

SB

104

7-LS055
Bannister
5/6/91

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:

Referred:

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 improvements 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).

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-LS05-1, 6-91)

TO: Senator Pat Rodey
Chair, Senate State Affairs Committee

FROM: Theresa L. Bannister *TLB*
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

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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

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. SB 104

Revision Date: _____ Department Affected: Department of Law
 Title: "...taking and compensation...of BRU: Legal Services
property by state agencies...other entities 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.

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.

FISCAL NOTE

| | | | |
|----------------|---|--------------------------|--|
| 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 |
| Sponsor: | 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.

Prepared by: Jeffery C. Ottesen, Director 

Phone: 465-2951

Division: Engineering and Operations Standards

Date: March 14, 1991

Approved by Commissioner: 
Frank G. Turpin

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.

PLETCHER, WEINIG, LOTTRIDGE & MOSER

ASSOCIATED IN THE PRACTICE OF LAW

DIMOND CENTER OFFICE TOWER
800 E. DIMOND BLVD., SUITE 3-620
ANCHORAGE, ALASKA 99515-2098

JOHN W. PLETCHER, III
A PROFESSIONAL CORPORATION

RICHARD A. WEINIG
ATTORNEY AT LAW

DOUGLAS D. LOTTRIDGE
ATTORNEY AT LAW

LARRY Z. MOSER
ATTORNEY AT LAW

TELEPHONE
(907) 349-1900

FACSIMILE
(907) 349-7758

KELLY C. FISHER
ATTORNEY AT LAW

CHARLES M. MERRINER
ATTORNEY AT LAW

ELLIOTT T. DENNIS
ATTORNEY AT LAW

TASHA M. PORCELLO
ATTORNEY AT LAW

May 14, 1991

The Honorable Pat Rodey
The State Senate
P.O. Box V
Juneau, Alaska 99801

Re: S.B. 104

Dear Senator Rodey:

Tim Benintendi requested that I address the objections to S.B. 104 presented by Ronald Baird's May 8, 1991 letter and the State's Position Paper of March 19, 1991.

The Need for S.B. 104

There is great public need for such a bill. In 1976, the Alaska Supreme Court ruled that business was a form of property which cannot be taken or damaged without payment of just compensation. However, the Court limited itself to the facts of the case, five months in which a bar in Petersburg was out of business during relocation due to a state highway project. Loss of profits for this "flesh wound" were compensable. However, the Supreme Court has not ruled upon whether a "mortal wound" is also compensable, i.e., where condemnation causes total destruction of a business and the owner is not able to relocate. Superior Court Judges across the state have split evenly upon the issue of whether a "mortal wound" is compensable. S.B. 104 is necessary to correct this injustice. No property owners should be forced to pay a greater proportion of the cost of a public project than any other citizen.

While all condemning agencies are required by AS 34.60. to appraise real property prior to negotiation which proceed a condemnation action where federal funding is involved, and to deposit an estimate of just compensation in conjunction with a declaration of taking, very few condemning agencies attempt to appraise lost profit damages caused by a taking or make deposit for same. This causes severe hardship on the property owner, whose business is either destroyed or must be relocated as a consequence of condemnation because such owner must fight a war on two simultaneous fronts: litigation on the amount of just compensation; and dealing with a business which is either

Pat Rodey
May 14, 1991
Page 2

destroyed or must be relocated without having available funds derived from the condemnation deposit. In either situation, debt service on the condemned property mounts while, as a consequence of relocation of the business or total destruction of the business, there usually is no income stream to meet that debt service. S.B. 104 corrects this injustice.

S.B. 104 is not nebulous in its definition of "business loss." Section 7 of the bill defines business loss as "short term loss of profits, long term loss of profits, and loss of good will." Loss of profit damages are no more difficult to prove in a condemnation case than in a tort or contract action, in which they are routinely awarded. State v. Hammer, 550 P.2d 820, 823, 826-827 (Alaska 1976). The Alaska Supreme Court has clearly defined what loss of profit damages are and the methodology by which they might be proven. City of Palmer v. Anderson, 603 P.2d 495, 500 (Alaska 1979); Guard v. P&R Enterprises, 631 P.2d 1068, 1071-1072 (Alaska 1981); City of Whittier v. Whittier Fuel & Marine Corp., 577 P.2d 216, 222, 225 (Alaska 1978). The Supreme Court of the United States has also defined what loss of profit damages are and the methodology by which they might be proved. Eastman Kodak Co. v. Southern Photo Materials Co., 37 S.Ct. 400, 405 (1927). These cases hold that the burden of proof of lost profits damages is upon the claimant and that such damages may not be speculative; they must be established with reasonable certainty. S.B. 104 requires this.

Lost profit damages are not duplicative of just compensation awarded for land, whether it is uniquely situated or not. They are projection of future lost profits based upon the historical operation of the business, a well established business appraisal technique. Lost profit damages are not the same as the "good will" concept advocated by the State and utilized by the California statute. To establish good will, there must be showing of "excess earnings," those which are greater than that of comparable enterprises. Limiting the property the owner to loss of good will will necessarily restrict compensation for business loss to only certain, select businesses: those more successful than their competitors. Even if a business is not more successful than its competitors, that business owner is entitled to lost profits if such loss is legally caused by a constitutionally taking or damage. Otherwise he would be forced to bear a larger proportion of the cost of a public project than would other citizens.

Objections of Ronald Baird

Mr. Baird has three objections:

(1) "Business damages" for fast food or other consumer-oriented businesses located along a major arterial constitute a duplication of payment for just compensation for real property, awarded as a consequence of the unique location of the land.

(2) Business loss is already available for temporary loss during relocation of the business;

(3) "Business Loss" or "business damage" are not terms with clear meaning to condemnation lawyers, appraisers, business valuation experts, or the accounting profession.

My reply is this:

(1) Valuation of uniquely situated property and lost profit are as different as apples and oranges. If a property is uniquely situated, so as to have enhanced value, that is compensable as just compensation for the real property taken and damaged. However, lost profit damages do not constitute a duplication of recovery. Lost profit damages, as defined by the Alaska Supreme Court and the Supreme Court of the United States are loss to the business owner of projected profits for a reasonable period of time, based upon historical performance of the business and similarly situated businesses. Arguments have been made in condemnation cases, attempting to tie lost profits to the uniqueness of the business location. This is an argument which has been offered primarily because the state and other condemnors have routinely insisted that business loss is compensable only as a part of just compensation of the value of extraordinarily located real property. S.B. 104 clearly differentiates between just compensation for real property taken or damaged, where

ever located, and lost profit damages attributable to the business itself.

(2) Mr. Baird is correct in asserting that current law allows compensation for temporary lost profit damages during relocation of the business. This is a "flesh wound" to the business. However there is no compensation reliably available under existing law for a "mortal wound" to the business, where the business owner is unable to relocate the business. This is a major injustice.

(3) Business loss is defined in Section 7 of S.B. 104 to be "short term loss of profits, long term loss of profits, and loss of good will." These concepts have been well defined by the Supreme Court of Alaska and the Supreme Court of the United States. They are well understood by business valuation experts and the accounting profession. The projection of future lost profits, based upon historical data of the business and those similarly situated, has been deemed to be the most reliable method of appraising lost profit damages by the Institute of Business Appraisers.

State's Position Paper Objections

The State's Position Paper of March 19, 1991 is correct in suggesting that lost profit damages are not compensable through federal funding and must be paid by the general fund. Even so, a condemning agency and the citizens of the state should not have a free lunch at the expense of a single taxpayer, operating a business upon land which the condemning agency covets. The property owner must be made whole for all loss.

The State alleges that millions of dollars of federal-aid highway funds would be lost in the current fiscal year if the effective date of the bill was the date upon which it was signed by the Governor. This could be cured easily by provision for an effective date, beginning at the close of the construction season of the year in which the bill is enacted, such as November 1, 199___. S.B. 104 should have no impact upon those projects which must be "obligated" (which requires that right-of-way acquisition is 100 percent complete). The declaration of taking is still available to condemning agencies and all these agencies must do is to perform good faith written appraisals of business loss and deposit the amount of those appraisals in court in conjunction with the declaration of

Pat Rodey
May 14, 1991
Page 5

taking. Allowing loss of profit damages has no effect upon this procedure, other than requiring a business loss appraisal and deposit based on that appraisal. The platting requirements prior to acquisition imposed by AS 09.55.275, to which the State objects, have been existing law since 1975.

Objections that compensation might be required for increasing or decreasing traffic flow, prohibiting certain turning movements, temporarily closing roads to traffic for maintenance or construction, regulating the size and weight of vehicles used by businesses, and condition or denial of certain driveway applications will open new causes of action are unfounded. The constitutional standard for "taking or damage" has been well defined by the Alaska Supreme Court. It is whether the property owner has been denied reasonable access for the type of business conducted on the property. B&G Meats, Inc. v. State, 601 P.2d 252 (Alaska 1979); Ault v. State, 688 P.2d 951 (Alaska 1984); and Alson v. State, 586 P.2d 1236 (Alaska 1978).

Contrary to the State's assertion, use of a declaration of taking procedure for accelerating transfer of title is not threatened by S.B. 104. All that is required is that the State or other condemning agency appraise lost profits, prior to filing a declaration of taking, as it does concerning just compensation for real property and deposit that amount in court along with the declaration of taking. The judge's discretion is limited to determining whether the appraisal was written, made in good faith, and whether a deposit for loss profit damages has been made. By utilizing the same planning techniques which have worked effectively in real property acquisitions, any condemning authority should have no more problem with providing appraisal of lost profit damages than it does, presently, with appraisal of real property values. The only problems which would be encountered by a condemning authority are those, such as the State's, concerning the Jewel Lake service station condemnations in Anchorage, where the State steadfastly refused to even analyze the potentiality for lost profit damages. A condemning authority should not be rewarded for such abuse of discretion.

On page 7 of the State's Position Paper, the State argues that S.B. 104 creates "time pressures" with disruptive impacts "to the construction and transportation industries." This is nothing more than an argument similar to that offered by the testimony of Joe Geldorf, Assistant Attorney General, at the Senate Affairs Committee hearing of March 6, 1991, to the effect that: "We know that the bill would be fair. But if we are fair, we can't afford to pour enough concrete." Neither the State nor any other condemning agency should treat the citizens of Alaska with such a cavalier attitude.

Pat Rodey
May 14, 1991
Page 6

Conclusion

A "flesh wound" to a business is a compensable at the present time. A "mortal wound," where the business cannot relocate, should also be compensable. S.B. 104 accomplishes this purpose.

My Best Regards,

PLETCHER, WEINIG,
LOTTRIDGE & MOSER

Richard A. Weinig
Richard A. Weinig

RAW/jv
22L.18

BRADBURY, BLISS & RIORDAN

LAWYERS

431 WEST 7TH AVENUE, SUITE 201
ANCHORAGE, ALASKA 99501-3583
(907) 278-4511 • TELEX 25-407
FACSIMILE: (907) 279-6211

RONALD L. DAIRD

May 8, 1991

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

Re: SB 104, Condemnation Practices

Dear Committee Member:

I am an attorney who has practiced condemnation law representing both condemnors and landowners. I wish to comment on SB 104. The views expressed herein are not those of any client but rather are my own.

I am opposed to the imposition of a requirement for paying "business damages" because I believe in the vast majority of instances where such damages will be asserted, compensation for them will essentially be duplicative of the compensation paid for the real property. I have been involved in a number of cases involving such claims. Typical of these is the taking of a fast food or other consumer-oriented business located along a major arterial. The landowner usually claims that his property is uniquely profitable because of its location. Such profitability almost always can be shown to affect the value of the real property and the landowner is compensated for this "business damage" when he receives fair market value for his land. Legislative recognition of "business loss" will in these scenarios simply invite creative ways to recover compensation for the taking of this type of property right more than once.

Additionally, the principal reason why the courts have been reluctant to extend constitutionally required compensation to "business loss" is the perception that in most instances, the business 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. Proponents of this bill simply have not made the case

that there are a significant number of additional situations where the existing law works unfairly. When balanced against the additional cost which the requirement of compensation for "business loss" will impose on public projects, I do not believe sound policy requires the adoption of this bill.

Even if one concludes that expansion of the types of compensation to be paid is warranted, the current bill is not the answer. "Business loss" or "business damage" are not terms which have clear meaning to condemnation lawyers, appraisers, business valuation experts or the accounting profession. Though it is against my personal interest to say so, SB 104 is a lawyer employment bill if there ever was one. The various disciplines I have referenced simply have not reached a consensus on defining this term or developing a methodology for measuring it. In the absence of theoretical and conceptual consensus in the various disciplines, it is unrealistic to expect a sound approach to emerge from a judicial definition of the term. Given time, it is conceivable that your staff in consultation with the condemnation bar could develop more narrowly drawn categories of loss which should be compensated but are not currently. Those definitions cannot be developed in the time frame of this legislature.

Finally, to the extent that you are considering revisions to compensation requirements in condemnation, I would urge the committee to consider the following proposed statute dealing with compensation for easement takings:

Compensation for Easement Takings.

Whenever an easement is taken for a public use, it shall be presumed that just compensation for such taking is equal to ____% of the fair market value of the fee simple interest in the portion of the parcel of land subject to the easement. Any party with an interest in the compensation to be awarded for such easement acquisition may extinguish the presumption created hereby in any proceeding for the determination of the amount to be paid for the interest by giving written notice to the court and the parties at such reasonable time as may be determined by the court by rule or otherwise.

This statute is designed to result in fair and uniform compensation for the taking of easements for utility facilities and other similar uses. The unfairness of the current system as well as the manner in which this statute would work are discussed at length in my article, Easement Condemnation in State v Dovle, Fair Market Value Without a Market which appears in the December 1989 issue of the Alaska Law Review. Enactment of this statute would provide a

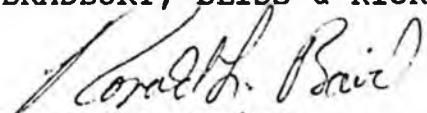
May 8, 1991
Page -3-

uniform policy for utilities throughout the state and insure uniform compensation to landowners throughout the state. Many utilities already have similar policies requiring the payment of ten percent (10%) of the fee value of the land affected by easements which they are acquiring.

I appreciate this opportunity to present my views.

Sincerely,

BRADBURY, BLISS & RIORDAN



Ronald L. Baird

RLB2:ss
rlb2\memo100

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

MEMORANDUM

DATE: May 10, 1991

TO: Committee Members
Senate State Affairs Committee

FROM: Senator Patrick M. Rodey, Chair
Senate State Affairs Committee

Pat

SUBJ: Proposed CSSB 104 (State Affairs)

7-LS0554\J

For your consideration today is the referenced version of SB 104, relating to condemnation practices by state agencies and municipalities.

The CS under consideration includes business loss and how it is to be determined in an eminent domain action (Section 3).

It defines "business loss" and "private injury" (Section 7).

The bill adds a definition of property to include short-term and long-term business interests over and above realty interests, and makes changes in the definition of a "displaced person" (Section 23).

It makes no new provisions for the valuation of "business goodwill".

These highlight the changes recommended in testimony in two previous hearings. The CS has an immediate effective date.

It requires state agencies to establish and operate relocation and payment programs (Section 11).

PMR/tb/memo002

PLETCHER, WEINIG, LOTTRIDGE & MOSER

ASSOCIATED IN THE PRACTICE OF LAW

DIMOND CENTER OFFICE TOWER
800 E. DIMOND BLVD., SUITE 3-620
ANCHORAGE, ALASKA 99515-2096

JOHN W. PLETCHER, III
A PROFESSIONAL CORPORATION

RICHARD A. WEINIG
ATTORNEY AT LAW

DOUGLAS D. LOTTRIDGE
ATTORNEY AT LAW

LARRY Z. MOSER
ATTORNEY AT LAW

TELEPHONE
[907] 349-1900

FACSIMILE
[907] 349-7758

KELLY C. FISHER
ATTORNEY AT LAW

CHARLES M. MERRINER
ATTORNEY AT LAW

ELLIOTT T. DENNIS
ATTORNEY AT LAW

TASHA M. PORCELLO
ATTORNEY AT LAW

April 19, 1991

The Honorable Pat Rodey
The State Senate
P.O. Box V
Juneau, Alaska 99801

Re: S.B. 104

Dear Senator Rodey:

I have examined Joseph W. Geldhof's letter to you of April 18, 1991, outlining the problems with S.B. 104 which are perceived by the Attorney General's office. There are only four objections, each of which is easily addressed.

OBJECTION NUMBER 1

Objection Number 1 states: "Payment of 'business loss' beyond the requirements of the Hammer case, i.e., where there is 'interruption' of the business, is not warranted;"

The term "interruption" is confusing because that term does not appear in the bill. Perhaps the Department of Law is referring to a question raised in the Senate Affairs Committee hearing of March 6, 1991, in which Senators Pourchot and Uehling inquired whether temporary closure of a road for a few hours would require compensation for business loss. As my testimony explained, the terms "taking" or "damage" are concepts of constitutional law which are well defined by the courts. "Damage," in the constitutional sense, is serious, substantial damage to a property right which is not de minimus. This is a matter to be determined by the court, not a jury. It is a concept governed by constitutional standards, which differ from the layman's interpretation of "damage," i.e., that if traffic is temporarily diverted from a business or that if there is a ten hour road closure, there is "damage." The Alaska Supreme Court's standard for "damage" in the constitutional sense is highly exacting and well defined. It is whether the property owner has been denied reasonable access for the type of business conducted on the property. B&G Meats, Inc. v. State, 601 P.2d 252 (Alaska 1979); Ault v. State, 688 P.2d 951 (Alaska 1984); Alsop v. State, 586 P.2d 1236 (Alaska 1978). If there is constitutional

RESPONSE TO CONCERNS

Pat Rodey
April 19, 1991
Page 2

"damage," payment of business loss is warranted. The Alaska Supreme Court, in State v. Hammer, has held that the Alaska Constitution requires full indemnification to the owner for property taken or damaged. Lost profit damages are property. State v. Hammer, 550 P.2d 820, 826 (Alaska 1976).

OBJECTION NUMBER 2

The second objection is that "business loss is not obviously defined in S.B. 104." This objection can be met easily by a slight amendment to Section 7 of the Committee Substitute bill, concerning AS 09.55.465(1). The Alaska Supreme Court has defined business loss as loss of profits. State v. Hammer, 550 P.2d 820, 823, 826, 827 (Alaska 1976); City of Palmer v. Anderson, 603 P.2d 495, 500 (Alaska 1979); Guard v. P&R Enterprises, 631 P.2d 1068, 1071-1072 (Alaska 1981); City of Whittier v. Whittier Fuel v. Marine Corp., 577 P.2d 216, 222, 225 (Alaska 1978). The State's objection could be met by clarification of the term "business loss" in light of those Supreme Court opinions:

- (1) "Business Loss" includes short-term loss of profits, [business loss] long-term loss of profits, [business loss,], and loss of good will;

OBJECTION NUMBER 3

Objection Number 3 states:

Proof of business loss, particularly loss of so-called 'good will' is difficult to establish and will result in protracted litigation;

The Alaska Supreme Court disagrees. In State v. Hammer, 550 P.2d 820, 824-825 (Alaska 1976)

Loss of profit damages have been awarded in a variety of civil contexts, including tort actions (both personal and business), breach of contract actions, anti-trust suits, and suits for infringement of a patent or a trademark. . . . Loss of profits damages are as susceptible of proof in an eminent domain case as in any other . . .

Pat Rodey
April 19, 1991
Page 3

OBJECTION NUMBER 4

Objection number 4 states:

requirements that increase the time before a condemning authority takes "possession," e.g., proposed Section 3 and 4 will result in unacceptable delay and essentially eviscerate the so-called "quick take" condemnation provisions.

Sections 3 and 4 of S.B. 104 are Sections 5 and 6 of the committee substitute bill. Neither will create undue delay or eviscerate quick take actions. They simply clarify a question, unresolved by the courts, concerning whether a court has the authority to determine whether the deposit of estimated just compensation in a declaration of taking action has been substantiated by one or more appraisals in good faith, whether the condemning authority has failed to comply with the Uniform Property Acquisition Act, or whether the condemning authority has failed to comply with the plating requirements of AS 09.55.275. AS 09.55.275 has been in effect since 1975. So long as the condemning authority has not grossly infringed upon constituents rights and tries to cut no corners, it is inconceivable how these provisions would "eviscerate" a declaration of taking action.

RELOCATION ARGUMENT

Jeffrey Ottesen suggests that the business compensation provisions of this bill be reincorporated into yet an unknown bill concerning revision of relocation statutes. I have reviewed Jeffrey Ottesen's fax of April 18, 1981 concerning these proposals. The items listed as "Relocation and Moving Expenses" and "Reestablishment Expenses" are desirable and should be statutorily enacted regardless of the status of S.B. 104 or the committee substitute. The provisions concerning Payment In Lieu of relocation are desirable, at the sole option of the condemnee.

However, the provisions concerning "Business Loss" are a poor substitute for S.B. 104 and, particularly, the committee substitute bill. Short term business loss is limited to \$50,000. Long term business loss is compensable only as a part of good will. Good will, if that is the condemnee's only remedy for lost profits or business loss, is contradictory to the holding in Hammer, that loss profits are a form of property which cannot be damaged without just compensation. The rationale for the Hammer, holding is that no individual property owner must be required to make a larger contribution to a public project than that of the general populace. The concept of good will is based upon "excess earnings," those which are greater than that of comparable enterprises. Limiting

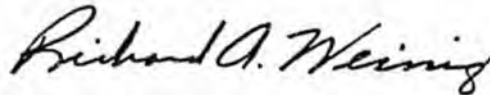
Pat Rodey
April 19, 1991
Page 4

the property owner to loss of good will necessarily restricts compensation for loss of profits to only certain, select, businesses: those more successful than their competitors. Even if a business is not more successful than its competitors, that business owner is entitled to lost profits and the business loss if such loss is legally caused by a constitutional taking or damage. Otherwise, he would be forced to bear a larger proportion of the cost of a public project than would other citizens.

In short, I recommend that the committee substitute for S.B. 104 be aggressively pursued, incorporating the change in definition of business loss which I have referenced previously.

My Best Regards,

PLETCHER, WEINIG,
LOTTRIDGE & MOSER



Richard A. Weinig

RAW/jv
cc: William Satterburg
22L.16

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

April 18, 1991

REPLY TO:

1031 W 4th AVENUE SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 276-3550
FAX: (907) 276-3697

1st NATIONAL CENTER
100 CUSHMAN ST. SUITE 400
FAIRBANKS, ALASKA 99701-4679
PHONE: (907) 452-1568
FAX: (907) 456-1317

P.O. BOX K—STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 463-5295

(907) 465-3603

The Honorable Pat Rodey
Alaska State Senator
P.O. Box V
Juneau, AK 99811

Re: SB 104

Dear Senator Rodey:

You requested the Attorney General's office provide you with a summary of problems we perceive with the current SB 104 legislation. Here are the problems we have with the bill in its current form:

1. Payment of "business loss" beyond the requirements of the Hammer case, i.e., where there is "interruption" of the business, is not warranted;
2. business loss is not obviously defined in SB 104;
3. proof of business loss, particularly loss of so-called "goodwill," is difficult to establish and will result in protracted litigation;
4. requirements that increase the time before the condemning authority takes "possession," e.g., proposed Section 3 and 4, will result in unacceptable delay and essentially eviscerate the so-called "quick take" condemnation provisions.

The Attorney General's office believes relatively minor alterations to the existing relocation statutes can solve many of the problems which gave rise to this legislative proposal. In that sense, we support the intent of Sections 7 and 8 in SB 104. We would be pleased to work with you and your staff on an amended

The Honorable Pat Rodey
Alaska State Senator
Re: SB 104

April 18, 1991
Page 2

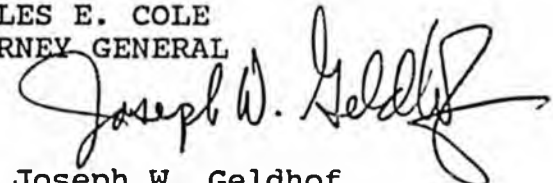
version of SB 104 which alters the existing relocation statutes contained in AS 29.35.

Please call if we can be of additional assistance.

Sincerely,

CHARLES E. COLE
ATTORNEY GENERAL

By:



Joseph W. Geldhof
Assistant Attorney General

JWG:ae

cc: Jeffrey W. Bush, Legislative/Regulations Attorney, Juneau AGO
Dwayne W. McConnell, Supervising Attorney, Transportation
Section, Anchorage AGO
Jeffrey C. Ottesen, Director, Equipment & Operations, DOT & PF
James Rockwell, Special Projects, Special Projects, Office of
the Governor
Catherine McHugh, Office of the Commissioner, DOT & PF

Alternate to SB 104

Attached is a summary of what can be paid now under relocation and what we would propose. In many instances, the only real change needed is an expansion of the 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.

| <u>Relocation Item</u> | <u>Current Law</u> | <u>Proposed Law</u> |
|--|-------------------------|---------------------|
| Relocation and Moving Expenses: | | |
| 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 reinstalling 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

| | | |
|---|--|--|
| Repairs or improvements to meet laws. | Covered, subject \$10k limit for all reestablishment expenses. | Increase limit to \$50k for reestablishment expenses. |
| Modifications to make property suitable. | Covered, subject \$10k limit. | Increase limit to \$50k. |
| Changes or replacement to signs. | Not to exceed \$1.5k for this item and total \$10k limit. | Not to exceed replacement of existing signs. |
| Provision of utility connections. | Covered, subject to \$10k limit. | Increase limit to \$50k. |
| Redecoration or replacement of soiled or worn surfaces at replacement site. | Covered, subject to \$10k limit. | Increase limit to \$50k. |
| Licenses, fees and permits when not covered by moving expenses. | Covered, subject to \$10k limit. | Increase limit to \$50k. |
| Surveys, soil testing, market studies. | Covered, subject to \$10k limit. | Increase limit to \$50k. |
| Advertising to notify patrons of new location. | Covered, subject to \$10k limit. | Increase limit to \$50k. |
| Increased cost of operation due to high taxes, insurance premiums, utility charges. | Not to exceed \$5k for this item and total \$10k limit. | Remove limit on this item and increase total limit to \$50k. |
| One time utility impact fees. | Covered, subject to \$10k limit. | Increase limit to \$50k. |

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.

DOT CONCERNS WITH SB 104

Business Losses

| | | |
|----------------------------|--|--|
| 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.

| | | |
|--|---|---|
| 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. |
|--|---|---|

Division of Engineering and Operations Standards
Alaska Department of Transportation
and Public Facilities

PO Box Z
3132 Channel Drive, Room 200
Juneau, Alaska 99801-2500

Voice (907) 465-2951

Facsimile Transmittal Form

Our FAX number is (907) 465-2460

Addressed to: Tim B. Senator Rodeg's office

Fax #: 463 3144

Voice #: _____

- From:
- Jeffery C. Ottesen, Director
 - Cathi Burger, Admin. Assistant
 - Bruce Bowler, Acting Chief, Right-of-Way
 - Loren Rasmussen, Chief, D&C Standards
 - Bruce Freitag, Chief, M&O Standards
 - Larry Carlson, Acting Chief, Bridge Design & Inspection
 - _____

Total number of pages (including this sheet): 3

If there are problems with transmission, please call Cathi Burger at (907) 465-2951

Comments: It's been reviewed and a few changes made. It would still require several funds that would not slow projects or add to the current caseload back log.
Thanks for working with us.

Date: March 6, 1991

To: Senator Pat Rodey
Members, Senate State Affairs Committee

From: Jim Morgan
Anchorage, AK

Re: SB-104, compensation for taking of or damage to
property by public agencies and other entities.

Written testimony from Mr. Morgan

I wish to make known my support of SB-104. My partner and I bought Sand Lake Texaco in July, 1979. We acquired a seven year SBA Loan and an additional eight year loan carried by the previous owner. We paid them off in full and on time. These loans only bought the business. The real estate improvements are owned by Texaco who in turn leases them to us.

When we were first notified about the Raspberry Road Project we were told by DOT that our business would be taken completely. There is no other place in the Sand Lake area to re-establish this business. We were informed that the only compensation we would receive was moving expenses and \$1000 to find another location. This stance by DOT remained until they were forced to deposit for short term loss by a court decision. DOT was denied possession to the Chevron property for this reason. They were then denied possession to our property for lack of deposit for long term loss; two times by Judge Gonzales. DOT filed a third motion for possession after a change in judges and was granted possession under the same circumstances they were denied possession before.

We then had a masters hearings and we were awarded short and long term business loss. The amounts awarded were not even close to realistic and we appealed asking for a jury trial. We are waiting for that at this time.

The cost of this litigation has been astronomical and eventually will have to be paid for by the State. The pressures put on us and everyone else

impacted by condemnation are enormous and in my feeling, borders on being criminal. No one should have to go through what we have in the past few years.

I believe that we will do very well in a jury trial. I believe this because of the absolute shock and horror of many of the people I have discussed this with. I have made presentations to eight different community councils so far and have received resolutions of support from all of them for this legislation. These councils include, Sand Lake, Spenard, Turnagain, Taku-Campbell, Rabbit Creek, Abbott Loop, Mid-Hillside, and Airport Heights. All their resolutions were unanimous except for Airport Heights, where one person was against it.

The State and Municipality should not be adversaries when involved in condemning property. The Raspberry Road project has been delayed for several years because of DOT's actions. The negative effect of the citizens involved has been enormous. At least \$4 million has been wasted on this project because of the State's attitude and actions. The State is going to have to pay for this in the long run.

We need a law that is strong enough to force the State and municipalities to deal honestly and fairly with people impacted by condemnation. It should not be necessary for citizens to have to revert to expensive litigation to force the State or municipality to do what it should do in the first place. Projects will be cheaper, they will get done faster and citizens will not be faced with fighting for their rights against unlimited funding.

The time is now. Make SB-104 a law.

signed / Jim Morgan

SB 104

Michael G. Cluff

March 5, 1991

D.B.A. Jewel Lake Tastee-Freez

6707 Jewel Lake Rd.

Anchorage, Alaska 99502

Subject;

Senate bill # 104

Senators;

I am presently going through the ordeal of condemnation.

The property that I lease is being taken for the Raspberry Road project. I can truly say this legislation is necessary to help someone who is forced to move his business and no location is available within the customer base area where the business has been established. Many business are very area specific and can not survive in just any location.

The day before a project is public knowledge a business has a market value equal to it's long term value. That is, the amount someone would pay to receive the long term profit potential of the business. The day after the project starts this value is zero if that business can not be reestablished.

I feel the taking entity should look at displaced business on a case by case bases, and be required to compensate for all the damages and loses not only to the property owners, but the business in those properties as well.

Sincerely,

Michael G. Cluff


To whom it may concern,

Mar 5, 1991

In regard to Senate Bill 104 I would like to offer the following brief testimony.

In July of 1981 I purchased a restaurant located in the 2500 block of W. Northern Lights Blvd. for \$70,000.00. Hard work and an excellent location allowed me to increase sales from \$300,000.00 in 1981 to \$500,000.00 by December of 1984. During this same period I invested an additional \$100,000.00 in new equipment and upgrades to the restaurant.

In May of 1985 I was advised the property I was located on would be taken for the widening of West Northern Lights Blvd. I was further told I would have 60 days to vacate the property and compensation would be forthcoming.

To my amazement, the compensation offered was \$53,000.00 which at the time would not have begun to cover the costs of relocation let alone outstanding debt and loss of livelihood. After litigation, which lasted until 1989 I received an additional \$80,000.00. If one were to deduct legal expenses, I received a net of \$107,000.00 all of which went to pay outstanding debt and living expenses until I was able to secure fulltime employment in August of 1986.

I was amused to read an interview in the Daily News in April of 1985 that told of the Municipality's desire to leave business's and private homeowners affected by condemnation in the same situation they were in prior to the taking of their assets. Simple mathematics would indicate this was hardly the case in my situation.

Sincerely,



Michael K. Anderson

(907) 248-2201

February 25, 1991

Representative Betty Bruckman
Post Office Box V
Juneau, Alaska 99811

MAR 1 1991

re: Senate Bill 104, Resolution to Support

Dear Representative Bruckman,

Please note that on February 20, 1991, the Mid-Hillside Community Council passed a resolution to support Senate Bill 104 dealing with property/business owner's rights when their property is condemned due to road projects.

Sincerely,

Mary Ann Bullock

Mary Ann Bullock, President
Mid-Hillside Community Council
PO Box 112011,
Anchorage, AK 99511
345-7115

217 Second Street, Suite 201
Juneau, Alaska 99801
(907) 586-2323
FAX (907) 463-5515



April 3, 1991

Senator Pat Rodey
Alaska State Senate
P.O. Box V
Juneau, Alaska 99811

Dear Pat:

Several months ago we were informed about the rather extensive background to the problems of condemnation practices as those practices impact businesses caught up in a property condemnation proceeding. As a consequence, we were quite pleased to note the appearance of SB 104 and we wish to go on record of being in strong support of this legislation. Just compensation and action for a business which has been taken or damaged is both fair and humane.

We listened with great interest to the testimony offered in the initial hearings (L & C) on this matter and would have no objection should the bill be modified to accommodate the concern raised by DOTPF in relation to construction projects which are currently underway.

The members of the Alaska State Chamber of Commerce want to thank you for your role as a sponsor of SB 104 and are reassured that you share in our concern for the legitimate concerns of the business community.

Cordially,

A handwritten signature in black ink, appearing to read "George Krusz". The signature is written in a cursive style with a large initial "G" and "K".

George Krusz
President

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

Senate Bill 104

SB 104 proposes to amend several statutes dealing with the taking of property under eminent domain proceedings. The bill provides for more thorough determination of business loss caused by the taking or damaging of property, to include short and long term loss, and the loss of goodwill.

It provides new responsibilities for masters in eminent domain actions. It directs a court, upon a motion of an interested party, to order the payment of deposited money to the person or persons entitled, immediately, where now the courts simply MAY order payment.

The bill provides for delays in the right of entry, and for courts to determine estimated just compensation substantiated by appraisals prepared in good faith. Under SB 104, state agencies will be required to establish and operate relocation and payment programs for persons displaced. There are changes to the definitions of "displaced persons".

SB 104 will address issues affecting many small businesses and franchisees in the state. It will provide a more realistic evaluation of business loss, and provide for better procedures and review opportunity for those persons suffering a loss due condemnation.



Senate

**SUMMARY OF CALIFORNIA'S PROVISION
FOR LOSS OF BUSINESS GOODWILL**

Section 1263.510 (Burden of Proof) (page 343 attached):

California defines goodwill as consisting 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."

The owner of a business on the impacted property 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.
2. The loss cannot reasonably be prevented by a relocation, or by taking steps that a reasonably prudent person would take in adopting procedures to preserve the goodwill.
3. Compensation for the loss will not be included in other state program payments.
4. Compensation for the loss will not be duplicated in awards otherwise due the owner.

The burden of proof of loss is on the property or business owner. The concept of determining "fair market value" was sanctioned by the legislature. The determination of loss of goodwill is governed by the "rules of evidence", not by special rules relating to valuation in eminent domain law.

California law provides for compensation for loss of goodwill only to the extent it cannot reasonably be prevented by relocation or other efforts by the owner to mitigate.

The California Legislature intended for payment of loss of goodwill to be discretionary, and such an increased cost so incurred as a result of the enactment of the revised eminent domain laws was not a cost which municipalities were required or mandated to incur.

Section 1263.520 (State Tax Returns) (page 345 attached):

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.

Section 1263.530 (Scope of Article) (page 345 of attached):

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

PMR/tb

Comparison of Alaska and California Concerning Business Losses

California is the only state 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. Following is a side-by-side comparison of a number of characteristics of the California law with the proposed bill.

| | California | Alaska |
|---|--|---|
| Consideration | Title 7, Chp. 9, Art. 6, Sec. 1263.510 - 530 | SB 104 |
| What is Compensable: | Loss of business goodwill, such as decline or temporary dropoff in patronage. Temporary interference loss or loss by interruption is specifically excluded. | Loss of short & long term business losses, loss of goodwill and private injury. |
| Definitions | 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. |
| Quicktake Procedure | No change in Quicktack procedures | 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 just "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 | NA | No longer a required step to be used 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. |

CALIFORNIA

ARTICLE 6

Compensation for Loss of Goodwill

- § 1263.510. Burden of proof
- § 1263.520. State tax returns
- § 1263.530. Scope of article

Collateral References:

Witkin Summary (8th ed) Constitutional Law § 735A.
Am Jur 2d Eminent Domain §§ 285 et seq.

Law Review Articles:

Basis of denial of compensation for loss of good will. 6 Cal Western LR 57.

Annotations:

Good will or "going concern" value as element of lessee's compensation for taking leasehold in eminent domain. 58 ALR3d 566.
Good will as element of damages for condemnation of property on which private business is conducted. 81 ALR3d 198.

§ 1263.510. [Burden of proof]

(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.

Added Stats 1975 ch 1275 § 2, operative July 1, 1976.

Law Revision Commission Comment:

Section 1263.510, which is the same in substance as Section 1016 of the Uniform Eminent Domain Code, is new to California eminent domain law. Under prior court decisions, compensation for business losses in eminent domain was not allowed. See, e.g., *City of Oakland v Pacific Coast Lumber & Mill Co.*, 171 Cal 392, 153 P 705 (1915); but see *Community Redevelopment Agency v Abrams*, (hearing granted by Supreme Court 1974). Section 1263.510 provides compensation for loss of goodwill in both a whole or a partial taking. Goodwill loss is recoverable under Section 1263.510 only to the extent it cannot reasonably be prevented by relocation or other efforts by the owner to mitigate.

The determination of loss of goodwill is governed by the rules of evidence generally applicable to such a determination and not by the special rules relating to valuation in eminent domain contained in Article 2 (commencing with Section 810) of Chapter 1 of Division 7 of the Evidence Code. See Evid. Code § 811 and Comment thereto. Thus, the provisions of Evidence Code Sections 817 and 819 that restrict admissibility of income from a business for the determination of value, damage, and benefit in no way limit admissibility of income from a business for the determination of loss of goodwill. Notwithstanding Section 1260.210, the burden of proof is on the property owner under this section.

Section 1263.510 compensates for goodwill loss only to the extent such loss is not compensated by Government Code Section 7262 (moving expense and moving losses for relocated business or farm operations; in-lieu payments for business or farm operation that cannot be relocated without a substantial loss of patronage). See also Sections 1263.010 (no double recovery), 1263.410 (offset against benefits to remainder).

Collateral References:

29 Cal Jur 3d Eminent Domain § 81.

Law Review Articles:

Maleck, Loss of business good will in eminent domain proceedings. (1978) 53 St BJ 32.

Annotations:

Good will as element of damages for condemnation of property on which private business is conducted. 81 ALR3d 198.

NOTES OF DECISIONS

The right to damages and the value of the property taken in an inverse condemnation action are normally determined as of the time of the damage or taking. Thus, in an action by a taxicab company against a city for damages for inverse condemnation due to the loss of business allegedly caused by the city's commencement of a competitive transportation service, plaintiffs could not avail themselves of Code Civ. Proc., §§ 1263.510 and 1230.065, declaring that as of 1976, good will of a business is compensable to a certain extent, where the loss of plaintiffs' business had occurred more than one year prior to 1976. *Hladek v Merced* (1977) 69 CA3d 585, 138 Cal Rptr 194.

In an eminent domain proceeding, the trial court's

denial of defendant's claim for compensation for loss of business good will, on the ground the complaint in the proceeding was filed one day before the statute permitting compensations for loss of business good will became effective, did not deny defendant equal protection of the laws, where the statute in question did not touch on a fundamental right, but fell within the area of economic regulation and was therefore subject to the rational relationship test. It is a necessary function of the Legislature to expand and change the law to meet modern conditions, and it was within the power of the Legislature, in the field of economic regulation, to specify a date certain when a new enactment will take effect. The rational relationship between

the statute and the governmental objective concerned orderly transition and was constitutionally justified for that reason. Carson, Redevelopment Agency v Wolf (1979) 99 CA3d 239, 160 Cal Rptr 213.

§ 1263.520. [State tax returns]

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.

Added Stats 1975 ch 1275 § 2, operative July 1, 1976.

Legislative Committee Comment:

Section 1263.520 is comparable to a portion of Government Code Section 7262(c). The state tax returns remain confidential under this section and may not be introduced in evidence in the case. See, e.g., Rev & Tax Code §§ 19282 (personal income tax), 22451 (bank and corporation tax).

Collateral References:

29 Cal Jur 3d Eminent Domain § 81.

§ 1263.530. [Scope of article]

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

Added Stats 1975 ch 1275 § 2, operative July 1, 1976.

Legislative Committee Comment:

Section 1263.530 makes clear that this article is not intended to affect the rules relating to compensation for temporary business losses. This matter is left to continuing case development.

Collateral References:

29 Cal Jur 3d Eminent Domain § 81.

Law Review Articles:

Compensation for injury to business. 4 CLR 248.
Unsoundness of California's noncompensability rule as applied to business losses in condemnation cases. 20 Hast LJ 675.

Annotations:

Good will as element of damages for condemnation of property on which private business is conducted. 81 ALR3d 198.

possibly have been found for its adhesives manufacturing plant, where there was no data available from which to determine the actual demand or fair market value of the property because of the special use made by defendant of it, and where expert witnesses presented evidence based on the market value of the property for the sole purpose for which it could reasonably be used. When special use property is involved, the opinions of experts and the data on which such opinions are based are entitled to greater deference for lack of any other objective standards such as the price which might be obtained were a buyer readily ascertainable. *Commerce City v National Starch & Chemical Corp.* (1981) 118 CA3d 1, 173 Cal Rptr 176.

In determining severance damage in an eminent domain proceeding, such factors as the size and shape of the remainder, and impairment of use of the property by showing the uses to which the property was adaptable prior to the taking and the limited uses to which the property may be devoted thereafter may properly be considered. *Commerce City v National Starch & Chemical Corp.* (1981) 118 CA3d 1, 173 Cal Rptr 176.

In eminent domain proceedings by a city for the taking of a right of way and slope easements for street purposes which bisected industrial property owned by defendant and operated as a plant for manufacturing adhesives, there was ample evidence to support the findings of the trial court that the remaining life of the machinery and fixtures on the property was reduced to six years and to support its use of the calculations of severance damages based on that determination in making its award, where evidence was presented that because of the taking and the resulting loss of expansion space, the plant would have to be discontinued or relocated within three to five years, where there was expert opinion that the property was a special purpose property which could not sell for the highest price to anyone who

wished to make any other use of it than an adhesives manufacturing plant, where the real property appraiser for defendant testified he took into consideration the economic feasibility of continued use of the facilities only to the extent it affected the present market value of the real property, including the machinery, equipment and fixtures, and where the city introduced no expert evidence either as to the value of the machinery and equipment in before or after taking condition or as to the character and special needs of the adhesive industry. Defendant's evidence of substantial impairment of use which diminished the market value of the property was admissible; although loss of profits is not compensable in eminent domain, compensation for diminution in value of the remainder for its prior higher and best use is constitutionally compelled. *Commerce City v National Starch & Chemical Corp.* (1981) 118 CA3d 1, 173 Cal Rptr 176.

Under the statute governing condemnation damages (Code Civ. Proc., § 1263.420), which provides a condemnee may recover any "damage . . . caused to the remainder by . . . (a) [t]he severance [or by] . . . (b) [t]he construction and use of the project for which the property is taken," it is damages caused by the taking that are the subject of a condemnation action; accordingly, expenses of mitigating damages may be awarded only if they have been incurred in mitigation of damages caused by a taking, not if they have been incurred to prevent or partially prevent a taking. Thus, legal and engineering expenses incurred by landowners attempting to compel a county water agency to comply with the plans and environmental impact report for a water pipeline project that traversed their land, which were expenses incurred to alter the taking of their land for the project rather than to mitigate damages caused by the taking, could not be recovered as condemnation damages. *Placer County Water Agency v Hofman* (1985, 3d Dist) 165 Cal App 3d 890, 211 Cal Rptr 894.

§ 1263.430. [Benefit to remainder]

Witkin Summary (9th ed) Constitutional Law § 1029.

§ 1263.440. [Time of damage or benefit]

Witkin Summary (9th ed) Constitutional Law § 1022.

§ 1263.450. [Basis of compensation]

Witkin Summary (9th ed) Constitutional Law § 1022.

§ 1263.510. [Burden of proof]

Witkin Procedure (3d ed) Plead § 1037.

Witkin Summary (9th ed) Constitutional Law § 1031.

Cal Jur 3d (Rev) Eminent Domain §§ 81, 167, 320.

Miller & Starr, Cal Real Estate 2d §§ 18:83, 23:1.

Code Civ. Proc., § 1263.510, which authorizes compensation for the loss of business goodwill caused by a forced relocation due to condemnation, was enacted with the purpose of providing monetary compensation for the kind of losses which typically occur when an ongoing small business is forced to move and give up the benefits of its former location. Thus, where a condemnation proceeding forced a veterinarian to move his practice from an older building with cheap rent which enabled the practice to show a profit to a new building with a rent of about \$29,000 per year higher, but at which the practice maintained its patronage, the veterinarian was entitled under Code Civ. Proc., § 1263.510, to compensation for the loss of the benefit of lower rent. The statute does not limit goodwill to patronage. *People ex rel. Dept. of Transportation v Muller* (1984) 36 Cal 3d 263, 203 Cal Rptr 772, 681 P2d 1340.

The defendants in an eminent domain proceeding were not entitled to recover compensation for loss of business goodwill under Code Civ. Proc., § 1263.510 (part of the new eminent domain law (Code Civ. Proc., § 1230.010 et seq.) which became operative on July 1, 1976), where the proceedings were initiated in 1973. Prior to enactment of the new law, compensation for loss of goodwill was not available in eminent domain proceedings, and, although a prior judgment had been reversed on appeal and the case had been retried after the operative date of the new law, Code Civ. Proc., § 1230.065, subds. (b) and (d), explicitly provide that the new law does not apply to an eminent domain proceeding commenced prior to January 1, 1976, and that, if an appeal is pending on the operative date, the law applicable prior to the operative date governs the determination of the appeal. *County of San Diego v Morrison* (1984, 4th Dist) 153 Cal App 3d 233, 200 Cal Rptr 187.

A county's payment for business goodwill in a condemnation proceeding it elected to pursue did not constitute the payment of a state-mandated cost under Rev. & Tax. Code, § 2231, subd. (a), and Rev. & Tax. Code, § 2207. Although Stats. 1975, ch. 1275, which revised and recodified the state's eminent domain laws, included the requirement that upon proof of satisfaction of certain stated conditions the owner of a business conducted on the condemned property is entitled to compensation for a loss of goodwill (Code Civ. Proc., § 1263.510), the Legislature made clear the

discretionary nature of acquisition of property by eminent domain by the passage of Code Civ. Proc., § 1230.030 (also included within Stats. 1975, ch. 1275). Thus, the Legislature intended for payment of goodwill to be discretionary, and such an increased cost so incurred as a result of the enactment of the revised eminent domain laws was not a cost which the county was required or mandated to incur. *City of Merced v State of California* (1984, 5th Dist) 153 Cal App 3d 777, 200 Cal Rptr 642.

In an eminent domain proceeding, the trial court properly refused an instruction requested by the condemning redevelopment agency that the property owner had the burden of proof to establish the value of goodwill lost as a result of the condemnation. Code Civ. Proc., § 1260.210, subd. (b), states that neither plaintiff nor defendant has the burden of proof on the issue of compensation, unless otherwise provided by statute, and Code Civ. Proc., § 1263.510, did not support the instruction requested by the redevelopment agency. That statute is limited to delineating the circumstances under which a defendant is entitled to any compensation for goodwill and is devoid of any reference to the amount thereof. There is nothing in the statutory scheme of the Eminent Domain Law (Code Civ. Proc., § 1230.010 et seq.) suggesting there is any logical reason to treat the burden of proof as to the amount of compensation for loss of goodwill any differently than for a taking of an interest in realty itself. Further, § 1263.510 is to be construed liberally to extend the remedial benefits of its provisions as fully as possible. *Redevelopment Agency v Metropolitan Theatres Corp.* (1989, 4th Dist) 215 Cal App 3d 808, 263 Cal Rptr 637.

A fair market value approach is an acceptable approach in determining the capitalization rate to apply to excess income in valuing lost goodwill of a business, in that neither Code Civ. Proc., § 1263.010 (compensation of property taken by eminent domain), nor valuations of goodwill in other contexts indicate an exclusive method for calculating lost goodwill. The plain language of Code Civ. Proc., §§ 1263.010 and 1263.510 (loss of goodwill) indicates the Legislature at least sanctioned a fair market value analysis in determining the value of loss of goodwill. *Community Development Com. v Asaro* (1989, 4th Dist) 212 Cal App 3d 1297, 261 Cal Rptr 231.

ARTICLE 1

General Provisions

Cal Jur 3d (Rev) Eminent Domain § 65.

7 Fed Proc, L Ed, Condemnation of Property §§ 14:139 et seq.

Bargaining in the shadow of eminent domain: Valuing and apportioning condemnation awards between landlord and tenant. (1987) 34 UCLA LR 1083.

ARTICLE 2

Leases

Eminent domain: measure and elements of lessee's compensation for condemnor's taking or damaging of leasehold. 17 ALR4th 337.



*Department of Transportation
and Public Facilities*

POSITION PAPER

BILL NO: SB 104

APPROVED: *Frank G. Turpin*
Frank G. Turpin, Commissioner

TITLE: 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.

DATE: March 19, 1991

Statement of Position

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.

**Attachment A
Concerning:**

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.

By

Department of Transportation and Public Facilities

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 its 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 there 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--replatting 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 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

This bill appears to be generated by a few recent business property acquisitions with very complex and unusual circumstances. Despite this, two cases have been resolved and the third appears headed toward settlement. Such a broad change in state policy should not be driven by what are essentially exceptions to a functioning policy. In most circumstances the current law works reasonably well and results in takings, either negotiated or thru condemnation, that fairly compensate the land and business owners. The exception is when a business cannot be relocated or is relocated to a less desirable location. In these infrequent circumstances current law provides only nominal compensation for a business which must close or incur higher costs because acceptable relocation is not possible. The current limit for such compensation is \$20,000.

We would recommend that in such circumstances the upper limit of compensation be increased which would only require a change to AS 34.60 (Relocation). A change of this nature would resolve the inequity created when relocation is not possible but would avoid the tremendous costs, delays and confusion we predict. Further, perhaps this type of loss should be eligible for after-the-fact analysis, when such factors as the owner's good faith efforts and actual business experience can be fairly determined. While some of these costs would also be ineligible for federal reimbursement, the likely overall cost in state funds would be much less.

If, however, some form of amendment to the eminent domain statute is required we would ask that the California statute be used, and that particular attention be paid to the issue of definitions and intent.

WALTER J. HICKEL, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

March 6, 1991

The Honorable Patrick Rodey
Alaska State Legislature
P. O. Box V
Juneau, AK 99811

Re: SB 104

Dear Senator Rodey:

I recently spoke with your aide, Tim Benintendi, regarding SB 104 and he requested my comments in writing. The Department of Commerce & Economic Development, Division of Investments has questioned whether Senate Bill 104 is intended to apply to a foreclosure of real property conducted pursuant to a deed of trust. While portions of the bill seem clearly to apply to eminent domain (see for example sections 1 - 7), some sections could arguably apply to a foreclosure conducted by a state agency pursuant to a deed of trust or judgment. (See for example, section 9, "persons displaced as a result of [FEDERALLY ASSISTED] activities undertaken by state agencies")

A possible solution to clarify that the program in AS 34.60 does not apply to foreclosure would be to add a provision to the definitions contained in section 21 as follows. "(8) "taking" does not include a foreclosure conducted pursuant to AS 09.35 or AS 34.20." While this change will address the concern of the Division of Investments, we do not speak for other state agencies and understand that the Department of Transportation and Public Facilities is undertaking its own careful review of the bill.

REPLY TO:

1031 W 4th AVENUE SUITE 200
ANCHORAGE, ALASKA 99501-199
PHONE: (907) 276-3550
FAX: (907) 276-3697

KEY BANK BUILDING
100 CUSHMAN ST. SUITE 400
FAIRBANKS, ALASKA 99701-4679
PHONE: (907) 452-1568
FAX: (907) 456-1317

P.O. BOX K— STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 463-5295

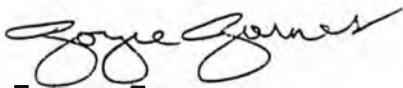
The Honorable Patrick Rodey
Alaska State Legislature

March 6, 1991
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Thank you for your attention to this concern. Please let
me know if I may be of further service.

Sincerely,

CHARLES E. COLE
ATTORNEY GENERAL

By: 
Joyce James
Assistant Attorney General

JJ:prm

cc: Martin Richard, Director
Division of Investments
Department of Commerce & Economic Dev.