

**ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE**

May 1, 2002

1:15 p.m.

MEMBERS PRESENT

Representative Norman Rokeberg, Chair
Representative Jeannette James
Representative John Coghill
Representative Kevin Meyer
Representative Ethan Berkowitz
Representative Albert Kookesh

MEMBERS ABSENT

Representative Scott Ogan, Vice Chair

COMMITTEE CALENDAR

CS FOR SENATE BILL NO. 6(FIN)

"An Act relating to required notice of eviction to mobile home park dwellers and tenants before redevelopment of the park."

- HEARD AND HELD

SENATE BILL NO. 183

"An Act relating to public interest litigants and to attorney fees; and amending Rule 82, Alaska Rules of Civil Procedure."

- MOVED SB 183 OUT OF COMMITTEE

CS FOR SENATE BILL NO. 278(FIN)

"An Act requiring a good faith effort to purchase property before that property is taken through eminent domain; and providing for an effective date."

- HEARD AND HELD

SENATE JOINT RESOLUTION NO. 37

Proposing an amendment to the Constitution of the State of Alaska relating to officers and employees of the executive branch.

- HEARD AND HELD

PREVIOUS ACTION

BILL: SB 6

SHORT TITLE:MOBILE HOME PARK EVICTION NOTICE

SPONSOR(S): SENATOR(S) ELLIS

Jrn-Date	Jrn-Page		Action
01/08/01	0013	(S)	PREFILE RELEASED - 12/29/00
01/08/01	0013	(S)	READ THE FIRST TIME - REFERRALS
01/08/01	0013	(S)	L&C, FIN
03/01/01		(S)	L&C AT 1:30 PM BELTZ 211
03/01/01		(S)	Heard & Held
03/01/01		(S)	MINUTE(L&C)
03/08/01		(S)	L&C AT 1:30 PM BELTZ 211
03/08/01		(S)	Moved CS(L&C) Out of Committee
03/08/01		(S)	MINUTE(L&C)
03/09/01	0594	(S)	L&C RPT CS 4DP 1NR SAME TITLE
03/09/01	0595	(S)	DP: PHILLIPS, DAVIS, AUSTERMAN, LEMAN;
03/09/01	0595	(S)	NR: TORGERSON
03/09/01	0595	(S)	FN1: ZERO(LAW)
03/19/01		(S)	FIN AT 9:00 AM SENATE FINANCE 532
03/19/01		(S)	Heard & Held
03/19/01		(S)	MINUTE(FIN)
03/22/01		(S)	FIN AT 9:00 AM SENATE FINANCE 532
03/22/01		(S)	MINUTE(FIN)
03/22/01	0768	(S)	FIN RPT CS 4DP 1DNP 2NR SAME TITLE
03/22/01	0768	(S)	DP: DONLEY, HOFFMAN, OLSON, LEMAN;
03/22/01	0768	(S)	NR: KELLY, WILKEN; DNP: GREEN
03/22/01	0768	(S)	FN1: ZERO(LAW)
03/28/01		(S)	RLS AT 10:45 AM FAHRENKAMP 203
03/28/01		(S)	MINUTE(RLS)
03/29/01	0858	(S)	RULES TO CALENDAR 3/29/01
03/29/01	0862	(S)	READ THE SECOND TIME
03/29/01	0862	(S)	FIN CS ADOPTED UNAN CONSENT
03/29/01	0862	(S)	ADVANCED TO THIRD READING UNAN CONSENT
03/29/01	0862	(S)	READ THE THIRD TIME CSSB 6(FIN)
03/29/01	0863	(S)	PASSED Y12 N7 A1
03/29/01	0867	(S)	TRANSMITTED TO (H)

03/29/01	0867	(S)	VERSION: CSSB 6(FIN)
03/30/01	0782	(H)	READ THE FIRST TIME - REFERRALS
03/30/01	0782	(H)	JUD
03/30/01	0794	(H)	CROSS SPONSOR(S): GUESS, CROFT
04/02/01	0816	(H)	CROSS SPONSOR(S): MURKOWSKI
02/13/02		(H)	JUD AT 1:00 PM CAPITOL 120
02/13/02		(H)	Heard & Held
02/13/02		(H)	MINUTE(JUD)
05/01/02		(H)	JUD AT 1:00 PM CAPITOL 120

BILL: SB 183

SHORT TITLE:ATTY FEES:APPORTIONMT/PUBLIC INT.LITIGANT
SPONSOR(S): FINANCE

Jrn-Date	Jrn-Page		Action
04/09/01	1014	(S)	READ THE FIRST TIME - REFERRALS
04/09/01	1015	(S)	FIN
04/23/01		(S)	FIN AT 9:00 AM SENATE FINANCE 532
04/23/01		(S)	Moved Out of Committee
04/23/01		(S)	MINUTE(FIN)
04/23/01	1213	(S)	FIN RPT 4DP 5NR
04/23/01	1213	(S)	DP: DONLEY, GREEN, WARD, LEMAN;
04/23/01	1213	(S)	NR: KELLY, AUSTERMAN, HOFFMAN, OLSON,
04/23/01	1213	(S)	WILKEN
04/23/01	1214	(S)	FN1: ZERO(LAW)
04/25/01		(S)	RLS AT 10:45 AM FAHRENKAMP 203
04/25/01		(S)	MINUTE(RLS)
04/25/01	1261	(S)	RULES TO CALENDAR 1OR 4/25/01
04/25/01	1263	(S)	READ THE SECOND TIME
04/25/01	1263	(S)	ADVANCED TO 3RD READING FAILED Y14 N6
04/25/01	1264	(S)	ADVANCED TO THIRD READING 4/26 CALENDAR
04/26/01	1285	(S)	READ THE THIRD TIME SB 183
04/26/01	1286	(S)	PASSED Y12 N8
04/26/01	1286	(S)	COURT RULE(S) ADOPTED Y14 N6
04/26/01	1286	(S)	ELLIS NOTICE OF RECONSIDERATION
04/27/01	1310	(S)	RECONSIDERATION NOT TAKEN UP
04/27/01	1311	(S)	TRANSMITTED TO (H)

04/27/01	1311	(S)	VERSION: SB 183
04/28/01	1296	(H)	READ THE FIRST TIME - REFERRALS
04/28/01	1296	(H)	JUD
04/30/01		(H)	JUD AT 1:00 PM CAPITOL 120
04/30/01		(H)	Heard & Held -- Meeting Postponed to 2:00 PM --
04/30/01		(H)	MINUTE(JUD)
02/08/02		(H)	JUD AT 1:00 PM CAPITOL 120
02/08/02		(H)	<Bill Postponed>
05/01/02		(H)	JUD AT 1:00 PM CAPITOL 120

BILL: SB 278

SHORT TITLE:TAKING PROPERTY BY EMINENT DOMAIN

SPONSOR(S): SENATOR(S) TORGERSON

Jrn-Date	Jrn-Page		Action
02/04/02	2108	(S)	READ THE FIRST TIME - REFERRALS
02/04/02	2108	(S)	CRA, JUD
02/19/02	2243	(S)	COSPONSOR(S): WILKEN
02/27/02		(S)	CRA AT 1:30 PM FAHRENKAMP 203
02/27/02		(S)	Moved Out of Committee
02/27/02		(S)	MINUTE(CRA)
03/01/02	2338	(S)	CRA RPT 2DP 2NR
03/01/02	2338	(S)	DP: TORGERSON, KELLY;
03/01/02	2338	(S)	NR: PHILLIPS, LINCOLN
03/01/02	2338	(S)	FN1: ZERO(CRT)
03/22/02		(S)	JUD AT 1:30 PM BELTZ 211
03/22/02		(S)	-- Meeting Canceled --
04/08/02		(S)	JUD AT 1:30 PM BELTZ 211
04/08/02		(S)	Moved CS(JUD) Out of Committee
04/08/02		(S)	MINUTE(JUD)
04/09/02	2680	(S)	JUD RPT CS 1DP 2NR SAME TITLE
04/09/02	2680	(S)	DP: TAYLOR; NR: THERRIAULT, COWDERY
04/09/02	2680	(S)	FN1: ZERO(CRT)
04/09/02	2680	(S)	FN2: INDETERMINATE(DOT)
04/10/02	2717	(S)	FIN REFERRAL ADDED BEFORE RULES
04/15/02		(S)	FIN AT 9:00 AM SENATE FINANCE 532
04/15/02		(S)	Heard & Held MINUTE(FIN)
04/17/02		(S)	FIN AT 9:00 AM SENATE FINANCE 532

04/17/02		(S)	Moved CS(FIN) Out of Committee
04/17/02		(S)	MINUTE(FIN)
04/17/02		(S)	MINUTE(FIN)
04/18/02	2831	(S)	FIN RPT CS 5DP 3NR SAME TITLE
04/18/02	2831	(S)	NR: DONLEY, KELLY, HOFFMAN;
04/18/02	2831	(S)	DP: GREEN, AUSTERMAN, OLSON, WILKEN,
04/18/02	2831	(S)	LEMAN
04/18/02	2831	(S)	FN1: ZERO(CRT)
04/18/02	2831	(S)	FN3: INDETERMINATE(DOT)
04/22/02		(S)	RLS AT 9:30 AM FAHRENKAMP 203
04/22/02		(S)	MINUTE(RLS)
04/24/02	2923	(S)	RULES TO CALENDAR 4/24/02
04/24/02	2927	(S)	READ THE SECOND TIME
04/24/02	2928	(S)	FIN CS ADOPTED UNAN CONSENT
04/24/02	2928	(S)	ADVANCED TO THIRD READING UNAN CONSENT
04/24/02	2928	(S)	READ THE THIRD TIME CSSB 278(FIN)
04/24/02	2928	(S)	PASSED Y20 N-
04/24/02	2928	(S)	EFFECTIVE DATE(S) SAME AS PASSAGE
04/24/02	2936	(S)	TRANSMITTED TO (H)
04/24/02	2936	(S)	VERSION: CSSB 278(FIN)
04/25/02	3123	(H)	READ THE FIRST TIME - REFERRALS
04/25/02	3123	(H)	JUD, FIN
05/01/02		(H)	JUD AT 1:00 PM CAPITOL 120

BILL: SJR 37

SHORT TITLE:CONST AM: HIRING FREEZE
SPONSOR(S): SENATOR(S) KELLY

Jrn-Date	Jrn-Page		Action
02/19/02	2226	(S)	READ THE FIRST TIME - REFERRALS
02/19/02	2226	(S)	STA, JUD, FIN
02/26/02		(S)	STA AT 3:30 PM BELTZ 211
02/26/02		(S)	Moved SJR 37 Out of Committee MINUTE(STA)
02/27/02	2318	(S)	STA RPT 3DP 1NR
02/27/02	2318	(S)	DP: THERRIAULT, PHILLIPS, HALFORD;
02/27/02	2318	(S)	NR: STEVENS
02/27/02	2318	(S)	FN1: (GOV)
03/18/02		(S)	JUD AT 1:30 PM BELTZ 211

03/18/02		(S)	Moved Out of Committee
03/18/02		(S)	MINUTE(JUD)
03/20/02	2472	(S)	JUD RPT 3DP 1DNP
03/20/02	2472	(S)	DP: TAYLOR, COWDERY, THERRIAULT;
03/20/02	2472	(S)	DNP: ELLIS
03/20/02	2472	(S)	FN1: (GOV)
03/22/02		(S)	FIN AT 9:00 AM SENATE FINANCE 532
03/22/02		(S)	Moved Out of Committee
03/22/02		(S)	MINUTE(FIN)
03/22/02	2496	(S)	FIN RPT 6DP 3NR
03/22/02	2496	(S)	DP: DONLEY, KELLY, GREEN, WILKEN, WARD,
03/22/02	2496	(S)	LEMAN; NR: AUSTERMAN, HOFFMAN, OLSON
03/22/02	2496	(S)	FN1: (GOV)
03/26/02		(S)	RLS AT 11:00 AM FAHRENKAMP 203
03/26/02		(S)	MINUTE(RLS)
03/28/02	2556	(S)	RULES TO CALENDAR 1OR 3/28/02
03/28/02	2558	(S)	READ THE SECOND TIME
03/28/02	2559	(S)	ADVANCED TO THIRD READING FLD Y14 N3 E3
03/28/02	2559	(S)	ADVANCED TO THIRD READING 4/2 CALENDAR
04/02/02	2591	(S)	READ THE THIRD TIME SJR 37
04/02/02	2592	(S)	HELD IN THIRD READING TO 4/8 CALENDAR
04/08/02	2663	(S)	BEFORE THE SENATE IN THIRD READING
04/08/02	2663	(S)	PASSED Y14 N5 E1
04/08/02	2663	(S)	ELTON NOTICE OF RECONSIDERATION
04/09/02	2691	(S)	RECONSIDERATION NOT TAKEN UP
04/09/02	2692	(S)	TRANSMITTED TO (H)
04/09/02	2692	(S)	VERSION: SJR 37
04/10/02	2861	(H)	READ THE FIRST TIME - REFERRALS
04/10/02	2861	(H)	STA, JUD, FIN
04/16/02		(H)	STA AT 8:00 AM CAPITOL 102
04/16/02		(H)	Moved Out of Committee -- Recessed to Thurs. 4/18/02 --
04/16/02		(H)	MINUTE(STA)
04/16/02	2949	(H)	STA RPT 2DP 2DNP 3NR
04/16/02	2949	(H)	DP: WILSON, STEVENS; DNP: CRAWFORD,

04/16/02	2949	(H)	HAYES; NR: JAMES, FATE, COGHILL
04/16/02	2950	(H)	FN1: (GOV)
05/01/02		(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

KIM OGNISTY, Intern
to Senator John Torgerson
Alaska State Legislature
Capitol Building, Room 427
Juneau, Alaska 99801
POSITION STATEMENT: Presented SB 278 on behalf of the sponsor,
Senator Torgerson.

RICHARD P. HARRIS Senior Vice President of Natural Resources,
Sealaska Corporation; and
Executive Vice President, Sealaska Timber Corporation
One Sealaska Plaza, Suite 400
Juneau, Alaska 99801-1276
POSITION STATEMENT: Assisted with the presentation of SB 278.

JON TILLINGHAST, General Counsel
Sealaska Corporation
One Sealaska Plaza, Suite 400
Juneau, Alaska 99801-1276
POSITION STATEMENT: Assisted with the presentation of SB 278.

DENNIS POSHARD, Legislative Liaison/Special Assistant
Office of the Commissioner
Department of Transportation & Public Facilities (DOT&PF)
3132 Channel Drive
Juneau, Alaska 99801-7898
POSITION STATEMENT: Provided comments during discussion of SB
278.

MICHAEL L. DOWNING, Director/Chief Engineer
Division of Statewide Design & Engineering Services
Department of Transportation & Public Facilities (DOT&PF)
3132 Channel Drive
Juneau, Alaska 99801-7898
POSITION STATEMENT: Provided comments during discussion of SB
278.

JAMES CANTOR, Assistant Attorney General
Transportation Section
Civil Division (Anchorage)

Department of Law (DOL)
1031 West 4th Avenue, Suite 200
Anchorage, Alaska 99501-1994

POSITION STATEMENT: Provided comments during discussion of SB 278.

RICHARD "DICK" CATTANACH, Executive Director
Associated General Contractors (AGC)
8005 Schoon Street, Suite 100
Anchorage, Alaska 99518

POSITION STATEMENT: Provided comments during discussion of SB 278.

WILLIAM CUMMINGS, Assistant Attorney General
Transportation Section
Civil Division (Juneau)
Department of Law (DOL)
PO Box 110300

Juneau, Alaska 99811-0300

POSITION STATEMENT: Provided comments during discussion of SB 278.

GWENDOLYN HALL, Staff
to Senator Pete Kelly
Alaska State Legislature
Capitol Building, Room 518
Juneau, Alaska 99801

POSITION STATEMENT: Presented SJR 37 on behalf of the sponsor, Senator Kelly.

JACK KREINHEDER, Chief Analyst
Office of the Director
Office of Management & Budget (OMB)
Office of the Governor
PO Box 110020

Juneau, Alaska 99811-0020

POSITION STATEMENT: During discussion of SJR 37, provided comments on behalf of the administration.

ACTION NARRATIVE

TAPE 02-58, SIDE A
Number 0001

CHAIR NORMAN ROKEBERG called the House Judiciary Standing Committee meeting to order at 1:15 p.m. Representatives Rokeberg, James, Coghill, and Meyer were present at the call to

order. Representatives Berkowitz and Kookesh arrived as the meeting was in progress.

SB 6 - MOBILE HOME PARK EVICTION NOTICE

Number 0037

CHAIR ROKEBERG announced that the first order of business would be CS FOR SENATE BILL NO. 6(FIN), "An Act relating to required notice of eviction to mobile home park dwellers and tenants before redevelopment of the park." [Before the committee was the proposed House committee substitute (HCS) for SB 6, version 22-LS0216\W, Kurtz, 2/11/02, adopted as a work draft on 2/13/02.]

Number 0109

REPRESENTATIVE COGHILL moved to adopt the proposed House committee substitute (HCS) for SB 6, version 22-LS0216\U, Kurtz, 4/26/02, as a work draft.

Number 0121

REPRESENTATIVE MEYER objected.

CHAIR ROKEBERG called an at-ease from 1:16 p.m. to 1:17 p.m.

Number 0128

CHAIR ROKEBERG announced that SB 6 would be held over [with the motion to adopt Version U pending].

SB 183 - ATTY FEES:APPORTIONMT/PUBLIC INT.LITIGANT

Number 0154

CHAIR ROKEBERG announced that the next order of business would be SENATE BILL NO. 183, "An Act relating to public interest litigants and to attorney fees; and amending Rule 82, Alaska Rules of Civil Procedure."

Number 0201

REPRESENTATIVE COGHILL moved to report SB 183 out of committee with individual recommendations and the accompanying zero fiscal note.

Number 0275

REPRESENTATIVE MEYER objected for the purpose of discussion. He referred to [subsection] (g) on page 2, and asked what the current practice is with regard to awarding attorney fees to or against public interest litigants.

CHAIR ROKEBERG surmised that currently "they're awarded 100 percent," and offered that subsection (g) will simply ensure that attorney fees will be awarded in the same manner as for non-public interest litigants.

REPRESENTATIVE MEYER withdrew his objection.

Number 0339

CHAIR ROKEBERG noted that there were no further objections to the motion. Therefore, SB 183 was reported from the House Judiciary Standing Committee.

SB 278 - TAKING PROPERTY BY EMINENT DOMAIN

Number 0377

CHAIR ROKEBERG announced that the next order of business would be CS FOR SENATE BILL NO. 278(FIN), "An Act requiring a good faith effort to purchase property before that property is taken through eminent domain; and providing for an effective date."

CHAIR ROKEBERG called an at-ease from 1:20 p.m. to 1:21 p.m.

Number 0407

KIM OGNISTY, Intern to Senator John Torgerson, Alaska State Legislature, said on behalf of Senator Torgerson, sponsor, that SB 278 is concerned with the "eminent domain and declaration of taking" proceedings in Alaska statute. The bill introduces a "reasonable and diligent effort" clause that attempts to place the condemnor of land and the private landholder in an equal negotiating position. The bill is not intended to try to remove the authority of the state to acquire land by eminent domain, nor in any way complicate existing proceedings. The phrase "reasonable and diligent effort" or similar language has been adopted in at least 23 other states. Encouraging the state to initiate communication from an equitable bargaining position will promote productive negotiations, facilitate dialog over

reasonable concerns, and encourage suggestions from all parties involved.

MS. OGNISTY noted that SB 278 was amended in the Senate Judiciary Committee, and that Senator Torgerson had no objections to that revision. The Senate Finance Committee, however, felt strongly that the original language should be returned to SB 278; therefore, she acknowledged, CSSB 278(FIN) is essentially the original bill. In response to a question, she indicated that the concept of SB 278 was brought to the sponsor as a result of a situation that the Sealaska Corporation encountered.

Number 0589

RICHARD P. HARRIS, Senior Vice President of Natural Resources, Sealaska Corporation ("Sealaska"); and Executive Vice President, Sealaska Timber Corporation, noted that the process of eminent domain allows the state to take private land for public purposes. He said:

For a company like Sealaska, private land is particularly important because it was a long and over a hundred-year process for Natives to be able to finally reacquire a land that was historically and aboriginally theirs. And so we are very diligent in protecting that land and ensuring that it isn't unreasonably taken. As I've indicated, we have very little land, and what we're trying to do is to ensure that eminent domain should be a proceeding of last resort. In other words, we believe that the private property owner needs to be put on an equal plain in terms of negotiation and in terms of finding acceptable alternatives that will work for the party.

Our view is that [SB 278] helps level the playing field - gives the private property owner a right to effectively negotiate with the condemnor in order to preserve his values and his rights as he perceives them. It doesn't give him an absolute veto over that; it's clearly structured just simply to ensure that there is a diligent process that is undertaken to be sure that private property rights are protected.... The model code allows this type of transaction, ... [and] any federal project or federally funded project requires a reasonable and diligent effort, so we don't

believe that this is an extraordinary or ... unreasonable request.

Number 0749

JON TILLINGHAST, General Counsel, Sealaska Corporation, added that a provision similar to [SB 278] is found in at least 23 other states' codes as well as the model eminent domain code, which he indicated says:

A condemnor shall make every reasonable and diligent effort to acquire property by negotiation ... an action to condemn property may not be maintained unless the condemnor made a good-faith effort to acquire the property by purchase before commencing the action.

MR. TILLINGHAST said that with such a provision, the state is at risk if it doesn't negotiate fairly with the private party. Therefore, because both sides have something at risk at the outset of the process, they will approach each other more as equals, which, he opined, will reduce litigation because the atmosphere surrounding negotiations will be improved and, thus, the landowner will feel more like he/she is being treated as an equal. He offered the following as a quote from the drafters of the uniform eminent domain code:

The purpose of preliminary purchase attempts include the protecting of property owners from arbitrary and unexpected exercises of eminent domain power, facilitation of amicable settlements of disputes as to the amount of just compensation, minimizing acquisition costs through reduction of litigation, and promotion of citizen cooperation with governmental programs involving land acquisitions.

MR. TILLINGHAST said that to his knowledge, that philosophy has remained unchanged since those words were written, which, he opined, indicated that the experts in the field continue to believe that this type of provision is a "litigation saver."

REPRESENTATIVE JAMES asked for a description of the incident that engendered SB 278.

Number 0904

MR. HARRIS said:

We've had periodic occasions where the [Department of Transportation & Public Facilities (DOT&PF)], for purposes of airports or other expansions, have come and initiated an action, actually brought condemnation. In one case, we had a separation of the surface and the subsurface estate, and [DOT&PF] said, "Here, we're just going to pay you this amount of money"; ... Sealaska Corporation, in this case, and a village corporation in Klawock, were basically told to "go fight it out" to figure out whose share of the money it belonged to. That left, clearly, a pretty unpalatable situation. We finally, after many, many years, were able to work out an amiable solution, but it was only after a long, long process.

Each time we start into a new action, we start from the process of ... [being told], "Here, we're here, here's the value of your property, here's what we're going to pay you for it." We don't feel that we're in a fair or a strong negotiating position, and when we try to speak about alternatives, we frequently find ourselves frustrated. And, as I said, we speak in terms of seeking opportunities not to see land condemned, but to work exchanges or some other types of transactions which will allow us to keep that acreage or the ownership of that acreage in an equal basis. We're not parties that sell [Alaska Native Claims Settlement Act (ANCSA)] land, as a (indisc.) rule.

REPRESENTATIVE JAMES said she'd heard that "it was an exchange issue, more than it was a price issue."

MR. HARRIS said that the issue in this case was that [the DOT&PF] wanted to condemn land and then buy it. He explained that the appraisal did not appraise the surface and the subsurface separately; "You had two separate owners - essentially a horizontally severed estate - and they said, 'You guys have to go figure it out; you have to work it out,'" he added.

REPRESENTATIVE JAMES mentioned that she wants to make sure that the piece of legislation before them actually fixes the sort of problem that Sealaska is facing. She asked whether, in the aforementioned situation, a trade was ever offered.

MR. HARRIS said that ultimately, that particular dispute was solved by a trade, but only after a considerable amount of legal wrangling. "The value of what we were paid for the property paled by what we paid our lawyers to argue this particular issue," he remarked. Turning to Section 2 of SB 278, he explained that lines [2-8] will allow entities to have separate appraisals that will have equal footing, and allow for alternative means of satisfying the public purpose. He surmised that currently, government entities find it much easier to just come in and condemn the property it wants, rather than taking the time to negotiate in a fair and equitable manner. In contrast, SB 278 give landholders the right to try to negotiate reasonable alternatives.

REPRESENTATIVE JAMES asked Mr. Harris whether he thought that the DOT&PF would now be more amenable to negotiations to begin with: "Do you think you have their attention? Do you think they would not do it that same way again, or did they do it to you more than once?"

MR. HARRIS said:

We've had repeat events.... We're working closer to getting their attention; we believe that this bill is really the vehicle to make sure that the attention exists with the people that we work with. We have their attention, but administrations change, internal policies change, and what we're doing is saying that this is an intelligent policy. It's clearly a policy that's acceptable in a variety of other states, and we believe that it's a reasonable one here.

REPRESENTATIVE JAMES indicated that although it may be appropriate to provide for property exchanges for Native corporations, she is not convinced that it would be in the best interest of the state for everyone to have that alternative available. She asked whether there would be a way to stipulate different procedures for Native corporations.

MR. TILLINGHAST noted that SB 278 does not compel the state to accept an exchange nor does it give regional corporations "the right to force one down the state's throat." If a land exchange is suggested by one of the parties, the state need only provide a reasonable explanation of why it is refusing that exchange.

Number 1332

MR. HARRIS pointed out that Sealaska owns both ANCSA land and non-ANCSA land. In each case, he said, Sealaska believes that SB 278 is a good law with regard to any private landowners. He opined that when taking private land for public purposes, it should be shown that such a process is really necessary. Senate Bill 278 will give private landholders the opportunity to seek an alternative to condemnation; if, however, a reasonable alternative cannot be arrived at, the state can say so and then proceed with condemnation. An example of an unreasonable exchange request would be an offer to exchange land worth \$1,000 for land worth \$100,000.

REPRESENTATIVE JAMES mentioned that she has had a lot of experience with circumstances involving [taking by] eminent domain, and has concluded that oftentimes the landholders were better off after the taking, acknowledging, however, that the circumstances might be a little different when land in Southeast Alaska is at issue. She said that she did not want to see [the provisions of] SB 278 being used to stop projects that could build Alaska's economy.

REPRESENTATIVE BERKOWITZ asked how Section 2 of SB 278 works in conjunction with AS 09.55.240(a)(12) and (b), which involve right-of-ways versus real property. He asked how a real estate appraisal would work in that context.

MR. HARRIS replied:

We deal with right-of-ways all the time. We provide and sell right-of-ways for pipelines, for hydroelectric projects - it's all underground; we can deal with that as an appraisal and ... we're very happy to lease property. It's when someone comes and condemns it ... So if we're talking about a right-of-way for a waterline, as an example, I'll give you the example of "Black Bear Hydro Power Project": we leased that property. They came and tried to condemn the property under federal law, and we told them we would fight until forever to stop that project. Once they came to us and said, "We would like to lease it," we were in a totally different ballgame.... We're a landowner; the condemnation of land is much different than using and releasing of land.

In that case, we were able, very successfully, to develop a successful easement process; we were compensated in the proper way, but we still owned the land. And those are the types of things, again, that we come back to and refer to, is to say: "Do you have to condemn the land in this case? Can we find another alternative? Can we use it as an easement and a lease, [or a] land trade?" I'm only using these as examples.... We've tried to say, "Allow the landowner to define what's acceptable to him other than, 'We're going to pay you and that's your only viable option.'"

Number 1603

REPRESENTATIVE BERKOWITZ asked whether appraisals would be based on fair market value [of the land] or on the replacement costs of generating an alternative route [for the project].

MR. HARRIS said appraisals are based strictly on the fair market value of the land using standard uniform appraisal procedures. He noted that in leasing property for an "Alascom repeater site," Sealaska followed U.S. Forest Service procedures, which involved using a percentage of the value of the repeater site. In that case, "it was 8 or 10 percent of the value of the improvements," he added.

REPRESENTATIVE BERKOWITZ remarked that different amounts might be arrived at depending on how the land is appraised, whether it is based on the rental value or the market value.

CHAIR ROKEBERG acknowledged that appraisal styles do differ.

REPRESENTATIVE JAMES mentioned that were she in the state's position, she would rather own the land than rent it or lease it.

MR. TILLINGHAST pointed out that SB 278 does not address appraisal methods; whatever rules appraisals must currently follow would not be changed by SB 278.

CHAIR ROKEBERG asked Mr. Tillinghast to address the argument that SB 278 will slow down the process of eminent domain, and to speak to whether eminent domain filing could take place before implementation. He also asked: "Many times, doesn't the state go ahead and start processing the taking before they finish their negotiations with somebody because of the time elements

necessary to get a project underway? Wouldn't this bill take that ability away?"

Number 1900

MR. TILLINGHAST said no, it certainly wouldn't; the state can continue to file a motion to get possession. The state can continue to file a declaration of taking, which lets them take the land immediately. And in those cases, he noted, the court has an expedited procedure for the preliminary issues, where in the court asks: Is the taking necessary, and is the taking authorized. He opined that with passage of SB 278, the court would then have three questions to ask during an expedited preliminary procedure: Is the taking necessary, is the taking authorized, and is the state "reasonable." He surmised that the latter question would not involve valuation of the land, merely whether the state is behaving within "the broad universe of reason that we expect of our public servants."

CHAIR ROKEBERG, referring to language in the bill that stipulates that the condemnor shall set "a reasonable period of time" in which to obtain an appraisal, asked Mr. Tillinghast what he considers to be a reasonable period of time.

MR. TILLINGHAST indicated that that would depend on where the property is located; he ventured that if the property were in Juneau, 30 days would be reasonable.

MR. HARRIS said that it would also depend on the size of the project. He said that typically, Sealaska can get an appraisal within 45 to 60 days. He posited that a project is not going to simply stop while waiting for an appraisal, typically projects are complex and other aspects can continue in the meantime.

MR. TILLINGHAST, in response to questions, said that under SB 278, if a landowner feels that the state has not negotiated reasonably and in good faith, he/she can file objections to the state's taking, with one of the objections being that the state didn't obey the law and wasn't reasonable and diligent. He noted that there are already rules for ensuring that the court deal with those types of preliminary objections in an expeditious manner. He opined that a person who is not satisfied with the amount of compensation being offered for his/her land will not be able to use the provisions of SB 278 to delay a project by even one day. He relayed that "the national experts" feel that clauses such those in SB 278 prevent eminent domain cases from going to court at all. He also relayed that

he has not heard of situations in which similar legislation has caused the delay of eminent domain proceedings.

Number 2171

MR. TILLINGHAST, in response to further questions about the possibility of delaying a project, said:

The court controls it's own proceedings, and the civil rules have limitations on how long discovery can go on, on these preliminary issues, and it's not very long. And there's no reason that the courts can't force this issue within that same preliminary proceeding. Now, for sure, ... if the state doesn't take my offer, I'm going say "I'm going to go to court and I'm going to claim you're being unreasonable." And that does give the landowner leverage, but that's the reason for the bill, is to give the landowner a lever in eminent domain negotiations - is to put the state at risk a little bit. Because right now, you've got the state as the sovereign and the landowner as the victim, and that's the way a lot of landowners see it.... But if the state is at risk of losing something, in this case losing their eminent domain right because they weren't reasonable, then the state is going to be more inclined to negotiate with the landowner as an equal.

MR. HARRIS opined that what Sealaska is asking for via SB 278 is not unreasonable. He indicated that under current statute, federally funded projects are already addressed in this same manner.

MR. TILLINGHAST concurred that the federal property acquisition guidelines have been adopted by the state; AS 34.60.120 says: "(1) Every reasonable effort shall be made to expeditiously acquire real property by negotiation." The problem with that clause, he opined, is that "nothing happens if the state doesn't do it - there's no remedy."

REPRESENTATIVE JAMES noted that she did not see any remedy in SB 278 either.

MR. TILLINGHAST said that the remedy is in Section 4, which provides that the state can be denied or dispossessed of the property if the court finds, as part of this preliminary process, that the state hadn't been reasonable with the

landowner. Currently, he added, the court does not have that authority. In response to further questions, he reiterated that the issue of whether the state is being reasonable would be decided at the outset of the eminent domain proceedings.

REPRESENTATIVE MEYER posited that the term "reasonable and diligent" is fairly subjective and could be hard to prove.

MR. TILLINGHAST, in response, offered that this type of clause is relatively common, and that there is already quite a bit of case law that provides the courts with guidance and outlines the state's maneuverability. He explained that language in Section 2 was added with the intent of creating "an objective cookbook" for the steps that the state must follow in order to satisfy the "reasonable and diligent effort" clause.

TAPE 02-58, SIDE B
Number 2377

DENNIS POSHARD, Legislative Liaison/Special Assistant, Office of the Commissioner, Department of Transportation & Public Facilities (DOT&PF), said that the DOT&PF really takes acquisition of property through eminent domain procedures as a very serious matter. He also said:

We respect the rights and concerns of property owners. It starts right at the beginning. Our guidance to our staff - which we've given you a copy of - right at the beginning of it, it describes the rights of individual property owners as are stated by the Alaska [State] Constitution and the Fifth Amendment of the [Constitution of the United States]; and we take it very seriously. We believe that the current process works well. About 93 percent of our acquisitions, of the roughly 350 or so that we acquire in a given year, we end up acquiring through negotiated settlement - we don't even go to court or any kind of eminent domain proceedings ... - which is a very good record compared to other states.

First of all, in terms of the current process, our acquisitions take place under the federal uniform Act and the Alaska Statutes. By law, we're required to offer fair market value. It's not like buying a home, where it's in your best interest to go in and maybe offer a low price in hopes that you're going to get a good deal. We're required by law to go in and offer

what we truly believe, based on an appraised value, to be fair market value for the property. We go in trying to compensate the owner what they're due ... for what their property is worth. Our right-of-way manual ... stresses the importance of fairness and just compensation.

There's exhaustive case law on eminent domain procedures, and, ultimately, everything we do - every appraisal, every piece of property we acquire - ends up getting reviewed by the Federal Highway Administration. For them to participate and fund the acquisition of property, we have to do it according to federal law and according to the codes that they establish. And under the existing law, a judge already ... decides the issue of authority and necessity, and eventually, if necessary, fair market value. But the way the eminent domain process works now, we can go in and we can, through eminent domain, acquire title to a piece of property through a relatively quick procedure that, as you noted in Section 4 of the bill, requires us to prove authority and necessity, which is a pretty objective standard for us to go in and prove.

Number 2219

MR. POSHARD continued:

I think that entering a new standard of "reasonable and diligent" into what we have to prove in the court before we can divest the property owner of their title will only result in project delays and increased costs in legal fees. That's why we believe that [SB 278] encourages additional litigation during the acquisition process, and ultimately it shifts some of our project dollars from asphalt and needed highway improvements into paying for attorneys to defend our takings.

This bill will also result in project delays. I think you have a letter from the commissioner ... [wherein] he expresses his concern, and he uses an example of one property owner who ... could use this new language to try and delay the project, for whatever reason, ... even on a project where all of the other homeowners ... were in agreement that this is a needed project

and were willing to negotiate and settle with the state for their parcels of property. Another concern for us is whether or not the expenses - ... the additional expenses - will ultimately be eligible for federal highway reimbursement. I think they will, but at least it's a concern that we have.

And then [there are] a couple of other issues ... related to ... some of the testimony that you heard.... I'm not intimately familiar with the cases and some of the property takings that were brought up, but I can say that the department is definitely willing to consider the concerns of the sponsor and other interested parties that have been expressed in testimony regarding this bill, particularly as it relates to land trades and appealing a master's decision. To that end I think you have in your packet a copy of a memorandum from Mike Downing [Director/Chief Engineer] ... that deals with the delegation of authority to appeal a master's decision.

MR. POSHARD concluded:

I think that in past committee hearings there was testimony about a case where a master's decision was appealed. That is a very, very rare thing for us to do; and that decision did occur by the regional staff and the Department of Law, and we've sent out a memorandum taking away that delegation of authority and bringing it back into the headquarters so that the chief engineer can review those cases and go over them with the commissioner before deciding to appeal. And ... with regard to land trades, ... I think you also have a memorandum in your packet ... from Mike Downing to staff requesting them to try to come up with a policy that we can put in place that is going to deal with that particular issue and maybe give some guidance for us in terms of ... looking at land trades as maybe a first option, particularly as it relates to ANCSA lands and Native corporation land acquisitions.

Number 2020

MICHAEL L. DOWNING, Director/Chief Engineer, Division of Statewide Design & Engineering Services, Department of Transportation & Public Facilities (DOT&PF), referred to a

handout in members' packets titled Simplified Project Development Flow Chart. He said:

We go through these steps in the same way every time. It's detailed in the ... code of federal regulations, and we have to follow these steps; we've got lots of policies and manuals that add detail, but this is generally it. It's very simple; the actual library of all the guidance is pretty big. But you can get a sense of the steps here, starting with planning, then the environmental document phase of work, which is where all of the real decisions about an alignment get made. There might be little details that we put into the final designs, such as pulling in a slope or flattening one out, that changes the acquisition requirements, but, generally speaking, the right-of-way needs get addressed in the environmental document phase....

That's also the opportunity for any affected landowner to speak up and say, "Well, we object at this point to what you're planning to do because of what it would [do to] affect our property interests." Once we've gotten an approval from the Federal Highway Administration of that document, we're bound to stay within it. We can't start working on some scope of work that's not under that approved document. We also can't acquire right-of-way in advance of that document being approved because, ... if we had that option, we could pick our favorite route, acquire the right-of-way, and then prejudice the outcome of the document by saying, "Well, we already own the land here."

So under NEPA, the National Environmental Policy Act [of 1969], we're prohibited from proceeding on with the acquisitions or any other steps that would prejudice the environmental document. That means that those two functions in the development of a project ... [are] the long items, they're the long-duration activities; they become the critical activities in terms [of] how long it takes to deliver a project.

MR. DOWNING said that according to his interpretation of SB 278, Sections 2 and 4 will expand the time it takes to acquire right-of-way. First, by adding the process that is involved in allowing the owner to propose alternative means and allowing the owner to go out and seek his/her own appraisal. He noted that

currently, landowners are not prohibited from getting their own appraisal and rebutting the department's appraisal, and such is often done.

Number 1917

CHAIR ROKEBERG asked why then, if that activity is currently allowed, the department objects to such provisions being put into statute.

MR. DOWNING said it is because Section 4 stipulates that the owner cannot be divested of his/her property until the department has proven that it has been "reasonable and diligent", which is defined in Section 2 as "having followed these steps that add time."

CHAIR ROKEBERG posited that following the steps in Section 2 shouldn't add time.

MR. DOWNING clarified that it is in proving "reasonable and diligent" that time will be added, since the owner cannot be divested of the property until after this "new test" regarding "reasonable and diligent" is passed by the Department.

MR. POSHARD pointed out that although property owners can currently choose to get their own appraisal and rebut the department's case, [Section 2 of SB 278] mandates that in each case, the department "shall invite" landowners to "obtain an appraisal" or "offer any alternative means".

CHAIR ROKEBERG asked whether the department would be satisfied if the provisions of Section 2 only applied to property valued at [at least] \$10,000 or \$15,000.

MR. DOWNING indicated that price is not always the main issue for property owners; for example, Native corporations are concerned about maintaining property inventories.

CHAIR ROKEBERG indicated that he did not think the provisions of Section 2 should apply to "small takings."

Number 1680

MR. POSHARD agreed, noting that a "full blown appraisal" can cost as much as \$2,500, and so for a small pieces of property, [applying the provisions of Section 2] do not make sense.

MR. DOWNING added: "Under our delegation of authority from the Federal Highway Administration for these appraisals, we're allowed to do a value estimate, in lieu of appraisals, for property acquisitions ... for \$10,000 and less." He noted, however, that this exception applies only when the department can reach an amicable agreement with the property owner on what the value is.

CHAIR ROKEBERG offered his interpretation that Section 2 stipulates that an appraiser shall be hired, and opined, therefore, that it would be good to include an exception for property valued at \$10,000 [or under].

REPRESENTATIVE JAMES opined that eminent domain is there for a reason, and surmised that regardless of the dollar amount, projects could be delayed because of the restrictions added to the taking process via Section 4, which is [linked with] Section 2.

MR. DOWNING pointed out that under the federal program, the property owner is still only entitled to just compensation; therefore, regardless of any processes added by SB 278, the property owner will not receive any additional monetary benefits. Instead, he opined, SB 278 will only create new process and new tests, and will encourage litigation.

REPRESENTATIVE JAMES asked whether the department currently has provisions pertaining to land exchanges.

MR. DOWNING said that he has just issued a memo to the department's right-of-way chiefs instructing them to develop a process by which the department can engage in land exchanges. He pointed out that when engaging in land exchanges, the department must ensure that it stays eligible for federal reimbursement and that both sides are treated fairly. He indicated that he anticipates that the details for a land exchange program should be worked out by the end of July [2002].

REPRESENTATIVE JAMES asked whether, in terms of public process, the development of such a program will be treated in the same manner as the development of regulations.

Number 1472

MR. DOWNING pointed out that Title 19 authorizes the DOT&PF to acquire properties for the [purpose] of exchange, although any policies the department ultimately comes up with to implement

that [acquisition] may also have to be supported by regulation, and, if so, then under the administrative procedures Act, the department would have to go through the public hearing process.

REPRESENTATIVE JAMES opined that regardless of whether regulations were required, any forthcoming land exchange policies ought to get some form of public scrutiny.

MR. DOWNING agreed, adding that the parties involved should be able to have confidence in the solution.

REPRESENTATIVE JAMES commented that she believes that there should be more private ownership of land, and, thus, favors land exchange as an alternative.

MR. POSHARD, turning to Section 4 of SB 278, reiterated that the DOT&PF feels that this provision will cause [project] delays and will increase legal expenses; hence the department's fiscal note of approximately \$1.3 million. He pointed out that this projected increase in cost reflects money that would be spent in right-of-way acquisition as opposed to asphalt or some other aspect of a given project. In response to a question, he explained that in an average year, the department experiences only one "authority and necessity" challenge. In contrast, he predicted, there will be quite an increase in challenges based on SB 278's proposed standard of "reasonable and diligent".

Number 1232

JAMES CANTOR, Assistant Attorney General, Transportation Section, Civil Division (Anchorage), Department of Law (DOL), testified via teleconference. He explained that the fiscal note only reflects increased legal costs, and doesn't reflect possible delays in a project. He said:

The legal issue here is not reasonableness or reasonable alternatives. Those are already addressed in our statutes, as they are in the statutes of other states. The issue is the sword, in Section 4, of being able to stop a project. And the stop of a project occurs merely with the allegation [that] the state was (indisc. - coughing) or diligent in their effort to acquire the property. We actually are not afraid of losing that issue in the end, once the court hears it, because we think we are reasonable and diligent. But there's a timing factor. And the timing factor's particularly serious here with short

construction seasons. So what I'd like to do is quickly explain the process and then explain an example of one that happened to us up here recently.

MR. CANTOR paraphrased from AS 34.60.120, which says:

(1) Every reasonable effort shall be made to expeditiously acquire real property by negotiation. (2) Real property shall be appraised before the initiation of negotiations, and the owner or a designated representative shall be given an opportunity to accompany the appraiser during the inspection of the property. (3) Before the initiation of negotiations for real property, an amount shall be established that is reasonably believed to be just compensation for the real property and that amount shall be offered for the property. In no event may the amount be less than the approved appraisal of the fair market value of the property.

MR. CANTOR noted that for properties of any value, [the DOT&PF] requires two "MAI appraisals" to determine just compensation.

CHAIR ROKEBERG asked, "What's the break point there?"

Number 1118

MR. CANTOR replied, "I think it's in the \$200,000 range." He continued with his opening remarks:

[The Department of Transportation & Public Facilities] attempts to negotiate starting at that appraised value. If they fail, they refer to the Department of Law to file condemnation. We [the DOL] actually attempt to negotiate before condemnation as well; sometimes just changing personalities helps resolve an issue. At that point, condemnation is filed, and the most common kind of condemnation involves the state depositing the amount of money - that appraisal amount of money - with the court, and the property owner can then withdraw that money and have it while the proceeding continues. So then the property owner is saying, "Well, sure, I have this amount of money, but I'm entitled to more," and you're arguing about the "more." Also at the time you deposit the money, title passes and [DOT&PF] takes possession and can start to build the project, and the rest of the legal

proceeding is to determine if the property owner should get more money.

However - and this is Section 4 of the bill, the "however" - ... the property owner can object to the state's authority and necessity.... As it works now, that's where the property owner says, "No, no, no, there's another alternative; you don't have to take this property." If the property owner has another idea of how the project should have been built, that's the chance for the property owner to stop the project so the state has to redesign it. The test there is, as the project crosses that particular parcel, was it designed to achieve the greatest public good with the least private injury. And until that issue gets resolved, property title does not pass, and the project does not proceed.

Number 1031

MR. CANTOR said:

Now, our courts set up in [Civil Rule 72 of the Alaska Rules of Civil Procedure] a series of deadlines to speed that process up so that projects can get going. However, in our experience, courts don't follow those rules, and there's a good reason for it: we're taking away somebody's constitutional right to possession of their property, and that should not be done ... lightly. And if that person needs extra time to do discovery, review documents, take depositions, have their experts review things, the courts are not going to stick to an artificial deadline; they'll give that person the time they need before we take their property from them. And so the Rule 72 deadlines don't actually define what happens in court; what happens in court is slower.

After the court reaches a decision on authority and necessity, and ... if the court says, "Yes, the state had the authority and necessity," then the project can start up again and proceed to be built. And then you continue the litigation through [an] evaluation phase, and any amounts of money due the property owner are paid with 10.5 percent interest, which is higher than interest on most civil litigation - it's an extra help for the landowner.... Section 4 takes that authority

and necessity objection and expands it to include an objection about reasonableness: you merely have to say the state was not reasonable and diligent, and the process stops, and you go to court and do your discovery, you take your depositions, and you figure [out] whether the state was reasonable or diligent....

The example I have is on the "Parks Highway"; this is one we went through last year. One of Anchorage's top-drawer aggressive trial lawyers interposed an objection on authority and necessity. The objection was basically that this highway, which [is] the freeway that's being built into Wasilla, didn't need to be built - instead there should be a second road, more or less parallel, in a different location. So that stopped the project. The project was set to be ... put out for bid, and it didn't get put out for bid. The objection was lodged on January 22; the court's decision on August 14 was that the state did have the authority and necessity to build the project where they designed it, but by that time, just with construction seasons, we've been delayed a year in the project. So, a proceeding that for the court system at least was relatively fast, delayed the project for a year.

Number 0865

MR. CANTOR concluded:

I expect to see a significant increase in this type of objection, under Section 4. The reason I expect to see it is because if I were representing the landowner, I would do it. I'd have a duty as a lawyer to zealously advocate my client's position, and I think that it's a very valuable advocacy tool to be able to allege [in order to slow the process down by stopping construction] that the state was not reasonable.... I think that gives me a very strong advocacy tool; I don't think it particularly benefits the landowner except as a negotiation tool, because, in the end, the landowner only gets just compensation and 10.5 percent interest. The penalty is to slow down the project; the penalty is not to pay the landowner more money or anything else. So all the landowner gets is the opportunity to stop the horses

because the landowner feels - or at least can allege - that they weren't being treated reasonably.

MR. CANTOR, referring to the fiscal note, opined that it is self-explanatory; he said that under the provisions of Section 4, it is estimated that of the current rate of condemnation rate of 7 percent, 84 percent of those would be subjected to "this type of challenge." He added that there may be an incentive "for people to push into condemnation in order to stop a project and get the upper hand in a negotiation; so we estimated what would happen if we had a 14 percent condemnation rate, and that's where those numbers come from."

CHAIR ROKEBERG asked Mr. Cantor whether he would still have objections if Section 4 were removed from SB 278.

MR. CANTOR said that removing Sections 3 and 4 would address his concerns, adding, however, that [DOT&PF] might still have concerns with Section 2.

Number 0690

MR. DOWNING, referring to Section 1 of SB 278, noted that because "we have that already," the addition of the term "reasonable and diligent effort" is not problematic in and of itself; rather, it is the way in which that term gets detailed via Section 2, and the way in which that detail can stop a project via Section 4, that gives the [DOT&PF] concern. He relayed that the [DOT&PF] is willing to work with the sponsor and other interested parties to resolve the issues raised by SB 278. He said of SB 278 that he did not believe it "to be in the public interest."

REPRESENTATIVE MEYER asked whether it is state money or federal money that's being used when cases go to court.

MR. DOWNING replied:

That is federal funds, if it's a federally funded project, ... as long we stay within the parameters of the guidance that they give us. We believe that there's elements of this bill that may go outside of that; for instance, if under "(b)(2)(1)," we end up having to pay for a value in excess of what you'd arrive at through the process detailed in the code of federal regulations, then that excess expenditure would be non-participating funds. We would try hard

to avoid that occurrence, but it sits out there as a possibility.

MR. DOWNING, in response to a question about the fiscal note, said:

We arrived at that due to the estimates that we have of how much additional litigation we would see. When you go from a challenge of authority and necessity to include reasonableness and [diligence], we believe that encourages considerably more challenges as a negotiating tool. Our experience in "authority and necessity" challenges is that they're running us in the \$35,000 range per occurrence, and we don't have many occurrences today - about one a year. And we think we'll see anywhere from ... 20 to 35 - maybe even 40 - a year ... [if] this bill goes through.... So that's what we're concerned about, is that increased litigation costs.... Again, we're going to be paying for attorney fees and ... not ... new pavement, safety improvements, ... [or] the other amenities that we get out of the transportation program.

MR. POSHARD pointed out that although [the DOT&PF] believes that the dollar figure in the fiscal note would likely be "federal eligible," there is no guarantee from the Federal Highway Administration that such would be the case. If the Federal Highway Administration does participate, then approximately 90 percent of the amount estimated in the fiscal note would be paid for with federal funds, leaving the state responsible for the other 10 percent.

REPRESENTATIVE MEYER asked for assurance that [the DOT&PF] will institute a land exchange program.

MR. DOWNING offered his assurance, adding that there is a strong demand for such a program, and that the Native corporations have a legitimate point that must be addressed.

Number 0288

RICHARD "DICK" CATTANACH, Executive Director, Associated General Contractors (AGC), testified via teleconference. He said:

Our primary concern is getting the jobs out in a timely manner, and we're very concerned about the

potential on this bill. We do acknowledge and are aware of the problem that Sealaska had, but I'm not sure this is the best solution to deal with that issue....

But I'm primarily concerned about Section 2(b)(2), because, imagine if you will, a hypothetical: let's assume that we want to extend the highway around Merrill Field - the Glenn Highway - and [the DOT&PF] is proceeding with that, and an antidevelopment group, if there is such a thing in Alaska, buys a piece of property, and they can't reach an agreement with [the DOT&PF], and they offer an alternative; they suggest the [DOT&PF] tunnel under the existing roadway from Bragaw all the way to (indisc.). Okay, that's an alternative, and [SB 278] says, "offer any alternative means". Then the state would of course reject that, but to do that, they've got to do it in a reasonable way, and they actually can't just do it offhand; they've had to consider that option, they've had to evaluate that option.

So, when they prepare their initial estimate, they've got to look at all of these options, whether they're feasible or not, and come to a conclusion as to why they've rejected them. And if they didn't, if this is one they hadn't looked at, I can't believe they can just say out of hand, "No, we can't accept that." So, I just don't know if we want to open that door. But then when it gets to court, and this antidevelopment group might just actually take it to court, if they lose, they would probably go to the supreme court. So we're not just talking about a number of months - we're maybe not talking about one construction season, we may be talking about two or three - and I don't know that we've done anything for the state of Alaska other than solve the problem that Sealaska has right now. I think there may be a better way to do that; I don't think this bill is the way to accomplish that, and we suggest that it be modified significantly if you intend to go forward with it.

Number 0059

WILLIAM CUMMINGS, Assistant Attorney General, Transportation Section, Civil Division (Juneau), Department of Law (DOL), said that although it has been mentioned that SB 278 follows the

model procurement code, he wanted to point out that this model procurement code has been adopted by only one jurisdiction in the United States, and that one jurisdiction is Alabama. He suggested that upon closer inspection, members will find that the provisions of SB 278 are actually contrary to the provisions of the [uniform eminent domain code].

TAPE 02-59, SIDE A
Number 0001

MR. CUMMINGS, referring to AS 34.60.120 that was cited by Mr. Cantor, said that the language therein is identical to language in the "model procurement code"; in other words, he added, "we're already doing that. He said that the difference of opinion lies in the remedies available. He elaborated:

Under the uniform eminent domain code, the state ... is put to the test, just like under this statute, but under the eminent domain code, if the state has gone through and acquired appraisals and has negotiated with the property owner and has offered him fair market value - ... no less than this approved appraisal that the statute called for - then that's prima facie evidence that the state has been reasonable and acting in good faith. The language that we have in the [proposed] statute in ... Sections 2 and 3 sets up quite a different standard for the state to follow, and allows a number of places for people to actively get in and litigate and what not, even though it's been in full compliance ... with the law already.

MR. CUMMINGS indicated that comments pertaining to "Section 306 of the model code" say:

This section requires that the condemnor attempt negotiations, as defined in Section 307, only to the extent reasonably necessary to satisfy the good faith effort requirement. An inflexible negotiation rule could well prove a source of unnecessary litigation, and unless carefully defined in a requirement, could provide an opportunity for dilatory tactics by property owners.

MR. CUMMINGS opined that the aforementioned is precisely what Sections 2, 3, and 4 would do: enhance the opportunity for litigation and result in delays, which costs the state dearly in

terms of time, money, and attorney fees. He also opined that there is a big difference between the remedies in "the code" and those proposed by SB 278. Under the legislation, he surmised, if the state has made a mistake, the only thing that will result is that the state's condemnation case will be kicked out of court and thus the state will have to "start all over again." "Under the eminent domain code" he offered, there are three things that can happen: One, the property owner could be found to be "all wet"; two, the state could be told to correct certain things; or, three, the case could be thrown out of court.

CHAIR ROKEBERG announced that SB 278 would be held over.

SJR 37 - CONST AM: HIRING FREEZE

Number 0305

GWENDOLYN HALL, Staff to Senator Pete Kelly, Alaska State Legislature, said on behalf of Senator Kelly, sponsor, that his intent in introducing SJR 37 is to help slow down the growth of government in facing a \$1.3 billion deficit. [Senate Joint Resolution 37] will grant the legislature the authority to demand that the executive branch implement a hiring freeze. It will not, however, outline any particular type of hiring freeze; rather, such would be discussed at a later date by the legislature should that body see fit to demand a hiring freeze.

CHAIR ROKEBERG called an at-ease from 2:58 p.m. to 2:59 p.m.

Number 0449

JACK KREINHEDER, Chief Analyst, Office of the Director, Office of Management & Budget (OMB), Office of the Governor, said that he would begin his remarks by quoting Representative Coghill, who in a House State Affairs Standing Committee (HSTA) hearing said that SJR 37 is "Senator Kelly's latest attempt to rewrite the constitution one line at a time." Mr. Kreinheder posited that although Representative Coghill was probably being facetious when he said that, his comment did contain a kernel of truth. Mr. Kreinheder said he is offering that quote in the context of questioning whether the concept embodied in SJR 37 rises to the level of deserving to be a constitutional amendment. He went on to say:

I'm not going to get into a lot of detail on the pros and cons or merits of a hiring freeze; we debated that at some length in [HSTA] and Representatives James and

Coghill were familiar with that. The Knowles Administration did do a hiring freeze in 1999 when oil prices dropped below \$10 a barrel. I don't recall exactly how long it was in effect - I believe it was somewhat in excess of six months. There were some modest savings, but we did that in response to a short-term problem, which was oil prices dropping precipitously. [In] our current situation, ... our revenue problem is not a short-term problem - oil prices are higher than average right now. We've got a long-term problem, and it's simply not realistic to have a hiring freeze in effect for the next five or ten years and expect that to solve our problem.

... A number of other states have done hiring freezes or [are] in the middle of it because of the national recession and the declines in their tax revenues and so forth. But, again, they're looking at a short-term problem, and those hiring freezes will be lifted when the economy picks back up and their revenues return to normal. The people have referred to the hiring freeze as a management tool; that's true, but I would characterize it as management by chance, or management by meat axe really, as opposed to a precision type of tool, because if you want to reduce the budget, our view is that the legislature should decide where they want it reduced and do that. With a hiring freeze, it is just chance or luck ... which employees will leave their jobs and which positions will end up vacant.

Number 0632

MR. KREINHEDER continued:

I just checked with ... Sharon Barton [Director, Division of Personnel, Department of Administration] and she tells me that ... their preliminary latest estimate for annual state turnover is between 11 and 12 percent; in other words, 11 or 12 percent of state employees leave their jobs in any one year.... And there's approximately 16,000 state employees now, not counting the university, so if we had a hiring freeze in effect for a year and there were no exceptions to it, we'd be looking at something in excess of 1,600 positions being left vacant, with the corresponding impacts on state services. And while you could argue that it's more fair or better for the employees to

have hiring freeze than layoffs, the effect on state services isn't going to be any different than if you fired 1,600 state employees. And, as you can imagine, those would be some significant impacts.

One thing we hadn't mentioned in prior testimony: speaking with the representative of the university, her understanding is that this [constitutional] amendment, unless there were some exception, would apply to the university as well.... The [constitutional] amendment does say, "in accordance with law"; however, it does not provide any exceptions ... for public safety or health issues such as [Alaska] State Troopers, or child protection/child abuse workers, correctional officers, and so forth. So that's one concern, is that it appears to be, on the face of it, a blanket requirement that the ... executive branch could not hire any employees or fill any vacancies in the executive branch. Perhaps that would be clarified by statute, but there's certainly no guarantee of that.

Number 0787

MR. KREINHEDER concluded:

[The] Department of Law raised some legal concerns about this amendment; we discussed those in [HSTA]. Just briefly, there has been case law, nationally, that a constitutional amendment that significantly changes the balance of power between the executive branch, legislative branch, or the court system, depending on how far it goes, if it goes too far, the courts have held that cannot be done by a constitutional amendment because it's one branch of the government imposing its will on the other, and that it would have to be done in a constitutional convention instead. Whether this [constitutional] amendment rises to that level is debatable, it's not black and white, but the question does exist, since it's taking one of the governor's powers - basic powers, which is for the executive branch to hire and appoint employees - and restricting that and giving the legislature that power.

MR. KREINHEDER, in response to a question, said that he was referring to case law from California and elsewhere, and noted

that he could provide the committee with further information later. In response to another question, he said that even if an exception for Department of Public Safety employees were included, the administration would still oppose SJR 37.

MS. HALL explained that SJR 37 does not include any exemptions because it was not intended to outline the specifics of a hiring freeze; SJR 37 simply grants the legislature the authority to require the executive branch to implement a hiring freeze. She noted that SJR 37 is not intended to be a solution to Alaska's deficit problem, it is merely intended as a tool to help decrease the growth of state government. She pointed out that 1,200 new state positions have been created since 1995. She observed that although the legislature can appropriate money to individual departments, it has no say in how those funds are actually spent once received by the departments.

CHAIR ROKEBERG surmised that if SJR 37 is adopted, the specific resolution requiring a hiring freeze could be drafted to include exemptions. [SJR 37 was held over.]

ADJOURNMENT

Number 1112

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 3:10 p.m.