Our File No. 150-1

On your agenda for review and recommendation to the Haines Borough Assembly is a proposed Record of Survey and a proposed Easement Grant (Utility Line Easements). These involve existing improvements on the Excursion Inlet land that the Borough expects to eventually receive by patent from the State of Alaska, through the Municipal Land Selection Act process. A survey of this land has been completed (Alaska State Land Survey 95-35), and the Planning Commission approved it on March 14, 2012. ASLS 95-35 is expected to be approved by the State, and will then be recorded. Sometime after this recording, the State will issue its land patent to the Borough.

The Planning Commission's role in reviewing proposed Borough easement grants is established in Borough Code Section 14.16.190 C.

Background. The Borough has management authority over the Excursion Inlet tract, in anticipation of receiving title from the State to its approved selection. Ocean Beauty Seafoods LLC and its predecessor companies have constructed and maintained utility line improvements (water lines, sewer lines, and power lines) on this tract for many years, dating even prior to statehood. Ocean Beauty, through its predecessor companies, had many years ago applied to the Alaska Division of Lands (ADL) for easements covering these utility lines, but Ocean Beauty had never perfected its application.

In 2012, DNR directed Ocean Beauty to submit an as-built survey of their utilities if they wanted to complete their ADL easement applications. Ocean Beauty hired Lounsbury and Associates to perform the survey, but during the DNR review process of the as-built survey, the State Attorney General's office advised DNR that the agency no longer had the ability to grant such easements, due a time limit of 25 years from the date

of original application. This conclusion did not mean that Ocean Beauty's existing improvements disappeared, but instead that it would be up to the Haines Borough, as successor in title to the State, to conclude the longstanding easement application of Ocean Beauty involving its existing utility lines.

Lounsbury and Associates has prepared a proposed Record of Survey for Ocean Beauty that depicts the location and widths of the utility easements for which Ocean Beauty has applied. A copy of that Record of Survey is in your packet.

Also in your packet is a proposed Easement Grant (Utility Line Easements) that has been negotiated in concept between Ocean Beauty and the undersigned, as retained counsel for the Borough. This proposed Easement Grant, together with the Record of Survey, are before the Planning Commission for your review and recommendations to the Borough Assembly. The Assembly will be the final authority regarding Ocean Beauty's request for legal recognition of its utility easements, as pre-existing improvements on this land that the Borough will receive from the State.

When the State issues its patent to ASLS 95-35 (which could be a number of months from now), it is intended that the Borough will issue a quitclaim to Ocean Beauty regarding the easements, simply confirming the actions the Borough had earlier taken with its management authority over the Excursion Inlet land, but before issuance of the state patent.

Recommendation. Because Ocean Beauty's utility improvements have been in place for many years, I am recommending that the proposed Easement Grant be reviewed and sent forward with your approval to the Borough Assembly, for its action by way of adoption of a noncode ordinance under authority contained in the "negotiated lease" provision of Borough Code 14.16.160. The proposed Easement Grant (Utility Line Easements) is drafted with this approach in mind.

Under this approach, Ocean Beauty's lease from the Borough would not be treated as a "new" easement lease for new utilities to be constructed in the future. Instead, the proposed lease recognizes Ocean Beauty's position, as an existing occupant, to its claim of "valid existing rights" to easements for utilities constructed by it and which that have long been in place, even before the Borough applied for ownership of this land.

Thus, the present situation is quite similar to the mandatory provisions in state law that require recognition of the pre-statehood claims of "existing tidelands occupants," as legal preference right holders, any time the State proposes to transfer ownership of tidelands to a local government (Alaska Tidelands Act, AS 38.05.820-.825). These "occupants" did not have to show that they held any earlier, vested property right to the tideland (and in fact most did not); they needed only to show their occupancy and

improvement of tidelands before a certain date specified in the statute, and their continued use.

Because the present circumstances of Ocean Beauty on the Excursion Inlet uplands appear to be substantially parallel to this category of longstanding, existing occupants of tidelands, the recommended easement grant to Ocean Beauty would require Ocean Beauty to pay the costs of survey (which Ocean Beauty has done), but it would not be assessing a “fair market value” easement fee or lease rental charge for the easement grant. (The Borough would ordinarily be required to assess an easement rental fee based on a percentage of the fair market value under Borough Code 14.16, if this were a “brand-new” utility easement request coming from a new proposed user of Borough land).

If the Planning Commission takes the action recommended in this Memorandum, the Assembly’s consideration of the proposed Easement Grant to Ocean Beauty will be accompanied by a draft noncode ordinance to implement the Grant.

Easement Grant provisions. The proposed Easement Grant contains standard easement provisions intended to give both parties a level of legal certainty. Among the provisions are the following:

- a. incorporation of the Record of Survey that gives the precise location of the utility easements (Paragraphs 1 and 2);
- b. recognition of the existing location of Ocean Beauty’s utility lines within those easements, and its right to repair or install new lines within these easements (Paragraph 3);
- c. Ocean Beauty’s sole responsibility for repair and maintenance of the subject utility lines (Paragraph 6);
- d. the fact that the easements “run with the land,” meaning that the easement grant has no fixed termination date, and that if either Ocean Beauty or the Borough transfers its interests in this land, the easements will continue to exist in accordance with the terms of the Easement Grant (Paragraph 7);
- e. the setting of a period of five continuous years of non-use by Ocean Beauty of any particular easement segment, after which time the Borough could give notice to Ocean Beauty that it will terminate the unused segment of the easement, resulting in the extinguishment of that easement segment (Paragraph 9); and

f. Ocean Beauty's obligation to remove improvements and restore to an acceptable level any easement segment it voluntarily abandons, or that is extinguished by non-use (Paragraph 10).

Please contact me, through Mark Earnest, Borough Manager, if any member of the Planning wants further clarification regarding any of the issues discussed in this Memorandum.

EASEMENT GRANT
(UTILITY LINE EASEMENTS)

FOR AND IN CONSIDERATION of the sum of TEN DOLLARS (\$10.00) in hand paid, and other good and value consideration, HAINES BOROUGH, an Alaska Municipal Corporation, of P.O. Box 1209, Haines, Alaska 99827 (“Grantor”) hereby grants, bargains, sells, conveys unto OCEAN BEAUTY SEAFOODS LLC, an Alaska Limited Liability Company of P.O. Box 70739, Seattle, WA 98127 (“Grantee”) Utility Easements (“Easements”) as follows:

1. **Burdened Parcels:** The Easements cross that certain real property owned, or to be owned, by Grantor, and known as Tracts A, B1, B2, C, D, G, I, K and L, ASLS 95-35, according to Plat No. _____ filed in the Juneau Recording District, First Judicial District, State of Alaska (the “Burdened Parcels”).

2. **Easement Locations.** The Easements shall be located within the Burdened Parcels, and shall consist of the hatched areas shown on that certain “Record of Survey, Excursion Inlet Utility Easements” filed as Plat No. _____ in the Juneau Recording District, First Judicial District.

The sidelines at the exterior margins of the easements will be parallel with the surveyed centerline unless otherwise labeled with bearings and distances on said Record of Survey. The width from centerline to each sideline and the area of each Easement are shown on said Record of Survey.

The easements are identified as “E1” through “E28”, inclusive, on said Record of Survey. The easement(s) transversing each Burdened Parcel are identified as follows:

Tract A: E-1

Trace B1: E12

Tract B2: E10, E11

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Tract C: E2

Tract D: E4

Tract G: E3, E5

Tract I: E6, E7, E8, E9

Tract K: E16, E17, E18, E23, E25, E26, E27, E28

Tract L: E8, E13, E14, E15, E19, E20, E21, E22, E24

3. Easement Rights. These Easements grant Grantee the right to retain the existing water lines, sewer lines, and power lines (the “Utility Lines”) within the Easements in their current locations. Grantee may install new utility lines within the Easements, provided that the new lines do not materially increase the Easement burden on the Burdened Parcels. Grantee is further granted a right of access across the Burdened Parcels for the purpose of maintaining, repairing, reconstructing, replacing and operating the Utility Lines.

4. Easements Exclusive. The Easements granted hereunder are exclusive to Grantee. Grantor shall have full use of the easement area to the extent such use does not unreasonably interfere with Grantee’s easement rights hereunder.

5. Easements Appurtenant. These Easements are appurtenant to and are granted for the benefit of the following real property (the “Benefited Parcels”):

Tr. 1 and Tr. 2, Alaska Tidelands Survey 97, Plat No. 376;
U.S. Survey No. 227; Alaska State Land Survey No. 85-222,
Plat No. 86-77; Tracts M and N, Alaska State Land Survey
95-35, Plat No. _____; a
portion of Alaska Tideland Survey 862 as shown on
Attachment A, Alaska State Land Use Permit #LAS 22470;
all in the Juneau Recording District, First Judicial District,
Alaska.

6. Repair and Indemnity. Grantee shall be solely responsible for the maintenance, operation, construction, reconstruction and repair of the Utility Lines. Grantee shall repair any damage to the Burdened Parcels caused by Grantee’s exercise of the rights granted hereunder. Grantee shall defend, indemnify, and save Grantor harmless from and against any loss, liability, or damage arising out of Grantee’s exercise of the rights granted hereunder.

EASEMENT GRANT (UTILITY LINE EASEMENTS)

7. **Easements Run With the Land.** The Easements granted hereunder shall run with the land, for the benefit of Grantee's successors and assigns with regard to the Benefited Parcels, and shall bind the Burdened Parcels with respect to Grantor's successors and assigns.

8. **After-Acquired Interest.** Grantor has selected the Burdened Parcels, and its selection has been approved by the State of Alaska under AS 29.65.010, *et. seq.* Grantor represents that it presently has management authority over the Burdened Parcels, and accordingly has authority to make this Easement Grant. In the event fee title has not been conveyed by the State of Alaska to Grantor by the date of execution of this Easement Grant, the Easement Grant shall attach to any fee or lesser interest subsequently acquired by Grantor from the State of Alaska.

9. **Non-Use and Reversion to Grantor.** If Grantee ceases all use of any of the Easement segments E1 through E28 for a period of five (5) consecutive years, Grantor may deem that segment unused and give written notice of at least thirty (30) days of Grantor's intent to terminate the Easement as to the unused segment. If Grantee does not resume use of the unused segment within thirty (30) days, or such longer period as may be stated in the notice, Grantor may by recorded instrument terminate the unused segment of the Easement. In the event of such a termination, all Grantee's rights hereunder shall expire as to such segment, and Grantor will own the affected Burdened Parcel free and clear of that segment of the Easement.

10. **Restoration Upon Non-Use or Relinquishment.** If Grantee voluntarily relinquishes any segment of Easements E1 through E28, and/or if any segment of Easements E1 through E28 reverts to Grantor pursuant to Paragraph 9 above, then Grantee shall be obligated to promptly remove from such segment all above-ground improvements and equipment, and to render any buried improvements and equipment stable, inert, and in compliance with all applicable environmental, health and safety laws and regulations. Upon the reversion for non-use or the relinquishment of any Easement segment, Grantee shall also be obligated to restore the affected land it to a condition that is reasonably satisfactory to Grantor, or at the Grantor's option, to pay the cost of such removal, and restoration. The Grantor's satisfaction shall be stated in writing.

11. **Severability.** Should any Easement or any part thereof granted under this instrument be invalid for any reason, the remaining Easements shall nevertheless remain in effect.

GRANTOR:

**HAINES BOROUGH,
an Alaska Municipal Corporation**

Dated: _____

By _____

Its: _____

GRANTEE:

**OCEAN BEAUTY SEAFOODS LLC,
a limited liability company**

Dated: _____

By _____

Its: _____

STATE OF ALASKA)
) ss.
FIRST JUDICIAL DISTRICT)

The foregoing instrument was acknowledged before me this ____ day of _____, 2013, by _____, the _____ of HAINES BOROUGH, an Alaska Municipal Corporation, on behalf of the corporation.

Notary Public in and for State of Alaska
My Commission Expires: _____

