SB

193

SENATOR
JOHN B. "JACK" COGHILL
Chairman

Senator Jan Faiks—Vice Chairman
Senator Mitch Abood
Senator Paul Fischer
Senator Joe Josephson

Alaska State Legislature

POUCH V
JUNEAU, ALASKA 99811
(907) 465-4921

Senate Committee on Transportation

M E M O R A N D U M

To: Committee members

From: Committee staff

Date: March 13, 1985

Re: SB 193 Backup materials

On Friday, March 15, the committee is scheduled to consider SB 193, the Governor's bill making changes in the State's eminent domain procedures. These changes are needed, according to the Governor, to codify recent court rulings on eminent domain takings.

The back-up material explains the intent behind the bill fairly well, and the Governor's transmittal letter, in particular, is detailed in its discussion of the court cases behind the bill. The referenced statutes, rules of court, and subsection of the State constitution should provide sufficient background to the issue. In addition, we are expecting to hear from the Court system, and hope to have that response by our meeting time.

The power of eminent domain is a particularly controversial, and sometimes abused power of government, and the changes proposed in SB 193 may, on the one hand, expedite the public's business, but may not, on the other hand, all be good for property-owners.

The members may want to consider, for example: Is it appropriate to place the onus on the property-owner to prove "by clear and convincing evidence" that the taking is "arbitrary, capricious, or an abuse of discretion" in order to keep his property? (Sec. 7). Is it appropriate to change the law so that, in the Governor's words, "our eminent domain code accurately reflects the law" (letter, p.5), or should the code be induced to change?

STAFF ANALYSIS

Introduced: 2/26/85
Referred: Transportation, Judiciary and Finance

IN THE SENATE

BY THE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

SENATE BILL NO. 193

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the power of eminent domain; and providing for an effective date."

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

* Section 1. AS 09.55.270 is amended by adding a new subsection to read:

(b) If the property is to be taken by a declaration of taking filed under AS 09.55.440, the state or the municipality shall prepare a decisional document that (1) states that the property is taken in a manner compatible with the greatest public good and least private injury, (2) summarizes the major facts supporting that decision, and (3) identifies any reports, studies, or statements relied upon for the decision.

* Sec. 2. AS 09.55.300(a) is amended to read:

(a) The court has power

(1) to regulate and determine the place and manner of making the connections and crossings or of enjoying the common uses mentioned in AS 09.55.260(5), and of the occupying of canyons, passes, and defiles for railroad purposes, as permitted and regulated by law;

(2) to limit the amount of property sought to be condemned if, in its opinion, the quantity sought to be condemned is not necessary;

(3) to determine whether the property is taken by necessity for a public use or purpose in a manner compatible with the greatest public good and least private injury, based upon the decisional

PROPOSED CHANGES

document required by AS 09.55.270 and the evidence allowed by AS 09.-55.460(d), if the taking is accomplished by a declaration of taking filed by the state or a municipality under the provisions of AS 09.-55.440.

* Sec. 3. AS 09.55.410 is amended to read:

Sec. 09.55.410. WITHDRAWAL OF FUNDS BY PARTY IN INTEREST. The money deposited in the court, or a part of it, may be withdrawn by a party in interest in the manner provided in AS 09.55.440. The[, AND THE] court may [SHALL HAVE THE POWER TO] direct the payment of delinquent taxes and special assessments out of the amount determined to be just compensation and to make orders with respect to encumbrances, liens, rents, insurance, and other charges as are just and equitable. ~~[The withdrawal of any part of the deposit by a party in interest is a waiver of all issues concerning the taking of the property, except the amount of just compensation.]~~

(1)

* Sec. 4. AS 09.55.430 is amended to read:

Sec. 09.55.430. CONTENTS OF DECLARATION OF TAKING. The declaration of taking must [SHALL] contain

(1) a statement of the authority under which the property or an interest in it is taken;

(2) a statement of the public use for which the property or an interest in it is taken;

(3) a description of the property sufficient for the identification of it;

(4) a statement of the estate or interest in the property;

(5) a map or plat showing the location of the property;

(6) a statement of the amount of money estimated by the plaintiff to be just compensation for the property or the interest in it;

(7) a statement that the property is taken by necessity for a project located in a manner which is most compatible with the greatest public good and the least private injury;

(8) a decisional document as described in AS 09.55.270(b).

* Sec. 5. AS 09.55.440(a) is amended to read:

(a) Upon the filing of the declaration of taking, and the deposit with the court of the amount of the estimated compensation stated in the declaration, title to the estate as specified in the declaration vests in the plaintiff, and that property is condemned and taken (2) for ~~[from]~~ the use of the plaintiff, and the right to just compensation for it vests in the persons entitled to it. The compensation must [SHALL] be ascertained and awarded in the proceeding and established by judgment. The judgment must [SHALL] include interest at the lawful interest rate set out in AS 45.45.010(a) [THE RATE OF SIX PER CENT PER YEAR] on the amount finally awarded which exceeds the amount paid into court under the declaration of taking. The interest runs from the date title vests to the date of payment of the judgment.

* Sec. 6. AS 09.55.450(a) is amended to read:

(a) Upon the filing of the declaration of taking and the deposit of the estimated compensation, the court may, upon motion, fix the time during which and the terms upon which the parties in possession are required to surrender possession to the petitioner. However, the right of entry may [SHALL] not be granted the plaintiff until after the running of the time for the defendant to file an objection to the declaration of taking or until after the hearing on any objection to the declaration of taking if the objection is filed [MADE] in the time allowed by Rule 72, Rules of Civil Procedure [LAW]. If an objection to the declaration of taking is filed in the time allowed, a hearing (3) for the review of the taking must be held ~~[within 10 days after the~~

as soon as the court calendar allows

filing, or as soon after that as possible,] to establish the validity of any objections. If no objection to the declaration of taking is filed in the time allowed, the defendant has waived all defenses and objections, and the plaintiff has a right of entry onto the property without further action by the court. If [WHERE] the party in possession withdraws any part of the award and remains in possession, the court may fix a reasonable rental for the premises to be paid by that party to the plaintiff during the [SUCH] possession.

* Sec. 7. AS 09.55.460 is amended by adding new subsections to read:

(4) [~~(c) The taking of property is necessary for a public use or purpose in a manner compatible with the greatest public good or least private injury unless the defendant establishes by clear and convincing evidence that the plaintiff's decision to condemn is arbitrary, capricious, or an abuse of discretion.~~]

(5) (c) The court, when making its finding under this section, shall consider the decisional document prepared by the plaintiff; supporting reports, studies, or statements; sworn affidavits submitted by the parties, their officers, or employees; and depositions taken by the parties. The court, in the exercise of its discretion, may allow the parties to submit additional necessary evidence.

* Sec. 8. This Act takes effect immediately in accordance with AS 01.-10.070(c).

amend sb 193 xx2

PROPOSED AMENDMENT NUMBER 1

TO

SB 193

On page 2, line 13, delete all material on lines 13, 14, and 15.

Currently, once the condemning authority has filed its declaration of taking, and escrowed the estimated amount of compensation, the right to the property being taken vests with the government, and the property owner no longer has a right to it. But the property owner can have access to the value of the property, by withdrawing from the escrowed funds. The proposed change would have the withdrawal of funds act as a waiver to all of the dispute except the amount of compensation. The question to answer is whether this is fair to the property owner who contests the taking, and would not have either the full use of the property or the value of the property to enjoy while the appeal is in process.

AMENDMENTS & RATIONALE

amend sb 193 xx1

PROPOSED AMENDMENT NUMBER 2

TO

SB 193

On pg 3, line 10, delete the word "from", and insert in its place:

the word "for"

This proposed change would clarify a poorly written statute dating from 1962.

amend sb 193 xx3

PROPOSED AMENDMENT NUMBER 3

TO

SB 193

On page 3, line 29, following the phrase "must be held",

delete the remainder of line 29, and

On page 4, line 1, delete everything up to but not including the phrase,

"to establish" and insert in its place:

as soon as the court calendar allows

This amendment would have the effect of diminishing the urgency of calendaring eminent domain appeals for court action. With court schedules as crowded as they now are, eminent domain proceedings, important though they may be, should not necessarily be afforded a statutory 30-day limit.

amend sb 193 xx4

PROPOSED AMENDMENT NUMBER 4

TO

SB 193

On page 4, line 10, delete subsection (c) and renumber remaining subsection accordingly

The effect of this amendment would be to take the burden off the owner of the property being taken, and place it back with the condemning authority to show that the taking was compatible with the greatest public good or least private injury. As the subsection is now written, the property owner (defendant) must show by clear and convincing evidence that the condemning authority's decision was arbitrary, capricious or an abuse of discretion. This is a policy question well within the purview of the Legislature, to determine upon whose shoulders the burden of proof will fall.

amend sb 193 xx5

PROPOSED AMENDMENT NUMBER 5

TO

SB 193

On page 4, line 17, between the words "statements;" and "affidavits",

insert the word "sworn"

The effect of this amendment would be to ensure that the affidavits the court is considering are authentic, and not hearsay.

Introduced: 2/26/85
Referred: Transportation, Judiciary and Finance

IN THE SENATE

BY THE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

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FOURTEENTH LEGISLATURE - FIRST SESSION

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COMMITTEE COPY

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(5) a map or plat showing the location of the property;

(6) a statement of the amount of money estimated by the plaintiff to be just compensation for the property or the interest in it;

(7) a statement that the property is taken by necessity for a project located in a manner which is most compatible with the greatest public good and the least private injury;

(8) a decisional document as described in AS 09.55.270(b).

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(a) Upon the filing of the declaration of taking, and the deposit with the court of the amount of the estimated compensation stated in the declaration, title to the estate as specified in the declaration vests in the plaintiff, and that property is condemned and taken from the use of the plaintiff, and the right to just compensation for it vests in the persons entitled to it. The compensation must [SHALL] be ascertained and awarded in the proceeding and established by judgment. The judgment must [SHALL] include interest at the lawful interest rate set out in AS 45.45.010(a) [THE RATE OF SIX PER CENT PER YEAR] on the amount finally awarded which exceeds the amount paid into court under the declaration of taking. The interest runs from the date title vests to the date of payment of the judgment.

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(a) Upon the filing of the declaration of taking and the deposit of the estimated compensation, the court may, upon motion, fix the time during which and the terms upon which the parties in possession are required to surrender possession to the petitioner. However, the right of entry may [SHALL] not be granted the plaintiff until after the running of the time for the defendant to file an objection to the declaration of taking or until after the hearing on any objection to the declaration of taking if the objection is filed [MADE] in the time allowed by Rule 72, Rules of Civil Procedure [LAW]. If an objection to the declaration of taking is filed in the time allowed, a hearing for the review of the taking must be held within 30 days after the

filing, or as soon after that as possible, to establish the validity of any objections. If no objection to the declaration of taking is filed in the time allowed, the defendant has waived all defenses and objections, and the plaintiff has a right of entry onto the property without further action by the court. If [WHERE] the party in possession withdraws any part of the award and remains in possession, the court may fix a reasonable rental for the premises to be paid by that party to the plaintiff during the [SUCH] possession.

* Sec. 7. AS 09.55.460 is amended by adding new subsections to read:

(c) The taking of property is necessary for a public use or purpose in a manner compatible with the greatest public good or least private injury unless the defendant establishes by clear and convincing evidence that the plaintiff's decision to condemn is arbitrary, capricious, or an abuse of discretion.

(d) The court, when making its finding under this section, shall consider the decisional document prepared by the plaintiff; supporting reports, studies, or statements; affidavits submitted by the parties, their officers, or employees; and depositions taken by the parties. The court, in the exercise of its discretion, may allow the parties to submit additional necessary evidence.

* Sec. 8. This Act takes effect immediately in accordance with AS 01.-10.070(c).

STATE OF ALASKA 1985 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date:

REQUEST
Bill/~~Resolution No.~~: SB 193
Title:

Sponsor: Rules Committee
Requestor:
Date of Request:

FISCAL DETAIL
Agency Affected: Transportation & Public Facilit
Program Category Affected: Capital Projects

BRU, Program or Subprogram(s) Affected:
Right of Way & Land Acquisition

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

Although a dollar amount cannot be identified in this fiscal note, this bill should definitely provide a savings to the State. It will alleviate problems that have developed in regard to eminent domain procedures which have the potential to seriously delay badly needed public work projects. This bill should improve eminent domain procedures without prejudicing property owners' rights.

Prepared By: Milton H. Lentz, Chief, ~~R/W~~ & Land Acq. Phone: 465-2985
Division: Standards & Technical Services/HQ Date: 2/13/85

Approved by Commissioner: Date: 2/14/85
Agency: Dept. of Transportation & Public Facilities

Distribution (by Agency preparing fiscal note):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

7/1/84

ANALYSIS OF FISCAL NOTE

"An Act relating to the power of eminent domain; and providing for an effective date"

This bill recognizes recent development in the law and contains provisions that should streamline eminent domain procedures without prejudicing property owner's rights.

First, this would require the court to schedule a hearing for the review of the taking within 30 days after the filing of any objections to the declaration of taking or as soon after that as possible. This particular amendment does not create a priority over other matters on the court's calendar, but does place a requirement upon the Superior Court to deal expeditiously with hearings on objections to the authority and necessity for the taking.

This bill would amend AS 09-55-410 by clearly stating that, if any money on deposit is withdrawn by a party in interest, the withdrawal operates as a waiver of all issues except the amount of just compensation. This would require the property owner early on to make a choice between attempting to stop the project or only litigating the issue of compensation. This bill would also raise the statutory interest allowed under the declaration of taking procedure to the lawful interest rate.

This bill would clearly state that if a defendant does not make his objections in a timely manner, he has waived his objection and defense to the taking.

It is concluded that legislation that leaves a property owner's substantive rights intact, but that changes the procedural aspects of the litigation to a more effective and timely manner so that capital projects are not delayed is in the best interest of the public.

Although a dollar amount cannot be identified, this bill should provide a savings to the State, since it will alleviate problems that have developed in regard to eminent domain procedure which have the potential to seriously delay badly needed public work project.

BILL SHEFFIELD
GOVERNOR

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STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

The Honorable Don Bennett
President of the Senate
Alaska State Legislature
Pouch V
Juneau, AK 99811

Dear Senator Bennett:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill making several changes in the exercise of the power of eminent domain under AS 09.55.240 -- 09.55.460. This bill recognizes recent developments in the law and contains provisions that should streamline eminent domain procedures without prejudicing landowners' rights. The result will alleviate delays that public works projects can experience. The public is well served by the amendments because it will get the use of its public works projects sooner and at lower public expense.

Section 1 of the bill amends AS 09.55.270 by requiring the condemning authority, before the taking of real property by a "declaration of taking," to prepare a decisional document summarizing the decision. Section 4 amends AS 09.55.430 by requiring that the decisional document be part of the declaration of taking. These two amendments codify and implement the holding in Ship Creek Hydraulic Syndicate v. State, 685 P.2d 715 (Alaska 1984).

Section 2 amends AS 09.55.300(a) by clearly specifying the power of the superior court when considering the requirement that a taking be made in a manner compatible with the greatest public good and least private injury. The court is to make its analysis based upon a review of the decisional document required by sec. 1 and on appropriate evidence as set out in sec. 7 of the bill.

Section 3 amends AS 09.55.410 by clearly stating the proposition that, if any money on deposit is withdrawn by a party in interest, the withdrawal operates as a waiver of all issues, except the amount of just compensation. This amendment codifies existing practice. We believe that it is reasonable because it requires the property owner early

on to make a choice between attempting to stop the project or only litigating the issue of compensation.

Section 5 amends AS 09.55.440(a) by raising the statutory interest allowed under the declaration-of-taking procedure to the lawful interest rate. Under AS 45.45.010, that interest rate is currently 10.5 percent. Under the existing language of AS 09.55.440(a), a property owner is entitled to interest at the rate of six percent on the amount finally awarded that is in excess of the initial deposit. This interest rate was found unconstitutional in City of Valdez v. 18.99 Acres, 686 P.2d 682 (Alaska 1984), where the court held that condemning authorities are required to pay lawful interest.

Section 6 provides a number of amendments to AS 09.55.450(a) that will streamline the procedure in the superior court. First, the court is required to schedule a hearing for the review of the taking within 30 days after the filing of any objections to the declaration of taking or as soon after that as possible. This particular amendment does not create a priority over other matters on the court's calendar, but does place a requirement upon the superior court to deal expeditiously with hearings on objections to the authority and necessity for the taking. When combined with the changed nature of that hearing under the amendments contained in sec. 7, the scheduling of a hearing on any objections to the declaration of taking should be greatly expedited.

Section 6 also contains amendments that clearly state that if a defendant does not make his objections in a timely fashion, he has waived his objections and defenses to the taking. This amendment parallels the existing law found in Civil Rule 72(e)(4). We believe that the amendment is necessary to avoid situations such as those that arose in Stewart v. State, Op. No. 2895 (Alaska, December 28, 1984).

In that case, the state filed its declaration of taking, and the property owners filed no objection to the taking. The project went out to bid and the contract was awarded. Six months after the action was filed and two months after the award of the contract, the property owners entered an objection to the taking and the superior court allowed the objections. Rather than litigate the propriety of the taking, the state dismissed its declaration of taking and redesigned its project. This resulted in higher construction costs. Section 6's amendment, absent extraordinary circumstances that the superior court may in the interest

of justice address, is not prejudicial to a defendant's rights; it places him in no worse position than any other civil litigant; i.e., objections or defenses that are not made are waived.

Section 7 contains amendments that are a departure from the existing law and practice. Existing AS 09.55.460 requires an analysis by the superior court to determine whether the taking was accomplished in a manner compatible with the greatest public good and least private injury. If the court finds that the taking was not made in that manner, the state is divested of the title it has acquired with its declaration of taking. The difficulty with the current statute is that no procedural standards are given for the analysis, and no burden of proof is assigned to the parties. The result, in practice, of this lack of clarity in the statute has been generally to assign to the defendant the burden of proof that the taking was not made in a manner compatible with the greatest public good and least private injury, and a "mini-trial" was necessary for the taking of the parties' evidence.

Court calendars are quite crowded and, when coupled with the "mini-trial" practice, the effect has been to delay the hearing until a significant block of the court's calendar can be set aside. One recent Supreme Court case, Ship Creek Hydraulic Syndicate v. State, cited above, produced a hearing in the trial court which lasted nearly five days, during which expert testimony was presented by both sides. While the trial court did ultimately confirm the taking, time that could have been devoted to the project was lost. It should also be noted that the requirement for a decisional document, which is set out in sec. 1, is a product of this case.

The language proposed in AS 09.55.460(c) assigns the burden to the defendant to prove by clear and convincing evidence that the decision to condemn was arbitrary, capricious, or an abuse of discretion. We believe that this language is a codification of the holdings in State v. 0.644 Acres, 613 P.2d 829 (Alaska 1980) and State v. 2.072 Acres, 652 P.2d 465 (Alaska 1982), and only represents a departure from existing statutory language in that the appropriate review standards are clearly and succinctly stated.

The language proposed in AS 09.55.450(d) is a departure from existing practice, but, when combined with the amendments regarding decisional documents, should streamline the procedure in the superior court without prejudicing

the property owners' rights. Under this language, the superior court will consider the decisional document, any supporting reports, studies, or statements relied upon in reaching the decision to condemn, and any affidavits the parties might submit, as well as depositions taken by the parties. There is no provision for the taking of evidence by the court except in situations in which the court allows the presentation of additional evidence. This proposed language provides for a review process by the superior court which is analogous to the function it serves when reviewing decisions of the district court and administrative agencies under AS 22.15.240 and Appellate Rule 609.

Under the cited statute and rule, the superior court reviews cases involving significant liberty and property interests that have been adjudicated by the district court and a variety of administrative agencies. These appeals are all upon the record without the taking of additional evidence, except as provided by statute and rule in extraordinary circumstances.

There are significant differences between the record in an appeal from the district court or an administrative agency and the decisional document envisioned in sec. 1 of this bill. The most important is that the aggrieved party will have presented his case before the matter is in the superior court. We believe that allowing the parties to submit affidavits and depositions in response to, or to support objections to, the taking is a reasonable substitute. We reach this conclusion because of the extensive nature of the background analysis that is performed in the course of developing a public works project. Typically, location and design studies and, in many instances, environmental impact studies are prepared. An additional component of the planning and design of a public works project is a public hearing process during which comments are solicited from the public. Furthermore, AS 35.30.010 requires approval by local planning and zoning commissions. An analogous approval is required under AS 09.55.275 for any replatting which is necessary to accommodate the project. By the time an eminent domain action is filed, the project is a well-known entity and well defined, and has been the subject of local political decisions and adjudication procedures under AS 35.30.010 and AS 09.55.275.

With this extensive administrative background, we believe that augmenting the evidence before the court with depositions and affidavits provides the superior court an adequate basis to review the appropriateness of the taking.

Rb 193

Under the amendments in this bill, the superior court has the discretion to allow the presentation of additional evidence as it does in its appellate jurisdiction.

I urge your favorable action on this measure, so that our eminent domain code accurately reflects the law, and so that the public's business is handled in an expeditious and fair manner for all concerned.

Sincerely,

Bill Sheffield
Governor

amend sb 193 xx7

PROPOSED AMENDMENT Nº 6

TO

SB 193

moved by Abood
adopted w/o objection

On page 4, line 12, delete the phrase "clear and convincing", and

insert in its place: "a preponderance of the"

While this amendment would not reverse the intent of the subsection, and the burden would still lie with the property-owner to prove his case, the change would have the net effect of reducing the degree of evidence required of the defendant.

Preponderance of evidence. Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. Braud v. Kinchen, La.App., 310 So.2d 657, 659. With respect to burden of proof in civil actions, means greater weight of evidence, or evidence which is more credible and convincing to the mind. That which best accords with reason and probability. The word "preponderance" means something more than "weight"; it denotes a superiority of weight, or outweighing. The words are not synonymous, but substantially different. There is generally a "weight" of evidence on each side in case of contested facts. But juries cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbear, in some degree, the weight upon the other side.

That amount of evidence necessary for the plaintiff to win in a civil case. It is that degree of proof which is more probable than not.

Preponderance of evidence may not be determined by the number of witnesses, but by the greater weight of all evidence, which does not necessarily mean the greater number of witnesses, but opportunity for knowledge, information possessed, and manner of testifying determines the weight of testimony.

Clear and convincing proof. Generally, this phrase and its numerous variations mean proof beyond a reasonable, *i.e.*, a well-founded doubt. Some cases give a less rigorous, but somewhat uncertain, meaning, *viz.*, more than a preponderance but less than is required in a criminal case.

Proof which should leave no reasonable doubt in the mind of the trier of the facts concerning the truth of the matters in issue. In Interest of Jones, 34 Ill.App.3d 603, 340 N.E.2d 269, 274.

That measure or degree of proof which will produce in mind of trier of facts a firm belief or conviction as to allegations sought to be established; it is intermediate, being more than mere preponderance, but not to extent of such certainty as is required beyond reasonable doubt as in criminal cases. Fred C. Walker Agency, Inc. v. Lucas, 215 Va. 535, 211 S.E.2d 88, 92.

See also Beyond a reasonable doubt; Burden of proof; Clear evidence or proof.

FROM BLACK'S LAW DICTIONARY

Alaska State Legislature

Pouch V
State Capitol
Juneau, Alaska 99811
Phone: (907) 465-3114

SENATE ADVISORY COUNCIL

MEMORANDUM

TO: Senator Jack Coghill
Attention: John Manley

FROM: Rob Nauheim Rob Nauheim

DATE: March 26, 1985

RE: Eminent domain proceedings

There does not appear to be any jurisdiction in which the burden of proof remains with the condemning authority after an initial decision has been made in an eminent domain proceeding. This is consistent with the notion that once a decision has been rendered it is up to those parties which do not agree with the decision to demonstrate how and why the decision was inappropriate. It also seems consistent with certain principles of public policy and the powers of eminent domain. The condemnation of private property is ultimately the result of a legislative decision to carry out public policy.

The alternative to which you alluded in the research request and which would give greater weight to the individual, would also have the effect of rendering any decision in an eminent domain case ineffective until the the condemning authority had proved its case.

If I can be of additional assistance in this matter, please give me a call.

RCN

ADVISORY COUNCIL MEMO

Alaska Court System
State of Alaska

OFFICE OF ADMINISTRATIVE DIRECTOR

303 K Street
Anchorage, Alaska 99501

March 22, 1985

Senator Coghill, Chair
Senate Transportation Committee
Pouch V
Juneau AK 99811

Dear Senator Coghill:

I am writing with regard to SB 193, an act relating to the power of eminent domain. I have discussed this measure with several of the presiding judges, who offer the following comments. First, the measure provides that a hearing for review of a taking must be held within 30 days after the filing, or as soon after that as is possible, to establish the validity of any objections (Section 6, pages 3-4). Calendaring of matters before the court is an inherently procedural task, properly within the purview of the courts. The Court System therefore opposes inclusion of language which appears to require placement on the calendar within a set time period. However, the courts are mindful of the concerns expressed in the governor's transmittal letter. Judge Serdahely in particular is exploring ways to expedite hearings before the superior court in Anchorage.

A second concern relates to section 7, paragraph (d), which limits live testimony at a hearing to object to a taking. Since supporting statements, reports and similar documents generally contain hearsay evidence, due process would be enhanced if these materials were sworn in a manner similar to affidavits.

Although this legislation represents a change in the way in which eminent domain proceedings would be handled, the other provisions of the bill involve substantive policy decisions appropriately addressed to the legislature.

Thank you for the opportunity to comment upon this legislation.

Sincerely,

Karla L. Forsythe

Karla L. Forsythe
General Counsel

cc: Arthur H. Snowden, II
Presiding Judges
William F. Cummings, Assistant Attorney General

COURT SYSTEM LETTER

SENATOR
JOHN B. "JACK" COGHILL
Chairman

Senator Jan Faiks—Vice Chairman
Senator Mitch Abood
Senator Paul Fischer
Senator Joe Josephson

Alaska State Legislature

POUCH V
JUNEAU, ALASKA 99811
(907) 465-4921

Senate Committee on Transportation

MEMORANDUM

To: Senate Advisory Council

From: John Manly, A.A. /jm

Date: March 22, 1985

Re: Eminent Domain proceedings

The Transportation Committee is presently considering SB 193, a Governor's bill proposing changes to statutes pertaining to eminent domain and the power of taking. One of these changes, under section 7 of the bill, would clarify what is meant by the phrase "in a manner compatible with the greatest public good or least private injury", by requiring the appellant (defendant) to establish by clear and convincing evidence that the condemning authority's decision to condemn was "arbitrary, capricious, or an abuse of discretion."

The proposed change is purported to merely codify existing law in Alaska as it has evolved through case law. In other words, it is currently the practice in this state that if a property-owner's property is condemned through eminent domain proceedings, and the property-owner contests the taking, the property-owner becomes the appellant, and the burden is then on the his shoulders to prove his case.

What we would like to know, before we go further with this bill, is if there are jurisdictions elsewhere in the country in which the burden is on the condemning authority to prove its case, if the property-owner appeals the taking. This would be opposite to present practice in Alaska, and apparently on the federal level, but would give greater weight to the individual in this area of law.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

BILL SHEFFIELD, GOVERNOR

REPLY TO:

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465-3603

MAR 2 6 1985

March 26, 1985

The Honorable John B. Coghill
Chairman, Senate Transportation Committee
Alaska State Senate
Pouch V
Juneau, AK 99811

Re: SB 193 relating to the power of eminent domain

Dear Senator Coghill:

During the Senate Transportation Committee meeting on March 20, 1985, inquiry was made regarding the approach of other jurisdictions on the issue of which party has the burden of proof that a particular taking is not necessary for a public purpose. My research indicates that it is routinely assigned to the property owner. In section 7 of SB 193, we proposed language codifying this legal principal which presently exists in Alaska law. The committee's amendment to the bill which deleted that language will not have much of an impact upon eminent domain practice in Alaska. However, if the committee further amends the bill by assigning to the condemning authority the burden to prove that its decision to condemn was not arbitrary, capricious, nor an abuse of discretion; the contrary is true. Statutory language of that sort would make Alaska unique among American jurisdictions, i.e. in effect the taking could be presumed invalid unless proven otherwise by the condemning authority.

The necessity for the taking of private property enjoys a presumption of validity for very sound public policy reasons. An executive agency undertakes a particular public works project by the direction of the legislature through the appropriation process. That public works project is brought to fruition by that executive agency under a grant of power conferred upon it by the legislature, which includes the grant of the power of eminent domain. Consequently, when, in the course of constructing a public works project, it becomes necessary to acquire interests in land necessary for its construction by the use of the power of eminent domain, the executive agency is fulfilling the will of the legislature, the elected representatives of the people. (It

is not fulfilling an agenda of its own.) It is for these reasons that the burden is assigned to the property owner to prove that the taking is not necessary for a public purpose. To assign the burden to the condemning authority is in our opinion contrary to sound public policy. Consequently, the administration is opposed to the amendment of SB 193 which would shift the burden of proof on the issue of necessity to the condemning authority.

If I may be of any further assistance in this matter, please contact me.

Sincerely yours,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By: William F. Cummings
William F. Cummings
Assistant Attorney General

WFC:prm

Rule 72. Eminent Domain.

(a) **Applicability of Other Rules.** The procedure for the condemnation of property under the power of eminent domain shall be governed by these rules, except as otherwise provided in this rule.

(b) **Joinder of Properties.** The plaintiff may join in the same action one or more separate pieces of property, whether in the same or different ownership and whether or not sought for the same use.

(c) **Complaint.**

(1) *Caption.* The complaint shall contain a caption as provided in Rule 10(a), except that the plaintiff shall name as defendants the property, designated generally by kind, quantity, and location, and at least one of the owners of some part of or interest in the property.

(2) *Contents.* The complaint shall contain a short and plain statement of the authority and necessity for the taking, the use for which the property is to be taken, a description of the property sufficient for its identification accompanied by a map or plat thereof, the interests to be acquired, and as to each separate piece of property a designation of the defendants who have been joined as owners thereof or of some interest therein. If an easement or right-of-way is sought to be condemned, the complaint and the attached map or plat must show the location, route and termini.

Upon the commencement of the action, the plaintiff need join as defendants only the persons having or claiming an interest in the property whose names are then known, but prior to any hearing involving the compensation to be paid for a piece of property, the plaintiff shall add as defendants all persons having or claiming an interest in that property whose names can be ascertained by a reasonably diligent search of the records, considering the character and value of the property involved and the interests to be acquired, and also those whose names have otherwise been learned. All others may be made defendants under the designation "Unknown Owners".

Process shall be served as provided in subdivision (d) of

this rule upon all defendants, whether named as defendants at the time of the commencement of the action or subsequently added, and the defendant may answer as provided in subdivision (e) of this rule. The court meanwhile may order such distribution of a deposit as the facts warrant.

(3) *Filing.* In addition to filing the complaint with the court, the plaintiff shall furnish to the clerk at least one copy thereof for the use of the defendants and additional copies at the request of the clerk or of a defendant.

(d) **Process.**

(1) *Notice—Delivery.* Upon the filing of the complaint the plaintiff shall forthwith deliver to the clerk joint or several notices directed to the defendants named or designated in the complaint. Additional notices directed to defendants subsequently added shall be so delivered. The delivery of the notice and its service have the same effect as the delivery and service of the summons under Rule 4.

(2) *Form.* Each notice shall state the court, the title of the action, the name of the defendant to whom it is directed, that the action is to condemn property, a description of his property sufficient for its identification, the interest to be taken, the authority and necessity for the taking, and the use for which the property is to be taken. The notice must show the location, route and termini of any easement or right-of-way sought to be condemned.

The notice shall also state that the defendant may serve upon the plaintiff's attorney an answer within twenty (20) days after service of the notice, that a failure to serve an answer constitutes a consent to the taking and to the authority of the court to proceed to hear the action and to fix the compensation, and that at a designated time and place the court will conduct a hearing to determine the authority and necessity for the taking.

The notice shall further state that the defendant, without filing an answer, may serve on plaintiff's attorney a notice of appearance designating the property in which he claims to be interested; that thereafter he will receive notice of all proceedings affecting it; that regardless of whether the defendant ap-

pears or answers, he may present evidence as to the amount of compensation to be paid for his property at the hearing or trial of the issue of just compensation; that regardless of whether he appears or answers he may share in the distribution of the award; that if neither an appearance nor an answer is filed the court will proceed to hear the action and to fix the compensation without further notice; and that if neither an appearance nor an answer is filed before ten (10) days after the jury's verdict is returned or the master's report is filed, judgment by default will be taken against the defendant for the relief demanded in the complaint.

(3) *Service of Notice.*

[a] *Personal Service.* Personal service of the notice shall be made in accordance with Civil Rule 4.

[b] *Unknown Owners.* Service of the notice upon unknown owners shall be made in accordance with Civil Rule 4(e).

(4) *Return—Amendment.* Proof of service of the notice shall be made, and amendment of the notice or proof of its service allowed, in the manner provided for the return and amendment of the summons under Rule 4(f) and (g).

(c) **Appearance or Answer.**

(1) *No Objection or Defense.* If a defendant has no objection or defense to the taking of his property, he may serve a notice of appearance designating the property in which he claims to be interested. Thereafter he shall receive notice of all proceedings affecting it.

(2) *Objection or Defense—Answer.* If a defendant has any objection or defense to the taking of his property, he shall serve his answer within twenty (20) days after the service of notice upon him. The answer shall identify the property in which he claims to have an interest, state the nature and extent of the interest claimed, and state all his objections and defenses to the taking of his property.

(3) *Declaration of Taking—Objection.* Any motion questioning the validity of a declaration of taking shall be served on or before the time provided in the notice for answering, or within twenty (20) days after the filing of the declaration of

taking, whichever is later. For good cause shown, the court may permit a later filing of the motion.

(4) *Waiver of Defenses and Objections.* A defendant waives all defenses and objections not presented as provided in this subdivision (c), but at the hearing or trial of the issue of just compensation, whether or not he has previously appeared or answered, and even though a default judgment may have been entered against him, he may present evidence as to the amount of compensation to be paid for his property, and he also may share in the distribution of the award if his claim

for compensation is filed before the award is ordered distributed by the court.

(5) *Other Pleading or Motion Precluded.* No other pleading or motion asserting any additional defense or objection shall be allowed.

(f) **Amendment of Pleadings.** Without leave of court, the plaintiff may amend the complaint at any time before the trial of the issue of compensation and as many times as desired, but no amendment shall be made which will result in a dismissal forbidden by subdivison (i) of this rule. The plaintiff need not serve a copy of an amendment, but shall serve notice of the filing, as provided in Rule 5(b), upon any party affected thereby who has appeared and, in the manner provided in subdivison (d) of this rule, upon any party affected thereby who has not appeared. The plaintiff shall furnish to the clerk of the court for the use of the defendants at least one copy of each amendment, and he shall furnish additional copies on the request of the clerk or of a defendant. Within the time allowed by subdivision (e) of this rule a defendant may serve his answer to the amended pleading, in the form and manner and with the same effect as there provided.

(g) **Substitution of Parties.** If a defendant dies or becomes incompetent or transfers his interest after his joinder, the court may order substitution of the proper party upon motion and notice of hearing. If the motion and notice of hearing are to be served upon a person not already a party, service shall be made as provided in subdivision (d) (3) of this rule.

(h) **Hearing and Trial.**

(1) *Procedure.* The hearing of the allegations and evidence of persons interested, whether before the court, jury, or a master, shall be conducted in the manner prescribed by these rules.

(2) *Hearing Before Master.* A master appointed by the court to ascertain the amount to be paid by the plaintiff to each owner or other person interested in the property shall report to the court pursuant to Rule 53(d) (1). If all parties object to the appointment of a master, they may have a trial by jury or, if the

jury is waived by all parties to the action, a trial without a jury, by filing a demand for it within the time allowed for answer or within the additional time which the court may set.

(3) *Notice of Report.* Upon the filing of a report by the master, the clerk shall forthwith mail notice of the filing to all parties who have appeared or answered.

(4) *Appeal and Trial De Novo.* The plaintiff may appeal within ten (10) days after being served with notice of the filing of the master's report. Any defendant who has appeared or answered before the filing of a master's report may appeal within fifteen (15) days after being served with notice of the filing of the master's report. Any other interested person desiring to appeal from a master's report must take his appeal within fifteen (15) days after the filing of such report.

(5) *Notice of Appeal.* A party or other interested person may appeal from the master's report by filing with the clerk a notice of appeal in duplicate, with sufficient additional copies for all parties who have appeared or answered. The notice of appeal shall contain the following:

[a] The title of the action.

[b] The names of the parties taking the appeal.

[c] The master's report or part thereof appealed from and the date of its filing.

[d] The name of the court to which the appeal is taken.

[e] A concise statement of the grounds of appeal.

Notification of the filing of the notice shall be given by the clerk by mailing copies thereof to all parties who have appeared or answered other than the party or parties taking the appeal, but his failure to do so does not affect the validity of the appeal. The notification to a party shall be given by mailing a copy of the notice of appeal to his attorney of record, or if the party is not represented by an attorney, then to the party at his last known address.

(i) **Dismissal of Action.**

(1) *As of Right.* If no hearing has begun to determine the compensation to be paid for a piece of property and the plaintiff has not acquired the title or a lesser interest in or taken possession, the plaintiff may dismiss the action as to that

property, without an order of the court, by filing a notice of dismissal setting forth a brief description of the property as to which the action is dismissed.

(2) *By Stipulation.* Before the entry of any judgment vesting the plaintiff with the title or a lesser interest in or possession of property, the action may be dismissed in whole or in part, without an order of the court, as to any property by filing a stipulation of dismissal by the plaintiff and the defendant affected thereby; and, if the parties so stipulate, the court may vacate any judgment that has been entered.

(3) *By Order of the Court.* At any time before compensation for a piece of property has been determined and paid and after motion and hearing, the court may dismiss the action as to that property, except that it shall not dismiss the action as to any part of the property of which the plaintiff has taken possession or in which the plaintiff has taken title or a lesser interest, but shall award just compensation for the possession, title or lesser interest so taken. The court at any time may drop a defendant unnecessarily or improperly joined.

(4) *Effect.* Except as otherwise provided in the notice, or stipulation of dismissal, or order of the court, any dismissal is without prejudice.

(j) **Deposit and Its Distribution.** The plaintiff shall deposit with the court any money required by law as a condition to the exercise of the power of eminent domain, and although not so required, may make such deposit. In such case the court and attorneys shall expedite the proceedings for the distribution of the money so deposited and for the ascertainment and payment of just compensation. If the compensation finally awarded to any defendant exceeds the amount which has been paid to him on distribution of the deposit, the court shall enter judgment against the plaintiff and in favor of that defendant for the deficiency. If the compensation finally awarded to any defendant is less than the amount which has been paid to him, the court shall enter judgment against him and in favor of the plaintiff for the over-payment.

(k) **Costs.** Costs and attorney's fees incurred by the defendant shall not be assessed against the plaintiff, unless:

(1) the taking of the property is denied; or

(2) the plaintiff appeals from the allowance of the master and the defendant does not appeal; or

(3) the award of the court was at least ten (10) percent larger than the amount deposited by the condemning authority or the allowance of the master from which an appeal was taken by the defendant; or

(4) the action was dismissed under the provisions of paragraph (i) of this rule; or

(5) allowance of costs and attorney's fees appears necessary to achieve a just and adequate compensation of the owner.

Attorney's fees allowed under this paragraph shall be commensurate with the time committed by the attorney to the case throughout the entire proceedings. (Amended by Supreme Court Order 414 effective August 1, 1980; and by Supreme Court Order 465 effective June 1, 1981)

CROSS REFERENCES: AS 09.55.240—AS 09.55.460; Civ. Form 148
(c) CROSS REFERENCES: AS 09.55.240—AS 09.55.270; Civ. Form 145
(d) (2) CROSS REFERENCE: Civ. Form 146
(d) (3) CROSS REFERENCE: Civ. Form 147
(e) (3) CROSS REFERENCES: AS 09.55.420—AS 09.55.460; Civ. Form 149
(e) (4) CROSS REFERENCE: AS 09.55.310
(h) (4) CROSS REFERENCE: AA 09.55.310

BILL SHEFFIELD
GOVERNOR

ch 193

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

The Honorable Don Bennett
President of the Senate
Alaska State Legislature
Pouch V
Juneau, AK 99811

Dear Senator Bennett:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill making several changes in the exercise of the power of eminent domain under AS 09.55.240 -- 09.55.460. This bill recognizes recent developments in the law and contains provisions that should streamline eminent domain procedures without prejudicing landowners' rights. The result will alleviate delays that public works projects can experience. The public is well served by the amendments because it will get the use of its public works projects sooner and at lower public expense.

Section 1 of the bill amends AS 09.55.270 by requiring the condemning authority, before the taking of real property by a "declaration of taking," to prepare a decisional document summarizing the decision. Section 4 amends AS 09.55.430 by requiring that the decisional document be part of the declaration of taking. These two amendments codify and implement the holding in Ship Creek Hydraulic Syndicate v. State, 685 P.2d 715 (Alaska 1984).

Section 2 amends AS 09.55.300(a) by clearly specifying the power of the superior court when considering the requirement that a taking be made in a manner compatible with the greatest public good and least private injury. The court is to make its analysis based upon a review of the decisional document required by sec. 1 and on appropriate evidence as set out in sec. 7 of the bill.

Section 3 amends AS 09.55.410 by clearly stating the proposition that, if any money on deposit is withdrawn by a party in interest, the withdrawal operates as a waiver of all issues, except the amount of just compensation. This amendment codifies existing practice. We believe that it is reasonable because it requires the property owner early

GOVERNOR'S LETTER OF TRANSMITTAL

on to make a choice between attempting to stop the project or only litigating the issue of compensation.

Section 5 amends AS 09.55.440(a) by raising the statutory interest allowed under the declaration-of-taking procedure to the lawful interest rate. Under AS 45.45.010, that interest rate is currently 10.5 percent. Under the existing language of AS 09.55.440(a), a property owner is entitled to interest at the rate of six percent on the amount finally awarded that is in excess of the initial deposit. This interest rate was found unconstitutional in City of Valdez v. 18.99 Acres, 686 P.2d 682 (Alaska 1984), where the court held that condemning authorities are required to pay lawful interest.

Section 6 provides a number of amendments to AS 09.55.450(a) that will streamline the procedure in the superior court. First, the court is required to schedule a hearing for the review of the taking within 30 days after the filing of any objections to the declaration of taking or as soon after that as possible. This particular amendment does not create a priority over other matters on the court's calendar, but does place a requirement upon the superior court to deal expeditiously with hearings on objections to the authority and necessity for the taking. When combined with the changed nature of that hearing under the amendments contained in sec. 7, the scheduling of a hearing on any objections to the declaration of taking should be greatly expedited.

Section 6 also contains amendments that clearly state that if a defendant does not make his objections in a timely fashion, he has waived his objections and defenses to the taking. This amendment parallels the existing law found in Civil Rule 72(e)(4). We believe that the amendment is necessary to avoid situations such as those that arose in Stewart v. State, Op. No. 2895 (Alaska, December 28, 1984).

In that case, the state filed its declaration of taking, and the property owners filed no objection to the taking. The project went out to bid and the contract was awarded. Six months after the action was filed and two months after the award of the contract, the property owners entered an objection to the taking and the superior court allowed the objections. Rather than litigate the propriety of the taking, the state dismissed its declaration of taking and redesigned its project. This resulted in higher construction costs. Section 6's amendment, absent extraordinary circumstances that the superior court may in the interest

of justice address, is not prejudicial to a defendant's rights; it places him in no worse position than any other civil litigant; i.e., objections or defenses that are not made are waived.

Section 7 contains amendments that are a departure from the existing law and practice. Existing AS 09.55.460 requires an analysis by the superior court to determine whether the taking was accomplished in a manner compatible with the greatest public good and least private injury. If the court finds that the taking was not made in that manner, the state is divested of the title it has acquired with its declaration of taking. The difficulty with the current statute is that no procedural standards are given for the analysis, and no burden of proof is assigned to the parties. The result, in practice, of this lack of clarity in the statute has been generally to assign to the defendant the burden of proof that the taking was not made in a manner compatible with the greatest public good and least private injury, and a "mini-trial" was necessary for the taking of the parties' evidence.

Court calendars are quite crowded and, when coupled with the "mini-trial" practice, the effect has been to delay the hearing until a significant block of the court's calendar can be set aside. One recent Supreme Court case, Ship Creek Hydraulic Syndicate v. State, cited above, produced a hearing in the trial court which lasted nearly five days, during which expert testimony was presented by both sides. While the trial court did ultimately confirm the taking, time that could have been devoted to the project was lost. It should also be noted that the requirement for a decisional document, which is set out in sec. 1, is a product of this case.

The language proposed in AS 09.55.460(c) assigns the burden to the defendant to prove by clear and convincing evidence that the decision to condemn was arbitrary, capricious, or an abuse of discretion. We believe that this language is a codification of the holdings in State v. 0.644 Acres, 613 P.2d 829 (Alaska 1980) and State v. 2.072 Acres, 652 P.2d 465 (Alaska 1982), and only represents a departure from existing statutory language in that the appropriate review standards are clearly and succinctly stated.

The language proposed in AS 09.55.450(d) is a departure from existing practice, but, when combined with the amendments regarding decisional documents, should streamline the procedure in the superior court without prejudicing

the property owners' rights. Under this language, the superior court will consider the decisional document, any supporting reports, studies, or statements relied upon in reaching the decision to condemn, and any affidavits the parties might submit, as well as depositions taken by the parties. There is no provision for the taking of evidence by the court except in situations in which the court allows the presentation of additional evidence. This proposed language provides for a review process by the superior court which is analogous to the function it serves when reviewing decisions of the district court and administrative agencies under AS 22.15.240 and Appellate Rule 609.

Under the cited statute and rule, the superior court reviews cases involving significant liberty and property interests that have been adjudicated by the district court and a variety of administrative agencies. These appeals are all upon the record without the taking of additional evidence, except as provided by statute and rule in extraordinary circumstances.

There are significant differences between the record in an appeal from the district court or an administrative agency and the decisional document envisioned in sec. 1 of this bill. The most important is that the aggrieved party will have presented his case before the matter is in the superior court. We believe that allowing the parties to submit affidavits and depositions in response to, or to support objections to, the taking is a reasonable substitute. We reach this conclusion because of the extensive nature of the background analysis that is performed in the course of developing a public works project. Typically, location and design studies and, in many instances, environmental impact studies are prepared. An additional component of the planning and design of a public works project is a public hearing process during which comments are solicited from the public. Furthermore, AS 35.30.010 requires approval by local planning and zoning commissions. An analogous approval is required under AS 09.55.275 for any replatting which is necessary to accommodate the project. By the time an eminent domain action is filed, the project is a well-known entity and well defined, and has been the subject of local political decisions and adjudication procedures under AS 35.30.010 and AS 09.55.275.

With this extensive administrative background, we believe that augmenting the evidence before the court with depositions and affidavits provides the superior court an adequate basis to review the appropriateness of the taking.

Rb 193

Under the amendments in this bill, the superior court has the discretion to allow the presentation of additional evidence as it does in its appellate jurisdiction.

I urge your favorable action on this measure, so that our eminent domain code accurately reflects the law, and so that the public's business is handled in an expeditious and fair manner for all concerned.

Sincerely,

Bill Sheffield
Governor

STATE OF ALASKA 1985 LEGISLATIVE SESSION

FISCAL NOTE

Revision Date:

REQUEST
Bill/~~Resolution~~ No.: SB 193
Title:

Sponsor: Rules Committee
Requestor:
Date of Request:

FISCAL DETAIL
Agency Affected: Transportation & Public Faci
Program Category Affected: Capital Projects

BRU, Program or Subprogram(s) Affected:
Right of Way & Land Acquisition

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

Although a dollar amount cannot be identified in this fiscal note, this bill should definitely provide a savings to the State. It will alleviate problems that have developed in regard to eminent domain procedures which have the potential to seriously delay badly needed public work projects. This bill should improve eminent domain procedures without prejudicing property owners' rights.

Prepared By: Milton H. Lentz, Chief, ~~R/W~~ & Land Acq. Phone: 465-2985
Division: Standards & Technical Services/HQ Date: 2/13/85

Approved by Commissioner: Date: 2/14/85
Agency: Dept. of Transportation & Public Facilities

Distribution (by Agency preparing fiscal note):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

ZERO FISCAL NOTE & ANALYSIS

ANALYSIS OF FISCAL NOTE

"An Act relating to the power of eminent domain; and providing for an effective date"

This bill recognizes recent development in the law and contains provisions that should streamline eminent domain procedures without prejudicing property owner's rights.

First, this would require the court to schedule a hearing for the review of the taking within 30 days after the filing of any objections to the declaration of taking or as soon after that as possible. This particular amendment does not create a priority over other matters on the court's calendar, but does place a requirement upon the Superior Court to deal expeditiously with hearings on objections to the authority and necessity for the taking.

This bill would amend AS 09-55-410 by clearly stating that, if any money on deposit is withdrawn by a party in interest, the withdrawal operates as a waiver of all issues except the amount of just compensation. This would require the property owner early on to make a choice between attempting to stop the project or only litigating the issue of compensation. This bill would also raise the statutory interest allowed under the declaration of taking procedure to the lawful interest rate.

This bill would clearly state that if a defendant does not make his objections in a timely manner, he has waived his objection and defense to the taking.

It is concluded that legislation that leaves a property owner's substantive rights intact, but that changes the procedural aspects of the litigation to a more effective and timely manner so that capital projects are not delayed is in the best interest of the public.

Although a dollar amount cannot be identified, this bill should provide a savings to the State, since it will alleviate problems that have developed in regard to eminent domain procedure which have the potential to seriously delay badly needed public work project.

Chapter 45. Trade Practices.

Article 1. Interest.

Sec. 45.45.010. Legal rate of interest. (a) The rate of interest in the state is 10.5 percent a year and no more on money after it is due except as provided in (b) of this section.

(b) No interest may be charged by express agreement of the parties in a contract or loan commitment which is more than five percentage points above the annual rate charged member banks for advances by the 12th Federal Reserve District on the day on which the contract or loan commitment is made. A contract or loan commitment in which the principal amount exceeds $25,000 is exempt from the limitation of this subsection.

(c) *[Repealed, § 3 ch 84 SLA 1973.]*

(d) *[Repealed, § 2 ch 94 SLA 1981.]*

(e) *[Repealed, § 4 ch 146 SLA 1974.]*

(f) No bank, credit union, savings and loan institution, pension fund, insurance company or mortgage company may require or accept any percent of ownership or profits above its interest rate. This subsection does not apply to a loan if the principal amount of the loan is $1,000,000 or more and the term of the loan is five years or more.

(g) Loan contracts and commitments covering one- to four-family dwellings may be prepaid without penalty, except federally insured loans that require a prepayment penalty.

(h) If the limitations on interest rates provided for in this section are inconsistent with the provisions of any other statute covering maximum interest, service charges or discount rates then the provisions of the other statute prevail. (§ 25-1-1 ACLA 1949; am § 20 ch 143 SLA 1968; am § 2 ch 69 SLA 1969; am §§ 1, 2 ch 94 SLA 1969; am §§ 1, 2 ch 239 SLA 1970; am §§ 1 — 3 ch 84 SLA 1973; am §§ 1 — 4 ch 146 SLA 1974; am § 1 ch 110 SLA 1976; am § 1 ch 159 SLA 1976; am § 2 ch 107 SLA 1980; am §§ 1, 2 ch 94 SLA 1981; am § 1 ch 56 SLA 1982)

Cross references. -- As to alternate technology and power resource loans, see AS 45.88.030(e).

Effect of amendments. — The 1981 amendment, in subsection (b), deleted "dated after June 4, 1976" following "contract or loan commitment" and substituted "on the day on" for "that prevailed on the 25th day of the month preceding the commencement of the calendar quarter during" preceding "which the contract" in the first sentence and substituted "$25,000" for "$100,000" preceding "is exempt" in the second sentence. The

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State v. Alaska Land Title Ass'n, Sup. Ct. Op. No. 2681 (File Nos. 5407, 5408), P.2d (1983).

48 U.S.C. § 321d does not apply to patents issued under the Small Tract Act of 1938, 43 U.S.C. §§ 682a-682(e) (now repealed). State v. Alaska Land Title Ass'n, Sup. Ct. Op. No. 2681 (File Nos. 5407, 5408), P.2d (1983).

The Right-of-Way Act of 1966 does not apply to rights-of-way created by a public land order issued pursuant to an executive order under which the President of the United States delegated his statutory authority to the Secretary of the Interior authorizing withdrawal of public lands in Alaska for specified public purposes. State v. Alaska Land Title Ass'n, Sup. Ct. Op. No. 2681 (File Nos. 5407, 5408), P.2d (1983).

Sec. 09.55.270. Prerequisites. Before property can be taken, it shall appear that

(1) the use to which it is to be applied is a use authorized by law;

(2) the taking is necessary to the use;

(3) if already appropriated to a public use, the public use to which it is to be applied is a more necessary public use. (§ 13.04 ch 101 SLA 1962)

Cross references. — For contents of complaint, see Civ. R. 72(c).

NOTES TO DECISIONS

Editor's note. — All notes from Montana decisions appearing under this section are constructions of the Montana statute from which this section derives.

Judicial review of necessity. — Alaska is among the minority of jurisdictions which statutorily calls for judicial inquiry into the question of necessity in eminent domain proceedings. Arco Pipeline Co. v. 3.60 Acres, More or Less, Sup. Ct. Op. No. 1177 (File No. 2419), 539 P.2d 64 (1975).

Such review is inappropriate to proceedings under declaration of taking. — The concept of judicial review embodied in Alaska's general eminent domain statutes is inconsistent with, and inappropriate to, proceedings under a declaration of taking. Arco Pipeline Co. v. 3.60 Acres, More or Less, Sup. Ct. Op. No. 1177 (File No. 2419), 539 P.2d 64 (1975).

The question of necessity under a declaration of taking is not one for initial judicial consideration as in the case of other condemnation proceedings. Arco Pipeline Co. v. 3.60 Acres, More or Less, Sup. Ct. Op. No. 1177 (File No. 2419), 539 P.2d 64 (1975).

For distinction between proceedings in condemnation under a declaration of taking and those under a complaint seeking condemnation and an order for possession, see Arco Pipeline Co. v. 3.60 Acres, More or Less, Sup. Ct. Op. No. 1177 (File No. 2419), 539 P.2d 64 (1975).

Pleading must plainly show authority and necessity for taking. — The right of eminent domain can only be exercised in behalf of a public use authorized by law, and in the taking of property necessary to such public use the complaint or petition in such proceedings must show plainly and affirmatively the existence of the statutory authority for the public use, and the necessity of the property for such use. Miocene Ditch Co. v. Lyng, 138 F. 544 (9th Cir. 1905).

An inference is not sufficient in eminent domain proceedings. There must be a clear, positive statement that the property sought to be condemned is necessary for a public use authorized by law, and supported by a statement of facts from which the court can see that the property is intended to be used for that purpose. Miocene Ditch Co. v. Lyng, 138 F. 544 (9th Cir. 1905).

The complaint should allege both that the use to which the property is to be applied is a use authorized by law and that the taking is necessary to such use. City of Helena v. Harvey, 9 P. 903 (Mont. 1886).

Which must be found by court before condemnation. — This section has been construed as requiring the court to find the use is authorized by law and the taking is

necessary "before condemnation." Bridges v. Alaska Hous. Auth., Sup. Ct. Op. No. 1 (File No. 16), 349 P.2d 149 (1960).

Necessity of findings. — It is upon findings made in accordance with this section that there is established a basis for further proceedings. The findings constitute the decision of the court upon the vital question of whether or not the property sought to be taken can be condemned at all. Van Dyke v. Midnight Sun Mining & Ditch Co., 177 F. 85 (9th Cir. 1910).

Questions to be considered by court. — Ordinarily the only questions to be considered by the courts in condemnation proceedings are: First, whether the petitioner has the power to exercise the right of eminent domain; second, whether the property itself is of a nature subject to condemnation; third, whether the property is being taken for a public or a private use; and fourth, whether the power is being used for taking an excessive amount of property. Town of Seward v. Margules, 9 Alaska 354 (1938).

Taking for use authorized by law is not conclusive that taking is necessary. — By providing that the right to take property for public use is founded upon a use authorized by law and that the use for such purpose is necessary, the law itself recognizes the fact that a mere taking for a use authorized by law is not conclusive that the taking is necessary for such use. City of Helena v. Harvey, 9 P. 903 (Mont. 1886).

The rule of necessity must be determinative of the right to take in each instance. Northern Pac. Ry. v. McAdow, 121 P. 473 (Mont. 1912).

But absolute necessity is not required. — An absolute necessity is not a prerequisite to the exercise of the law of eminent domain. Butte A. & Pac. Ry. v. Montana U. Ry., 41 P. 232 (Mont. 1895).

Although the condemnor may have the burden of making a prima facie showing of necessity, the language of this section ought to be construed to require no more than that the particular taking be shown to be "reasonably requisite and proper for the accomplishment of the purpose for which it is sought." City of Fairbanks v. Metro Co., Sup. Ct. Op. No. 1192 (File No. 2504), 540 P.2d 1056 (1975).

Question of necessity is one of fact. — In an action to condemn private property for a public use, the question of necessity is one of fact, to be determined as other questions of fact, in view of all the evidence in the case. State ex rel. Livingston v. District Court, 300 P. 916 (Mont. 1931).

And involves both public and private considerations. — The question of necessity in a given case involves a consideration of facts which relate to the public and also to the private citizen whose property may be injured. State ex rel. Livingston v. District Court, 300 P. 916 (Mont. 1931).

Particular questions left to discretion of condemning authority. — In general condemnation proceedings under this article, once the condemnor has presented sufficient evidence to support a finding that a particular taking is "reasonably requisite" for the effectuation of the authorized public purpose for which it is sought, particular questions as to the route, location or amount of property to be taken are to be left to the sound discretion of the condemning authority absent a showing by clear and convincing evidence that such determinations are the product of fraud, caprice or arbitrariness. City of Fairbanks v. Metro Co., Sup. Ct. Op. No. 1192 (File No. 2504), 540 P.2d 1056 (1975).

Evidence should show that the land is reasonably required for the purpose of effecting the object of its condemnation. State ex rel. Livingston v. District Court, 300 P. 916 (Mont. 1931).

Burden of proof. — One seeking to show that a particular taking is excessive or arbitrary has a heavy burden of proof in the attempt to persuade the court to substitute its judgment for that of the condemnor. City of Fairbanks v. Metro Co., Sup. Ct. Op. No. 1192 (File No. 2504), 540 P.2d 1056 (1975).

Proof of unnecessary injury. — When an attempt is made to show that the location proposed is unnecessarily injurious, the proof should be clear and convincing; otherwise no location could ever be made. State ex rel. Livingston v. District Court, 300 P. 916 (Mont. 1931).

Relative private injury. — That certain property owners suffer relatively greater injury than others, or are less directly benefited by the project, does not establish that the taking of their property is unnecessarily injurious or unwarranted. City of Fairbanks v. Metro Co., Sup. Ct. Op. No. 1192 (File No. 2504), 540 P.2d 1056 (1975).

While it is true that the inability of a particular condemnee to obtain immediate beneficial use from the project may be considered as a factor in weighing the project's impact in terms of the degree of private injury involved in a proposed route or location, the interest in minimizing private

injury is not absolute and must always be weighed in relation to the goals and efficacy of the project in its entirety at the time such determinations are made. City of Fairbanks v. Metro Co., Sup. Ct. Op. No. 1192 (File No. 2504), 540 P.2d 1056 (1975).

City clearly met its initial burden of demonstrating that its taking certain parcels of land for purposes of the construction of a sewer line was reasonably necessary under the circumstances. City of Fairbanks v. Metro Co., Sup. Ct. Op. No. 1192 (File No. 2504), 540 P.2d 1056 (1975).

Complaint held sufficient. — Where a complaint used the words "imperatively required" for a public use and alleged facts supporting the same, this was sufficient to show necessity under this section. Town of Seward v. Marcules, 9 Alaska 354 (1938).

Appeal from interlocutory order finding use authorized and taking necessary. — See Van Dyke v. Midnight Sun Mining & Ditch Co., 177 F. 85 (9th Cir. 1910); Northern Mining & Trading Co. v. Alaska Gold Recovery Co., 20 F.2d 5 (9th Cir. 1927).

Convenience and enhanced profits are insufficient to permit appropriation. — That the appropriation of a particular piece of property would promote convenience of operation and enhance the profits of the business of a railroad company is not alone a sufficient reason for permitting it. Northern Pac. Ry. v. McAdow, 121 P. 473 (Mont. 1912).

Collateral references. — Sufficiency of condemnor's negotiations required as preliminary to taking in eminent domain, 21 ALR4th 765.

Sec. 09.55.275. Replat approval. No agency of the state or municipality may acquire property located within a municipality exercising the powers conferred by AS 29.33.150 — 29.33.245 which results in a boundary change unless the agency or municipality first obtains from the municipal platting authority preliminary approval of a replat showing clearly the location of the proposed public streets, easements, rights-of-way, and other taking of private property. Final approval of replat shall be similarly obtained. However, if a state agency clearly demonstrates an overriding state interest, a waiver to the approval requirements of this section may be granted by the governor. The platting authority shall treat applications for replat made by state or local governmental agencies in the same manner as replat petitions originated by private landowners. (§ 2 ch 96 SLA 1975)

Sec. 09.55.280. Entry upon land. In all cases where land is required for public use, the state, the public entity, or persons having the authority to condemn, or its agents in charge of the use may enter upon the land and make examination, surveys, and maps and locate the boundaries; but it shall be located in the manner which will be most compatible with the greatest public good and the least private injury, and subject to the provisions of AS 09.55.300. The entry shall constitute no cause of action in favor of the owners of the land except for injuries resulting from negligence, wantonness, or malice. (§ 13.05 ch 101 SLA 1962)

and the deposit of the estimated compensation. Russian Orthodox Greek Catholic Church of N. Am. v. Alaska State Hous. Auth., Sup. Ct. Op. No. 809 (File No. 1600), 498 P.2d 737 (1972).

It is the objection which calls for the hearing. A motion for hearing with supporting affidavits is not required. State, Dep't of Transp. & Pub. Facilities v. 0.644 Acres, Sup. Ct. Op. No. 2118 (File No. 4861), 613 P.2d 829 (1980).

As to showings necessary where owner contests validity of taking, see Arco Pipeline Co. v. 3.60 Acres, More or Less, Sup. Ct. Op. No. 1177 (File No. 2419), 539 P.2d 64 (1975).

For distinction between proceedings in condemnation under declaration of taking and those under complaint seeking condemnation and order for possession, see Arco Pipeline Co. v. 3.60 Acres, More or Less, Sup. Ct. Op. No. 1177 (File No. 2419), 539 P.2d 64 (1975).

Collateral references. — Condemnor's acquisition of, or right to, minerals under land taken in eminent domain, 36 ALR2d 1424.

Charging landowner with rent or use value of land where he remains in possession after condemnation. 20 ALR3d 1164.

Sec. 09.55.460. Effect of appeal. (a) No appeal or a bond or undertaking given operates to prevent or delay the vesting of title to real property or the right to possession of it.

(b) The plaintiff may not be divested of a title or possession acquired except where the court finds that the property was not taken by necessity for a public use or purpose in a manner compatible with the greatest public good and the least private injury. In the event of that finding, the court shall enter the judgment necessary to (1) compensate the persons entitled to it for the period during which the property was in the possession of the plaintiff, (2) recover for the plaintiff any award paid to any person, and (3) order the plaintiff to restore the property to the condition in which it existed at the time of the filing of the declaration of taking unless such restoration is impossible, in which case the court shall award damages to the proper persons as compensation for any diminution in the value of the property caused by the plaintiff's wrongful possession. (§ 13.23 ch 101 SLA 1962; am § 3 ch 149 SLA 1976)

Legislative history reports. — For report on ch. 149, SLA 1976 (HCSSB 546), see 1976 House Journal, p. 945.

NOTES TO DECISIONS

Presumption that taking is reasonably requisite to realization of public use. — Once an authorized public use for the taking is established by the condemnor, and statutory and procedural requirements are otherwise satisfied, that the particular taking is reasonably requisite to the realization of that use shall be presumed. Arco Pipeline Co. v. 3.60 Acres, More or Less, Sup. Ct. Op. No. 1177 (File No. 2419), 539 P.2d 64 (1975).

The question of necessity under a declaration of taking is not one for initial judicial consideration as in the case of other condemnation proceedings. Arco Pipeline Co. v. 3.60 Acres, More or Less, Sup. Ct. Op. No. 1177 (File No. 2419), 539 P.2d 64 (1975).

The concept of judicial review embodied in Alaska's general eminent domain stat-

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utes is inconsistent with, and inappropriate to, proceedings under a declaration of taking. Arco Pipeline Co. v. 3.60 Acres, More or Less, Sup. Ct. Op. No. 1177 (File No. 2419), 539 P.2d 64 (1975).

Absent clear showing of fraud, etc. — In proceedings in eminent domain by way of a declaration of taking under AS 09.55.420 — 09.55.450, the court is without authority, either by virtue of the express mandate of subsection (b) of this section or by implication from the legislative history and policy evidenced in AS 09.55.440, to review the question of the necessity of a particular taking absent a clear showing of fraud, bad faith, arbitrariness or an abuse of discretion in exercise of the power of condemnation by the condemning authority. Arco Pipeline Co. v. 3.60 Acres, More or Less, Sup. Ct. Op. No. 1177 (File No. 2419), 539 P.2d 64 (1975).

Notwithstanding such provisions as AS 09.55.270(2), judicial inquiry into such necessity or the condemnor's determinations with respect thereto is not appropriate unless and until the condemnee has presented clear and convincing evidence that the condemnor has acted in bad faith or so capriciously and arbitrarily as to indicate the absence of any reasonable determining principle. Arco Pipeline Co. v. 3.60 Acres, More or Less, Sup. Ct. Op. No. 1177 (File No. 2419), 539 P.2d 64 (1975).

Only specific allegations of fraud, bad faith or some gross abuse of discretion in locating the pipeline could raise issues sufficient to permit judicial review of the necessity of the taking. Arco Pipeline Co. v. 3.60 Acres, More or Less, Sup. Ct. Op. No. 1177 (File No. 2419), 539 P.2d 64 (1975).

Failure of condemnor to make showing was not abuse of discretion. — Where it is clear that the use intended is public and statutorily authorized, and condemnor has presented unrebutted evidence to the effect that the design and construction criteria for the pipeline are most feasibly satisfied by the route across the property of the owner, it cannot be said that condemnor is under any duty to initially submit evidence that it has considered such alternate routing; nor can the failure to make such showing under the circumstances justify a finding of arbitrariness or an abuse of discretion. Arco Pipeline Co. v. 3.60 Acres, More or Less, Sup. Ct. Op. No. 1177 (File No. 2419), 539 P.2d 64 (1975).

No implied waiver. — Subsection (b) of this section, which provides in part, that when the court finds that the property was not taken by necessity for a public use or purpose in a manner compatible with the greatest public good and least private injury; the court shall enter the judgment necessary to "recover for the plaintiff any award paid to any person," militates against a finding of implied waiver from the respondents' withdrawal of money deposited in the registry of the court by the state in conjunction with its filing of a declaration of taking against respondents' property. State, Dep't of Transp. & Pub. Facilities v. 0.644 Acres, Sup. Ct. Op. No. 2118 (File No. 4861), 613 P.2d 829 (1980).

Injury should be minimized. — This section, which mandates in subsection (b) that "private injury" be considered with reference to the particular properties involved, contemplates that the injury suffered by each individual should be minimized to the extent that it is reasonably possible to do so without impairing the integrity and function of the project and without adding unreasonable costs to the project. State, Dep't of Transp. & Pub. Facilities v. 0.644 Acres, Sup. Ct. Op. No. 2118 (File No. 4861), 613 P.2d 829 (1980).

State's failure to consider several important, relevant factors made it impossible to rationally determine whether intended taking was compatible with the greatest public good and the least private injury, and rendered its action arbitrary, thus taking of subject land could not be upheld. State, Dep't of Transp. & Pub. Facilities v. 2.072 Acres, More or Less, Sup. Ct. Op. No. 2575 (File No. 6159), 652 P.2d 465 (1982).

Collateral references. — Appeal relating to amount of condemnation award, 50 ALR2d 1386.

Reviewability, on appeal from final judgment in eminent domain proceeding, of interlocutory order, as affected by fact that order was separately appealable, 79 ALR2d 1400.

Running of interest on judgment where both parties appeal, 11 ALR4th 1099.

the basic distinction arises between a question of fact and a question of law. Taylor v. Interior Enterprises, Inc., Sup. Ct. Op. No. 621 (File No. 1113), 471 P.2d 405 (1970).

Questions of fact may not be re-examined by court. — Where there is a trial by jury, questions of fact must be decided by the jury and may not be re-examined by the court. Taylor v. Interior Enterprises, Inc., Sup. Ct. Op. No. 621 (File No. 1113), 471 P.2d 405 (1970).

Criterion for determining sufficency of evidence for jury. — In deciding whether the evidence is sufficient to raise a question of fact to be presented to the jury, the court applies a criterion. In Alaska's courts the criterion is whether there is room for a difference of opinion among reasonable men as to the factual issue in controversy. If there is, the issue is submitted to the jury for its determination. If not, the court decides the issue without reference to the jury. Taylor v. Interior Enterprises, Inc., Sup. Ct. Op. No. 621 (File No. 1113), 471 P.2d 405 (1970).

Power of removing factual issues from jury. — The courts have exercised the power of removing from consideration by a jury factual issues in a case where the court decides there is insufficient evidence to raise a question of fact to be presented to the jury. Taylor v. Interior Enterprises, Inc., Sup. Ct. Op. No. 621 (File No. 1113), 471 P.2d 405 (1970).

Section does not preclude review of rulings on motions to set aside awards. — Nothing in this section precludes appellate review of the trial judges' rulings on motions to set aside awards. Fruit v. Schreiner, Sup. Ct. Op. No. 838 (File Nos. 1526, 1546), 502 P.2d 133 (1972).

Applicability of fair cross-section standard to civil jury selections. — See Malvo v. J.C. Penney Co., Sup. Ct. Op. No. 901 (File No. 1630), 512 P.2d 575 (1973).

Applied in State v. Kaatz, Sup. Ct. Op. No. 1536 (File No. 3080), 572 P.2d 775 (1977).

Quoted in Knudsen v. City of Anchorage, Sup. Ct. Op. No. 21 (File No. 58), 358 P.2d 375 (1960); Patrick v. Sedwick, Sup. Ct. Op. No. 206 (File No. 314), 391 P.2d 453 (1964); Pennington v. Snow, Sup. Ct. Op. No. 625 (File No. 1101), 471 P.2d 370 (1970); Martinez v. Bullock, Sup. Ct. Op. No. 1152 (File No. 2209), 535 P.2d 1200 (1975); Jeffries v. Glacier State Tel. Co., Sup. Ct. Op. No. 1985 (File No. 4298), 604 P.2d 4 (1979).

Cited in Lee v. State, Sup. Ct. Op. No. 749 (File No. 1395), 490 P.2d 1206 (1971).

Section 17. Imprisonment for Debt. There shall be no imprisonment for debt. This section does not prohibit civil arrest of absconding debtors.

The gist of the offense under AS 28.35.026 is failure to return an automobile with a conscious purpose to injure the owner and not mere failure to pay the rental price. Hence, the constitutional prohibition against imprisonment for debt has not been violated. Speidel v. State, Sup. Ct. Op. No. 584 (File No. 1014), 460 P.2d 77 (1969).

Section 18. Eminent Domain. Private property shall not be taken or damaged for public use without just compensation.

Cross reference. — As to compensation and damages awarded for property taken by eminent domain, see AS 09.55.330.

I. General Consideration.
II. Damage.
III. Taking.
IV. Just Compensation.

I. GENERAL CONSIDERATION.

Construction. — The supreme court has liberally construed this section in favor of the private property owner. Alsop v. State, Sup. Ct. Op. No. 1764 (File No. 3023), 586 P.2d 1236 (1978).

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Compensation for personal property. — Reading Alaska Const., art. I, § 18, and Alaska Const., art. I, § 1, in paria materia, and the generally recognized principle that the constitution and legislative enactments in implementation thereof are to be liberally construed, the supreme court found no clear legislative intent to have been manifested that personal property taken or damaged by public use should not be justly compensated. Stroh v. Alaska State Hous. Auth., Sup. Ct. Op. No. 496 (File No. 924), 459 P.2d 480 (1969).

There is no clear legislative intent manifested that personal property taken or damaged by public use should not be justly compensated. Stroh v. State Hous. Auth., Superior Court, 3rd Jud. Dist., No. 65-1222, 459 P.2d 484 (1969).

See note under catchline "Personal property used on land not considered in determining compensation" under analysis line IV, "Just Compensation."

Chattel as real estate. — The rule is that for a chattel to become a fixture and be considered as real estate, three prerequisites must unite: There must be an annexation to the realty of something appurtenant thereto; the chattel must have adaptability or application as affixed to the use for which the real estate is appropriated; and there must be an intention of the party to make the chattel a permanent accession to the freehold. Intention, the third of the three factors said to comprise the general test for determining whether an object has become a fixture, refers to the intent of the parties that the object being introduced onto the realty become a permanent accession thereto. Stroh v. State Hous. Auth., Superior Court, 3rd Jud. Dist., No. 65-1222, 459 P.2d 484 (1969).

Carpeting constituted personalty at the time of the taking, and party was entitled to recover the actual market value thereof at the time of the taking. Stroh v. Alaska State Hous. Auth., Sup. Ct. Op. No. 496 (File No. 924), 459 P.2d 480 (1969); Stroh v. State Hous. Auth., Superior Court, 3rd Jud. Dist., No. 65-1222, 459 P.2d 484 (1969).

Expectation of renewal of a lease is not a compensable interest. State, Dep't of Hwys. v. Salzwedel, Sup. Ct. Op. No. 1861 (File No. 3976), 596 P.2d 17 (1979).

Proceedings distinguished from ordinary civil actions. — This constitutional guarantee, together with the peculiar in rem nonadversary pleadings characteristic of condemnation proceedings, distinguish these proceedings from ordinary civil actions. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

Alaska's procedural rules pertaining to condemnation actions do not provide a burden of pleading which could be looked to as determinative of the companionate burden of persuasion. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

Procedural rules involving the concept of risk of failure to persuade are inapposite in a condemnation proceeding where the sole issue is determination of just compensation. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

The separate questions of order of proof and order of final arguments of counsel in condemnation proceedings should be left to the discretion of the trial judge. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

The burden of production facet of burden of proof, rather than the risk of non-persuasion aspect, is the more meaningful concept in the trial of a condemnation proceeding. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

Competent evidence of fair market value. — As to the issue of fair market value, both the condemning agency and the property may produce competent evidence of the fair market value of the condemned property. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

For additional notes concerning evidence, see notes under analysis line IV, "Just Compensation."

Role of expert witness in eminent domain proceedings. — See Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

Absent the production of evidence by either party, the triers of fact will determine fair market value solely from the other party's evidence. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

Testimony. — It is not necessary, in order to give credence to a witness' opinion

of fair market value, to also require him to show that the property and market value are such that the entire purchase price could be expected to be paid at the time of sale. State v. 7.026 Acres, more or less, Sup. Ct. Op. No. 601 (File No. 1106), 466 P.2d 364 (1970).

Sale 15 months after date of taking. — As to admission into evidence of a sale taking place 15 months after the date of the taking by the state, see Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

The focal point of the trier of fact's inquiry is the ascertainment of just compensation. Thus, regardless of whether the condemning agency or the property owner meets a given burden of persuasion, Alaska's constitutional mandate requires that the owner be awarded just compensation for the property he has lost. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

Jury confronted with conflicting opinions as to value. — In the usual condemnation case, the jury is confronted with conflicting opinions as to value. The jury is not faced with the necessity of finding a particular value or no value at all. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

Instructions on burden of proof, in the sense of allocating the risk of failure to persuade the jury, are inappropriate in condemnation actions. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

In a condemnation proceeding, the trial court did not err in refusing to instruct the jury on the subject of burden of proof, where the jury was informed that the exercise of the power of eminent domain is subject to the constitutional requirement of payment of just compensation, and was further instructed that their only concern was the determination of the just compensation to be awarded. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

Quoted in Stroh v. Alaska State Hous. Auth., Sup. Ct. Op. No. 496 (File No. 924), 459 P.2d 480 (1968).

II. DAMAGE.

Section expressly requires compensation for damage, while 5th amendment does not. — See State v. Hammer, Sup. Ct. Op. No. 1268 (File Nos. 2500, 2660), 550 P.2d 820 (1976).

Temporary loss of profits during relocation incurred because of the state's exercise of its eminent domain power in taking the property on which the business was conducted is a damaging of property within this section and must be compensated for. State v. Hammer, Sup. Ct. Op. No. 1268 (File Nos. 2500, 2660), 550 P.2d 820 (1976).

III. TAKING.

When taking occurs. — It is the general rule that a taking does not occur until: (1) Legal title vests in the state, (2) the state enters into actual possession, or (3) the state takes constructive possession either by causing damage to property or by depriving the owner of full beneficial use of his land. Stewart & Grindle, Inc. v. State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

Once an owner is deprived of the economic advantages of legal ownership, a taking has occurred. Grant v. State, Sup. Ct. Op. No. 1385 (File No. 2855), 560 P.2d 36 (1977).

Although the state is clearly not bound to abide by its construction plans and specifications, it is reasonable for parties negotiating for the sale of the land involved to assume that those plans will be implemented, and where the plans are not implemented, any further economic interference constitutes a second taking for which the state must pay just compensation. Grant v. State, Sup. Ct. Op. No. 1385 (File No. 2855), 560 P.2d 36 (1977).

Limiting access to vessels able to pass through a culvert six feet in diameter was in effect a taking of such access. Wernberg v. State, Sup. Ct. Op. No. 972 (File No. 1797), 519 P.2d 801 (1974).

Loss of access due to closure of intersection. — Where owners received compensation for the taking of their property for construction of a highway, a second taking occurred, separate from the first, when the state decided to redesign the highway, the second taking consisting of a loss of access due to closure of an intersection and due to the limitation of travel on the frontage road to one-way traffic, if the settlement or the receipt of the intersection award had been in reliance upon unrestricted access to be closed. Alsop v. State, Sup. Ct. Op. No. 1764 (File No. 3023), 586 P.2d 1236 (1978).

Where owners contended that a second taking of their property occurred when the state redesigned the highway for the construction of which their property had

been originally taken, closing off an intersection and limiting travel on the frontage road to one-way traffic, in order to recover damages, each of the owners must demonstrate that he or a predecessor in interest had a portion of his property taken for the original construction project, that he or his predecessor relied on construction of the intersection or the two-way frontage road, or both, in settling or receiving an award for their condemnation claims, and that his remaining property had decreased in value as a result of the highway modifications. Alsop v. State, Sup. Ct. Op. No. 1764 (File No. 3023), 586 P.2d 1236 (1978).

Nonabutting owners, whose property has not been taken, cannot claim damages because a more circuitous access route is imposed upon them. Alsop v. State, Sup. Ct. Op. No. 1764 (File No. 3023), 586 P.2d 1236 (1978).

Changing a frontage road from a two-way street to a one-way street is not by itself a taking. B & G Meats, Inc. v. State, Sup. Ct. Op. No. 1950 (File No. 3940), 601 P.2d 252 (1979).

A distinction must be made between loss of access and loss of traffic flow. The latter is not a part of the owner's interest in his property. Restrictions which merely result in a diversion of traffic away from the property are thus not compensable. B & G Meats, Inc. v. State, Sup. Ct. Op. No. 1950 (File No. 3940), 601 P.2d 252 (1979).

Principles which control when claim of taking caused by loss of access is raised. — See B & G Meats, Inc. v. State, Sup. Ct. Op. No. 1950 (File No. 3940), 601 P.2d 252 (1979).

Compensation required for taking littoral access right. — The state must justly compensate the property owner when it takes by inverse condemnation, a littoral access right. Grant v. State, Sup. Ct. Op. No. 1385 (File No. 2855), 560 P.2d 36 (1977).

Institution of condemnation proceedings constitutes a compensable appropriation of vacant and unimproved land, and the property owner is constitutionally entitled to interest dating from the institution of such proceedings. Stewart & Grindle, Inc. v. State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

Under the Alaska statutory scheme, an owner of unimproved or untenanted property is deprived of both investment potential and the possibility of future development the moment a condemnation action commences. Meanwhile, the owner remains liable for property taxes, mortgage payments, and any other expenses incidental to legal ownership. Stewart & Grindle, Inc. v. State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

Appropriation deemed exercise of power of eminent domain. — Neither the failure of the state to institute a condemnation action nor the owners' assertion of a claim based on the theory of trespass changed the essential nature of the state's action in appropriating the owners' property from one of the exercise of the power of eminent domain. State v. Crosby, Sup. Ct. Op. No. 322 (File No. 584), 410 P.2d 724 (1966).

IV. JUST COMPENSATION.

Measure of just compensation. — Just compensation is measured by the value of the property taken. State v. 7.026 Acres, more or less, Sup. Ct. Op. No. 601 (File No. 1106), 466 P.2d 364 (1970).

Fair market value is an appropriate measure of the just compensation guaranteed by this section. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

"Fair market value". — Fair market value is the price in money that the property could be sold for on the open market under fair conditions between an owner willing to sell and a purchaser willing to buy, with reasonable time allowed to find a purchaser. State v. 7.026 Acres, more or less, Sup. Ct. Op. No. 601 (File No. 1106), 466 P.2d 364 (1970).

One criterion for determining value is what the property is worth on the market — its fair market value, and this is to be determined by a just consideration of all the uses for which the property is suitable. State v. 7.026 Acres, more or less, Sup. Ct. Op. No. 601 (File No. 1106), 466 P.2d 364 (1970); Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

The highest and most profitable use for which the property is adaptable is to be considered, to the extent that the prospect of demand for such use affects the market value while the property is privately held. State v. 7.026 Acres, more or less, Sup. Ct. Op. No. 601 (File No. 1106), 466 P.2d 364 (1970).

The essential difference between market price and market value lies in the premises of intelligence, knowledge and willingness, all of which are contemplated in market value but not in market price. Stated differently, at any given moment of time, market value

connotes what a property is actually worth and market price what it may be sold for. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

Use of property must be reasonably probable. — It must be shown that the use for which the property is claimed to be adaptable is reasonably probable. If this cannot be shown, evidence of prospective use must be excluded because it would allow mere conjecture and speculation to become a guide for ascertainment of value, and this is not a permissible method for the judicial ascertainment of truth. State v. 7.026 Acres, more or less, Sup. Ct. Op. No. 601 (File No. 1106), 466 P.2d 364 (1970).

"Best use" evidence. — See Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

In determining just compensation, usually measured by the "market value" of the property, the highest and most profitable use for which the land is adaptable may be considered to the extent that the prospective demand for such use affects the property's present market value. Thus, many courts, including Alaska's, have allowed evidence of a reasonably probable subdivision to be admitted to prove the adaptability of the land for subdivision use. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

Admissibility of subdivision plat. — Where the adaptability of the land for subdivision use is shown to be reasonably probable, and not too remote or speculative, then a subdivision plat is admissible as illustrating the potential and reasonably probable use. State v. 7.026 Acres, more or less, Sup. Ct. Op. No. 601 (File No. 1106), 466 P.2d 364 (1970).

A truly speculative or imagined use should not be considered. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

Evidence of use as subdivision. — The majority of courts allow evidence of a potential subdivision only for the limited purpose of showing the adaptability of the land for subdivision purposes. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

The courts are much more liberal in admitting evidence of a potential subdivision when some preliminary steps have been taken to develop the land. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

Where there is testimony that the highest and best use of the property is as an industrial subdivision, and evidence that other property in the immediate area was subdivided for industrial purposes, the proposed subdivision is not purely conjectual or speculative. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

If the land were adaptable for subdivision purposes, it would seem that the potential income to be derived from sales of the subdivided lots would be highly relevant to a determination of the "market value," especially to the extent that sophisticated investors who make decisions on the basis of income capitalization take part in market transactions. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

Capitalization of income, in contexts other than proposed subdivisions, has been recognized as an accepted method of valuation by a number of jurisdictions. Although capitalization of anticipated proceeds from a proposed subdivision necessarily has a speculative element, it still has a direct impact on the property's market value since it will influence investment decisions and thereby affect supply and demand. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

To the extent that the "just compensation" guarantee in this section comprises a notion of fair market value rather than merely the price the property will bring in an imperfect market, income capitalization must be considered particularly apposite. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

Even in a market where a parcel's price is unaffected by its income potential, income capitalization must be considered to have a bearing on "market value." The danger that market price will not closely reflect market value is enhanced when the property is not currently generating income. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

Income capitalization in general and the anticipated use or development method in particular are standard appraisal practices. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

An expert's testimony which capitalized the anticipated rentals from a proposed recreational subdivision to arrive at an estimate of fair market value was properly admitted. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

As to admission of expert testimony on market value based on the development costs and income capitalization of a potential subdivision, see Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

Rule as to special benefits. — The rule in Alaska is that special benefits to the remainder can only be used to offset severance damages to the remainder. In the event that special benefits exceed severance damages, the landowner is still entitled to receive the full market value of the portion actually taken. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

Just compensation is not conditioned upon receipt of commensurate value by the state. Stewart & Grindle, Inc. v. State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

Personal property used on land not considered in determining compensation. — The general rule is to the effect that personal property which is used on land taken by eminent domain cannot be considered in the determination of the compensation. State v. Ness, Sup. Ct. Op. No. 977 (File No. 1914), 516 P.2d 1212 (1973).

The majority rule excludes property tax assessments from evidence in condemnation cases on the rationale that such an assessment is res inter alios acta, notoriously unreliable as a criteria of true value or the opinion of persons not called as witnesses and subject to cross-examination. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

It is almost everywhere the law that the value placed upon a parcel of land for the purposes of taxation by the assessors of the town in which it is situated is no evidence of its value for other than tax purposes. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

AS 29.53.080 does not furnish the basis for the admissibility of tax assessments as evidence in condemnation proceedings. Given the limited purpose of the act, there is no indication that the legislature intended to make tax assessments prima facie evidence of value in condemnation proceedings. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

In view of the special purposes for which tax assessments are made, the fact that there is little likelihood that an owner would contest an under-assessment or an assessment which did not reflect the property's full value, the potential unreliability of such assessments due to the varied qualifications of assessors, and the fact that such assessments standing alone embody the opinions of persons not called as witnesses and not subject to cross-examination, the admission of property tax assessments as evidence of fair market value in condemnation actions is prohibited. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

Payment of interest may be necessary component of just compensation. — The payment of interest is, in appropriate circumstances, a necessary component of constitutionally guaranteed "just compensation." Stewart & Grindle, Inc. v. State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

Before interest can accrue, there must be a "taking." Stewart & Grindle, Inc. v. State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

Owner is entitled to interest from date of taking to date of payment. — This section necessitates that a property owner be compensated for delays incurred between the dates of the government's taking of property and making payment. If an award were paid immediately upon the taking of the land by the state, no damages to the property owner would ensue. But where, due to the necessity of legal proceedings to ascertain fair market value of property, delays ensue, the property owner is entitled to an adequate sum to reimburse him for the loss of use of the money during the period of such delay. To hold otherwise would constitute a taking of the property without just compensation. Therefore, it is well established that the owner of property is entitled to interest from the date of taking to the date of payment. Russian Orthodox Greek Catholic Church of North America v. Alaska State Hous. Auth., Sup. Ct. Op. No. 809 (File No. 1600), 498 P.2d 737 (1972).

Since compensation for delays required. — The 5th amendment to the United States Constitution and this section require that a property owner be compensated for delays incurred between the dates of the government's taking of property and making payment. Stewart & Grindle, Inc. v. State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

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Interest from date owner loses economic advantages but not liabilities. — If as a matter of constitutional law the property owner is entitled to interest from the moment the state takes legal possession, he should, a fortiori, receive interest where he has been deprived of all the economic advantages of legal ownership but is relieved of none of the liabilities. Stewart & Grindle, Inc. v. State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

Although no statute so provides. — There is no statutory provision for payment of interest from the date a condemnation action is instituted where the property owner remains in possession, and it has long been recognized that unless interest is specifically authorized by legislative enactment, it may not ordinarily be assessed against the state in any action. Stewart & Grindle, Inc. v. State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

Compensation to include expenses necessarily incurred. — Civil R. 72(k)(4), when construed in the framework of the "just compensation" clauses of the United States and Alaska constitutions, entitles the property owner to be made whole for expenses necessarily incurred in connection with the condemnation of his property. Stewart & Grindle, Inc. v. State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

This section and the 5th amendment entitle the property owner to be made whole for expenses necessarily incurred in connection with the condemnation of his property. City of Anchorage v. Scavenius, Sup. Ct. Op. No. 1183 (File Nos. 2214, 2222), 539 P.2d 1169 (1975).

Without such a rule, the state forces a property owner to pay a greater portion of the costs of a public project than any other taxpayer must pay by afflicting him with unavoidable expenses of condemnation. Placing such a burden on the property owner is no more just than assessing a levy against him but no others. City of Anchorage v. Scavenius, Sup. Ct. Op. No. 1183 (File Nos. 2214, 2222), 539 P.2d 1169 (1975).

Construction of holding in Stewart & Grindle, Inc. v. State. — The holding in Stewart & Grindle, Inc. v. State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974), that Civil R. 72(k)(4) when construed in the framework of the "just compensation" clauses of the United States and Alaska constitutions entitles the property owner to be made whole for expenses necessarily incurred in connection with the condemnation of his property, does not mean that the state must become the guarantor of costs incurred in advancing every possible legal theory an owner may have in an eminent domain proceeding. State, Dep't of Hwys. v. Salzwedel, Sup. Ct. Op. No. 1861 (File No. 3976), 596 P.2d 17 (1979).

Any rule which purports to shift the costs of the initial determination of the compensation award upon the owner would be unconstitutional. City of Anchorage v. Scavenius, Sup. Ct. Op. No. 1183 (File Nos. 2214, 2222), 539 P.2d 1169 (1975).

Appraisers' and attorney's fees held "necessarily" incurred. Stewart & Grindle, Inc. v. State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

Where the property to be taken has a readily ascertainable market value, or is worth too little to warrant a professional appraisal, an appraiser's fee could not be said to be "necessary," and the property owner would not be entitled to compensation for such an expense. Stewart & Grindle, Inc. v. State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

Where the property to be taken has a readily ascertainable market value, or is worth too little to warrant a professional appraisal, an appraiser's fee could not be said to be "necessary," and the property owner would not be entitled to compensation for such an expense. Stewart & Grindle, Inc. v. State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

Where the property has a readily ascertainable market value and the state has offered at least that amount, any attorney's fees subsequently incurred would not be necessary in order to obtain just compensation, and would accordingly be disallowed. Stewart & Grindle, Inc. v.

State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

No award of expenses in situations not specified in Civ. R. 72(k). — In the absence of an amendment, the supreme court is not justified in awarding costs and attorney's fees in situations not specified in Civ. R. 72(k), which specifies when costs and attorney's fees incurred by the property owner are to be assessed against the condemnor. City of Anchorage v. Scavenius, Sup. Ct. Op. No. 1183 (File Nos. 2214, 2222), 539 P.2d 1169 (1975).

Award of fees incurred in unsuccessfully seeking compensation for the expectancy of renewal of a lease was error since the expenses in developing this claim were not "necessarily incurred" within the meaning of Civ. R. 72(k)(4). State, Dep't of Hwys. v. Salzwedel, Sup. Ct. Op. No. 1861 (File No. 3976), 596 P.2d 17 (1979).

Where property owner unsuccessfully appeals master's award. — A condemnor is not entitled to an award of costs and attorney's fees when the property owner has unsuccessfully appealed a master's award. City of Anchorage v. Scavenius, Sup. Ct. Op. No. 1183 (File Nos. 2214, 2222), 539 P.2d 1169 (1975).

Just compensation within range of testimony precludes new trial. — The trial court did not commit an abuse of discretion in denying the state's motion for new trial, where the jury's determination of just compensation was within the range of the testimony. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

Jury's award of $0.00 as just compensation to a property owner for the taking of an easement was not patently inadequate or violative of constitutional provisions pertaining to eminent domain. Scavenius v. City of Anchorage, Sup. Ct. Op. No. 1182 (File No. 2193), 539 P.2d 1161 (1975).

The taking of an easement does constitute an appropriation of the owner's property regardless of its minuscule effect. But where the property owner failed to object to instructions expressly permitting the entry of an award of no compensation and the difference between an award of $0.00 compensation and a nominal sum to which the property owner would have been entitled is de minimus, the failure to award compensation per se did not require reversal. Scavenius v. City of Anchorage, Sup. Ct. Op. No. 1182 (File No. 2193), 539 P.2d 1161 (1975).

Section 19. Right to Bear Arms. A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

Section 20. Quartering Soldiers. No member of the armed forces shall in time of peace be quartered in any house without the consent of the owner or occupant, or in time of war except as prescribed by law. The military shall be in strict subordination to the civil power.

Section 21. Construction. The enumeration of rights in this constitution shall not impair or deny others retained by the people.

Right of self-representation has been so retained by the people. — See McCracken v. State, Sup. Ct. Op. No. 986 (File No. 1791), 518 P.2d 85 (1974).

A prisoner has a right to represent himself in post-conviction relief proceedings. McCracken v. State, Sup. Ct. Op. No. 986 (File No. 1791), 518 P.2d 85 (1974).

The right to counsel should not be used to bar self-representation. McCracken v. State, Sup. Ct. Op. No. 986 (File No. 1791), 518 P.2d 85 (1974).

The right to self-representation is not absolute. McCracken v. State, Sup. Ct. Op. No. 986 (File No. 1791), 518 P.2d 85 (1974).

Qualifications on right of self-representation in post-conviction proceedings. — See McCracken v. State, Sup. Ct. Op. No. 986 (File No. 1791), 518 P.2d 85 (1974).

Criminal R. 39(b) construed in light of this section. — See McCracken v. State, Sup. Ct. Op. No. 986 (File No. 1791), 518 P.2d 85 (1974).