

# **INVESTIGATIVE REPORT**

## *Finding of Record and Closure*

**\*\*\*PUBLIC REPORT\*\*\***

*(Edited to remove confidential information per AS 24.55.160)*

Ombudsman Complaint A098-0738

June 8, 1999

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## **BACKGROUND**

A South-Central Alaska resident contacted the Anchorage office of the Alaska Ombudsman on December 9, 1998, to complain about the manner in which the Department of Natural Resources (DNR) Division of Agriculture conducted a recent auction of three agricultural parcels in the Matanuska-Susitna Borough. The complainant requested that the Ombudsman keep confidential the complainant's identity as per AS 24.55.160(b).

The complainant alleged that the Division inadequately notified interested parties of the December 8, 1998, public outcry land auction. The complainant alleged that had the division done more to advertise the auction, interested parties would have had more opportunity to prepare and obtain funding to buy the parcels. The complainant contended that instead of placing a legal advertisement in the legal notice sections of newspapers, that smaller advertisements should be placed more frequently in the section of the newspaper dealing with agricultural parcels. The complainant also alleged that the complainant's spouse had requested that the Division notify them of any impending land sale but the division failed to do so.

Assistant Ombudsman Linda Lord-Jenkins investigated the following allegation:

***Unfair: The Division of Agriculture did not provide the public sufficient public notice of intent to auction three agricultural parcels at Point MacKenzie and did not provide sufficient information about the parcels to***

*allow interested persons to make knowledgeable bids on this land.*

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## **INVESTIGATION**

The Division of Agriculture scheduled competitive public outcry auction #98-2 of three agricultural parcels to be held in Palmer, Alaska on December 8, 1998. The Division placed legal advertisements in the Fairbanks Daily News Miner, the (Wasilla-based) Frontiersman, and Anchorage Daily News on October 21, 1998; the Delta Wind on October 22 and the Alaska Journal of Commerce on October 26, 1998. Each advertisement ran one time. The Anchorage Daily News and Fairbanks Daily News Miner are daily newspapers of general circulation in their respective communities. The Frontiersman is a semi-weekly newspaper serving the Matanuska-Susitna Valley. The Delta Wind is published bi-weekly for the Delta Junction area. The Alaska Journal of Commerce publishes weekly in Anchorage but has a statewide mail distribution as well as individual sales.

A search of the newspaper archives for the Anchorage Daily News and Fairbanks News Miner showed that neither paper published a news article about the upcoming sale prior to the event.

The Anchorage Daily News archives showed that the newspaper carried a story about the auction on December 9, the day after the sale was held. The News carried no "advance" news article about the sale. Division staff said no advance press release was issued to news organizations notifying them of the impending sale. Division Director Robert Wells told the investigator that the division did not advertise the sale in the Alaska Agriculture Report as required by regulations because that report is no longer published. However, he said that the division complied with all other regulatory requirements for public notice on agricultural sales.

Mr. Wells acknowledged that the agricultural sale regulation calls for less public notice than required in other land disposals. He said that the lesser amount of notice was based on the division's occasional need to sell livestock quickly to protect the animals. He said that emergency sales were necessary years ago and are not often needed now. He also said he would consider a change in the method of public notice in light of that fact.

Division secretary Sherry Sparr said the December 8 land auction notice was posted on State of Alaska Internet home page sites for the Division of Agriculture Director, the Alaska Revolving Loan Fund, and Division of Land from November 18, 1998, until after the auction was held. She said the Internet posting was a courtesy to the public and other agencies.

Posting public notices on the Internet is not a requirement of Alaska statutes or regulations.

The Internet posting text is “boilerplate” and used for upcoming land auctions so additions and deletions were done electronically, according to Ms. Sparr who said she did not retain a printed copy of the posting. The information stated roughly:

The Division of Agriculture, Agricultural Revolving Loan Fund, will hold a land disposal on December 8, 1998, at 2:00 p.m. in the Matanuska-Susitna Borough Assembly Chambers, 350 East Dahlia Avenue, Palmer, AK, with bidder registration at 1:00 p.m. This outcry auction will include two Pt. MacKenzie parcels and one in the Palmer area. For more information or a sale brochure, contact the Division of Agriculture Palmer office at 745-7200 or the Fairbanks office at 451-2780.

In early spring the Division home pages included an announcement of another land auction scheduled for March. This announcement stated:

#### MARCH AGRICULTURAL LAND SALE

The division is preparing to sell four agricultural parcels, one located in Fairbanks and three in Delta Junction, in a sale scheduled for March 12, 1999. The auction will be held at the Delta Junction Community Center at 2:00 p.m., with bidder registration at 1:00 p.m. Auction brochures are available from the Fairbanks office (3700 Airport Way, Fairbanks, AK 99709, 451-2780 or the Palmer office (1800 Glenn Hwy., Suite 12, Palmer, AK 99645, 745-7200).

This March sale notice was posted on the Agriculture Division Director’s home page and the ARLF home page but was not found on the Division of Land’s extensive home page.

The division also provided the informational sales brochures to the Fairbanks and Palmer Division of Agriculture office and the Department of Natural Resources Public Information Center in Anchorage at the Frontier Building.

The division kept a mailing list of the informational brochures requested from each office for both sales. Staff stated that 231 brochures were requested from the Palmer office; 15 from the Fairbanks office and 12 from the DNR Public Information Center. Ten of the brochures distributed in Palmer were picked up without obtaining identity

information. Of the requests, 181 came from South-Central Alaska; 22 from the rest of Alaska and 20 from out-of-state.

Division staff distributed 267 informational brochures to individuals on the mailing list for the March sale. Palmer staff said that they provided about 30 more brochures to the public between February 22 and March 12. Fairbanks provided 13 brochures for a total of 310 brochures. Of those requests, 193 came from South-Central Alaska; 43 from the rest of the state and 35 from outside Alaska. The complainant's name was not included on the mailing list for the March sale.

The Division reported that 15 to 25 people attended the March auction. Five individuals registered as bidders.

The December informational packets contained: the three parcels' legal descriptions; information on site improvements; minimum bid requirements, the percentage of cropland and wetland; any reservations on usage; an area and tract map for each parcel; information about bidder qualifications; proof of residency; veteran's land discounts on purchase price; and other auction procedures. Under the written rules for the sale is the following information concerning funding:

The successful bidders may apply for ARLF (Alaska Revolving Loan Fund) financing. ARLF financing is subject to application, review, and approval, with no guarantee of financing to the successful bidder. An ARLF loan application, current financial statement, three current years of tax returns, and a \$50 application (fee is required from all individuals part to the loan) must be submitted to ARLF, Division of Agriculture, Palmer. Loan packets will be provided to successful bidders at the auction. Financing terms offered are: Maximum 20 years, minimum 10% down payment at 8% interest rate, payable by monthly payments. Payments other than monthly will be considered based on request and review of case flows. Lender's title insurance is required for ARLF financing at purchaser's cost.

### **Statutes and regulations governing public notice**

Division Director Robert Wells said the division advertised the impending auction under guidelines established by 11 AAC 39.730, which states:

(a) Advertisement of disposal, if required, shall be published in

(1) a newspaper or other periodical of general circulation in the area where the property is located or which the

director reasonably believes will notify a sufficient number of potentially interested parties, and  
(2) the Alaska Agriculture Market Report.

Sub-section (b) of this regulation states that the advertisement may include: a description of the property, the minimum acceptable price, the method and terms of disposal, availability of financing, directions about any specific forms that must be submitted and information about information required of bidder, the deadline and address for submission of bids or offers, or the place, date, and time of auction, the date on which bids or offers will be reviewed, any applicable deadline for submitting applications for preference rights, any applicable statement that the director reserves the right to refuse any and all offers, a statement that the property is sold or leased "AS IS, WHERE IS, with no implied or expressed warranty of condition whatsoever," a statement that if no acceptable bid or offer is received, the director may dispose of the property without readvertising, and a statement citing the governing regulatory authority.

11 AAC 39.710 Minimum price, directs the division to establish a minimum price for each property before disposal. Factors that may be considered in establishing a minimum price include the current assessed, appraised, surveyed, replacement, forced sale, or market value; the present supply and demand for similar property; the length of time that the state has owned the property; the length of time that the property has been on the market; and the ongoing management costs of the property to the state.

The total minimum price for the three parcels was \$560,700. Director Wells reported that the successful bids totaled \$749,000.

The investigator reviewed other Alaska statutes on public notice prior to a land or property disposal. Four statutes required publishing notice at least once a week for two consecutive weeks and posting the notice in two public places. Six statutes call for "reasonable public notice" but did not define reasonable. Twenty statutes refer to AS 38.05.945 as the definition for proper public notice.

AS 38.05.945 is found in DNR statutes. The statute governs various aspects of public notice for classification or reclassification of land designation, closing of land to mineral leasing; zoning of land and land disposals and similar issues.

Subsection (b) outlines the public notice requirements as:

(A) publication of a legal notice in newspapers of statewide circulation and in newspapers of general

circulation in the vicinity of the proposed action at least once a week for two consecutive weeks;

(B) publication of a notice in display advertising form in the newspapers described in (A) of this paragraph at least once a week for two consecutive weeks;

(C) public service announcements on the electronic media serving the area to be affected by the proposed action; and

(D) one or more of the following methods:

(i) posting in a conspicuous location in the vicinity of the action;

(ii) notification of parties known or likely to be affected by the action; or

(iii) another method calculated to reach affected parties.

### **Studies on the effectiveness of legal advertising**

The investigator searched the Internet to determine if any studies had been completed on the effectiveness of legal advertising versus display advertising. She was unable to locate reference to any studies conducted in the last two decades.

### **Use of the Internet to issue public notice**

Governor Tony Knows on June 4 signed an executive order on use of the Internet for public notices this month. The policy was recommended by the state Telecommunications Information Council policy committee and a prototype website has been developed according to John Lindback, Chief of Staff for Lt. Gov. Fran Ulmer. He said each department is training staff to use the site which is scheduled to be unveiled to the public on July 1.

The order directs that all State of Alaska public notices be placed on one site. There will be "categories" of notices for people to review, such as notices related to public meetings, regulations, bids, etc. The site will also feature a search function so that people can hunt for notices relating to anything specific that they're looking for. All expired notices will then move into a public archives on the net and, if necessary, people can

look up an old one.

He said the proposed site does not affect the state's statutory obligations to advertise in the media.

The State of Utah recently passed legislation directing state agencies to use the Internet to make public notice.

The Alaska Lieutenant Governor's office is taking public comment on regulations to require the use of public broadcasting for public notices. Close of the comment period is June 25, 1999.

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### **OMBUDSMAN'S ANALYSIS AND FINDING**

***Allegation: Unfair: The Division of Agriculture did not provide the public sufficient public notice of intent to auction three agricultural parcels at Point MacKenzie and did not provide sufficient information about the parcels to allow interested persons to make knowledgeable bids on this land.***

The Office of the Ombudsman's Policies and Procedures Manual at 4040(3) defines unfair as an administrative act that violated some principle of justice:

Investigation of a complaint that an administrative act was "unfair" should consider both the process by which the action was taken or the decision was made and the equitableness of that decision, that is, the balance between the agency and a complainant in the decision-making process.

In this case, examination covered the question of whether "adequate and reasonable notice of the matter was provided to the complainant."

A review of Division of Agriculture statutes and regulations indicates that, with one exception, the method of advertising this sale substantially complied with long-standing statutes and regulations governing public notice on agricultural disposals. The exception is that the Division did not advertise in the Alaska Agricultural Market Report because that publication no longer exists. Further, the public notice given in this case complied with the majority of public notice requirements for various disposals by other state agencies.

The sales were advertised broadly in Alaska. Notice was posted in DNR offices for the public to see. A mailing list was developed and packets mailed to those on the list. The Internet was utilized as an additional method of notice.

It is difficult to argue that the complainant suffered any unique disadvantage because the general public was notified of the sale in the same manner as the complainant. The record also indicates that more than 250 individuals requested information on the December and March sales, based on the legal advertising method and perhaps aided by the Internet.

While common sense would suggest that “display” advertising in the real estate section is a more visible method of advertising than the single column, eight-point type advertisements that make up legal advertising sections, there is little tangible evidence to support that claim.

Nor is there evidence that the type of advertisement led to reduced bids on the property. The division set minimum price for the three parcels, which was exceeded in the auction by nearly \$200,000.

The complainant also contends that the division staff ignored a verbal request that the complainant be sent information about any impending agricultural land sale. This allegation is not possible to prove or disprove because the complainant does not know who the request was made of nor is there documentary evidence to support the allegation.

Because the Division of Agriculture exceeded the Division’s statutes and regulations governing property disposal and, in fact has begun utilizing the Internet to publicize its land sales, this allegation was found to be *not supported* by the facts.

Because this allegation was unsupported, the Ombudsman can make no recommendations. The impending executive order on the use of the Internet to publicize public notices provides a good source of information for citizens connected to the Internet. However, the Ombudsman suggested that the division director consider placing the required legal advertisement or an advertisement of some kind in the real estate sections of publications in the future. A suggestion does not require an agency response.