

**HOUSE
COMMITTEE REPORT**

(11)

Date referred: 2/28/86

FURTHER REFERRALS:

DATE: 4-24-86

The FINANCE Committee has considered HB 600

"An Act relating to acquisition of rights-of-way by the Department of Transportation and Public Facilities; and providing for an effective date."

and recommends:

- do pass
- do not pass
- do pass with attached amendment(s)
- no recommendation
- replace with CS HB 600 (Tsp) same title
- new title

and recommends Individual Recommendations

further referral to the _____ Committee

- and attaches:
- letter of intent
 - first fiscal note
 - new fiscal note
 - zero fiscal note 2-26-86 - Same (Tsp) Version

SIGNING DO PASS:

Albert P. Adams
John P. ...
John ...
Ronald J. ...
John ...

SIGNING OTHER RECOMMENDATIONS:

Mike ... - No Rec.
Pat ... novel
Rich. ... (DO NOT PASS)
Steve ... No Recommendation
Stephen ...
Jan ...

Albert P. Adams
Chairman

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date : _____

REQUEST

Bill/Resolution No.: House Bill 600 (TRANS)
 Title: An Act relating to acquisition of right of way by DOT&PF and providing for an effective date
 Sponsor: Scnultz
 Requestor: _____
 Date of Request: _____

FISCAL DETAIL

Agency Affected: Department of Transportation & Public Facilities
 BRU: _____
 Components: _____

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES		-0-				
TRAVEL		-0-				
CONTRACTUAL		-0-				
SUPPLIES		-0-				
EQUIPMENT		-0-				
LAND & STRUCTURES		-0-				
GRANTS, CLAIMS		-0-				
MISCELLANEOUS		-0-				
TOTAL OPERATING		-0-				

CAPITAL		-0-				
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REVENUE		-0-				
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FUNDING : (Thousands of Dollars)

GENERAL FUND		-0-				
FEDERAL FUNDS		-0-				
OTHER		-0-				
TOTAL		-0-				

POSITIONS :

FULL-TIME		-0-				
PART-TIME		-0-				
TEMPORARY		-0-				

ANALYSIS : Attach a separate page if necessary

Prepared by: Milton H. Lentz, CRA *2/24/86*
 Division: Engineering & Operations Standards Phone: 465-2985
 Date: 2/24/86
 Approved by Commissioner: _____ Date: 2-26-86
 Agency: Department of Transportation & Public Facilities

Distribution (by Agency preparing fiscal note):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

Offered: 2/28/86
Referred: Finance

Original sponsor: Shultz and Koponen

1 IN THE HOUSE BY THE TRANSPORTATION COMMITTEE
2 CS FOR HOUSE BILL NO. 600 (Transportation)
3 IN THE LEGISLATURE OF THE STATE OF ALASKA
4 FOURTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to acquisition of rights-of-way by
7 the Department of Transportation and Public Facili-
8 ties; and providing for an effective date."

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

10 * Section 1. AS 44.42.02C(b) is amended to read:

11 (b) The department may

12 (1) engage in experimental projects relating to available
13 or future modes of transportation and any means of improving existing
14 transportation facilities and service;

15 (2) exercise the power of eminent domain, including the
16 declaration of taking as provided in AS 09.55;

17 (3) acquire, trade land for, or purchase undeveloped or
18 prepared rights-of-way for present or future use as road, highway,
19 railroad, or pipeline corridors.

20 * Sec. 2. This Act takes effect July 1, 1986.

HB 600 ISSUE SUMMARY

HB 600 is introduced at the request of AHTNA Inc., in order to address several problems confronting AHTNA Inc., as well as other major landowners throughout the State of Alaska. These issues have been raised by AHTNA Inc. representatives in their discussions with DOT/PF employees and other administration and Legislative personnel. HB 600 is designed to respond to the counsel which AHTNA Inc. representatives received from those sources.

Among the specific issues of concern are the following:

1. Local hire: encouraging the employment of local people, within a community impacted by development, on projects in their community, especially where property-owned by those local citizens is to be used by the State in the development project.
2. Fair and equitable compensation: Often raw land, especially in rural areas, has a relatively low current appraised value, in part because of infrequent land transactions in those areas with a resultant scarcity of "comparables" for valuation purposes.
3. Expediting local construction projects: With the downturn in the State economy it has become a matter of economic necessity for many Alaskan residents that proposed public works projects be moved from legislative appropriation and administrative approval into the field as rapidly as possible.
4. Minimizing project costs to the State: In order to generate the greatest possible impact from Alaskas' increasingly limited capital budget, innovative processes and procedures for land or right-of-way acquisition and development should be explored.

DAVID L. ALLISON
ATTORNEY AT LAW

Although these four issues, obviously, do not address all of the concerns regarding local employment, fair compensation, accelerated construction schedules and maximum return on State capital expenditures, they do illustrate the primary issues addressed by the modification of AS 44.42.020 as proposed in HB 600. A brief summary of how HB 600 responds to these four issues is contained in Attachment # 3 in this package.

HB 600 JUSTIFICATION

HB 600 is a very simple bill with limited impact compared with many of the complex and extensive bills which regularly come before this committee. It is a bill, however, which holds real promise for assisting many individual Alaskans, major land owners and even, possibly, the State treasury, at little or no cost to the State.

The provisions of HB 600, in substance, allow the Department of Transportation and Public Facilities to acquire prepared, as well as undeveloped, rights-of-way for highways and certain other public purposes. These provisions are not mandatory and require no more of the DOT/PF personnel than is required at present.

The potential effects of HB 600, however, are significant. If, for example, DOT/PF were to exercise its' discretion to negotiate for and acquire prepared right-of-way for a highway extension or by-pass from the owner of the real estate parcel through which the highway was to pass, that property owner would be in a unique position to legally guarantee the employment of local people for the task of clearing the right-of-way. Not only would the property owner have the advantage of adding value to the land prior to selling it, but the buyer, DOT/PF, would have the advantage of acquiring in one transaction the cleared right-of-way which would, without HB 600, require at least two, if not more, separate transactions. HB 600, therefore, has the potential to address each of the four issues mentioned in the ISSUE SUMMARY, which is attachment # 2 herein.

HB 600 responds to the issue of local hire by providing an opportunity for Alaskans to obtain employment on construction projects which take place near their homes. This opportunity is especially available when the major land holder from whom the right-of-way is obtained is a Native Corporation in that those corporations have both a commitment to, and a demand for, shareholder hire. Since the majority of the Native Corporation shareholders are also Alaska citizens, shareholder hire is, effectively, local hire. To the extent that shareholders are not available or not qualified for the jobs, those jobs are very likely to go to other, non-shareholder, local people as the

DAVID L. ALLISON
ATTORNEY AT LAW

Native Corporations have their headquarters, and, therefore, their hiring facilities, in Alaska.

The potential for fair and equitable compensation to the land owner is improved by the provisions of HB 600 by providing the opportunity to the land owner to add value to the right-of-way being acquired by DOT/PF prior to transfer of the property. Although the underlying value of the real estate is not changed by this bill, the opportunity to employ shareholders and to earn additional income from the right-of-way preparation, especially if the land clearing is done efficiently, adds significantly to the overall value and utility of the corporate land to the corporation without any additional cost to the State.

Because HB 600 would provide for acquisition of the prepared right-of-way in one transaction, rather than two or more transactions as is presently the case, implementation of HB 600 will be likely to expedite local construction projects, or, at least, offer an opportunity to expedite those projects. This potential benefit, like local hire, is most likely to be realized in situations where the right-of-way seller is a Native Corporation because such corporations are of sufficient size, with sufficient available employees and equipment, to undertake the clearing and other necessary or appropriate right-of-way preparation allowed for under the bill.

Maximizing local hire; expediting local construction projects; and providing fair and equitable compensation to the land owner; all improve the potential for minimizing the project costs to the State and reducing transfer payments from the State to both the individual Alaskans and the rural communities most severely impacted by declining revenues and limited local tax bases. Since HB 600 is discretionary rather than mandatory, DOT/PF would have the opportunity to experiment with the process on a limited basis, perhaps involving only one or two projects, until the benefits of the legislation are proven.

HB 600 is a simple bill which offers the potential for substantial benefits to the people of Alaska. Your positive recommendation is requested.

Collateral references. — 39 Am. Jur. 2d, Highways, Streets, and Bridges, § 1 et seq.
39A C.J.S., Highways, § 1 et seq.

Sec. 44.42.010. Commissioner of transportation and public facilities. The principal executive officer of the Department of Transportation and Public Facilities is the commissioner of transportation and public facilities. (E.O. No. 39, § 2 (1977))

Sec. 44.42.020. Powers and duties. (a) The department shall

- (1) plan, design, construct and maintain all state modes of transportation and transportation facilities and all docks, floats, breakwaters, buildings and similar facilities;
- (2) study existing transportation modes and facilities in the state to determine how they might be improved or whether they should continue to be maintained;
- (3) study alternative means of improving transportation in the state with regard to the economic costs of each alternative and its environmental and social effects;
- (4) develop a comprehensive, long-range intermodal transportation plan for the state;
- (5) study alternatives to existing modes of transportation in urban areas and develop plans to improve urban transportation;
- (6) cooperate and coordinate with and enter into agreements with federal, state and local government agencies and private organizations and persons in exercising its powers and duties;
- (7) manage, operate, and maintain state transportation facilities and all docks, floats, breakwaters and buildings, including all state highways, vessels, railroads, pipelines, airports, and aviation facilities;
- (8) study alternative means of transportation in the state, considering the economic, social, and environmental impacts of each alternative;
- (9) coordinate and develop state and regional transportation systems, considering deletions, additions, and the absence of alterations;
- (10) develop facility program plans for transportation and state buildings, docks and breakwaters required to implement the duties set out in this section, including but not limited to (A) functional performance criteria; and (B) schedules for completion;
- (11) supervise and maintain all state automotive and mechanical equipment, aircraft, and vessels, except vessels and aircraft used by the Department of Fish and Game or the Department of Public Safety;
- (12) supervise aeronautics inside the state, under AS 02.10;

(13) complete and maintain a current inventory of public facilities, including a projection of the serviceability of the facilities and projections of replacements and additions to facilities needed to provide the level of services programmed by the various user agencies, for municipalities with populations of less than 12,000 and for unincorporated communities, and perform those duties on a cooperative basis with larger municipalities;

(14) adopt energy performance standards for public facilities of the state, the construction of which begins after July 1, 1980; the standards shall be based on thermal and lighting energy standards established by the American Society of Heating, Refrigeration and Air Conditioning Engineers as adapted for application in high latitude, cold climate environs;

(15) provide planning assistance, including but not limited to energy audits and related technical services, to school districts and regional educational attendance areas to develop and implement

(A) standards for the design, construction and operation of rural educational facilities; and

(B) energy conservation measures for rural educational facilities

(b) The department may

(1) engage in experiment or projects relating to available or future modes of transportation and any means of improving existing transportation facilities and services;

(2) exercise the power of eminent domain, including the declaration of taking as provided in AS 09.55, (E.O. No. 39, § 2 (1977); am § 13 ch 168 SLA 1978; am § 12 ch 83 SLA 1980; am E.O. No. 50, § 10 (1981))

Cross references. — For the responsibility and authority of the supreme court over state court facilities, see AS 22.05.025.

Effect of amendments. — The 1980 amendment added paragraphs (14) and (15) to subsection (a).

The 1981 amendment, in subsection (a), deleted "communication facilities" following "transportation facilities" in paragraph (1), deleted "and communication facilities" following "facilities and services" in paragraph (2), deleted "and communication" following "improving

transportation" in paragraph (3), deleted "communication facilities" following "transportation facilities" in paragraph (7), deleted "and communication facilities" following "plans for transportation" in paragraph (10), deleted "and" at the end of paragraph (11), deleted "and communications" following "aeronautics" and substituted a semicolon for a period near the end of paragraphs (12) and (13). The amendment also deleted "and communication" following "facilities and services" in paragraph (1) of subsection (b).

Sec. 44.42.030. Regulations. The department may adopt regulations under the Administrative Procedure Act (AS 44.62) to implement, interpret, or make more specific its powers and duties. (E.O. No. 39, § 2 (1977))

Sec. 44.42.040. Departmental organization. The commissioner shall establish regions within the state. The functions of the department within each region shall be performed, to the maximum extent

Alaska Statutes

Title 19. Highways and Ferries.

Chapter

- 05. Administration (§ 19.05.040)
- 10. State Highway System (§§ 19.10.060, 19.10.170)
- 20. Cooperation by and with the State (§ 19.20.015)
- 30. Access Roads (§§ 19.30.080, 19.30.127, 19.30.241, 19.30.260 — 19.30.320)
- 40. James Dalton Highway (§§ 19.40.100, 19.40.200, 19.40.210)
- 60. Ferry Terminal Facilities (§ 19.60.070)
- 65. Alaska Marine Highway System (§ 19.65.010)

Chapter 05. Administration.

Article

- 1. Department of Transportation and Public Facilities (§ 19.05.010)

Article 1. Department of Transportation and Public Facilities.

Section

- 40. Powers of department

Sec. 19.05.040. Powers of department. The department may

- (1) acquire property;
- (2) exercise the power of eminent domain;
- (3) take immediate possession of real property, or any interest in it under a declaration of taking or by other lawful means;
- (4) acquire rights-of-way for present or future use;
- (5) control access to highways;
- (6) regulate roadside development;
- (7) preserve and maintain the scenic beauty along state highways;
- (8) dispose of property acquired for highway purposes;
- (9) accept and dispose of federal funds or property available for highway construction, maintenance, or equipment;
- (10) enter into contracts or agreements relating to highways with the federal government, municipalities, a political subdivision, or with a foreign government, if the contract is approved by the federal government;
- (11) establish, levy, and collect tolls, fees, charges, and rentals for the use of state roads, highways, bridges, crossings, and causeways; and

(12) exercise any other power necessary to carry out the purpose of AS 19.05 — 19.25. (§ 2 art III title I ch 152 SLA 1957; am § 3 ch 35 SLA 1971; am § 2 ch 162 SLA 1984)

Effect of amendments. — The 1981 amendment deleted "and" at the end of paragraph (10), inserted present paragraph (11), and redesignated former paragraph (11) as present paragraph (12).

Chapter 10. State Highway System.

Article

- 1. Designation, Marking and Use (§ 19.10.060)
3. Construction (§ 19.10.170)

Article 1. Designation, Marking and Use.

Section

60. Regulation of weight and load of vehicles and use of highways during certain seasons

Sec. 19.10.010. Dedication of land for public highways.

NOTES TO DECISIONS

A utility may construct a powerline on an unused section line easement reserved for highway purposes under this section. Fisher v. Golden Valley Elec. Ass'n, Sup. Ct. Op. No. 2606 (File No. 6902), 658 P.2d 127 (1983).

AS 19.25.010 places Alaska among

those states which permit powerline construction by a utility as an incidental and subordinate use of a highway easement. Fisher v. Golden Valley Elec. Ass'n, Sup. Ct. Op. No. 2606 (File No. 6902), 658 P.2d 127 (1983).

Sec. 19.10.060. Regulation of weight and load of vehicles and use of highways during certain seasons. The department, with respect to highways under its jurisdiction, may

- (1) establish limitations on weight, size, and load of vehicles;
(2) [Repealed, § 25 ch 144 SLA 1977.]

(3) prohibit the operation or impose restrictions on vehicular use of highways during certain seasons of the year. (§ 5 art III title II ch 152 SLA 1957; am § 1 ch 55 SLA 1963; am § 25 ch 144 SLA 1977; am § 2 ch 77 SLA 1982)

Cross references. For the duties of the Department of Commerce and Economic Development to operate weighing stations and enforce weight and load limitations based upon directions of the Department

of Transportation and Public Facilities, see AS 14.33.020(25).

Effect of amendments. -- The 1982 amendment inserted "size" in paragraph (1).

Article 3. Construction.

Section

170. Construction by department

Sec. 19.10.170. Construction by department. (a) Except as provided in AS 36.98 and AS 44.33.300, it shall be the general policy of the department to require the construction of all highways under bid contract. However, subject to the provisions of (b) of this section, when the estimated cost of a construction project is less than \$100,000 or when it appears to be in the best interests of the state, the department may perform the work notwithstanding any other provisions of law.

(b) Construction or professional services in connection with the construction of highways performed by the department under (a) of this section which have an estimated cost exceeding \$5,000 may not be performed by the department unless the commissioner determines, in writing, that the cost to the state will be less than that incurred as a result of a formally advertised or negotiated contract. The determination of the commissioner shall be supported by findings of fact which shall set out enough facts and circumstances to clearly justify the determination. The determinations and findings shall be maintained as a permanent record of the department.

(c) In this section, "professional services" means architectural, engineering, or land surveying services. (§ 1 art III title IV ch 152 SLA 1957; am § 2 ch 277 SLA 1976; am §§ 1, 2 ch 104 SLA 1978; am § 1 ch 144 SLA 1982)

Effect of amendments. — The 1982 amendment inserted "AS 36.98 and" in the first sentence of subsection (a).

Chapter 20. Cooperation by and with the State.

Section

15. Local control of state transportation corridors

Sec. 19.20.015. Local control of state transportation corridors. (a) A municipality, by resolution of its governing body, may request of the department the assumption of the department's responsibilities relating to planning of transportation corridors which are to be located within the boundaries or operating area of the municipality. After receipt of the request, the department shall provide by agreement for assumption by the municipality of the department's responsibilities relating to planning of transportation corridors, unless the commissioner determines that assumption of



Dept. of Transportation & Public Facilities

Position Paper

BILL NO: House Bill No. 600 and Senate Bill No. 428 **APPROVED:**

Bill Knapp
R. J. Knapp
Commissioner

TITLE: An Act relating to acquisition of right of way by DOT&PF and providing for an effective date

2/26/86

In reviewing both HB 600 and SB 428, it is our opinion that the language adds nothing to existing powers of the State of Alaska already under AS 44.42.020. We do, however, have some concern with the language and its impact.

The words "...prepared rights-of-way..." imply that preparation of the right of way is done prior to or as a condition of acquisition. The condemning authority could purchase the right of way in either an undeveloped or prepared condition under the power of eminent domain (AS 09.55); however, the condemning authority is limited to pay no more than fair market value for property. Fair market value does not include value that contributes to public construction or enhancement of a project. In other words, the price paid for right of way would be measured in terms of fair market value, not in terms of construction costs for performing project preparation. Providing that prepared rights of way were to be acquired, the fair market value of the land would have to be a separate issue from the price of doing the preparation to meet the requirements of the law. The increase in market value, if any, may or may not equal the cost of doing the preparations. It is noted that laws governing the fair market value concept are well established and defined by the courts.

Another question regarding the acquisition of prepared rights of way has to do with the competitive bid requirements of AS 37.05.230. The preparation of rights of way for a specific project surely would be deemed to be public construction, therefore subject to competitive bid. In a recent opinion of the Supreme Court of the State of Alaska, City and Borough of Sitka v. Construction ... General Laborers Local 942, 644 p. 2d 227, Op. No. 2495 (May 7, 1982, Alaska), it was held that clearing requirements included in a timber sale contract were "public construction" and therefore subject to the Little David-Bacon Act of Alaska. The primary test applied in the opinion was the extent to which the clearing work under the timber sale contract related to the construction of a dam. In essence, the court concluded that the clearing work would not have been done but for the construction of the dam. This opinion would surely have some effect on our issue in regard to acquiring project-specific prepared rights of way.

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M

March 20, 1986

SUBJECT: Relationship of AS 37.05.230 to the
acquisition of prepared right-of-ways
under HB 600

TO: Representative Al Adams

FROM: George termohle *GU*
Legislative Counsel

Louann Cutler of your staff requested an explanation of how acquisition of prepared right-of-ways under HB 600 relates to the competitive bid requirements of AS 37.05.230.

HB 600 authorizes the Department of Transportation and Public Facilities to acquire right-of-ways in undeveloped or prepared states for use as road, highway, railroad, or pipeline corridors. The bill, in part, affirms existing authority of the department to acquire right-of-ways for roads and highways under AS 19.05.040(1) and (4) and AS 19.05.080. The bill also clarifies the department's authority to acquire right-of-ways that have been prepared for use as a transportation corridor. A prepared right-of-way has had some work done to it that enhances its usefulness as a transportation corridor. The kinds of work that are involved include land clearing, brushing, and grading of the land.

AS 37.05.230 requires the state to award contracts for construction, supplies, materials, etc. on the basis of competitive bids.

The procedures for acquisition of right-of-ways are set out in AS 19.05 and AS 09.55.240 - 09.55.460.

Where the state purchases a right-of-way that is in its natural, unimproved condition, the state must perform the preparation and construction work itself or must let a construction contract for the work. When the state enters into a contract for construction to prepare a right-of-way for a

Representative Al Adams
Page 2
March 20, 1986

road or other purpose that contract must be awarded on the basis of competitive bids.

Where the state purchases a right-of-way that already is in a prepared condition the state is acquiring the land and the improvements made by the landowner. No public construction contract is involved in the acquisition of the proposed right-of-way because the state did not contract for the improvements. The improvements were on the land when the state acquired the right-of-way.

If the state purchases a right-of-way on the condition that the right-of-way be prepared by the landowner then AS 37.05.230 is involved. In such a case the state is purchasing the right-of-way and contracting for construction of improvements to the right-of-way. The contract for construction would violate the requirements of AS 37.05.230 because it was awarded to the landowner without following the competitive bid process.

The landowner may make improvements to a right-of-way to get a higher price for the land because the improvements make the land more valuable to the department. Whether the landowner will receive a price that is high enough to cover the cost of making the improvements to the land, depends on the outcome of negotiations between the landowner and the department. If the department and the landowner cannot agree on a price, the department can acquire the land and the improvements attached to the land through eminent domain, in which case the department pays fair market value for the land. The fair market value of the land with the improvements may not be enough to pay the landowner for the cost of making the improvements.

HB 600 and AS 37.05.230 do not conflict, nor does HB 600 change the effect of AS 37.05.230. A contract for construction on a state owned right-of-way must be awarded on a competitive bid basis, and, to the extent that such a contract is involved in acquisition of a prepared right-of-way, that contract would be subject to AS 37.05.230.

Acquisition of prepared right-of-ways can be exempted from the requirements of competitive bidding by adding an exception to AS 37.05.230 that excludes from the competitive bidding statute any construction performed by a landowner as a

Representative Al Adams
Page 3
March 20, 1986

~~condition of the acquisition of a right-of-way by the Department of Transportation and Public Facilities, if that is the intent of the legislature.~~

In summary, HB 600 does not change the requirement that the state award all public construction contracts on the basis of competitive bid. Once the state has agreed to acquire the right-of-way, any preparation of the right-of-way must be performed under a construction contract awarded according to the competitive bidding procedure of AS 37.05.230. HB 600 does clarify the authority of the state to acquire ~~prepared right-of-ways where the improvements to the right-of-way exist at the time of acquisition and to pay a higher price for the right-of-way.~~

Please contact me if I can provide more information.

GU:mkr
m4/024

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL

March 21, 1986

The Honorable John B. Coghill
Alaska Senate
P.O. Box V
Juneau, AK 99811

Re: SE 428/HB 600

Dear Senator Coghill:

You have inquired regarding the legal impact SE 428. Identical legislation has also been introduced in the House of Representatives as HB 600.

This bill amends AS 44.42.020 with new language, proposed as subsection (b)(3), which allows the Department of Transportation and Public Facilities (DOT/PF) the discretion to "acquire, purchase, or take over underdeveloped or prepared rights of way for present or future use as a road, highway, railroad or pipeline corridors." The language regarding prepared rights of way presents a number of legal difficulties, which arise from state procurement policies and general legal requirements regarding public construction contracts after award of the contract.

Under existing statutory authority, the Department of Transportation and Public Facilities has the duty to acquire land necessary as rights of way. AS 19.05.080 and AS 35.20.010. It is also required to construct public projects, with a cost of construction of more than \$100,000, by contracts awarded on the basis of competitive bidding to the lowest responsible bidder. The department can, upon a showing by ultimate facts, waive the requirements for competitive bidding when it is in the state's best interests. AS 19.10.170, 19.10.210, 35.15.010 and 35.15.050.

The new language contained in SE 428 grants no new authority to DOT/PF. The department presently has the ability to acquire land and to accomplish the construction of public works by means other than competitive bidding. The proposed language does blend the functions of land acquisition and construction

BILL SHEFFIELD, GOVERNOR

REPLY TO:

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465-3603

together, but in no way changes any other legal obligations of the department or other requirements which presently exist.

When the state acquires land it is obligated to render just compensation for the land, which is based upon the fair market value of the land without regard to any special value the land may have to the state for the project constructed in the manner proposed. AS 09.55.310 and Gackstetter v. State, 618 P.2d 564 (Alaska 1980). Its obligation can be characterized as a responsibility to pay as much money for the land as is reasonably supportable by external criteria found in the particular real estate market.

Public construction contracts are generally awarded to the lowest bidder which is determined on the basis of price competition among interested contractors. DOT/PF's duty in regard to these contracts may be characterized as the responsibility to accomplish the construction at the least cost to the state.

The proposed language of this bill does not alter DOT/PF's responsibilities under existing law regarding either land acquisition or public construction contracting. The department would still be required to prove by ultimate facts that the particular acquisition of prepared rights of way would be in the state's best interests compared to buying the land for fair market value and accomplishing the construction by competitive bidding with the award to the lowest responsible bidder.

There is a second set of legal requirements which also apply to public construction projects which the provisions of HB 428 do not alter. These requirements govern the performance of contracts for public construction projects and come into play after the contract has been awarded.

AS 36.05.010 through AS 36.05.110 require the payment of prevailing wage rates on public construction contracts. There is little doubt that the type of work contemplated by the term "prepared rights of way" would fall within the ambit of these statutes. Public construction is defined in AS 36.95.010(3) to mean ". . . the on site field surveying, erection, rehabilitation, alteration, extension or repair, including painting or redecorating of buildings, highways or other improvements to real property under contract for the state . . ." (Emphasis added). The fact that the state would be contracting for the purchase of land instead of the construction of a public works project would not defeat a worker's right to receive the prevailing wage rate. This conclusion is reached because of the close connection between the work to be done as an incident of the land

acquisition and the completed project, and the fact that the land as improved to the state's specifications will be used for a facility owned and used by the state. See, City and Borough of Sitka v. Construction and General Laborers Local 942, 644 P.2d 227 (Alaska 1982) and Alaska Federation of Labor v. State Department of Labor et al, Alaska Supreme Court Opinion No. 3014, January 31, 1986.

Under the provisions of AS 36.25.010 contractors on state public works projects, which have a contract price of more than \$100,000, are required to procure payment bonds to guarantee payment for laborers and material men providing services and goods necessary for the performance of the contract. There have been no cases which require payment bonding under circumstances similar to the requirement to pay prevailing wage rates which we have discussed above. However, it is probable that our courts could reach that conclusion in regard to prepared rights of way.

We reach this conclusion because payment bonds are required to serve two functions. They protect laborers and material men by ensuring that they will be paid for their services or goods. Coincidentally, payment bonds also protect the state because they provide the exclusive remedy in the event of nonpayment of laborers and material men. Hence, the state is not subject to liens filed by laborers and material men under AS 34.35.050. (The argument for requiring payment bonds for creation of prepared rights of way is amplified because the relationship is structured as a land transaction, which would be subject to liens filed by laborers and material men.)

If a major alteration in public policy is sought by the passage of HB 428, the bill is not successful. The bill does not grant any authority to DOT/PF which it does not already possess under existing law. The department would still be required to prove that it was in the state's best interests to purchase prepared rights of way rather than have the work preparing the right of way done under a contract awarded on the basis of competitive bidding. It is a virtual certainty that laborers actually performing the work would be entitled to receive the prevailing wage rate under AS 36.05.010 which would make labor costs for preparing the right of way equal to the labor costs under competitive bidding. Similarly, there is also a very strong possibility that payment bonding would be required when prepared rights of way are purchased. The costs of these bonds would have to be factored and would be the same for both property owners preparing rights of way for sale to the state and construction contractors. It appears, given the costs paying prevailing wage rates and procuring the appropriate bonding, that

Honorable John B. Coghill
Alaska Senate

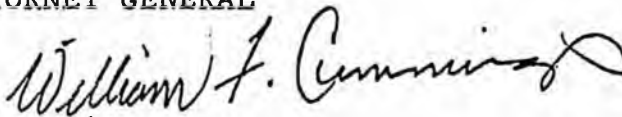
March 21, 1986
Page 4

it would be unlikely that the necessary showing that a contract to acquire prepared rights of way would be in the state's best interest, except for very modest projects, unless the property owner is willing to accept greatly reduced equipment rates on equipment required for the work and give up normally expected returns for overhead and profit.

If we may be of any further assistance on these matters, please contact us at your earliest convenience.

Sincerely yours,

HAROLD M. BROWN
ATTORNEY GENERAL

By: 
William F. Cummings
Assistant Attorney General

WFC:prm

Introduced: 2/14/86
Referred: Transportation
and Finance

1 IN THE HOUSE

BY SHULTZ

2

HOUSE BILL NO. 600

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

FOURTEENTH LEGISLATURE - SECOND SESSION

5

A BILL

6

For an Act entitled: "An Act relating to acquisition of rights-of-way by
7 the Department of Transportation and Public Facili-
8 ties; and providing for an effective date."

9

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

10

* Section 1. AS 44.42.020(b) is amended to read:

11

(b) The department may

12

(1) engage in experimental projects relating to available

13

or future modes of transportation and any means of improving existing
14 transportation facilities and service;

15

(2) exercise the power of eminent domain, including the

16

declaration of taking as provided in AS 09.55;

17

(3) acquire, purchase, or take over undeveloped or prepared

18

rights-of-way for present or future use as road, highway, railroad, or

19

pipeline corridors.

20

* Sec. 2. This Act takes effect July 1, 1986.