

SB

1900

MEMORANDUM

State of Alaska
Department of Law

TO: Dennis Poshard
Legislative Liaison

DATE: April 29, 1998

FILE NO.:

TELEPHONE NO.: 465-3600

W.F.C.
FROM: William F. Cummings
Assistant Attorney General
Transportation Section - Juneau

SUBJECT: SB 190 (JUD)

I have serious reservations regarding SB 190 (JUD). While the amendments made to the bill in the Senate Judiciary Committee have clarified the language, the bill has a number of unresolved problems.

This bill is unnecessary. DOT&PF acquires between two and five percent of its land acquisitions through condemnation actions. The rest of its land acquisitions, i.e., more than 95 percent of the total, is acquired through voluntary negotiations. It is not credible to argue that DOT&PF does not make good faith efforts to acquire interests in land cases through negotiations before filing condemnation cases.

Under existing law, a taking in a condemnation case can be voided if the property owner can prove that it was not acquired in a manner consistent with the "greatest public good and least private injury." This standard allows an aggrieved property owner to successfully attack a taking, if he/she can prove that the taking is arbitrary, capricious, or an abuse of discretion. The analysis under this existing language requires that the condemning authority carefully balance the public needs against private injury, with the intent to maximize the public benefit, but minimize private injury. This analysis would include whether the interest that DOT&PF seeks to acquire is appropriate for the facility to be constructed.

Under SB 190 two new means to challenge a taking are provided, i.e., the property owner could argue the interest to be acquired is not appropriate for the facility to be constructed and the negotiations, conducted prior to filing, were not made in good faith. These sorts of determinations are incredibly fact dependent and would be complicated to address in a judicial proceeding. The result of requiring these sorts of analysis in superior court will be to delay badly needed public projects until their resolution. This consequence is particularly troublesome because the bill addresses problems that do not exist.

I have written this memorandum from the perspective of DOT&PF. Senate Bill 190 (JUD) would have a similar impact upon condemnation actions filed by municipalities.

Dennis Poshard
Legislative Liaison
DOT&PF

April 29, 1998
Page 2

If you have any questions on this matter, please contact me at your earliest convenience.

WFC/bap

KODIAK OFFICE
112 MILL BAY ROAD
KODIAK, ALASKA 99615
(907) 486-4925
(907) 486-5264 (FAX)



STATE CAPITAL
JUNEAU, ALASKA 99801-1182
(907) 465-4925
(800) 821-4925 (TOLL FREE)
(907) 465-3517 (FAX)

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SECTIONAL

CS SB 190 (JUD)

Section 1. This section specifically includes that property interests must also be necessary for the authorized public use as a prerequisite for an eminent domain taking.

Section 2. This section provides a new condition that a good faith effort to negotiate the purchase of the property interest is also required prior to an eminent domain taking. However, in any dispute over nature of the negotiation, it is the opposing party's burden of proof to show that a good faith effort was not made.

Section 3. A statement that the good faith effort has been made (or in certain circumstances, not made) to purchase of property is added to the list of contents in a declaration of taking.

Section 4. The appeals section is amended to allow a court denial of an eminent domain taking if it finds that a good faith effort to purchase was not made.

Section 5. Effective date clause.

SENATE DISTRICT C
KODIAK ISLAND
SOUTHEAST ISLANDS



STATE CAPITOL
JUNEAU, ALASKA 99801-1182
(907) 465-4925
(800) 821-4925 (TOLL FREE)
(907) 465-3517 (FAX)
Senator_Jerry_Mackie@legis.state.ak.us

SENATOR JERRY MACKIE

ALASKA STATE LEGISLATURE

SPONSOR STATEMENT

SB 190, Require Negotiations Prior to Eminent Domain Taking.

I introduced SB 190 to bring fairness and expediency to state and municipal government actions which require the acquisition of private land for public purposes. The usual practice is to acquire private property through condemnation proceedings. This is a process where the governmental entity exercises the power of eminent domain to take the property and compensate the owner with or without the private owner's consent or agreement. The only recourse for an unwilling owner is to challenge in court the validity of the takings public purpose and the amount of compensation. In most cases the court's consideration is principally to determine the appropriate level of compensation. For both the governmental entity and the private property owner, this can be an expensive and time consuming procedure. For many landowners the prospect of contesting a condemnation proceeding in court is often beyond the landowner's financial abilities to pursue. In these situations, the landowner is at the mercy of the governmental entity, the extent of its property desires, and its method of determining compensation.

SB 190 would simply require that, prior to condemnation, a "good faith" effort is made to purchase private property through negotiations with the property owner. At least 23 states have similar requirements.

***Issue: Should the State be Required to Undertake
Good Faith Negotiations With a Private Landowner
Before Taking Property by
Eminent Domain (SB 190)***

Description of the Issue: Should the State of Alaska be required to conduct good faith negotiations with a private landowner before initiating eminent domain proceedings against that landowner?

Discussion of the Issue: At least 23 states require that the State, before taking property through eminent domain, make a good faith effort to acquire the property by consensual purchase. And, the drafters of the Uniform Eminent Domain Code recommend such a requirement in model state legislation. Although Alaska agencies will often undertake negotiations as a matter of practice, there is no current requirement in Alaska law that they do so.

A "good faith negotiations" requirement sets a cooperative tone in the state's dealings with its private sector. Moreover, supporters believe that it minimizes the likelihood of contested litigation, since the government and the private party begin their relationship as negotiators rather than adversaries.

Moreover, because the clause is common, there is considerably judicial precedent giving the clause a common sense interpretation. No prolonged face-to-face negotiations are required. A reasonable offer, based on full disclosure, and a willingness to consider timely counteroffers, is sufficient. And, the requirement does not apply where it is not practical--such as where the owner can't be found, or is incapable of conveying title.

Recommendation: In a state with so limited a private property base, the use of eminent domain should be a last resort in Alaska. SB 190 would establish precisely such a policy by requiring that a good faith effort to purchase be made before property is involuntarily taken. The bill would also require the state to justify the particular interest in the property taken, in order to avoid a more intrusive interest being taken than is necessary to accomplish the state's goal.