

SB104

SENATE FINANCE COMMITTEE REPORT

DATE: 5/13/91

FURTHER:

DATE TURNED INTO OFFICE: _____

The Finance Committee considered SENATE BILL NO. 104

"An Act relating to the taking and compensation for damage of property by state agencies, municipalities, and other entities; and providing for an effective date."

Died in SFC

and recommended:

- replace with _____ CS _____
- or adopt _____ CS _____
- attached amendment(s)
- _____ letter of intent adopted
- same title
- new title
- technical title change (HB only)

do pass

do not pass

no recommendation

individual recommendations

further referral to _____

ATTACHES NEW FISCAL NOTE(S):
Dept/Date:

fiscal note(s) _____

zero fiscal note(s) _____

appropriation-no fiscal note

SIGNING DO PASS:

APPROVES PREVIOUS:
Dept/Date:

fiscal note(s) _____

zero fiscal note(s) _____

OTHER RECOMMENDATIONS:

1. _____ 2. _____

Co-Chairs: Signatures and Recommendations

SENATE COMMITTEE REPORT

DATE: 2/6/91

FURTHER: Finance

Date of 5-Day Notice: 3/14/91
(in accordance with Uniform Rule 23)

DATE TURNED INTO OFFICE: 5-13-91

State Affairs Committee considered SB 104

Taking and compensation for damage of property by state agencies, municipalities, and other entities; efd.

and recommended:

- replace with _____ CS ST. AFFAIRS same title
- or adopt _____ CS _____ new title
- attached amendment(s) technical
- _____ letter of intent adopted title change (HB only)

- do pass
- do not pass
- no recommendation
- individual recommendations
- further referral to _____

FM & P/M

ATTACHES NEW FISCAL NOTE(S): Dept/Date:
 fiscal note(s) _____

zero fiscal note(s) _____

appropriation-no fiscal note

APPROVES PREVIOUS: Dept/Date:
 fiscal note(s) DOT 3/14/91
SB & CS

zero fiscal note(s) LAW 3/5/91
SB & CS

Governor's bill w/fiscal note

SIGNING DO PASS:

OTHER RECOMMENDATIONS:

2 - not same bill no rec
2 - with check no rec
2 - give 10 day notice

Patricia Kelley do pass
Chair: Signature and Recommendation

STATE OF ALASKA
1991 LEGISLATIVE SESSION

FISCAL NOTE

No. 1
 BI Bill Version: SB 104
 (S) Publish Date: 5/13/91

Revision Date: Department Affected: DOT&PF
 Title: relating to the taking and compensation for damage of property by state agencies; ... BRU: Statewide Engineering & Operations Standards
 Sponso.: Senators Rodey, Halford Component: Engr. & Operations Stand.
 Requestor: Senator Rodey Component Serial Number: 547

EXPENDITURES/REVENUES: (Thousands of Dollars)

| OPERATING | FY92 | FY93 | FY94 | FY95 | FY96 | FY97 |
|-------------------|------|------|------|------|------|------|
| PERSONAL SERVICES | 0 | 0 | 0 | 0 | 0 | 0 |
| TRAVEL | 0 | 0 | 0 | 0 | 0 | 0 |
| CONTRACTUAL | 0 | 0 | 0 | 0 | 0 | 0 |
| SUPPLIES | 0 | 0 | 0 | 0 | 0 | 0 |
| EQUIPMENT | 0 | 0 | 0 | 0 | 0 | 0 |
| LAND & STRUCTURES | 0 | 0 | 0 | 0 | 0 | 0 |
| GRANTS, CLAIMS | 0 | 0 | 0 | 0 | 0 | 0 |
| MISCELLANEOUS | 0 | 0 | 0 | 0 | 0 | 0 |
| TOTAL OPERATING: | 0 | 0 | 0 | 0 | 0 | 0 |

| | | | | | | |
|---------|---------|---------|---------|---------|---------|---------|
| CAPITAL | 2,000.0 | 2,000.0 | 2,000.0 | 2,000.0 | 2,000.0 | 2,000.0 |
|---------|---------|---------|---------|---------|---------|---------|

| | | | | | | |
|---------|---|---|---|---|---|---|
| REVENUE | 0 | 0 | 0 | 0 | 0 | 0 |
|---------|---|---|---|---|---|---|

FUNDING: (Thousands of Dollars)

| | | | | | | |
|----------------|---------|---------|---------|---------|---------|---------|
| GENERAL FUNDS | 2,000.0 | 2,000.0 | 2,000.0 | 2,000.0 | 2,000.0 | 2,000.0 |
| FEDERAL FUNDS | 0 | 0 | 0 | 0 | 0 | 0 |
| OTHER | 0 | 0 | 0 | 0 | 0 | 0 |
| TOTAL FUNDING: | 2,000.0 | 2,000.0 | 2,000.0 | 2,000.0 | 2,000.0 | 2,000.0 |

POSITIONS

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

Estimate of current year impact:

ANALYSIS: (Attach a separate page if necessary)
 See second page and department position paper.

Changes in CSSB-104 (STA)
 reflect NO FISCAL CHANGE from the original
 fiscal note. This fiscal note is appropriate.
5/13/91 date W.A. Co. J. Comte Aide (initial)

Prepared by: Jeffery C. Ottesen, Director [Signature]

Phone: 465-2951

Division: Engineering and Operations Standards

Date: March 14, 1991

Approved by Commissioner: [Signature]
 Frank G. Furpin

Phone: 465-3900

Agency: Department of Transportation and Public Facilities

Date: March 14, 1991

Distribution By Preparer: Legislative Finance, Legislative Sponsor, Requestor, OMB, Impacted Agency(ies).

ANALYSIS (cont. from page 1):

This bill will have significant direct and indirect impacts to our capital budget. All costs associated with paying business losses including direct payments, legal costs, appraisal costs, staff time and court fees will be ineligible for federal-aid (23 CFR 710.304 (h)). It is difficult to predict how much these payments will be and the extent of litigation which will ensue to interpret the various provisions of the bill. In cases where the Attorney General's office counsels against going to court we will be compelled to reach negotiated settlements. We typically do this now for dollar amounts in excess of fair market value determinations. This bill will likely expand this practice as it broadens the type of losses which can be claimed.

Direct Costs

We have based our estimate of \$2 million dollars on a number of assumptions. Each is highly variable and it would have been easy to estimate this fiscal note at a much larger figure. A single business loss claim sought during a condemnation action in 1990 sought \$2 million. Based upon actual experience, we would adjust the amount necessary to pay and defend these claims in future capital budget requests.

Assumptions:

| | |
|---|---------------|
| Business loss cases settled by negotiations: | 25 |
| Average settlement | \$40,000 |
| Average administrative cost (legal, appraisal, staff) | \$8,000 |
| Subtotal | \$1.2 million |

| | |
|---|---------------|
| Business loss cases settled in court: | 8 |
| Average settlement | \$80,000 |
| Average administrative cost (legal, appraisal, staff) | \$20,000 |
| Subtotal | \$0.8 million |

Total **\$2.0 million**

Indirect Costs

As this bill has an immediate effective date, it will slow the progress of a number of ongoing projects. If these are delayed beyond the end of the federal fiscal year, we will lose the opportunity to "obligate" this money and hence this is an opportunity loss. While it does not show up in a fiscal note, this bill will have the greatest effect on urban projects which are typically the most expensive. Further, in the current fiscal year the department is required to obligate the highest level of federal funds in our history, and an amount which was revealed to us after the fiscal year began. Thus we predict that at least one or two projects will fail to obligate at a potential "cost" of \$10 to \$20 million.

Note: If appropriated, these funds could either be added to the general fund match for federal-aid highways and aviation which include money for a variety of costs not eligible for federal participation, or a separate fund could be appropriated which strictly limits the use of these funds to business loss claims and related expenses.

FISCAL NOTE

No. 2

STATE OF ALASKA
1991 LEGISLATIVE SESSION

Bill Version: SB 104

(S) Publish Date: 5/13/91

Revision Date: _____ Department Affected: Department of Law
 Title: "...taking and compensation...of property by state agencies...other entities" BRU: Legal Services
 Component: Operations
 Sponsor: Senator Rodey
 Requestor: Senate State Affairs COMPONENT SERIAL NO.

| | | | |
|--|--|---|---|
| | | 9 | 3 |
|--|--|---|---|

Expenditures/Revenues: (Thousands of Dollars)

| OPERATING | FY 92 | FY 93 | FY 94 | FY 95 | FY 96 | FY 97 |
|-------------------|-------|-------|-------|-------|-------|-------|
| PERSONAL SERVICES | | | | | | |
| TRAVEL | | | | | | |
| CONTRACTUAL | | | | | | |
| SUPPLIES | | | | | | |
| EQUIPMENT | | | | | | |
| LAND & STRUCTURES | | | | | | |
| GRANTS, CLAIMS | | | | | | |
| MISCELLANEOUS | | | | | | |
| TOTAL OPERATING | -0- | -0- | -0- | -0- | -0- | -0- |

| | | | | | | |
|---------|--|--|--|--|--|--|
| CAPITAL | | | | | | |
|---------|--|--|--|--|--|--|

| | | | | | | |
|---------|--|--|--|--|--|--|
| REVENUE | | | | | | |
|---------|--|--|--|--|--|--|

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

Estimate of current year impact:

ANALYSIS: (Attach a separate page if necessary.)
 Please see the attached analysis.

Changes in CSB-104 (STA) have no fiscal impact. This fiscal note is appropriate.
5/13/91 date MAR 07 Comte Aide (Initial)

Prepared By: Richard I. Pegues, Director Phone: 465-3672
 Division: Administrative Services Date: March 5, 1991
 Approved by Commissioner: Charles E. Cole, Attorney General
 Agency: Department of Law Date: March 5, 1991

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. SB 104

This bill makes three basic changes to state laws concerning eminent domain, and relocation assistance and real property acquisition practices.

First, the bill would extend existing relocation assistance program benefits to a person, or a person's business or farm, who are displaced by a taking or damaging of property for activities of state agencies. Currently relocation assistance is available only for state agency activities that are federally funded.

Second, the bill would make both short-term and long-term business loss compensable under eminent domain laws. Many jurisdictions do not compensate for such losses, except for losses suffered due to temporary interruptions to business operations, as is currently the case in Alaska.

Third, the bill would require that prior to filing a declaration of taking and prior to taking possession, the state or municipality must complete an expansive fact finding to prove that the amount deposited with the court for estimated compensation for business losses is adequate.

Although these changes will require additional attorney services, they will not have a fiscal impact on the Department of Law. The state's cost for any capital project involving relocation assistance or business losses will be incrementally higher. However, the total number of attorney hours provided in any given year will probably not increase, and thus the legal services costs that are reimbursed to Law by the Department of Transportation and Public Facilities will simply be redistributed for different project legal purposes. The cost that the state pays for eminent domain and relocation assistance will increase to the extent that business losses and state-funded agency activities are a part of capital improvement projects. These increased costs would occur in future capital project budgets. The Department of Transportation and Public Facilities' view on these matters may be helpful in this latter regard.

CS FOR SENATE BILL NO. 104 (STATE AFFAIRS)
 IN THE LEGISLATURE OF THE STATE OF ALASKA
 SEVENTEENTH LEGISLATURE - FIRST SESSION

BY THE SENATE STATE AFFAIRS COMMITTEE

Offered: 5/13/91
 Referred: Finance

Sponsor(s): SENATORS RODEY, Halford

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to the taking, acquisition, and compensation for damage of property by
 2 state agencies, municipalities, and other entities; amending Alaska Rule of Civil Procedure
 3 72; and providing for an effective date."

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

5 * Section 1. AS 09.55.300(b) is amended to read:

6 (b) If the court determines that the property is to be taken for a public use [,] and if all
 7 parties to the action agree [DO NO OBJECT], the court shall appoint a master to determine the
 8 amount to be paid by the plaintiffs to each owner or other person interested in the property as
 9 compensation and damages by reason of the appropriation of the property. If a party [ALL
 10 PARTIES] to the action objects [OBJECT] to the appointment of a master, the court shall
 11 proceed with a jury trial, unless the jury is waived by all parties to the action.

12 * Sec. 2. AS 09.55.310(a) is amended to read:

13 (a) The jury or master shall hear the allegations and evidence of persons interested and
 14 shall ascertain and assess the following:

1 (1) the value of the property sought to be condemned, and all improvements on
2 it pertaining to the realty, and of each separate estate or interest in it; if it consists of different
3 parcels, the value of each parcel and each estate or interest in each parcel shall be separately
4 assessed;

5 (2) if the property sought to be condemned constitutes only a part of a larger
6 parcel, the damages that [WHICH] will accrue to the portion not sought to be condemned by
7 reason of its severance from the portion sought to be condemned, and the construction of the
8 improvemen's in the manner proposed by the plaintiff;

9 (3) separately, how much the portion not sought to be condemned and each estate
10 or interest in it will be benefited, if at all, by the construction of the improvements proposed by
11 the plaintiff; and, if the benefit is equal to the damages assessed under (2.) of this section, the
12 owner of the parcel may not [SHALL] be allowed [NO] damages except for the value of the
13 portion taken; but if the benefits are less than the damages [SO] assessed, the former shall be
14 deducted from the latter and the remainder shall be the only damages allowed in addition to the
15 value;

16 (4) if the property sought to be condemned is for a railroad, the cost of good and
17 sufficient fences along the line of the railroad, and the cost of cattle guards where fences may
18 cross the line of the railroad;

19 (5) the full amount of business loss caused by taking or damaging the
20 property.

21 * Sec. 3. AS 09.55.330 is amended to read:

22 Sec. 09.55.330. COMPENSATION AND DAMAGES. For the purpose of assessing
23 compensation and damages, the right to compensation and damages [THEM] accrues at the date
24 of issuance of the summons, and their [ITS] actual value at that date is the measure of
25 compensation of the property, except business loss, to be actually taken, and the basis of
26 damages to property, except business loss, not actually taken but injuriously affected in the cases
27 where the damages are allowed. The amount of business loss to be awarded as just
28 compensation is the amount of actual or projected loss that is proved by a party in interest
29 by a preponderance of the evidence at a master's hearing or at trial. If an order is made
30 letting the plaintiff into possession, as provided in AS 09.55.380, the compensation and damages
31 awarded shall draw lawful interest from the date of the order. No improvements put upon the

1 property after the date of the service of summons shall be included in the assessment of
2 compensation or damages.

3 * Sec. 4. AS 09.55.440(b) is amended to read:

4 (b) Upon motion of a party in interest and notice to all parties, the court shall
5 expeditiously [MAY] order that the money deposited [OR A PART OF IT] be paid immediately
6 to the person or persons entitled to it for or on account of the just compensation to be awarded
7 in the proceedings. If the compensation finally awarded exceeds the amount of money deposited,
8 the deposit shall be offset against the award. If the compensation finally awarded is less than
9 the amount of money deposited, the court shall enter judgment in favor of the plaintiff and
10 against the proper parties for the amount of the excess.

11 * Sec. 5. AS 09.55.450(a) is amended to read:

12 (a) Upon the filing of the declaration of taking and the deposit of the estimated
13 compensation, the court may, upon motion, fix the time during which and the terms upon which
14 the parties in possession are required to surrender possession to the petitioner. However, the
15 right of entry may [SHALL] not be granted the plaintiff until after the running of the time for
16 the defendant to file an objection to the declaration of taking or until after the hearing on an
17 [ANY] objection to the declaration of taking if the objection is made in the time allowed by law.
18 In addition, the court may not grant the right of entry until the court determines that the
19 amount of the deposit of the estimated just compensation for all property that has been
20 taken or damaged is substantiated by one or more appraisals prepared in good faith.

21 Where the party in possession withdraws a [ANY] part of the award and remains in possession,
22 the court may fix a reasonable rental for the premises to be paid by that party to the plaintiff
23 during the [SUCH] possession.

24 * Sec. 6. AS 09.55.460(b) is amended to read:

25 (b) The plaintiff may not be divested of a title or possession taken unless [ACQUIRED
26 EXCEPT WHERE] the court finds that the property was not taken by necessity for a public use
27 or purpose in a manner compatible with the greatest public good and the least private injury, the
28 amount of estimated just compensation deposited under AS 09.55.440(a) is not adequate,
29 the state failed to comply with AS 34.60, the plaintiff is a municipality that failed to comply
30 with AS 34.60, or the plaintiff failed to comply with AS 09.55.275. In the event of that
31 finding, the court shall enter the judgment necessary to (1) compensate the persons entitled to

1 it for the period during which the property was in the possession of the plaintiff, (2) recover for
2 the plaintiff any award paid to any person, and (3) order the plaintiff to restore the property to
3 the condition in which it existed at the time of the filing of the declaration of taking unless
4 [SUCH] restoration is impossible, in which case the court shall award damages to the proper
5 persons as compensation for a [ANY] diminution in the value of the property caused by the
6 plaintiff's wrongful possession.

7 * Sec. 7. AS 09.55 is amended by adding a new section to article 3 to read:

8 Sec. 09.55.465. DEFINITIONS. In AS 09.55.240 - 09.55.465,

9 (1) "business loss" includes short-term loss of profits, long-term loss of profits,
10 and the loss of goodwill;

11 (2) "private injury" includes business loss caused by the taking of or damage to
12 property.

13 * Sec. 8. AS 29.10.200(25) is amended to read:

14 (25) AS 29.35.030 (eminent domain, relocation assistance, and real property
15 acquisition practices)

16 * Sec. 9. AS 29.35.030(a) is amended to read:

17 (a) A municipality may, only within its boundaries, exercise the powers of eminent
18 domain and declaration of taking in the performance of a power or function of the municipality
19 and shall use [UNDER] the procedures set out in AS 09.55.250 - 09.55.460 and AS 34.60,
20 regardless of the source of funding. In addition, in the case of a second class city, the exercise
21 of the power of eminent domain or declaration of taking must be by ordinance that is submitted
22 to the voters at the next general election or at a special election called for that purpose. A
23 majority of the votes on the question is required for approval of the ordinance.

24 * Sec. 10. AS 34.60.010 is amended to read:

25 Sec. 34.60.010. PURPOSE. The purpose of this chapter is to establish a uniform policy
26 for the fair and equitable treatment of persons displaced as a result of activities undertaken by
27 state agencies [FEDERALLY ASSISTED PROGRAMS] in order that the displaced persons will
28 not suffer disproportionate injuries as a result of programs designed for the benefit of the public
29 as a whole.

30 * Sec. 11. AS 34.60.020 is amended to read:

31 Sec. 34.60.020. STATE AGENCIES TO ESTABLISH PROGRAM. State agencies shall

1 establish and provide the means for implementing a program providing fair and reasonable
2 relocation and other payment for persons displaced as a result of [FEDERALLY ASSISTED]
3 activities undertaken by state agencies, to carry out relocation assistance programs for persons
4 displaced, and to provide payments to persons as a result of the acquisition, taking, or damaging
5 of [REAL] property for activities of state agencies.

6 * Sec. 12. AS 34.60.040(a) is amended to read:

7 (a) When the acquisition, taking, or damaging of [REAL] property for a [FEDERALLY
8 ASSISTED] program or project undertaken by a state agency will result in the displacement of
9 a person, the state agency responsible for the program or project shall make payment to the
10 displaced person, upon proper application as approved by the state agency, for

11 (1) actual reasonable expenses in moving a person, the person's family, business,
12 farm operation, or other personal property;

13 (2) actual direct losses of tangible personal property as a result of moving or
14 discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable
15 expenses that would have been required to relocate the property as determined by the state
16 agency; and

17 (3) actual reasonable expenses in searching for a replacement business or farm.

18 * Sec. 13. AS 34.60.050 is amended to read:

19 Sec. 34.60.050. REPLACEMENT HOUSING FOR HOMEOWNERS. (a) In addition
20 to payments otherwise authorized by this chapter, the state agency shall make an additional
21 payment not to exceed \$22,500 [,] to a displaced person who is displaced from a dwelling
22 actually owned and occupied by the person for not less than 180 days before the initiation of
23 negotiations for the acquisition of the property. This additional payment must include the
24 following elements:

25 (1) the amount, if any, that when added to the acquisition or taking cost of the
26 dwelling acquired or taken by the state agency, equals the reasonable cost of a comparable
27 replacement dwelling that is a decent, safe, and sanitary dwelling adequate to accommodate the
28 displaced person, is reasonably accessible to public services and places of employment, and is
29 available on the private market; all determinations required to carry out this paragraph shall be
30 made in accordance with standards established by the state agency making the additional
31 payment;

1 (2) the amount, if any, that will compensate the displaced person for any
2 increased interest costs that the displaced person is required to pay for financing the acquisition
3 of the comparable replacement dwelling; this amount may be paid only if the dwelling acquired
4 or taken by the state agency was encumbered by a bona fide mortgage that was a valid lien on
5 the dwelling for not less than 180 days before the initiation of negotiations for the acquisition
6 or taking of the dwelling; and

7 (3) reasonable expenses incurred by the displaced person for evidence of title,
8 recording fees, and other closing costs incident to the purchase of the replacement dwelling, but
9 not including prepaid expenses.

10 (b) The additional payment authorized by (a) of this section may be made only to a
11 displaced person who purchases and occupies a replacement dwelling that is decent, safe, and
12 sanitary not later than the end of the one-year [ONE YEAR] period beginning on the date on
13 which the person receives from the state agency final payment of all costs of the acquired or
14 taken dwelling [,] or the date on which the person moves from the acquired or taken dwelling,
15 whichever is the later date.

16 * Sec. 14. AS 34.60.060 is amended to read:

17 Sec. 34.60.060. REPLACEMENT HOUSING FOR TENANTS AND OTHERS. In
18 addition to amounts otherwise authorized by this chapter, the state agency shall make a payment
19 to or for a displaced person displaced from a dwelling, who is not eligible to receive a payment
20 under AS 34.60.050, if the dwelling was actually and lawfully occupied by the displaced person
21 for not less than 90 days before the initiation of negotiations for the acquisition or taking of the
22 dwelling. The payment must be either

23 (1) the amount necessary to enable the displaced person to lease or rent for a
24 period not to exceed three years and six months [,] a decent, safe, and sanitary dwelling of
25 standards adequate to accommodate the displaced person in areas not generally less desirable in
26 regard to public utilities and public and commercial facilities, and reasonably accessible to the
27 person's place of employment, but not to exceed \$5,250; or

28 (2) the amount necessary to enable the displaced person to make a down payment,
29 including incidental expenses described in AS 34.60.050(a)(3), on the purchase of a decent, safe,
30 and sanitary dwelling of standards adequate to accommodate the displaced person in areas not
31 generally less desirable in regard to public utilities and public and commercial facilities, but not

1 to exceed \$5,250.

2 * Sec. 15. AS 34.60.070 is amended to read:

3 Sec. 34.60.070. EXPENSES INCIDENTAL TO TRANSFER OF PROPERTY. The state
4 agency, as soon as practicable after the date of payment of the purchase price or the date of
5 deposit in court of funds to satisfy the award of compensation in a condemnation proceeding to
6 acquire, take, or compensate for damage to [REAL] property, whichever is the earlier, shall
7 reimburse the owner, to the extent the department considers fair and reasonable, for expenses
8 necessarily incurred for

9 (1) recording fees, transfer taxes, and similar expenses incidental to conveying
10 the [REAL] property to the state agency;

11 (2) penalty costs for prepayment of a preexisting recorded mortgage entered into
12 in good faith encumbering the real property, if the mortgage was a valid lien on the property for
13 not less than 180 days before the initiation of negotiations for the acquisition of the property; and

14 (3) the pro rata portion of [REAL] property taxes paid that are allocable to a
15 period subsequent to the date of vesting title in the state [,] or the effective date of possession
16 of the [REAL] property by the state agency, whichever is the earlier.

17 * Sec. 16. AS 34.60.080(a) is amended to read:

18 (a) The state court having jurisdiction of a proceeding instituted by the state agency to
19 take [ACQUIRE REAL] property by condemnation shall award the owner of a [ANY] right to,
20 or title to, or interest in, the [REAL] property a sum that will in the opinion of the court
21 reimburse the owner for reasonable costs, disbursements, and expenses, including reasonable
22 attorney, appraisal, and engineering fees [,] actually incurred because of the condemnation
23 proceedings, if

24 (1) the final judgment is that the state agency cannot take [ACQUIRE] the
25 [REAL] property by condemnation; or

26 (2) the proceeding is abandoned by the state agency.

27 * Sec. 17. AS 34.60.090(a) is amended to read:

28 (a) When the acquisition, taking, or damaging of [REAL] property for a program or
29 project undertaken by a state agency [FOR A FEDERALLY ASSISTED PROGRAM OR
30 PROJECT UNDERTAKEN BY THE STATE AGENCY] will result in the displacement of a
31 person [ON OR AFTER JANUARY 2, 1971], the state agency shall provide a relocation

1 assistance advisory program for displaced persons that [WHICH] offers the services described
2 in (c) of this section. If [THE STATE AGENCY DETERMINES THAT] a person occupying
3 property immediately adjacent to the [REAL] property acquired or taken is caused substantial
4 economic injury because of the acquisition or taking, the state agency shall [IT MAY] offer
5 the occupant relocation advisory services under the program.

6 * Sec. 18. AS 34.60.120 is amended to read:

7 Sec. 34.60.120. UNIFORM [REAL] PROPERTY ACQUISITION, TAKING, AND
8 DAMAGE COMPENSATION POLICY. (a) A state agency or other entity acquiring, taking,
9 or damaging [REAL] property for a [ANY] project or program [IN WHICH FEDERAL OR
10 FEDERAL-AID FUNDS ARE USED] shall to the greatest extent practicable comply with the
11 [FOLLOWING] policies set out in this section. [:]

12 (b) [(1)] Every reasonable effort shall be made to expeditiously acquire, take, or make
13 compensation for [REAL] property by negotiation.

14 (c) Property to be acquired, taken, or damaged [(2) REAL PROPERTY] shall be
15 appraised before the initiation of negotiations, and the owner or a designated representative shall
16 be given an opportunity to accompany the appraiser during the inspection of the property.

17 (d) [(3)] Before the initiation of negotiations for [REAL] property, an amount shall be
18 established that is reasonably believed to be just compensation for all [THE REAL] property
19 acquired, taken, or damaged, and that amount shall be offered for the property. In no event
20 may the amount be less than the approved appraisal of the fair market value of the property. A
21 decrease or increase in the fair market value of [REAL] property before the date of valuation
22 caused by the public improvement for which the property is acquired or taken or by the
23 likelihood that the property would be acquired, taken for, or damaged by the improvement,
24 other than that due to physical deterioration within the reasonable control of the owner, will be
25 disregarded in determining the compensation for the property. The owner of the [REAL]
26 property to be acquired, taken, or damaged shall be provided with a written statement of, and
27 a summary of the basis for, the amount established as just compensation.

28 (e) [(4)] An owner may not be required to surrender possession of [REAL] property
29 before the state agency concerned pays the agreed purchase price or deposits with the court in
30 accordance with applicable law, for the benefit of the owner, an amount not less than the
31 approved appraisal of the fair market value of the property [,] or the amount of the award of

1 compensation in the condemnation proceeding for the property.

2 (f) [(5)] The construction or development of a public improvement shall be so scheduled
3 that [, TO THE GREATEST EXTENT PRACTICABLE,] a person lawfully occupying [REAL]
4 property is not required to move from a dwelling, assuming a replacement dwelling will be
5 available, or to move the person's business or farm operation, without at least 90 days' written
6 notice of the date by which the move is required and until at least 90 days have elapsed after
7 a court

8 (1) determines that the prerequisites under AS 09.55.270 have been met; or
9 (2) has ruled under AS 09.55.450(a) on any objections made to a declaration
10 of taking, or the time for filing objections under AS 09.55.450(a) has ended without an
11 objection being filed.

12 (g) [(6)] If an owner or tenant is permitted to occupy the acquired or taken [REAL]
13 property [ACQUIRED] on a rental basis for a short term or for a period subject to termination
14 by the state agency on short notice, the amount of rent required may not exceed the fair rental
15 value of the property to a short-term occupier.

16 (h) [(7)] In no event may the time of condemnation be advanced or negotiations or
17 condemnation and the deposit of funds in court for the use of the owner be deferred, nor any
18 other coercive action be taken in order to compel an agreement on the price to be paid for the
19 acquisition, taking, or damage to property.

20 (i) [(8)] If an interest in [REAL] property is to be taken or damaged [ACQUIRED] by
21 exercise of the power of eminent domain, formal condemnation proceedings shall be instituted.
22 The [ACQUIRING] state agency may not intentionally make it necessary for an owner to institute
23 legal proceedings to prove the fact of the taking or damage of the [REAL] property.

24 (j) [(9)] If the acquisition, taking, or damage of only part of the property would leave
25 its owner with an uneconomic remnant, an offer to acquire or take the entire property shall be
26 made.

27 * Sec. 19. AS 34.60.130(a) is amended to read:

28 (a) Notwithstanding another [ANY OTHER] provision of law, if a state agency acquires
29 or takes an [ANY] interest in real property, the state agency shall [MUST] acquire or take at
30 least an equal interest in all buildings, structures, or other improvements located upon the real
31 property that [WHICH] the state agency requires to be removed from the real property or that

1 [WHICH] the state agency determines will be adversely affected by the use to which the real
2 property will be put.

3 * Sec. 20. AS 34.60.130(b) is amended to read:

4 (b) For the purpose of determining just compensation to be paid for a building, structure,
5 or other improvement required to be acquired or taken under (a) of this section, the building,
6 structure, or other improvement is considered to be a part of the real property to be acquired or
7 taken notwithstanding the right or obligation of a tenant, as against the owner of another [ANY
8 OTHER] interest in the real property, to remove the building, structure, or improvement at the
9 expiration of the tenant's term, and the fair market value that [WHICH] the building, structure,
10 or improvement contributes to the fair market value of the real property to be acquired or taken,
11 or the fair market value of the building, structure, or improvement for removal from the real
12 property, whichever is the greater, shall be paid to the tenant.

13 * Sec. 21. AS 34.60.135 is amended to read:

14 Sec. 34.60.135. PLANNING LOANS FOR ADDITIONAL HOUSING. In addition to
15 the other programs authorized by this chapter, a state agency may make loans in order to
16 encourage and facilitate the construction or rehabilitation of housing to meet the needs of
17 displaced persons. These loans are a part of the [FEDERALLY ASSISTED] project cost and
18 may be made to nonprofit, limited dividend, or cooperative organizations or public bodies. The
19 loans may be made only for necessary and reasonable expenses, before construction, for planning
20 and obtaining federally insured mortgage financing for the rehabilitation or construction of
21 housing for displaced persons. The loans may not exceed 80 percent of the reasonable costs
22 expected to be incurred in planning, and in obtaining financing for housing for displaced persons.
23 Reasonable costs include [BUT ARE NOT LIMITED TO] costs for preliminary surveys and
24 analysis of market needs, preliminary architectural fees, site acquisition, application and mortgage
25 commitment fees, and construction loan fees and discounts. Loans to an organization established
26 for profit [SHALL] bear interest at a market rate established by the state agency. All other loans
27 are [SHALL BE] without interest. The state agency shall require repayment of loans made under
28 this section [,] under terms and conditions established by the state agency. Repayment shall be
29 made upon completion of the project or sooner, and except in the case of a loan to an
30 organization established for profit, the state agency may cancel a [ANY] part or all of a loan
31 following a determination by the state agency that a permanent loan to finance the rehabilitation

1 or construction of the housing cannot be obtained in an amount adequate for repayment of the
2 loan.

3 * Sec. 22. AS 34.60.137 is amended to read:

4 Sec. 34.60.137. HOUSING REPLACEMENT ASSISTANCE AS LAST RESORT. If a
5 state agency [FEDERAL AIDED] program or project cannot proceed to actual construction
6 because comparable replacement sale or rental housing is not available, and the state agency
7 determines that housing cannot otherwise be made available, the agency may take action
8 necessary or appropriate to provide the housing by use of funds authorized for the project.

9 * Sec. 23. AS 34.60.150 is amended to read:

10 Sec. 34.60.150. DEFINITIONS. In this chapter

11 (1) "business" means any lawful activity, excepting a farm operation, conducted
12 primarily

13 (A) for the purchase, sale, lease, and rental of personal and real property,
14 and manufacture, processing, or marketing of products, commodities, or other personal
15 property;

16 (B) for the sale of services to the public;

17 (C) by a nonprofit organization; or

18 (D) for assisting, solely for the purpose of AS 34.60.040(a), in the
19 purchase, sale, resale, manufacture, processing, or marketing of products, commodities,
20 personal property, or services by the erection and maintenance of an outdoor advertising
21 display, whether or not the display is located on the premises on which any of the above
22 activities are conducted;

23 (2) "displaced person" means a [ANY] any person who [, ON OR AFTER
24 JANUARY 2, 1971] moves from [REAL] property, or moves personal property from [REAL]
25 property, as a result of the acquisition or taking of the [REAL] property, in whole or in part, or
26 as a result of the written order of the state agency to vacate [REAL] property, for a program or
27 project undertaken by the state agency, and solely for the purpose of AS 34.60.040(a) and
28 34.60.090, as a result of the acquisition or taking of, or as a result of the written order of a state
29 agency to vacate other [REAL] property on which the person conducts a business or farm
30 operation for the program or project;

31 (3) "farm operation" means any activity conducted solely or primarily for the

1 production of one or more agricultural products or commodities, including timber, for sale or
2 home use, and customarily producing these products or commodities in sufficient quantity to be
3 capable of contributing materially to the operator's support;

4 (4) "mortgage" means those classes of liens commonly given to secure advances
5 on, or the unpaid purchase price of, real property [,] under the law of the state in which the real
6 property is located, together with the credit instruments, if any, secured by the property;

7 (5) "person" means an individual, partnership, corporation, or association;

8 (6) "property" includes short-term and long-term business interests:

9 (7) "state agency" means a department, agency, instrumentality, corporate
10 authority of the state, or a political subdivision of the state, or a department, agency,
11 instrumentality, or authority of two or more political subdivisions of the state [PARTICIPATING
12 IN FEDERALLY ASSISTED PROGRAMS].

13 * Sec. 24. AS 34.60.100 is repealed.

14 * Sec. 25. AS 09.55.300(b). amended by sec. 1 of this Act, amends Alaska Rule of Civil Procedure
15 72(h)(2) by establishing different criteria for determining whether a master's hearing is held to determine
16 the amount to be paid by the plaintiff.

17 * Sec. 26. This Act takes effect immediately under AS 01.10.070(c).

SENATE BILL NO. 104

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - FIRST SESSION

BY SENATORS RODEY, Halford

Introduced: 2/6/91

Referred: State Affairs and Finance

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to the taking and compensation for damage of property by state
2 agencies, municipalities, and other entities; and providing for an effective date."

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

4 * Section 1. AS 09.55.31(a) is amended to read:

5 (a) The jury or master shall hear the allegations and evidence of persons interested and
6 shall ascertain and assess the following:

7 (1) the value of the property sought to be condemned, and all improvements on
8 it pertaining to the realty, and of each separate estate or interest in it; if it consists of different
9 parcels, the value of each parcel and each estate or interest in each parcel shall be separately
10 assessed;

11 (2) if the property sought to be condemned constitutes only a part of a larger
12 parcel, the damages that [WHICH] will accrue to the portion not sought to be condemned by
13 reason of its severance from the portion sought to be condemned, and the construction of the
14 improvements in the manner proposed by the plaintiff;

1 (3) separately, how much the portion not sought to be condemned and each estate
2 or interest in it will be benefited, if at all, by the construction of the improvements proposed by
3 the plaintiff; and, if the benefit is equal to the damages assessed under (2) of this section, the
4 owner of the parcel may not [SHALL] be allowed [NO] damages except for the value of the
5 portion taken; but if the benefits are less than the damages [SO] assessed, the former shall be
6 deducted from the latter and the remainder shall be the only damages allowed in addition to the
7 value;

8 (4) if the property sought to be condemned is for a railroad, the cost of good and
9 sufficient fences along the line of the railroad, and the cost of cattle guards where fences may
10 cross the line of the railroad;

11 (5) the full amount of business loss caused by taking or damaging the
12 property.

13 * Sec. 2. AS 09.55.440(b) is amended to read:

14 (b) Upon motion of a party in interest and notice to all parties, the court shall
15 expeditiously [MAY] order that the money deposited [OR A PART OF IT] be paid immediately
16 to the person or persons entitled to it for or on account of the just compensation to be awarded
17 in the proceedings. If the compensation finally awarded exceeds the amount of money deposited,
18 the deposit shall be offset against the award. If the compensation finally awarded is less than
19 the amount of money deposited, the court shall enter judgment in favor of the plaintiff and
20 against the proper parties for the amount of the excess.

21 * Sec. 3. AS 09.55.450(a) is amended to read:

22 (a) Upon the filing of the declaration of taking and the deposit of the estimated
23 compensation, the court may, upon motion, fix the time during which and the terms upon which
24 the parties in possession are required to surrender possession to the petitioner. However, the
25 right of entry may [SHALL] not be granted the plaintiff until after the running of the time for
26 the defendant to file an objection to the declaration of taking or until after the hearing on an
27 [ANY] objection to the declaration of taking if the objection is made in the time allowed by law.
28 In addition, the court may not grant the right of entry until the court determines that the
29 amount of the deposit of the estimated just compensation for all property that has been
30 taken or damaged is substantiated by one or more appraisals prepared in good faith.
31 Where the party in possession withdraws a [ANY] part of the award and remains in possession,

1 the court may fix a reasonable rental for the premises to be paid by that party to the plaintiff
2 during the [SUCH] possession.

3 * Sec. 4. AS 09.55.460(b) is amended to read:

4 (b) The plaintiff may not be divested of a title or possession taken unless [ACQUIRED
5 EXCEPT WHERE] the court finds that the property was not taken by necessity for a public use
6 or purpose in a manner compatible with the greatest public good and the least private injury, the
7 amount of estimated just compensation deposited under AS 09.55.440(a) is not adequate,
8 the state failed to comply with AS 34.60, the plaintiff is a municipality that failed to comply
9 with AS 34.60, or the plaintiff failed to comply with AS 09.55.275. In the event of that
10 finding, the court shall enter the judgment necessary to (1) compensate the persons entitled to
11 it for the period during which the property was in the possession of the plaintiff, (2) recover for
12 the plaintiff any award paid to any person, and (3) order the plaintiff to restore the property to
13 the condition in which it existed at the time of the filing of the declaration of taking unless
14 [SUCH] restoration is impossible, in which case the court shall award damages to the proper
15 persons as compensation for a [ANY] diminution in the value of the property caused by the
16 plaintiff's wrongful possession.

17 * Sec. 5. AS 09.55 is amended by adding a new section to article 3 to read:

18 Sec. 09.55.465. DEFINITIONS. In AS 09.55.240 - 09.55.465,

19 (1) "business loss" includes short-term business loss, long-term business loss, and
20 the loss of goodwill;

21 (2) "private injury" includes business loss caused by the taking of or damage to
22 property.

23 * Sec. 6. AS 29.10.200(25) is amended to read:

24 (25) AS 29.35.030 (eminent domain, relocation assistance, and real property
25 acquisition practices)

26 * Sec. 7. AS 29.35.030(a) is amended to read:

27 (a) A municipality may, only within its boundaries, exercise the powers of eminent
28 domain and declaration of taking in the performance of a power or function of the municipality
29 but must use [UNDER] the procedures set out in AS 09.55.250 - 09.55.460 and AS 34.60,
30 regardless of the source of funding. In the case of a second class city, the exercise of the
31 power of eminent domain or declaration of taking must be by ordinance that is submitted to the

1 voters at the next general election or at a special election called for that purpose. A majority of
2 the votes on the question is required for approval of the ordinance.

3 * Sec. 8. AS 34.60.010 is amended to read:

4 Sec. 34.60.010. PURPOSE. The purpose of this chapter is to establish a uniform policy
5 for the fair and equitable treatment of persons displaced as a result of activities undertaken by
6 state agencies [FEDERALLY ASSISTED PROGRAMS] in order that the displaced persons will
7 not suffer disproportionate injuries as a result of programs designed for the benefit of the public
8 as a whole.

9 * Sec. 9. AS 34.60.020 is amended to read:

10 Sec. 34.60.020. STATE AGENCIES TO ESTABLISH PROGRAM. State agencies shall
11 establish and provide the means for implementing a program providing fair and reasonable
12 relocation and other payment for persons displaced as a result of [FEDERALLY ASSISTED]
13 activities undertaken by state agencies, to carry out relocation assistance programs for persons
14 displaced, and to provide payments to persons as a result of taking or damaging
15 [ACQUISITION] of [REAL] property for activities of state agencies.

16 * Sec. 10. AS 34.60.040(a) is amended to read:

17 (a) When the taking or damaging [ACQUISITION] of [REAL] property for a
18 [FEDERALLY ASSISTED] program or project undertaken by a state agency will result in the
19 displacement of a person, the state agency responsible for the program or project shall make
20 payment to the displaced person, upon proper application as approved by the state agency, for

21 (1) actual reasonable expenses in moving a person, the person's family, business,
22 farm operation, or other personal property;

23 (2) actual direct losses of tangible personal property as a result of moving or
24 discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable
25 expenses that would have been required to relocate the property as determined by the state
26 agency; and

27 (3) actual reasonable expenses in searching for a replacement business or farm.

28 * Sec. 11. AS 34.60.050 is amended to read:

29 Sec. 34.60.050. REPLACEMENT HOUSING FOR HOMEOWNERS. (a) In addition
30 to payments otherwise authorized by this chapter, the state agency shall make an additional
31 payment not to exceed \$22,500 [,] to a displaced person who is displaced from a dwelling

1 actually owned and occupied by the person for not less than 180 days before the initiation of
2 negotiations for the acquisition of the property. This additional payment must include the
3 following elements:

4 (1) the amount, if any, that when added to the taking [ACQUISITION] cost of
5 the dwelling taken [ACQUIRED] by the state agency, equals the reasonable cost of a comparable
6 replacement dwelling that is a decent, safe, and sanitary dwelling adequate to accommodate the
7 displaced person, is reasonably accessible to public services and places of employment, and is
8 available on the private market; all determinations required to carry out this paragraph shall be
9 made in accordance with standards established by the state agency making the additional
10 payment;

11 (2) the amount, if any, that will compensate the displaced person for any
12 increased interest costs that the displaced person is required to pay for financing the acquisition
13 of the comparable replacement dwelling; this amount may be paid only if the dwelling taken
14 [ACQUIRED] by the state agency was encumbered by a bona fide mortgage that was a valid lien
15 on the dwelling for not less than 180 days before the initiation of negotiations for the taking
16 [ACQUISITION] of the dwelling; and

17 (3) reasonable expenses incurred by the displaced person for evidence of title,
18 recording fees, and other closing costs incident to the purchase of the replacement dwelling, but
19 not including prepaid expenses.

20 (b) The additional payment authorized by (a) of this section may be made only to a
21 displaced person who purchases and occupies a replacement dwelling that is decent, safe, and
22 sanitary not later than the end of the one-year [ONE YEAR] period beginning on the date on
23 which the person receives from the state agency final payment of all costs of the taken dwelling
24 [,] or the date on which the person moves from the taken [ACQUIRED] dwelling, whichever is
25 the later date.

26 * Sec. 12. AS 34.60.060 is amended to read:

27 Sec. 34.60.060. REPLACEMENT HOUSING FOR TENANTS AND OTHERS. In
28 addition to amounts otherwise authorized by this chapter, the state agency shall make a payment
29 to or for a displaced person displaced from a dwelling, who is not eligible to receive a payment
30 under AS 34.60.050, if the dwelling was actually and lawfully occupied by the displaced person
31 for not less than 90 days before the initiation of negotiations for taking [ACQUISITION OF] the

1 dwelling. The payment must be either

2 (1) the amount necessary to enable the displaced person to lease or rent for a
3 period not to exceed three years and six months [,] a decent, safe, and sanitary dwelling of
4 standards adequate to accommodate the displaced person in areas not generally less desirable in
5 regard to public utilities and public and commercial facilities, and reasonably accessible to the
6 person's place of employment, but not to exceed \$5,250; or

7 (2) the amount necessary to enable the displaced person to make a down payment,
8 including incidental expenses described in AS 34.60.050(a)(3), on the purchase of a decent, safe,
9 and sanitary dwelling of standards adequate to accommodate the displaced person in areas not
10 generally less desirable in regard to public utilities and public and commercial facilities, but not
11 to exceed \$5,250.

12 * Sec. 13. AS 34.60.070 is amended to read:

13 Sec. 34.60.070. EXPENSES INCIDENTAL TO TRANSFER OF PROPERTY. The state
14 agency, as soon as practicable after the date of payment of the purchase price or the date of
15 deposit in court of funds to satisfy the award of compensation in a condemnation proceeding to
16 take or compensate for damage to [ACQUIRE REAL] property, whichever is the earlier, shall
17 reimburse the owner, to the extent the department considers fair and reasonable, for expenses
18 necessarily incurred for

19 (1) recording fees, transfer taxes, and similar expenses incidental to conveying
20 the [REAL] property to the state agency;

21 (2) penalty costs for prepayment of a preexisting recorded mortgage entered into
22 in good faith encumbering the real property, if the mortgage was a valid lien on the property for
23 not less than 180 days before the initiation of negotiations for the acquisition of the property; and

24 (3) the pro rata portion of [REAL] property taxes paid that are allocable to a
25 period subsequent to the date of vesting title in the state [,] or the effective date of possession
26 of the [REAL] property by the state agency, whichever is the earlier.

27 * Sec. 14. AS 34.60.080(a) is amended to read:

28 (a) The state court having jurisdiction of a proceeding instituted by the state agency to
29 take [ACQUIRE REAL] property by condemnation shall award the owner of a [ANY] right to,
30 or title to, or interest in, the [REAL] property a sum that will in the opinion of the court
31 reimburse the owner for reasonable costs, disbursements, and expenses, including reasonable

1 attorney, appraisal, and engineering fees [,] actually incurred because of the condemnation
2 proceedings, if

3 (1) the final judgment is that the state agency cannot take [ACQUIRE] the
4 [REAL] property by condemnation; or

5 (2) the proceeding is abandoned by the state agency.

6 * Sec. 15. AS 34.60.090(a) is amended to read:

7 (a) When the taking or damaging [ACQUISITION] of [REAL] property for a program
8 or project undertaken by a state agency [FOR A FEDERALLY ASSISTED PROGRAM OR
9 PROJECT UNDERTAKEN BY THE STATE AGENCY] will result in the displacement of a
10 person [ON OR AFTER JANUARY 2, 1971], the state agency shall provide a relocation
11 assistance advisory program for displaced persons that [WHICH] offers the services described
12 in (c) of this section. If [THE STATE AGENCY DETERMINES THAT] a person occupying
13 property immediately adjacent to the [REAL] property taken [ACQUIRED] is caused substantial
14 economic injury because of the taking, the state agency shall [ACQUISITION, IT MAY] offer
15 the occupant relocation advisory services under the program.

16 * Sec. 16. AS 34.60.120 is amended to read:

17 Sec. 34.60.120. UNIFORM [REAL] PROPERTY TAKING AND DAMAGE
18 COMPENSATION [ACQUISITION] POLICY. (a) A state agency or other entity taking or
19 damaging [ACQUIRING REAL] property for a [ANY] project or program [IN WHICH
20 FEDERAL OR FEDERAL-AID FUNDS ARE USED] shall to the greatest extent practicable
21 comply with the [FOLLOWING] policies set out in this section. [:]

22 (b) [(1)] Every reasonable effort shall be made to expeditiously take or make
23 compensation for [ACQUIRE REAL] property by negotiation.

24 (c) Property to be taken or damaged [(2) REAL PROPERTY] shall be appraised
25 before the initiation of negotiations, and the owner or a designated representative shall be given
26 an opportunity to accompany the appraiser during the inspection of the property.

27 (d) [(3)] Before the initiation of negotiations for [REAL] property, an amount shall be
28 established that is reasonably believed to be just compensation for all [THE REAL] property
29 taken or damaged, and that amount shall be offered for the property. In no event may the
30 amount be less than the approved appraisal of the fair market value of the property. A decrease
31 or increase in the fair market value of [REAL] property before the date of valuation caused by

1 the public improvement for which the property is taken [ACQUIRED] or by the likelihood that
2 the property would be taken [ACQUIRED] for or damaged by the improvement, other than that
3 due to physical deterioration within the reasonable control of the owner, will be disregarded in
4 determining the compensation for the property. The owner of the [REAL] property to be taken
5 [ACQUIRED] shall be provided with a written statement of, and a summary of the basis for, the
6 amount established as just compensation.

7 (e) [(4)] An owner may not be required to surrender possession of [REAL] property
8 before the state agency concerned pays the agreed purchase price or deposits with the court in
9 accordance with applicable law, for the benefit of the owner, an amount not less than the
10 approved appraisal of the fair market value of the property [,] or the amount of the award of
11 compensation in the condemnation proceeding for the property.

12 (f) [(5)] The construction or development of a public improvement shall be so scheduled
13 that [, TO THE GREATEST EXTENT PRACTICABLE,] a person lawfully occupying [REAL]
14 property is not required to move from a dwelling, assuming a replacement dwelling will be
15 available, or to move the person's business or farm operation, without at least 90 days' written
16 notice of the date by which the move is required and until at least 90 days have elapsed after
17 a court

18 (1) determines that the prerequisites under AS 09.55.270 have been met; or
19 (2) has ruled under AS 09.55.450(a) on any objections made to a declaration
20 of taking, or the time for filing objections under AS 09.55.450(a) has ended without an
21 objection being filed.

22 (g) [(6)] If an owner or tenant is permitted to occupy the [REAL] taken or
23 damaged property [ACQUIRED] on a rental basis for a short term or for a period subject to
24 termination by the state agency on short notice, the amount of rent required may not exceed the
25 fair rental value of the property to a short-term occupier.

26 (h) [(7)] In no event may the time of condemnation be advanced or negotiations or
27 condemnation and the deposit of funds in court for the use of the owner be deferred, nor any
28 other coercive action be taken in order to compel an agreement on the price to be paid for the
29 taking or damage to property.

30 (i) [(8)] If an interest in [REAL] property is to be taken or damaged [ACQUIRED] by
31 exercise of the power of eminent domain, formal condemnation proceedings shall be instituted.

1 The [ACQUIRING] state agency may not intentionally make it necessary for an owner to institute
2 legal proceedings to prove the fact of the taking or damage of the [REAL] property.

3 (i) [(9)] If the taking or damage [ACQUISITION] of only part of the property would
4 leave its owner with an uneconomic remnant, an offer to take [ACQUIRE] the entire property
5 shall be made.

6 * Sec. 17. AS 34.60.130(a) is amended to read:

7 (a) Notwithstanding another [ANY OTHER] provision of law, if a state agency takes
8 an [ACQUIRES ANY] interest in real property, the state agency shall take [MUST ACQUIRE]
9 at least an equal interest in all buildings, structures, or other improvements located upon the real
10 property that [WHICH] the state agency requires to be removed from the real property or that
11 [WHICH] the state agency determines will be adversely affected by the use to which the real
12 property will be put.

13 * Sec. 18. AS 34.60.130(b) is amended to read:

14 (b) For the purpose of determining just compensation to be paid for a building, structure,
15 or other improvement required to be taken [ACQUIRED] under (a) of this section, the building,
16 structure, or other improvement is considered to be a part of the real property to be taken
17 [ACQUIRED] notwithstanding the right or obligation of a tenant, as against the owner of
18 another [ANY OTHER] interest in the real property, to remove the building, structure, or
19 improvement at the expiration of the tenant's term, and the fair market value that [WHICH] the
20 building, structure, or improvement contributes to the fair market value of the real property to
21 be taken [ACQUIRED], or the fair market value of the building, structure, or improvement for
22 removal from the real property, whichever is the greater, shall be paid to the tenant.

23 * Sec. 19. AS 34.60.135 is amended to read:

24 Sec. 34.60.135. PLANNING LOANS FOR ADDITIONAL HOUSING. In addition to
25 the other programs authorized by this chapter, a state agency may make loans in order to
26 encourage and facilitate the construction or rehabilitation of housing to meet the needs of
27 displaced persons. These loans are a part of the [FEDERALLY ASSISTED] project cost and
28 may be made to nonprofit, limited dividend, or cooperative organizations or public bodies. The
29 loans may be made only for necessary and reasonable expenses, before construction, for planning
30 and obtaining federally insured mortgage financing for the rehabilitation or construction of
31 housing for displaced persons. The loans may not exceed 80 percent of the reasonable costs

1 expected to be incurred in planning, and in obtaining financing for housing for displaced persons.
2 Reasonable costs include [BUT ARE NOT LIMITED TO] costs for preliminary surveys and
3 analysis of market needs, preliminary architectural fees, site acquisition, application and mortgage
4 commitment fees, and construction loan fees and discounts. Loans to an organization established
5 for profit [SHALL] bear interest at a market rate established by the state agency. All other loans
6 are [SHALL BE] without interest. The state agency shall require repayment of loans made under
7 this section [,] under terms and conditions established by the state agency. Repayment shall be
8 made upon completion of the project or sooner, and except in the case of a loan to an
9 organization established for profit, the state agency may cancel a [ANY] part or all of a loan
10 following a determination by the state agency that a permanent loan to finance the rehabilitation
11 or construction of the housing cannot be obtained in an amount adequate for repayment of the
12 loan.

13 * Sec. 20. AS 34.60.137 is amended to read:

14 Sec. 34.60.137. HOUSING REPLACEMENT ASSISTANCE AS LAST RESORT. If a
15 state agency [FEDERAL AIDED] program or project cannot proceed to actual construction
16 because comparable replacement sale or rental housing is not available, and the state agency
17 determines that housing cannot otherwise be made available, the agency may take action
18 necessary or appropriate to provide the housing by use of funds authorized for the project.

19 * Sec. 21. AS 34.60.150 is amended to read:

20 Sec. 34.60.150. DEFINITIONS. In this chapter

21 (1) "business" means any lawful activity, excepting a farm operation, conducted
22 primarily

23 (A) for the purchase, sale, lease, and rental of personal and real property,
24 and manufacture, processing, or marketing of products, commodities, or other personal
25 property;

26 (B) for the sale of services to the public;

27 (C) by a nonprofit organization; or

28 (D) for assisting, solely for the purpose of AS 34.60.040(a), in the
29 purchase, sale, resale, manufacture, processing, or marketing of products, commodities,
30 personal property, or services by the erection and maintenance of an outdoor advertising
31 display, whether or not the display is located on the premises on which any of the above

1 activities are conducted;

2 (2) "displaced person" means a [ANY] any person who [, ON OR AFTER
3 JANUARY 2, 1971] moves from [REAL] property, or moves personal property from [REAL]
4 property, as a result of the taking [ACQUISITION] of the [REAL] property, in whole or in part,
5 or as a result of the written order of the state agency to vacate [REAL] property, for a program
6 or project undertaken by the state agency, and solely for the purpose of AS 34.60.040(a) and
7 34.60.090, as a result of the taking [ACQUISITION] of, or as a result of the written order of a
8 state agency to vacate other [REAL] property on which the person conducts a business or farm
9 operation for the program or project;

10 (3) "farm operation" means any activity conducted solely or primarily for the
11 production of one or more agricultural products or commodities, including timber, for sale or
12 home use, and customarily producing these products or commodities in sufficient quantity to be
13 capable of contributing materially to the operator's support;

14 (4) "mortgage" means those classes of liens commonly given to secure advances
15 on, or the unpaid purchase price of, real property [,] under the law of the state in which the real
16 property is located, together with the credit instruments, if any, secured by the property;

17 (5) "person" means an individual, partnership, corporation, or association;

18 (6) "property" includes short-term and long-term business interests;

19 (7) "state agency" means a department, agency, instrumentality, corporate
20 authority of the state, or a political subdivision of the state, or a department, agency,
21 instrumentality, or authority of two or more political subdivisions of the state [PARTICIPATING
22 IN FEDERALLY ASSISTED PROGRAMS].

23 * Sec. 22. AS 34.60.100 is repealed.

24 * Sec. 23. This Act takes effect immediately under AS 01.10.070(c).

FISCAL NOTE

Revision Date: 05/12/91
Title: Condemnation Practices

Department Affected: DOT&PF
BRU: Statewide Engineering and Operations Standards

Sponsor: Senators Rodey, Halford
Requestor: Senators Rodey

Component: Engr. & Operations Stand.
Component Serial Number: 547

EXPENDITURES/REVENUES: (Thousands of Dollars)

| OPERATING | FY93 | FY94 | FY95 | FY96 | FY97 | FY98 |
|-------------------------|-------|-------|-------|-------|-------|-------|
| PERSONAL SERVICES | 0 | 0 | 0 | 0 | 0 | 0 |
| TRAVEL | 0 | 0 | 0 | 0 | 0 | 0 |
| CONTRACTUAL | 200.0 | 200.0 | 200.0 | 200.0 | 200.0 | 200.0 |
| SUPPLIES | 0 | 0 | 0 | 0 | 0 | 0 |
| EQUIPMENT | 0 | 0 | 0 | 0 | 0 | 0 |
| LAND & STRUCTURES | 0 | 0 | 0 | 0 | 0 | 0 |
| GRANTS, CLAIMS | 0 | 0 | 0 | 0 | 0 | 0 |
| MISCELLANEOUS | 0 | 0 | 0 | 0 | 0 | 0 |
| TOTAL OPERATING: | 200.0 | 200.0 | 200.0 | 200.0 | 200.0 | 200.0 |

| | | | | | | |
|---------|----------|----------|----------|----------|----------|----------|
| CAPITAL | 3,150.00 | 3,150.00 | 3,150.00 | 3,150.00 | 3,150.00 | 3,150.00 |
|---------|----------|----------|----------|----------|----------|----------|

| | | | | | | |
|---------------------|---|---|---|---|---|---|
| REVENUE FUND SOURCE | 0 | 0 | 0 | 0 | 0 | 0 |
|---------------------|---|---|---|---|---|---|

FUNDING: (Thousands of Dollars)

| | | | | | | |
|-----------------------|---------|---------|---------|---------|---------|---------|
| GENERAL FUNDS | 3,150.0 | 3,150.0 | 3,150.0 | 3,150.0 | 3,150.0 | 3,150.0 |
| FEDERAL FUNDS | 0 | 0 | 0 | 0 | 0 | 0 |
| OTHER FUND SOURCE | 0 | 0 | 0 | 0 | 0 | 0 |
| TOTAL FUNDING: | 3,150.0 | 3,150.0 | 3,150.0 | 3,150.0 | 3,150.0 | 3,150.0 |

POSITIONS

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

Estimate Of Current Year Impact: We would require approximately 50% of the amount shown for FY93 as the bill has an immediate effective date.

ANALYSIS: (Attach a separate page if necessary)

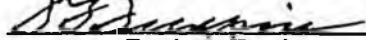
See second page and department position paper.

Prepared by: Jeff Ottesen, Chief, Right-of-Way & Environment

Phone: 465-2951

Division: Engineering and Operations Standards

Date: January 8, 1992

Approved by Commissioner: 
Frank G. Turpin

Phone: 465-3900

Agency: Department of Transportation and Public Facilities

Date: January 9, 1992

ANALYSIS (cont. from page 1):

This bill will have significant direct and indirect impacts to our capital and operating budgets. For capital activities the greatest effect will be in highway projects. All costs associated with paying business losses including direct payments, legal costs, appraisal costs, staff time and court fees will be ineligible for federal-aid (23 CFR 710.304 (h)) and thus require general fund expenditures. It is difficult to predict how much these payments will be and the extent of litigation which will ensue to interpret the various provisions of the bill. In cases where the Attorney General's office counsels against going to court we will be compelled to reach negotiated settlements. We typically do this now for dollar amounts in excess of fair market value determinations. This bill will likely expand this practice as it significantly broadens the type of losses which can be claimed.

For operating activities new costs will be incurred where maintenance activities on transportation facilities must necessarily cause disruptions to adjacent businesses. Streets or runways temporarily closed for maintenance activities will expose the department to loss of business claims. Currently, such temporary shutdowns are not compensable so a new and potentially costly new operating expense will bear on our operating budgets.

Capital Costs

We have based our estimate on a number of assumptions. Each is highly variable and it would have been easy to estimate this fiscal note at a much larger figure. A single business loss claim sought during a condemnation action in 1990 sought \$2 million. Based upon actual experience, we would adjust the amount necessary to pay and defend these claims in future capital budget requests.

Basis of Estimate:

| | | |
|---|-----|-----------------------|
| Average number of businesses potentially impacted by construction projects: | 200 | |
| Analysis of business loss potential for above @ \$250 each | | \$50,000 |
| Business loss cases settled by negotiations: | 40 | |
| Average settlement assumed at \$40,000 | | \$1,600,000 |
| Average administrative cost (legal, appraisal, negotiations staff) @ \$10,000 | | \$400,000 |
| Business loss cases settled in some phase of court proceedings: | 10 | |
| Average settlement assumed at \$80,000 | | \$800,000 |
| Average administrative cost (legal, appraisal, negotiations staff) @ \$30,000 | | \$300,000 |
| Sub-total: | | \$3.15 million |

Operating Costs

The department performs numerous maintenance-type activities which could be "claimed" as causing some degree of business loss. A pavement resealing might close traffic along an urban arterial for up to a day impacting dozens of businesses temporarily. Even snow plowing operating which temporarily place a berm in front of driveways might serve as a basis for a claim. Each affected business would be potentially eligible to file a claim and receive compensation. Because of the sheer number, such claims would have to be dealt with on an administrative basis with a relatively short and uncomplicated procedure.

ANALYSIS (cont. from page 2):

Basis of Estimate:

Contract with a private-sector firm to process and analyze minor business loss type claims:
Assume 500 claims filed annually @ \$50 each to process: \$25,000
Claims paid -- assume 350 claims paid @ \$500 each \$175,000

Sub-total: \$0.2 million

Total: \$3.35 million

Indirect Costs

As this bill has an immediate effective date, it will slow the progress of nearly all ongoing projects in order that the business loss issues may be considered. Such delays will undoubtedly cause some projects to slip sufficiently that we cannot complete by the end of the current federal fiscal year (9/30/92) and if this happens we will lose the opportunity to "obligate" this money and hence this is an opportunity loss.

Such slippage would have been difficult to absorb in past years, but in the current year it may be devastating. The new federal highway bill has authorized an unprecedented level of funding to Alaska but such authorization did not take place until the second quarter of the FFY. We are striving to do more in less time than any previous annual highway program in our history and thus the additional steps imposed by this bill may prevent us from fully utilizing federal funds.

The bill will have the greatest impact on urban-type projects, because of the concentration of business activity. Such projects are typically the most expensive. Thus the delay of just one or two urban projects is quite likely and this could cause the State of Alaska to "lose" as much as \$20 or \$30 million.

Note: When appropriated, these funds could either be added to the general fund match for federal-aid highways and aviation which include money for a variety of costs not eligible for federal participation, or a separate fund could be appropriated which strictly limits the use of these funds to business loss claims and related expenses.

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. CSSB 104 (ST)

Revision Date: February 21, 1992
Title: "...taking and compensation...of property by state agencies...other entities."
Sponsor: Senator Rodev
Requestor: Senate State Affairs

Department Affected: Department of Law
BRU: Legal Services
Component: Operations

COMPONENT SERIAL

| | | | |
|--|--|---|---|
| | | 9 | 3 |
|--|--|---|---|

Expenditures/Revenues: (Thousands of Dollars)

| OPERATING | FY 93 | FY 94 | FY 95 | FY 96 | FY 97 | FY 98 |
|-------------------|-------|-------|-------|-------|-------|-------|
| PERSONAL SERVICES | | | | | | |
| TRAVEL | | | | | | |
| CONTRACTUAL | | | | | | |
| SUPPLIES | | | | | | |
| EQUIPMENT | | | | | | |
| LAND & STRUCTURES | | | | | | |
| GRANTS, CLAIMS | | | | | | |
| MISCELLANEOUS | | | | | | |
| TOTAL OPERATING | **** | **** | **** | **** | **** | **** |

| | | | | | | |
|---------|--|--|--|--|--|--|
| CAPITAL | | | | | | |
|---------|--|--|--|--|--|--|

| | | | | | | |
|----------------------|--|--|--|--|--|--|
| REVENUE FUND SOURCE: | | | | | | |
|----------------------|--|--|--|--|--|--|

FUNDING: (Thousands of Dollars)

| | | | | | | |
|--------------------|------|------|------|------|------|------|
| GENERAL FUND | **** | **** | **** | **** | **** | **** |
| FEDERAL FUNDS | | | | | | |
| OTHER FUND SOURCE: | | | | | | |
| TOTAL | | | | | | |

POSITIONS:

| | | | | | | |
|-----------|------|------|------|------|------|------|
| FULL-TIME | **** | **** | **** | **** | **** | **** |
| PART-TIME | | | | | | |
| TEMPORARY | | | | | | |

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

Prepared by: Richard I. Peques, Director Phone: 465-3672
Division: Administrative Services Date: February 21, 1992
Approved by Commissioner: Charles E. Cole, Attorney General
Agency: Department of Law Date: February 21, 1992

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

Updated 1992 fiscal note.

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSSB 104 (STA)

This bill makes significant changes to state laws concerning eminent domain, and relocation assistance and real property acquisition practices. Some of the more significant changes are the following:

First, the bill would extend existing relocation assistance program benefits to a person, where such person is displaced or damaged by a taking or damaging of property as the result of activities of state agencies. Currently relocation assistance is available only where a state agency acquires real property under a federally-assisted program.

Second, the bill would make both short-term and long-term business loss compensable under eminent domain laws. Many jurisdictions do not compensate for such losses, except where the loss suffered is due to a temporary interruption to business operations, as is currently the case in Alaska.

Third, the bill would require that prior to filing a declaration of taking and prior to taking possession, the state or municipality must complete an expansive fact finding to prove that the amount deposited with the court for estimated compensation for business losses is adequate.

Fourth, the bill would permit the court to divest the state or municipality of title or possession to the property if the amount of estimated compensation deposited with the court is not adequate, if damages paid under AS 34.60 are not adequate or if the replatting requirements of AS 09.55.275 are not met.

These changes will require additional attorney services and will have a fiscal impact on the Department of Law. The state's cost for any capital project involving relocation assistance or business losses will be incrementally higher. Disagreements over the measure of business losses as well as disputes over the adequacy of the estimated amount deposited with the court will likely result in more litigation and court time. This means the total number of attorney hours provided in any given year will increase, and thus the legal services costs that are reimbursed to Law by the Department of Transportation and Public Facilities will be increased accordingly.

Furthermore, the cost that the state pays for eminent domain and relocation assistance will also increase to the extent that business losses and state-funded agency activities are a part of capital improvement projects, probably decreasing the number of projects that could be undertaken in any given year. These increased costs would occur in future capital project budgets. The

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSSB 104 (STA)

Department of Transportation and Public Facilities' view on these matters may be helpful in this latter regard.

Because an accurate increase in legal costs cannot be predicted, they have not been shown. However, we believe that these costs could increase by as much as ten or twenty percent.

CSSB 104 (STA)

CS Compared To Original Bill (by section)

- Section 1: New section which amends AS 09.55.300 (b), and is not in the original. It requires that all parties to an eminent domain action must agree to the appointment of a hearing master.
- Section 2: Unchanged from original's section 1.
- Section 3: Amends AS 09.55.330, and is not in the original.
- Section 4: Unchanged from original's section 2.
- Section 5: Unchanged from original's section 3.
- Section 6: Unchanged from original's section 4.
- Section 7: Unchanged from original's section 5.
- Section 8: Unchanged from original's section 6.
- Section 9: Minor clarifying language from original's section 7.
- Section 10: Unchanged from original's section 8.
- Section 11: Restores the word "acquisition" to the original section 9.
- Section 12: Restores the word "acquisition" to the original section 10.
- Section 13: Restores the word "acquisition" to the original section 11.
- Section 14: Restores the word "acquisition" to the original section 12.
- Section 15: Restores the word "acquire" to the original section 13.
- Section 16: Identical to original's section 14.
- Section 17: Restores the words "acquire" and "acquisition" to the original's section 15.
- Section 18: Restores the words "acquire" and "acquisition" to the original's section 16.

- Section 19: Restores the word "acquires" to the original section 17.
- Section 20: Unchanged from original's section 18.
- Section 21: Unchanged from original's section 19.
- Section 22: Unchanged from original's section 20.
- Section 23: Restores the word "acquisition" to the original's section 21.
- Section 24: Unchanged from original's section 22.
- Section 25: States that Alaska Rule of Civil Procedure 72 (h) (2) is amended by the addition of Section 1 of this CS.
- Section 26: Unchanged from original's section 23.

**DIVISION OF LEGAL SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA**

P.O. Box Y, Juneau, Alaska 99811
(907) 465-3867 or 465-2450
FAX (907) 465-2029

Deliveries to: 240 Main Street
Court Plaza, Room 500
Mail Stop 3101

MEMORANDUM

May 7, 1991

SUBJECT: Sectional summary of CSSB 104 (State Affairs)
(Work Order No. 7-LS0554\J, 5-6-91)

TO: Senator Pat Rodey
Chair, Senate State Affairs Committee

FROM: Theresa L. Bannister *TB*
Legislative Counsel

You have requested a sectional summary of the above described bill.

As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

Section 1 amends AS 09.55.300(b) to require that all parties to an eminent domain action must agree before a master is appointed. If a party objects, the master is not appointed.

Section 2 amends AS 09.55.310(a) to require the jury or master in an eminent domain action to ascertain and assess the full amount of business loss caused by taking or damaging the property.

Section 3 amends AS 09.55.330 to establish how business loss is to be determined in an eminent domain action.

Section 4 amends AS 09.55.440(b) by directing the court in an eminent domain action to expeditiously order that deposited money be paid immediately to the persons entitled to it.

Section 5 amends AS 09.55.450(a) by adding a third situation in which a court is prohibited from granting a right of entry in an eminent domain action. The new

provision delays the right of entry until the court determines that the deposited amount of the estimated just compensation for all property taken or damaged is substantiated by one or more appraisals prepared in good faith.

Section 6 adds four additional situations in which the plaintiff in an eminent domain action may be divested of a title or possession taken. The new situations are when the court finds that the amount of the estimated just compensation deposited under AS 09.55.440(a) is not adequate, when the state failed to comply with AS 34.60, when the plaintiff is a municipality that failed to comply with AS 34.60, and when the plaintiff failed to comply with AS 09.55.275.

Section 7 defines "business loss" and "private injury" for the eminent domain article.

Section 8 amends AS 29.10.200 to make home rule municipalities subject to the change made in sec. 9.

Section 9 adds to AS 29.35.030(a) the requirement that municipalities use the procedures set out in AS 34.60 (Relocation Assistance and Real Property Acquisition Practices), regardless of the source of funding, when exercising the powers of eminent domain and declaration of taking.

Section 10 states that the purpose of AS 34.60 is to establish a uniform policy for the fair and equitable treatment of persons displaced as a result of state agency activities.

Section 11 requires state agencies to establish and operate a relocation and payment program for persons displaced as a result of the acquisition, taking, or damaging of property for activities of state agencies.

Section 12 requires a state agency to make certain payments to displaced persons when the acquisition, taking, or damaging of property for a state agency program will displace the persons.

Section 13. Sec. 34.60.050(a) requires a state agency to make, in addition to other payments authorized by AS 34.60, an additional payment to a displaced person who meets certain requirements. The payment must include

(1) the amount that, when added to the cost of acquiring or taking the dwelling, equals the reasonable cost of a comparable replacement dwelling that meets certain criteria;

(2) the amount that will compensate the displaced person for any increased interest costs that the displaced person is required to pay for financing a comparable replacement dwelling; this amount is to be paid only if the dwelling acquired or taken

by the state agency was encumbered by a mortgage meeting certain requirements; and

(3) certain other expenses incurred by the displaced person relating to the replacement dwelling.

Sec. 34.60.050(b) limits the making of the additional payment authorized in (a) to a displaced person who purchases and occupies a replacement dwelling, which must meet certain criteria, within one year from (1) when the person receives final payment of all costs of the acquired or taken dwelling, or (2) when the person moves from the acquired or taken dwelling, whichever is later.

Section 14 requires state agencies, in addition to amounts otherwise authorized by AS 34.60, to make a specified payment to a displaced person who is not eligible for a payment under AS 34.60.050, if the dwelling was actually and lawfully occupied by the person for a certain period before the initiation of negotiations for acquiring or taking the dwelling.

Section 15 requires a state agency, as soon as practicable after paying the purchase price or depositing the funds to satisfy the award of compensation in a condemnation proceeding, whichever event is earlier, to reimburse the owner to a fair and reasonable extent for certain expenses.

Section 16 requires the state court handling a state agency condemnation proceeding to award each owner of an interest in the property a sum that the court determines will cover certain costs incurred because of the condemnation proceedings, if (1) the final judgment is that the agency cannot take the property by condemnation, or (2) the state agency abandons the proceeding.

Section 17 directs a state agency to provide a specified relocation assistance advisory program for displaced persons when the acquisition, taking, or damaging of property for a program or project undertaken by a state agency will result in the displacement of a person. Directs the state agency to offer the occupant of immediately adjacent property the relocation advisory services under the program if the person is caused substantial economic injury because of the acquisition or taking.

Section 18 directs a state agency or other entity acquiring, taking, or damaging property for a project to comply with certain listed policies to the greatest extent practicable.

Section 19 directs a state agency acquiring or taking an interest in real property to acquire or take at least the same interest as taken in the real property, in all buildings, structures, and other improvements located upon the property that are to

Senator Pat Rodey
May 7, 1991
Page 4

be removed by the state agency or that will be adversely affected by the use to which the real property will be put.

Section 20 states that for determining just compensation for a building, structure, or other improvement required to be acquired or taken under AS 34.60.130(a), the building, structure, or other improvement is considered to be a part of the real property to be acquired or taken even if a tenant eventually has the right or obligation to remove it. The tenant with the right or obligation of removal is to be paid the fair market value that the building, structure, or improvement contributes to the fair market value of the real property to be acquired or taken, or the fair market value of the building, structure, or improvement for removal, whichever is greater.

Section 21 makes technical changes and deletes the federal assistance requirement from AS 34.60.135.

Section 22 amends AS 34.60.137 to cover state agency projects, not just federal aided projects.

Section 23 adds a definition of property to include short-term and long-term business interests. Makes several changes in the definition of "displaced person" to reflect the changes in the rest of the chapter and to delete an obsolete date.

Section 24 repeals AS 34.60.100.

Section 25 describes how AS 09.55.300(b), as amended by this bill, changes a court rule.

Section 26 gives the act an immediate effective date.

If I can be of further assistance, please advise.

TLB:mi
91-086.mai

Patrick M. Rodey
Senator

Alaska State Legislature



Senate

3111 C. St., Suite 510
Anchorage, Alaska 99503
(907) 561-7618

During Session:
P.O. Box V
Juneau, Alaska 99811
(907) 465-3793

MAY 15 1991

MEMORANDUM

DATE: May 14, 1991

TO: Senators Kerttula and Pourchot
Co-Chairmen, Senate Finance Committee

FROM: Senator Patrick M. Rodey

SUBJ: Request for Scheduling - CSSB 104 (STA)

I respectfully request that CSSB 104 (STA) be scheduled for hearing in the Senate Finance Committee. The bill seeks to address shortcomings in Alaska's eminent domain laws and condemnation practices.

The primary thrust of the bill concerns adequate compensation for business loss, especially in the cases of leasees and franchisees for whom relocation is not possible.

Current law provides for compensation for the loss of real estate, and relocation expenses for those businesses able to move successfully, however, provisions for adequate compensation for businesses which must close is not well-defined.

Your review and support of this bill would be greatly appreciated. Support material will provided.

PMR/tb/memo004

Patrick M. Rodey
Senator

Alaska State Legislature



Senate

3111 C. St., Suite 510
Anchorage, Alaska 99503
(907) 561-7618

During Session:
P.O. Box V
Juneau, Alaska 99811
(907) 465-3793

SPONSOR SUMMARY

CS Senate Bill 104 (STA)

This bill is intended to address inadequacies in eminent domain proceedings where business loss occurs. The chief beneficiaries would be businesses which rent or lease. The Alaska Supreme Court has ruled that business is a form of property which cannot be taken or damaged without payment of just compensation. Short term loss of profit due to business interruption has been judged compensable.

The court has not ruled on compensability in cases of total, or long term business loss due to condemnation when the business cannot be relocated. This bill is necessary to correct that injustice. No property owner should be forced to pay a greater proportion of the cost of a public project than any other citizen.

In Section 7, the bill clearly defines "business loss". Proof of business loss is a burden of the claimant. It is routinely calculated and awarded in tort and contract cases, and would be no more difficult in condemnation cases. SB 104 requires damage be established with reasonable certainty, not speculation. The Supreme Courts of Alaska, and the United States have defined short and long term loss of profits, and loss of goodwill. The concepts are well understood by valuation experts and accountants.

CSSB 104 (STA) does the following:

- Improves public policy by rectifying the injustice of inadequate compensation of businesses which are destroyed by condemnation.
- Reduces likelihood of litigation by allowing for a master's hearing if all parties agree.
- Establishes how business loss is to be determined.
- Applies constitutional standard of "taking" and "damaging" in relevant statutes.

CSSB 104 (STA) more fairly addresses concerns of small business and franchise entities. It will provide more a realistic evaluation of business loss, and improve procedures for scrutiny and settlement of claims.

California Statute Pertaining to Business Loss

Article 6. Compensation for Loss of Goodwill

Compensation

1263.510 (a) The owner of a business conducted on the property taken, or on the remainder if such property is part of a larger parcel, shall be compensated for loss of goodwill if the owner proves all of the following:

- (1) The loss is caused by the taking of the property or the injury to the remainder.
- (2) The loss cannot reasonably be prevented by a relocation of the business or by taking steps and adopting procedures that a reasonably prudent person would take and adopt in preserving the goodwill.
- (3) Compensation for the loss will not be included in payments under Section 7262 of the Government Code.
- (4) Compensation for the loss will not be duplicated in the compensation otherwise awarded to the owner.

(b) Within the meaning of this article, "goodwill" consists of the benefits that accrue to a business as a result of its location, reputation for dependability, skill or quality, and any other circumstances resulting in probable retention of old or acquisition of new patronage.

Tax Returns

1263.520 The owner of a business who claims compensation under this article shall make available to the court, and the court shall, upon such terms and conditions as will preserve their confidentiality, make available to the plaintiff, the state tax returns of the business for audit for confidential use solely for the purpose of determining the amount of compensation under this article. Nothing in this section affects any right a party may otherwise have to discovery or to require the production of documents, papers, books and accounts.

Inverse Condemnation

1263.530 Nothing in this article is intended to deal with compensation for inverse condemnation claims for temporary interference with or interruption of business.

RECEIVED 12/17



*Department of Transportation
and Public Facilities*

POSITION PAPER

BILL NO: SB 104

APPROVED:

FR W. G. Turpin
Frank G. Turpin, Commissioner

TITLE: Condemnation Practices

DATE: March 16, 1992

Statement of Position

This document is meant to expand the previous position paper issued on this bill by focusing on alternative approaches which would reduce the potential for impairment of project schedules, and would achieve a much better balance between net payments for business losses versus administrative, appraisal and legal costs. This presentation begins at page 9 of Attachment A.

While sensitive to the underlying circumstances which this bill appears to address, the department cannot endorse it in the current form. Further, we feel it important to point out the very serious consequences these changes would have on the ability of the state to proceed with capital construction. Simply stated, projects will become significantly more costly, with such costs being fully ineligible for federal-aid reimbursement, and the likelihood of long delays on some projects appears certain.

There are, however, certain features of the bill which we support, such as making uniform the treatment of citizens relocated as a consequence of an eminent domain action. Here-to-fore relocation benefits of AS 34.60 were exclusively available to projects with federal funding. Projects with other funding sources were not eligible for these relocation benefits, thus causing non-uniform treatment of citizens affected by capital projects.

The impacts of this bill are very far reaching, and could add millions of dollars to the general fund cost of transportation programs on a yearly basis. A detailed discussion of our analysis of the bill and its ramifications is attached. I hope you will take the time to review this material for it clarifies how adverse an impact this bill is likely to have on this vital area of public service.

Finally, we believe a far more targeted and less costly solution is possible to resolve the type of problem addressed by this bill. Our recommendation is contained in the last section of Attachment A.

For Further Information contact Katy McHugh at 465-3900.

Attachment A

SB 104

An Act relating to the taking and compensation for damage of property by state agencies, municipalities, and other entities; and providing for an effective date.

Introduction

It is believed that this bill is meant to rectify what is perceived as an inequity when a business is relocated as a consequence of an eminent domain action and suffers some form of uncompensated loss which is ineligible for compensation under existing constitutional and statutory law. In addressing this circumstance, the bill as written, would accomplish significant change in eminent domain practices particularly as it relates to businesses, but also to all eminent domain and relocation actions. These changes are so profound, that Alaska would become a "pioneer" state in the area of eminent domain law and would easily have the most generous program in the nation. We believe that there is a real opportunity that this generosity will result in payments well in excess of fair market value.

This paper attempts to explain what protections exist under current law, the changes proposed in this new law as well as the fiscal consequences of these changes, and recommendations to address the problem of business relocations which would be less disruptive to the program as a whole.

Current Practice

The practice of eminent domain is perhaps one of the most powerful government powers. It needs to be carefully controlled by sound policy and procedure, with appropriate checks and balances. We believe that any policy adjustment should be carefully considered in relation to the dual goals of protection of both private and public rights.

Current practice contains an inequity between projects with federal funding and those without. Unless federal funding is involved, no relocation benefits are authorized under state law. This bill corrects this inequity by making relocation benefits available for all projects.

When federal funds are involved, current policy regarding condemnation and relocation work well in most instances. We believe that policy adjustments should build upon the strengths of current law. Following is a discussion of the rights and protections afforded citizens affected by eminent domain actions under present law.

1. Just compensation generally: The supreme court has stated that the constitutional provision and the law is to be construed in favor of the owner. That is, under current law the owner is given the benefit of every doubt.

- A. Measure of compensation for real property: Full market value upon the date of taking. The owner is entitled to the market value of the property taken plus the market value of the property not taken but injured by the taking as measured by the decrease in the market value of the remainder before and after the taking. Under current department practice these values are determined by appraisers and certified by review appraisers.
- B. Measure of compensation for special damages: The owner is entitled to:
1. payment of expenses incurred in finding and moving to a new place of business, including lodging, transportation and brokerage fees;
 2. payment for personal property lost or damaged during relocation;
 3. payment for personal property which cannot be used in the new business location; and,
 4. in the event a business cannot be relocated, a payment can be made in lieu of relocation up to \$20,000. In essence this is a payment for going out-of-business.
- C. Relocation benefits: The business owner is entitled to relocation costs and benefits including the cost of moving, including packing and unpacking, storage and move insurance, licenses and permits, new signs and stationary, certain repairs or improvements to new location, utility connections, feasibility studies, advertising, new special assessment costs, advertising of new business location, and other items considered essential to reestablish the business.

Summary: Under current law the owner is compensated for the value of the real property lost; cost of finding a new place of business; all damage to personal property; and all moving costs. Conceptually the owner should be whole; i.e.: he should be able to buy or lease a comparable piece of property and move his/her business to it.

However, there are gaps in the above benefits that arise in some circumstances. Perhaps the biggest gap is left when no suitable location can be found or a location less suitable to the business is the only alternative. In these circumstances, the business owner may suffer damages. Here lies what we believe is the crux of the problem and our recommendations address businesses facing relocation which suffer consequences not now eligible for compensation.

2. Deposit. The state must deposit it's estimate of compensation when it files a declaration of taking. The owner is in a position whereby he/she can obtain full payment of the state's estimate of compensation on the date of filing or as soon thereafter as it is clear they will not contest the authority and necessity of the state's acquisition.

3. Authority. If the owner contests the state's authority to acquire the property in question, the state must prepare a statement of authority and necessity. This document requires that the state justify in writing the purpose and need for the property in question (see AS 09.55.270). Alaska is one of a limited number of states which bestows this additional layer of protection to private parties affected by eminent domain.
4. Costs and fees. A property owner may be concerned about the cost of contesting a condemnation. Yet, the law currently goes a long ways towards protecting the owner in condemnation proceedings.

- A. Master's Hearing. Under Civil Rule 72, any party to a condemnation is entitled to a masters hearing or jury trial on the question of just compensation. The master's hearing is informal in nature and gives everyone the right to an inexpensive shot at putting their compensation arguments to a neutral third party appointed by the courts. The vast majority of acquisitions which are uncontested as to authority but are disputed as to compensation are currently resolved by a masters hearing.

Any party can appeal the master's decision to the courts but if the state is the appealing party, it must pay 100% of the owners costs and fees incurred through trial regardless of how the trial turns out.

- B. Owner's costs and fees and the 10% Rule. Rule 72 provides that if an owner is successful in increasing just compensation by 10% above the state's offer, they get 100% of their reasonable costs and attorneys fees. Even if they do not succeed in increasing just compensation by 10% they still get all costs and fees that the court finds were reasonably and necessarily incurred to assure the payment of adequate just compensation.
- C. State's costs and fees. There is no provision for payment to the state of its costs and fees incurred on condemnation claims. Even if the state wins, i.e., the estimate of value is upheld, the court can find that the owner's costs and fees were necessarily incurred, and the state still cannot collect any of its costs and fees.
- D. Expedited proceedings. Rule 72 (j) provides that the court and the parties are to expedite the proceedings for the determination of just compensation.
- E. Abandoned proceedings. If the state abandons the proceedings or is not granted possession because they failed to prove authority and necessity of the taking AS 34.60.080(a) requires that the owner be paid all reasonable costs, disbursements, and expenses of the proceedings.

Analysis of Bill's Changes and Consequences

This bill would have both short and long term impacts. The immediate effective date will change the rules under which many projects which are currently undergoing active acquisition efforts. Most of these projects must be "obligated" (which requires that ROW acquisition is 100% complete) or we cannot use the federal funds allocated to the project. The presence of even one business seeking compensation under the provisions of this bill on a active project will threaten our ability obligate the project because we can't certify the right-of-way acquisition as being complete. This will potentially result in the loss of millions of dollars of federal-aid highway funds in the current federal fiscal year.

A long term effect of the bill is the tremendous legal uncertainty it will cause. The bill will dramatically alter the practice of property acquisition involving businesses. Administrative and judicial decisions will no longer have the firm foundation of case law as developed in numerous cases in Alaska and the nation over many decades. The potential for delay and tedious legal interpretation will remain high for a long time. This will delay many future projects and add significant cost.

Furthermore, additional business compensation added by this bill, including staff time, appraisal costs, legal costs and the actual compensation to business owners will be eligible for federal funds. Business losses are not eligible for federal reimbursement, (23 CFR 710.304 (h) states: "*Payments made for ... loss of business ... are not eligible for federal participation.*") Thus, any payment for such losses will be out of an additional state general fund contribution.

A fourth consequence of the bill, and perhaps an unintended consequence, is the possibility that many actions of government falling under the legitimate exercise of its powers, which cause damage to a business may now be compensable. Many necessary actions of government can be interpreted as a damage, though they are not eligible for compensation under current eminent domain theory. Consider:

- Actions to increase or decrease traffic flow on a given route.
- Actions to limit or prohibit certain turning movements.
- Actions to temporarily close roads to traffic for maintenance or construction.
- Actions regulating the size and weight of vehicles used by businesses.
- Actions to condition or deny certain driveway applications.

We believe these types of actions could be construed as a "taking" or damage which is eligible for reimbursement. Even if we prevail in court, the vagueness of the bill's language would seem to invite suits of this nature.

Comparison to Other States

No other state that we know of compensates for short and long term business losses. Both Florida and California provide some compensation for loss of goodwill. In

California, a bellwether state in many other legal issues, their act compensates for loss of goodwill, but under a rather tightly defined standard which the business owner is obliged to prove. The Florida law is more limited than the California law.

In conversations with CalTrans personnel who administer the right-of-way program in California, they have experienced the time consuming and costly legal proceedings that we predict for this bill.

In one court decision (California Department of Transportation v. Muller), involving a viable though not very prosperous veterinary clinic, the court awarded the clinic operator a new clinic that was substantially better in quality, size and condition than the acquired location. The fact that the business was a corporation owned by the same individual who owned the land and buildings did not prevent what in essence were duplicate payments (i.e., the fair market value of the property and the non-relocatable business assets). This contravenes a basic concept of eminent domain which is to make the property owner "whole" but not to enrich them at the public's expense.

CalTrans finds that many goodwill claims are found invalid based upon the failure to provide records or that goodwill is not substantiated. Where goodwill must be compensated, claims range from \$30,000 to in excess of \$1,000,000.

Given the more limited application of the California law and burden of proof placed on the business owner, we predict that under the effects of this bill Alaska's experience will be more costly for there are no bounds to what the state must pay, nor is their a burden of proof on the business owner.

A comparison of the California law and SB 104 is shown in Table 1.

Additional Issues

Aside from the major points made above there are other concerns that we wish to bring forward:

Compensation Question

The bill create a scheme where the emphasis is on requiring the state to deposit as much money as possible up front, scrutinizing that deposit and requiring prompt distribution of the deposit.

There should be no requirement of distribution until objections to the state's right to take are resolved and competing claims to the deposit are resolved. The court must be left with the discretion to distribute the deposit when and how it's judgement warrants. Court time should not be wasted holding proceedings on the deposit as opposed to determining the fair amount of compensation. Considering that the state jeopardizes it's case if the deposit is less than 90% of the final compensation this additional scrutiny is

unwarranted. Further there may be more than one party who is entitled to a portion of the deposit.

Loss of Declaration of Taking Procedure

Alaska law currently provides a procedure whereby we can accelerate the transfer of title while the process of establishing equitable compensation is adjudicated. This procedure is intended to ensure that vital public projects are not delayed, while retaining protections for the land owner affected. The bill appears to frustrate our ability to utilize this procedure by allowing objections to matters that are inherently subjective.

Table One
Comparison of Alaska and California Concerning Business Losses

California is one of very few states known to have a statutory requirement for compensation of certain types of business loss not otherwise compensable under eminent domain proceedings. Because the California law is exceptional in character, it is felt a good benchmark by which the proposed legislation may be compared. The following is a side-by-side comparison of a number of characteristics of the California law with the proposed bill.

| CONSIDERATION | CALIFORNIA <i>(Title 7, Ch. 9, Art. 6, Sec. 1263. 510-530)</i> | ALASKA <i>(SB 104)</i> |
|---|---|---|
| What is Compensable: | Loss of business good will, such as a decline or temporary drop-off in patronage. Temporary interference loss or loss by interruption is specifically excluded. | Loss of short and long term business losses, loss of goodwill, and private injury. |
| Definition: | Goodwill is defined in some detail by legislation. | Above terms are not defined. |
| How claimed: | Business owner is notified of opportunity to make claim, CalTrans then prepares goodwill appraisal. Only a small fraction of businesses file goodwill loss claim. | State <u>must</u> prepare appraisal before negotiations. State will incur costs on all businesses, regardless of presence of actual loss. |
| Required Information: | State granted access to prior 3 years tax records plus uses voluntary questionnaire. | State has no legal access to any business information or records except that which is volunteered. |
| Funding: | Use state general fund; FHWA will not participate. | Use state general fund; FHWA will not participate. |
| Declaration of Taking Procedure: | Not changed. | Additional time factors and burdens placed on process, render it ineffective. |
| Definition of "Real Property:" | Not changed. | Changed considerably by exchanging term "real property" with "property." |
| Changes in Uniform Relocation Requirements: | Not changed. | Intertwined with eminent domain process and process appears cumbersome in consequence. |
| Burden to Minimize Loss: | Business owner is required to take steps that a reasonably prudent person would take and adopt to preserve goodwill. | No duty or burden is placed on business owner to minimize loss. |
| Duplicate Compensation: | Duplication of compensation is prohibited. | Duplication of payments is not prohibited and perhaps probable, given overlap of various types of losses to be recompensed. |
| Burden of Proof: | Owner must prove that there is a loss of goodwill. | State must determine losses with no burden of proof on owner. |
| Relationship to Taking: | There must be a taking of real property in order that a loss of goodwill is claimed. | No taking of real property is required in order that loss may occur. |
| Use of Master's Process: | N/A | No longer a required step to be used to minimize the number of full court proceedings. |
| Capping of Benefits by Fair Market Value (FMV): | In practice, benefits are carefully calculated and at most the FMV of the business less value of saleable assets is compensable. | Uncertainties in language provide no guarantee of a ceiling, thus payments could likely exceed a FMV determination. |

These frustrations include:

Compensation.

The bill imposes a third level of compensation determination on the judge before the state is granted possession. The court must determine that the state has deposited adequate just compensation for all real and personal property interests taken. This is a departure from current law in two respects:

First, there is a hearing regarding the adequacy of the compensation deposit. This will entail extensive testimony from experts, a process which causes significant delay in obtaining possession since most experts will not testify or be in a position to render a meaningful opinion until they have finished their reports. Also consider the crowded court docket and the result is that a declaration of taking will be meaningless.

Second is the requirement of valuation for personal property which gets into incidental or special damages such as business loss and damage to personal property. Currently the claimant bears the burden of proof on these items. This is reasonable because the claimant is in the best position to control and limit the loss. The bill removes the owners incentive to limit the loss. In most cases incidental or special damages are not incurred until the claimant actually moves. Under the bill the claimant must be adequately compensated before the claimant has to move.

Replat.

The court may not grant possession until the state has replatted the owner's remainder. This is a very problematic requirement for we must own property before we file for a subdivision. Right now this element of the law is not followed in "letter" but adhered to in "spirit". The change places a burden on us which we can not technically satisfy--replating land prior to possession.

Compensation Benefits to Those Who Have Not Had Real Property Taken.

A whole new class of claimants is created by the proposed legislation. Currently benefits are triggered by the taking of some real property interest. If we take something that person could claim applicable relocation benefits. This threshold is removed, and a person can claim benefits regardless of whether a real property interest is taken.

Time Pressures

There is always considerable pressure by the public to keep projects moving. These projects solve urgent transportation and safety needs, create jobs in construction, and ensure that we utilize every available federal dollar. The bill gives a business owner tremendous leverage to stop projects. Thus we will be coerced to settle for amounts that may far exceed compensation based on merits. If we instead choose to go slow so that time is not our disadvantage, project timetables will slip by one year at minimum. Such a strategy cannot be implemented without significant short

term disruptions to projects now underway, with corresponding impacts to the construction and transportation industries.

Merger of Acquisition and Relocation

This bill has the affect of merging two distinct aspects of land acquisition under eminent domain. Case law of the U.S. Supreme Court has held firm to the principal that compensation for the consequent damages of the taking are not compensable as part of the fee granted for the taking. In other words we purchase the property and not the opportunities which the owner may lose. However, in recognition of the these consequential damages Congress passed the Uniform Relocation Act (1971) which does compensate for some aspects of these consequential costs. The two types of compensation are separated both in time and procedure.

Initially we value the land and either voluntarily or involuntary possession is gained and a final price is established. Secondly, and administratively the department proceeds with payments for relocation. This bill has the effect of intertwining these two elements and making them complex in application.

Definition of Property

The bill redefines property to include personal property. The change in definition adds unnecessary confusion without corresponding benefits to the public. As a general rule we acquire real property and relocate or compensate for personal property when it cannot be reused or relocated.

Duplicate and Unjustified Compensation

A very real likelihood of the amendments is that business owners will receive duplicate compensation or compensation for losses that market analysis will not support. In addition to generous payments prompted by the use of delay this prediction is based on a number of points:

Overlapping and Undefined Terms: The terms short term business loss, long term business loss and loss of goodwill are undefined and contain some overlapping elements in general practice. They often come to mean "blue sky" or that which is over and above what a fair market value of a business is.

Burden of Proof: The state bears the full burden of estimating these losses at a very early stage in the proceedings and without access to business records. The owner has no burden of proof, nor a duty to take steps to minimize losses. This is a dramatic departure from current eminent domain practice in this and other states.

Compensation Cap: There is no upper limit to what must be compensated. Traditionally, eminent domain is limited to fair market value plus special damages. This upper limit would not apply with these amendments and compensation far in excess of fair market value seems inevitable.

Unprofitable Businesses: Many businesses are unprofitable upon market analysis yet provide a wage to the owner. They would have little or nominal value in a business transaction, but do provide independence and the future potential for profit to the owner. The state has heard arguments that we owe such owner's their income and perhaps future profit for life and this may now be possible upon the right interpretation by the courts.

Summary

A major point on these special damages is that the loss is unknown until the business has either relocated or shut down. The owner has the ability to minimize the damages. The bill requires that the state estimate and pay for business loss before it is known whether a loss has occurred and without access to relevant records. The bill renders ineffective the declaration of taking provisions and gives owners significant leverage to coerce unwarranted compensation. The bill creates a huge disincentive for the owner to minimize his damages. Finally, the bill sets out no parameters or definitions of what the terms mean nor does it ensure that duplicate nor unwarranted compensation is disallowed.

Alternates to the Bill

Briefly, the department is not taking a position on the need to compensate for various types of business loss. While generally, such losses are non-compensable under federal law, various states have enacted laws which make them compensable within their jurisdiction and a growing body of case law is expanding the concept of business losses throughout the country.

What does concern us is the bill's extreme effects on our ability to complete projects. Aside from compensating business owners, the bill will enlarge the bureaucracy and clog the courts, at great costs to Alaska's citizens. Lastly, it will almost guarantee that a portion of our annual federal-aid allocations are lost due to our inability to expeditiously advance projects through the right-of-way process.

We believe these undesirable consequences are avoidable while ensuring that business losses are compensable. What we propose is an alternative that relies primarily upon administrative procedures separate and apart from the condemnation process. The three main concepts embodied within our concept are as follows:

- Reaffirm the relationship between business loss and property takes. If businesses can claim damages on "any" action of government, then there is no conceivable limit to potential claims. Virtually any action of government, including regulation, taxation, allocation of resources, and provision of services can be argued as harming someone. This element of the current bill is a real "sleeper" and is perhaps it's most harmful feature.

- Expansion of the relocation benefits compensable for various types of business damages. In brief, current relocation benefits are generally quite limited. We propose a five-fold expansion of the caps on these benefits.
- Create a California-type Loss of Good Will Provision in state law (see Attachment A). The California program relies upon administrative procedures, places the burden of proof upon the business, and limits such payments to the fair market value of the business.

Enclosed Attachment B further describes how the proposed alternative would work. While the majority of these new costs would be ineligible for federal-aid, and thus would require new annual general fund appropriations, the program would be far less disruptive to projects, and would pay a far larger portion of funds to businesses rather than those who administer and participate in court-based proceedings.

The concepts presented in this alternative would require a major and perhaps total rewrite to the current bill. We are prepared and willing to assist in this effort, if requested, but given the magnitude of the task have not prepared substitute language at this time.

Attachment B

SB 104

An Act relating to the taking and compensation for damage of property by state agencies, municipalities, and other entities; and providing for an effective date.

Alternatives to SB 104

Attached is a summary of what can be paid now under relocation and what we would propose as an alternative to SB 104. In many instances, the only real change needed is an expansion of the existing dollar limits. It is important to note that these benefits are administered by staff, subject to fairly simple standards of proof on the part of the business, such as business records, receipts for equipment cost and estimates for relocation expenses. While most of the proposed expanded benefits would not be compensable under federal-aid guidelines, they would result in a far simpler and more expeditious process than contained in the current bill.

Relocation and Moving Expenses:

| Relocation Item | Current Law | DOT&PF Proposal |
|---|-------------------------|--------------------|
| Personal property lost or damaged during relocation | Actual cost. | No change. |
| Personal property which cannot be reused. | Fair market value. | No change. |
| Moving related costs | Actual cost. | No change. |
| Storage of business property | Actual cost. | No change. |
| Licenses, permits, or certificates | Actual cost. | No change. |
| Insurance connected with move or storage. | Actual cost. | No change. |
| Consultant services for moving or re-installing business equipment. | Actual cost. | No change. |
| Substitute personal property. | Actual cost. | No change. |
| Searching for replacement location. | Actual cost up to \$1k. | Increase to \$10k. |

Reestablishment Expenses

| Relocation Item | Current Law | DOT&PF Proposal |
|---|--|---|
| Repairs or improvements to meet laws. | Covered, subject \$10k limit for all reestablishment expenses. | Increase limit to \$50k for reestablishment expenses (cumulative maximum for all 10 types of reestablishment activities). |
| Modifications to make property suitable. | Covered, subject \$10k limit. | Same |
| Changes or replacement to signs. | Not to exceed \$1.5k for this item and total \$10k limit. | Same |
| Provision of utility connections. | Covered, subject to \$10k limit. | Same |
| Redecoration or replacement of soiled or worn surfaces at replacement site. | Covered, subject to \$10k limit. | Same |

Reestablishment Expenses (cont.)

| Relocation Item | Current Law | DOT&PF Proposal |
|---|---|-----------------|
| Licenses, fees and permits when not covered by moving expenses. | Covered, subject to \$10k limit. | Same |
| Surveys, soil testing, market studies. | Covered, subject to \$10k limit. | Same |
| Advertising to notify patrons of new location. | Covered, subject to \$10k limit. | Same |
| Increased cost of operation due to higher rent, taxes, insurance premiums, utility charges. | Not to exceed \$5k for this item and total \$10k limit. | Same |
| One time utility impact fees. | Covered, subject to \$10k limit. | Same |

NOTE: The total for reestablishment expenses is now \$10,000 for all categories, regardless of how many such expenses are necessary. We would propose expanding these to an upper limit of \$50,000.

Business Losses

| Relocation Item | Current Law | DOT&PF Proposal |
|----------------------------|--|--|
| Short Term Business Losses | Partially covered in reestablishment expenses. | Covered by increase in up to \$50k allowed for reestablishment. |
| Long Term Business Losses. | Not covered. | With proper definition it should be compensable as part of loss of good will. |
| Loss of Good Will | Not covered. | Make compensable based upon tests similar to California law. Such payments should be non-redundant, verifiable and owner should be responsible to take steps to reasonably avoid these losses. Upset limit is fair market value. |

Payment in Lieu of Relocation

| Relocation Item | Current Law | DOT&PF Proposal |
|--|---|---|
| A lump sum payment in lieu of moving and reestablishment expenses (and business losses). | Equal to average annual net earnings, up to a maximum of \$20,000 | Equal to average annual net earnings for past three years. Payable for 2 years of net earnings up to \$100,000 maximum. |

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RONALD L. BAIRD

March 18, 1992

VIA FACSIMILE AND U.S. MAIL
(907) 465-2069

State Affairs Committee
c/o The Honorable Pat Pourchot
Alaska State Senate
P.O. Box V
Juneau, Alaska 99811

Attention: Susan Barnett

Re: SB104, Condemnation Practices

Dear Committee Member:

I am an attorney who has practiced condemnation law representing both condemnors and landowners. I am a member of the Condemnation Subcommittee of the Civil Rules Committee which was appointed by the Supreme Court to revise Rule 72 of the Alaska Rules of Civil Procedure which governs condemnation actions. I wish to comment on SB104 now pending before your committee. The views expressed herein are not those of any client but rather are my own.

Definition of Business Loss

I was opposed to this bill as it existed in Senate State Affairs last year because the bill employed the term "business damages" without definition. The current bill is an improvement in that respect with its definition that "business loss includes short term loss of profits, long term loss of profits, and a loss of goodwill." (SB104, § 7.) While this definition is an improvement over the previous bill, it continues to present the prospect of providing the landowner with double compensation for some types of loss and a fiscal impact so large it is impossible to estimate.

There are two problems with this definition. The term, "long term loss of profits", creates the prospect that the landowner will be better off after condemnation than the landowner would have

The Honorable Pat Pourchot
March 18, 1992
Page -2-

been if required to continue in a business environment fraught with risk. This language will encourage landowners to claim compensation for profits indefinitely into the future which requires the assumption that the business will remain profitable for all of those years. No business is capable of reasonably making such an assertion. I do not believe it is the proper function of government to insulate businesses from the risks, including business failure, which exists in any free enterprise. The term invites speculation by the jury leading to astronomical compensation awards.

The term "goodwill" is also flawed because of its potential to allow recovery under this category for losses which are in fact related to the real property and compensated in connection with the taking of that kind of property. Most businesses can be relocated particularly if adequate time is allowed for such relocation. Alaska case law already requires compensation for temporary loss of profits occasioned by the necessity of setting up a new place of business following the taking of the old operation. In those instances where the location is critical to the operation of the business, that fact will almost always figure substantially in the value of the land itself. If this bill is passed, the jury would have to be instructed separately on the loss of goodwill and there is great potential for double compensation.

I believe these concerns could be addressed by a definition of "business loss" which expands the current liability of the government yet places important limitations on the landowners recovery. I think these objectives can be achieved by the following definition:

(1) "Business loss" means the value, discounted to the date on which possession of the business location is relinquished, of profits which are reasonably probable to have been earned by the business but for the taking, for a period not to exceed three (3) years from the date of taking.

This definition adds three clarifying and helpful concepts to this area. First, the definition makes clear that the recovery of future profits must be discounted to the date of taking at which point they will then earn interest at the judgment rate. Second, the profits to be awarded are required to have been reasonably probable to have been earned. "Reasonably probable" is already a term used to deal with a number of kinds of future events, such as zoning changes, which may affect value but must not be speculative. Third, this definition sets an upper limit to the number of years

The Honorable Pat Pourchot
March 18, 1992
Page -3-

for which the jury can find that a business would be profitable. I have chosen three years but a lesser or larger number might be justified.

Additions/Conditions on the Government's Right to Take

The new bill also contains several new provisions which represent steps backward in the law of condemnation. The revisions set forth in §§ 5 and 6 of the bill essentially have the effect of eliminating quick take condemnation in Alaska. The language added to these sections would arm landowner lawyers with ample ammunition for substantially delaying public projects. The result is a substantial transfer of power from the governmental agencies to the court system which does not have the resources to deal with the litigation that will result. Lawyers such as myself, however, will profit.

Section 24's repeal of A.S. 34 60.100 similarly will obstruct the timely development of public improvement projects. Removal of this section would provide yet another means by which lawyers will be able to litigate the agency's right to take with the attendant delay and transfer of project resources to legal fees.

Restriction on Use of Master's Hearing

Finally, the revisions of § 1 and § 25 of the bill pertaining to the master's hearing procedure represents a great leap backward. The master's hearing is an informal, inexpensive and fast procedure whereby the landowner and agency can obtain the opinion of a neutral third party as to the fairness of compensation. This procedure results in the resolution of about 90% of condemnation cases in my experience. In many smaller takes, landowners can participate in the master's hearing without the assistance of counsel. Any movement towards greater reliance on civil jury trials in these cases again merely benefits lawyers and further delays prompt recovery of compensation in these cases. Many jurisdictions including the federal government have eliminated the use of jury trials in these types of cases due to the wildly erratic results (both favorable and unfavorable to landowners) and the cost and expense associated with this type of procedure.

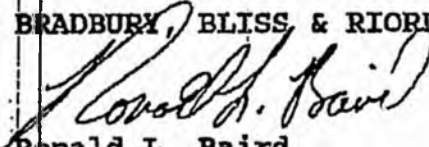
The revision set forth in this section was proposed by Richard Weinig to the Condemnation Subcommittee. This committee represents a cross-section of government and landowner attorneys. Mr. Weinig was unable to persuade any other members of the committee that this revision was in the public interest. It should be rejected by the legislature as well.

The Honorable Pat Pourchot
March 18, 1992
Page -4-

In general, while the version of SB104 now before your committee is some improvement over the legislation considered in 1991, it continues to be seriously flawed and now contains additional provisions which are steps backward in the area of condemnation law. It should not be enacted.

Sincerely,

BRADBURY, BLISS & RIORDAN


Ronald L. Baird

RLB:ss
rlb2\pourchot

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March 18, 1992

Tim Benintendi
c/o The Honorable Pat Rodey
Alaska State Senate
Juneau, Alaska 99811

Via Fax 463-3144

Re: CS for Senate Bill No. 104: Eminent Domain Amendments
Response to 3-18-92 Comments of Ron Baird

Dear Tim:

Some points to consider with respect to Ron Baird's letter:

1) There are already sufficient legal protections built into the law to discount future proven profits to present net worth. Lost profits already must be shown with certainty as a matter of law. Limiting them to a 3-year period is not only a denial of just compensation, but arbitrary. If a limit were to be imposed, such limit should be determined by the jury in the exercise of its discretion, as amounts of just compensation generally are within the province of the jury.

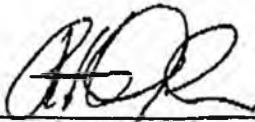
3) Sections 5 and 6 of the Bill, which would impose procedural safeguards pertaining to the condemnor's estimate of just compensation, contrary to Mr. Baird's suggestion, will not substantially delay public projects by creating a litigation feast. Rather, greater safeguards concerning the initial estimate of just compensation will benefit not only the landowner but the State as well by insuring that the condemnation decision is based upon better and more complete information. Thus, Sections 5 and 6 may well lead to a decrease in litigation, if the State complies with their provisions.

3) Mr. Baird, generally, is a condemnor's counsel.

Sincerely,

THE LAW OFFICES OF WILLIAM R. SATTERBERG, JR.

~~William R. Satterberg, Jr.~~


Robert John

WRS:jmm

TO THE SENATE FINANCE COMMITTEE:

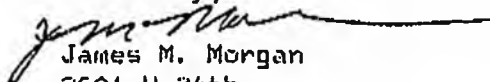
March 12, 1992

The fiscal note from DOT concerning SB-104 fails to look at two important facts. #1-How much does it cost to leave the laws concerning condemnation as they are now? The Raspberry Road project is a good example. There was 3.4 million dollars allocated to litigate an 18 million dollar project. This is ludicrous. The Minnesota Drive project and the Raspberry Road project were combined by DOT to save 1.5 to 3 million dollars. DOT seperated these two projects rather than make a settlement with the businesses affected by the project. The cases of the two service stations were finally settled out of court. The state had to pay attorney fees for both businesses affected. They also paid a monetary settlement to both parties. The laws are in place to protect Alaska citizens from being forced to give up their property without being paid for it. Unfortunately these laws are very ambiguous and it becomes necessary to wage a long and costly court battle to obtain fair treatment. This process can put lifelong plans on hold for an indefinite period of time, or even entirely crush them. This is what the state depends on.

The second fact the fiscal note proves is that DOT admits there is business loss when roads are constructed. They currently refuse to pay for it and businesses are required to pay a much higher cost for road construction than anyone else.

I strongly urge you to do everything possible to make SB-104 an Alaska state law.

Sincerely;



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