

SB

278

HFIN

FILE

Philip B. Evans
Owner, Association President
North Gate Square Commercial Condominiums

PO Box 85103
Fairbanks, AK 99708
(907) 479-5407

February 6, 2002

Senator Gary Wilken
State Capital Building
Juneau, AK 99801-1182

Dear Senator Wilken:

The State of Alaska Department of Transportation recently took a portion of my property to use for a road construction project. I would like to make you aware of my experience with them.

1. Prior to condemnation being filed, the person representing the State was courteous but misleading in attempting to convince me to accept a settlement that was completely unfair.
2. Prior to condemnation being filed, the State appraiser provided no meaningful information. She was quite insistent about her authority to be on my property and utilize space in a business located in the mall for her office. She was deceptively courteous and misleading in her attempt to promote an unfair evaluation of the property.
3. The State did not provide me a copy of their completed appraisal report and Market Data Book.
4. I was unable to settle with the State based on that appraisal because the compensation was totally inadequate and unfair.
5. The appraisal did not fairly set forth the value of the Taking and the consequences to the Remainder Property.
6. In the appraisal of my property, the "Before the Taking Value" was based on the current use of the property rather than the "Highest and Best Use" of the property.
7. The following items were not fairly considered when analyzing the effects of the Right-of-Way Taking on my property:
 - a. Loss of parking
 - b. Change in Highest and Best Use
 - c. Decline in Market Appeal
 - d. Change in the Business Use of the property
 - e. Decline in Market Value
8. When it became apparent the State was misleading and unfair in their attempts to reach settlement, I hired an attorney and an appraiser to provide me accurate and fair counsel.
9. The State appraiser concluded that just compensation for the property taken and damages was \$80,229. The appraiser for North Gate Square and Philip Evans concluded that just compensation for property taken and damages was \$676,000. As a consequence, we proceeded to hearing.
10. Frank King, an appraiser, was appointed by the State to preside over the Master's Hearing. At the conclusion of the Hearing, Mr. King rendered a decision awarding \$324,000, for property taken and damages. Although this was approximately half of the amount sought, I decided rather than continue with litigation I would settle. The State subsequently appealed.

Philip B. Evans
Owner, Association President
North Gate Square Commercial Condominiums

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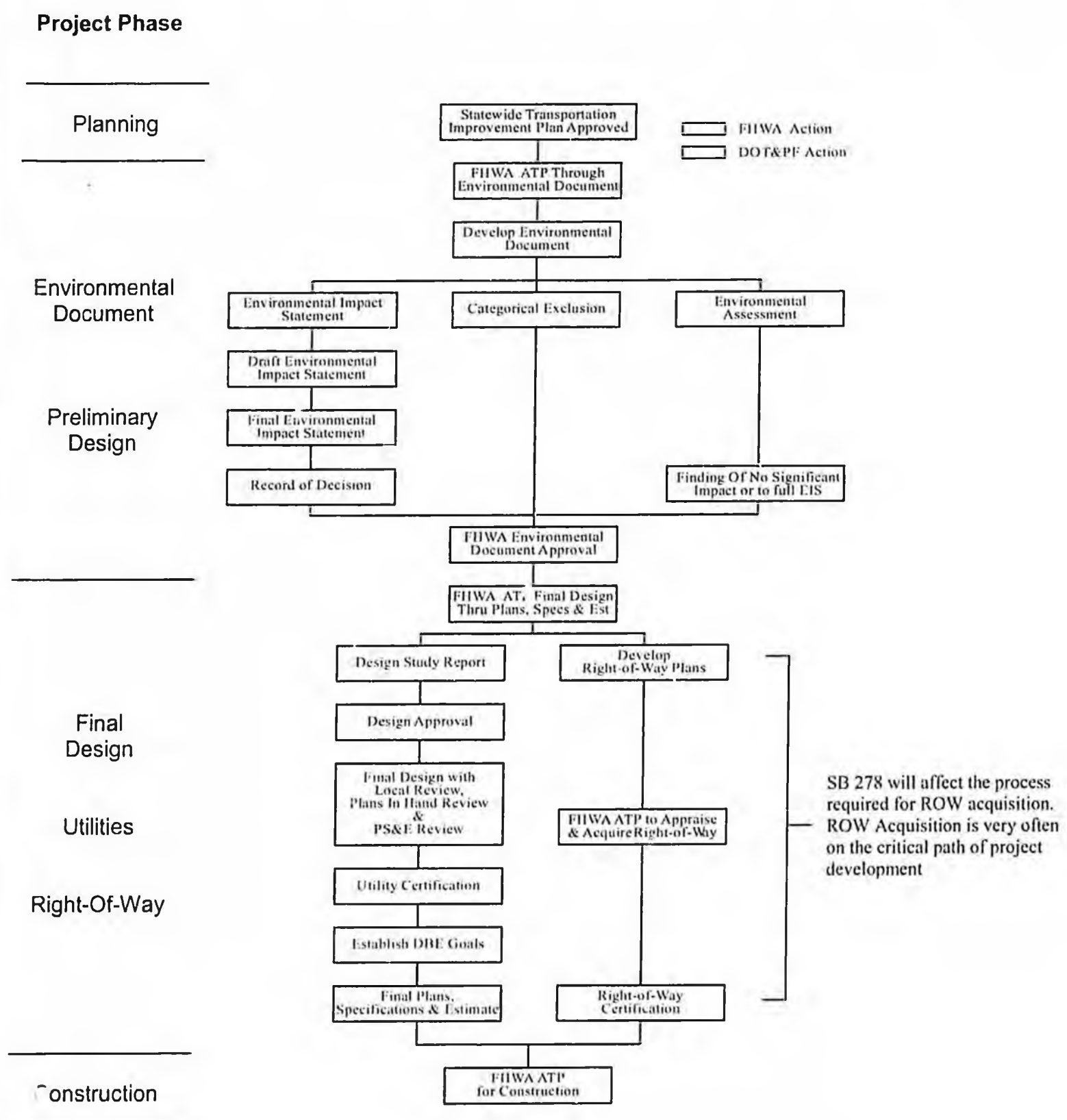
11. The State's decision to appeal will significantly increase costs for not only me but also for the State.

Your assistance and interest in this proceeding is appreciated.

Sincerely,

Philip B. Evans

SIMPLIFIED PROJECT DEVELOPMENT FLOW CHART



MEMORANDUM

State of Alaska

Department of Transportation & Public Facilities
Statewide Design & Engineering Services

TO: Rick Kauzlarich,
State ROW Chief
Frank Mielke, Chief ROW Agent,
Southeast Region
John F. Bennett, Chief ROW
Northern Region
Kim Rice, PE, Chief ROW Agent
Central Region


DATE: May 1, 2002

FILE NO:

TELEPHONE NO: 465-2960

FAX NUMBER: 465-2460

TEXT TELEPHONE: 465-3652

FROM: Michael L. Downing, PE
Chief Engineer 

SUBJECT: Land Exchange Option for
Project Acquisitions

The purpose of this memo is request your assistance in exploring the option of using land exchanges to acquire property for projects. This option is presented in A.S. 19.05.110 and A.S. 19.05.120.

My intent is to have a procedure available to us to use in negotiations with property owners such as ANCSA corporations that request an exchange of lands in lieu of a purchase. Rick Kauzlarich, State Right- of-Way Chief, will be convening a Chief's meeting in May 2002. I expect a draft of this procedure for my approval by July 30, 2002.

cc: Joe Perkins, PE, Commissioner
Robert J. Doll, Regional Director, Southeast
Ralph D. Swarhout, PE, Regional Director, Northern
David R. Eberle, Regional Director, Central

MEMORANDUM

State of Alaska

Department of Transportation & Public Facilities
Statewide Design & Engineering Services

TO: Pat Kemp, P.E.
Steve Horn, P.E.
Dave Bloom, P.E.


DATE: May 1, 2002

FILE NO:

TELEPHONE NO: 465-2960

FAX NUMBER: 465-2460

TEXT TELEPHONE: 465-3652

FROM: Michael L. Downing, PE 
Chief Engineer

SUBJECT: Appeals of Master's
Hearing Award

This memo is to clarify the Division's delegation of authority with regard to appeals of Master's Hearing Award decisions. Effective today, appeals of a Master's Award need to be approved in the Chief Engineer's office.

When a request to appeal a Master's Award is sent to my office, please include all relevant information necessary for the decision and allow enough time for consultation with the Commissioner if necessary.

cc: Joe Perkins, PE, Commissioner
Robert J. Doll, Regional Director, Southeast
Ralph D. Swarthout, PE, Regional Director, Northern
David R. Eberle, Regional Director, Central
Rick Kauzlarich, State Right of Way Chief
Frank Mielke, Chief Right of Way Agent, Southeast
John F. Bennett, Chief Right of Way Agent, Northern
Kim Rice, PE, Chief Right of Way Agent, Central

Excerpt from AKDOT&PF's Right of Way Manual: CHAPTER 4. APPRAISAL PROCEDURES AND GUIDELINES

4.00.00. INTRODUCTION.

The Alaska Constitution, Article I, Section 18, Eminent Domain, reads in part: "Private property shall not be taken or damaged for public use without just compensation." The Fifth Amendment to the United States Constitution states: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Title III of the Uniform Act requires that real property be appraised before the initiation of negotiations. FHWA has waived this requirement for parcels with a value of \$2500 or less and for donated parcels. The owner or a designated representative shall be given the opportunity to accompany the appraiser during inspection of the property. DOT&PF shall establish an amount that it believes to be just compensation for the property. This amount may be no less than the approved appraisal of the property's fair market value.

The 1987 amendments to the Uniform Act, for the first time in federal law, define an appraisal as follows: "A written statement independently and impartially prepared by a qualified appraiser setting forth an opinion of defined value of an adequately described property as of a specific date, supported by the presentation and analysis of relevant market information."

This chapter is designed to guide those involved in both the preparation of appraisals and the management of appraisal functions. It presents formats that will:

- (1) conform to state and federal policies regarding the appraisal of real estate for the purpose of acquiring rights-of-way and land;
- (2) ensure that the appraiser has considered all the required elements in arriving at the conclusion of value;
- (3) maintain a uniform method of appraisal report writing that will conform with industry standards, and support DOT&PF's review, acquisition, relocation, and property management functions; and

- (4) ensure that the value is just, not merely to the person whose property is acquired, but to the public paying for it.

The format and level of documentation required in an appraisal are dependent on the assignment, and the complexity of the appraisal problem to be solved. For the purposes of this chapter, the terms "appraisal", "appraisal report" and "valuation" are used interchangeably.

4.01.00. GENERAL

4.01.01. Acceptable Appraisal. An acceptable appraisal report is one that fulfills all the requirements of this chapter, and contains enough factual support, documentation, and sound reasoning for its conclusions to be readily understood. An appraisal report that fulfills all requirements of DOT&PF's guidelines as to form may still be unacceptable due to substance (inadequate investigation or interpretation of market facts; improper application of appraisal techniques; analysis or conclusions based on misleading, inaccurate, or incomplete data, etc.).

All appraisals performed for DOT&PF must include documentation showing that the owner or designated representative was allowed the opportunity to accompany the appraiser during the inspection. (Form 25A-132)

Guidance concerning the acceptability of specific techniques or processes, policy, or technical guidance may be requested from Appraisal Review. For various reasons DOT&PF may find more than one appraisal acceptable for a parcel, but there will be only one approved appraisal per parcel (Section 5.00.00).

4.01.02. Fair Market Value. Fair market value and market value are synonyms for purposes of this manual. The Uniform Act and 49 C.F.R. refer to fair market value, while the Appraisal Foundation refers to market value. Fair market value is defined in the "Uniform Standards of Professional Appraisal Practice" (1995 Edition) as:

"The most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and

seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby: (1) buyer and seller are typically motivated; (2) both parties are well informed or well advised, and acting in what they consider their best interests; (3) a reasonable time is allowed for exposure in the open market; (4) payment is made in terms of cash in United States dollars or in terms of financial arrangements comparable thereto; and (5) the price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale."

The Alaska Supreme Court has defined fair market value as "the price in (terms of) money that the property could be sold for on the open market under fair conditions between an owner willing to sell and a purchaser willing to buy, with a reasonable time allowed to find a purchaser."

State v. 7.026 Acres, Sup. Ct. Op. No. 601, 466 P.2d 364, 365 (1970). The opinion further reads, in part: "The highest and most profitable use for which the property is adaptable is to be considered, to the extent that the prospect of demand for such use affects the market value while the property is privately held." Fair market value is normally based on a parcel's fee simple value.

When preparing the report, the appraiser should keep in mind that no consideration should be given (or allowance made) for the involuntary nature of the taking, the lack of desire of the owner to part with their property, or inconvenience and possible hardship caused the owner. The appraiser must be concerned exclusively with estimating fair market value. DOT&PF has established separate administrative, relocation, and property management programs to assist with "making the owner whole," and these considerations must NOT enter into the appraisal process.

4.01.03. Highest and Best Use. Highest and best use analysis should identify the highest and most profitable use for which the property may be privately held, to the extent that the demand for that use affects market value. Highest and best use must be demonstrated, and may not be too speculative. The report must show that the appraiser's choice is (1) physically possible, (2) legally permissible, (3) financially feasible, and (4) maximally productive. These criteria are usually considered sequentially (a use may be physically possible, but financially infeasible or legally prohibited). The value of the subject's land is generally estimated as though vacant, unless the land is improved with legally nonconforming improvements. The highest and best use of the land as though vacant must be considered in relation to its existing use, as well as all potential uses.

4.01.04. Determining the Larger Parcel. The appraiser is responsible for determining the larger parcel in the appraisal problem. Typically, DOT&PF's larger parcel recommendation to the appraiser is based on engineering and/or title information. The appraiser must support a larger parcel decision using the principles of substitution, demand, and applied economics.

"The Dictionary of Real Estate Appraisal" (published by the Appraisal Institute) defines larger parcel as:

"1. In condemnation, that tract or tracts of land which are under the beneficial control of a single individual or entity and have the same, or an integrated, highest and best use. Elements for consideration by the appraiser in making a determination in this regard are contiguity, or proximity, as it bears on the highest and best use of the property, unity of ownership, and unity of highest and best use.

2. In condemnation, the portion of a property that has unity of ownership, contiguity, and unity of use, the three conditions that establish the larger parcel for the consideration of severance damages in most states. In federal and some state cases, however, contiguity is sometimes subordinated to unitary use."

22-LS1399VT
Kurtz
5/8/02

adopted 5/8/02

HOUSE CS FOR CS FOR SENATE BILL NO. 278(FIN)
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-SECOND LEGISLATURE - SECOND SESSION

BY THE HOUSE FINANCE COMMITTEE

Offered:
Referred:

Sponsor(s): SENATORS TORGERSON, Taylor, Wilken

A BILL

FOR AN ACT ENTITLED

1 "An Act requiring a good faith effort to purchase property before that property is taken
2 through eminent domain; and providing for an effective date."

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

4 * Section 1. AS 09.55.270 is amended to read:

5 Section 09.55.270. Prerequisites. Before property can be taken, it shall appear
6 that

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

8 (2) the taking is necessary to the use;

9 (3) if already appropriated to a public use, the public use to which it is
10 to be applied is a more necessary public use; and

11 (4) the condemnor has made a reasonable and diligent effort to
12 acquire the property by negotiation as provided in (b) and (c) of this section,
13 unless the property owner is

14 (A) unable to negotiate due to incapacity;

1 (B) unable to convey legal title; or

2 (C) absent.

3 * Sec. 2. AS 09.55.270 is amended by adding new subsections to read:

4 (b) Before taking property estimated by the condemnor to be worth \$15,000 or
5 more, a condemnor shall invite the property owner, within a reasonable period of time
6 set by the condemnor, to obtain an appraisal from a real estate appraiser certified
7 under AS 08.87 and offer to

8 (1) sell the property to the condemnor for the appraised value plus the
9 cost of appraisal; or

10 (2) exchange the property for a parcel of comparable value.

11 (c) If a property owner makes an offer under (b) of this section within the
12 reasonable period of time set by the condemnor, the condemnor must either accept the
13 offer, or reject the offer and provide a reasonable explanation of the reasons for the
14 rejection along with a reasonable counter offer. If a condemnor invites the property
15 owner to make an offer to sell the property as described in (b) of this section and the
16 property owner fails to respond within a reasonable period of time, or if the property
17 owner rejects a reasonable counter offer made under this subsection, the condemnor
18 may commence eminent domain proceedings under AS 09.55.290.

19 * Sec. 3. AS 09.55.430 is amended to read:

20 Sec. 09.55.430. Contents of declaration of taking. The declaration of taking
21 must contain

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

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

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

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

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

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

31 (7) a statement that the property is taken by necessity for a project

1 located in a manner that is most compatible with the greatest public good and the least
2 private injury; and

3 (8) a statement that the plaintiff has complied with
4 AS 09.55.270(b) and (c), if applicable, unless the property owner is

5 (A) unable to negotiate due to incapacity;

6 (B) unable to convey legal title; or

7 (C) absent.

8 * Sec. 4. AS 09.55.440(a) is amended to read:

9 (a) Upon the filing of the declaration of taking and the deposit with the court
10 of the amount of the estimated compensation stated in the declaration, title to the
11 estate as specified in the declaration vests in the plaintiff, and that property is
12 condemned and taken for the use of the plaintiff, and the right to just compensation for
13 it vests in the persons entitled to it. The compensation shall be ascertained and
14 awarded in the proceeding and established by judgment. If, following the award of
15 just compensation in the proceedings, the court finds as a matter of law that the
16 plaintiff has not complied with AS 09.55.270(b) and (c), the court may award an
17 additional sum of up to 10 percent of the award of just compensation as
18 additional compensation. The judgment must include interest at the rate of 10.5
19 percent a year on the amount finally awarded that exceeds the amount paid into court
20 under the declaration of taking. The interest runs from the date title vests to the date
21 of payment of the judgment.

22 * Sec. 5. This Act takes effect immediately under AS 01.10.070(c).

SB 278: Legislation to Require a Good Faith Effort to Purchase Land Before it is Acquired Through Eminent Domain

SB 278 would amend Alaska's eminent domain laws by requiring the government, and other condemning authorities, to diligently attempt, in good faith, to purchase private land before taking that land through the power of eminent domain. The reasons for the legislation are these:

With only 10% of Alaska's land in private ownership, the State of Alaska should proceed carefully before eroding that already-insufficient private land base through the exercise of the power of eminent domain. Moreover, Alaskans value the importance of private property rights, and they believe that government should intrude on those rights gingerly--and only as a last resort.

In Alaska, there is usually some discussion between the condemnor and the property owner before eminent domain proceedings are instituted, but there is no consequence to the state if it fails to do so. As a result, officials are free to make only an unreasonable offer, or none at all. They can end discussions at their whim, and they are under no obligation to take even the most reasonable landowner concerns seriously.

As a result, the discussions--to the extent that they occur--are not arms-length. Fair dealing necessitates that both sides have an incentive to deal, and the proposed legislation provides that incentive by engraining the better practice of sincere bargaining into statute.

At least 23 of our sister states currently impose such a requirement, as Appendix A to this rationale illustrates. Moreover, the Uniform Eminent Domain Code recommends such a provision, and the appended legislation is patterned after §202(a) of

that model law. ^{1/} And, the requirement that the condemning authority "shall make every reasonable effort to acquire expeditiously real property by negotiation" has been an integral element of federal real property acquisition policy since 1971. ^{2/}

Because of its widespread use, the "good faith negotiation" requirement, as a prerequisite to the use of eminent domain, has been extensively interpreted by the nation's courts, which have given the clause a common-sense interpretation. For example:

- "Lengthy or face-to-face negotiations are not required." ^{3/} A letter offer can suffice, and if the private landowner doesn't make a reasonable counteroffer within a reasonable period of time, the property can then be condemned. *Id.* According to the leading commentator on eminent domain law, "no lengthy series of negotiations, offers and counter-offers is required. If the corporation desiring the property submits an offer to the owner and upon his refusal to accept the same asks for a counter-offer from him, and he refuses to name any figures or names an unreasonable one, it is sufficient...Even when the owner does not definitely reject the offer, but says he will give his answer within a specified time, the condemnor need not wait, but may institute proceedings at once." ^{4/}
- Section 203 of the *Uniform Code* requires that the state, at the outset of negotiations, offer the owner full appraised value for the property; however, that offer--in-and-of-itself--is not conclusive evidence of "good faith." ^{5/} The requirement of an initial full-value offer has been omitted from the enclosed legislation; and, as a result, the state's initial offer needn't be for full appraised value;

^{1/} Uniform Laws Annotated, *Uniform Law Commissioners' Model Eminent Domain Code, 1974 Act*, §202 ("Uniform Code") ("A condemnor shall make every reasonable and diligent effort to acquire property by negotiation."); see also §306(a) ("[A]n action to condemn property may not be maintained...unless the condemnor made a good faith effort to acquire the property by purchase before commencing the action.")

^{2/} Sec. 301, Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P.L. 91-646).

^{3/} *City of Thornton v. Farmers Reservoir and Irrigation Company*, 575 P.2nd 382, 392 (Colorado 1978).

^{4/} 3 J. Sackman, *Nichols on Eminent Domain* ("Nichols"), §24.15 at 24-264.

^{5/} *Uniform Code*, §306, Commentary.

rather, it need only be a reasonable offer "likely to preserve the framework for further negotiations"--in other words, not something that any reasonable person would dismiss as a deal-killer; ⁶ /

- The state would be obliged to disclose any appraisal that it has conducted on the property, along with some reasonable breakdown of the various items that the appraisal covers. ⁷ / In this way, the landowner will be an informed negotiator, and the controversy will be more likely to lead to an amicable resolution; ⁸ / and
- The state must be specific as to the interest and property for which the offer is made, so that the landowner can intelligently respond. ⁹ /

These legislatures, and their courts, believe that a good-faith requirement will "save time and expense incident to a condemnation proceeding." ¹⁰ / As the Supreme Court of Virginia put it 71 years ago in *Charles v. Big Sandy & C.R. Co.*, 129 S.E. 384, 385:

A landowner should not be put to the trouble and possible expense of counsel fees upon the mere whim or caprice of the condemnor, when a bona fide effort to purchase his land would in all probability terminate the transaction.

With such a statute, the landowner and the state begin with an arms-length bargaining relationship based on full disclosure. Without such a statute, the parties begin as adversaries. These statutes are thus designed to make litigation and prolonged delay less likely; for, as our own Supreme Court has noted, a landowner who feels fairly treated

⁶ / *State Highway and Transportation Commissioner of Virginia v. Herndon*, 302 S.E.2nd 55, 58 (Virginia 1983).

⁷ / See, e.g., *State v. Rowland*, 444 A.2nd 1123, 1129 (N.J.Super. 1982).

⁸ / This requirement is similar to that imposed by §203(c) of the *Uniform Code*. Section 202(b) of the *Uniform Code* imposes the further requirement that the owner be allowed to accompany the state's appraiser, but that requirement is omitted from the enclosed legislation.

⁹ / *Prarie View Telephone Company v. County of Cherry*, 138 N.W.2nd 468, 470 (Nebraska 1965).

¹⁰ / *Clements v. Forth Worth D.S.P.Ry. Co.*, 7 S.W.2nd 895, 897 (Texas App. 1928).

at the outset is far less inclined to ultimately litigate. ^{11/} According to *Nichols* (see n. 4, above), the requirement to negotiate is "designed to provide the negotiating parties with an atmosphere conducive to independent settlement." ^{12/} Or as the drafters of the *Uniform Code* explained:

The purposes of preliminary purchase attempts include the protecting of property owners from arbitrary and unexpected exercises of eminent domain power, facilitation of amicable settlement of disputes as to the amount of just compensation, minimizing acquisition costs through reduction of litigation and promotion of citizen cooperation with governmental programs involving land acquisition.

Id. at §306, Commentary. In sum, this proposal will have little impact on officials who already treat landowners fairly when condemnation seems necessary. At the same time, it will assure that, in each case, every appropriate step is taken to avoid prolonged litigation.

^{11/} *Ship Creek Hydraulic Syndicate v. State*, 685 P.2nd 715, 718 (Alaska 1984). At a minimum, the court said, procedural fairness prior to condemnation will allow the landowner to make rational decisions about his property, rather than reactive decisions provoked by perceived heavy-handedness.

^{12/} *Nichols, supra* at §24.12, p. 24-185.



ALASKA STATE LEGISLATURE

SENATOR JOHN TORGERSON

CHAIR, SENATE RESOURCES COMMITTEE

CHAIR, SENATE COMMUNITY AND REGIONAL AFFAIRS COMMITTEE

CHAIR, JOINT COMMITTEE ON NATURAL GAS PIPELINES

Session:

State Capitol, Room 427, Juneau, AK 99801
Telephone 907/465-2828 Fax 907/465-4779

District:

45457 Kenai Spur Hwy. Suite 101B.
Soldotna, AK 99669
Telephone 907/260-3042 Fax 907/260-3044

Sponsor Statement Senate Bill 278

Taking Property By Eminent Domain

The enactment of this bill will bring fairness and expediency to government and other condemning authorities that require the acquisition of private lands for public uses. This bill is not trying to remove the authority of the state to take land by eminent domain. It will add a provision to ensure there is a "reasonable and diligent effort" made by government agencies to negotiate with property owners before land is claimed under eminent domain.

It is reasonable to require a government entity to make a "reasonable and diligent effort" to negotiate with the landowner on a value and price prior to taking the property. Someone that does not have the financial ability or an understanding of the legal process could be overwhelmed with the bureaucracy and be at a disadvantage in trying to protect his or her property rights.

By requiring a "reasonable and diligent effort" to justify the state's authority of eminent domain, the landowner will have the benefit of full disclosure of information used by the state to determine the public purpose and legitimate value before property can be taken.

REPRESENTING THE KENAI PENINSULA

Anchor Point Bear Creek Clam Gulch Cooper Landing Crown Point Fritz Creek Happy Valley Halibut Cove Homer Hope Kachemak City Kachemak Selo Kasilof Lowell Point Mouse Pass Nanwalek Nikolaevs Ninilchik Port Graham Razdolna Seward Seldovia Soldotna Stariski Sterling Voznesenka

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: SB 278
(S) Publish Date: 3/1/02

Revision Date/Time (Note if correction): _____ Dept. Affected: _____
Title Taking property by eminent domain BRU Alaska Court System
Component Trial Courts
Sponsor Senator Torgerson
Requester Senate Comm. and Reg. Affairs Component No. 768

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type-Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2002) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)
The court system does not anticipate any fiscal impact from the passage of SB 278.

Prepared by: Douglas Wooliver Phone 463-4750
Division: Alaska Court System Date/Time 2/28/02 8:59 AM
Approved by: Stephanie Cole Date 2/28/02
Agency: Alaska Court System

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: 4
Bill Version: HCS SB 278(JUD)
(H) Publish Date: 5/6/02

Revision Date/Time (Note if correction): 05/01/02 11:30am Dept. Affected: DOT&PF
Title An Act requiring a good faith effort to BRU
purchase property before that property is taken... Component _____
Sponsor Torgerson
Requester House Judiciary Component No. _____

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES	1,313.0	1,313.0	1,313.0	1,313.0	1,313.0	1,313.0
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2002) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

** See attached analysis.

Prepared by: Dennis R. Poshard, Assistant to Commissioner Phone 465-3904
Division: Commissioner's Office Date/Time 5/1/02 11:46 AM
Approved by: Joseph L. Perkins, Commissioner Date 5/1/2002
Agency: Alaska Department of Transportation and Public Facilities

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

BILL NO. HCSSB278JUD

ANALYSIS CONTINUATION

The Department acquired 980 parcels statewide during 1999 to 2001 (an average of 327 parcels per year). Sixty-seven (67) parcels (7%) out of the 980 parcels were acquired through condemnation action.

On average, 23 parcels per year are acquired through condemnation action.

Currently there is one (1) Authority and Necessity (A&N) Challenge per year. If SB 278 passes the likelihood of A&N challenges to acquisitions will substantially increase due to new legal requirements to prove "reasonableness and due diligence."

Authority and Necessity (A&N) Challenges cost an average of \$36,500 per challenge to defend (based on Department of Law figures).

With passage of SB 278, we predict that the number of condemnation parcels will increase (from 7% to 14%) as well as an increase in A&N Challenges (18 to 46 A&N Challenges per year) for an estimate of \$657,000 to \$1,350,500* in legal fees to only defend against the challenges.



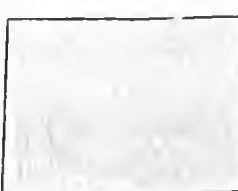

* 327 parcels per year at 7% condemnation rate = 23 parcels
23 parcels X 80% A&N Challenge rate = 18 parcels
18 parcels X \$36,500 = \$657,000 increased cost to defend.

* 327 parcels per year at 14% condemnation rate = 46 parcels
46 parcels X 80% A&N Challenge rate = 37 parcels
37 parcels X \$36,500 = \$1,350,500 increased cost to defend.

Notes:

- The property owner does not prevail with the A&N Challenge they will be responsible for their legal fees.
- If the State loses the A&N Challenge, then the property owner's legal fees will be paid by the State.

Appendix A: The Requirement to Negotiate in Other States

	<u>State</u>	<u>Citation</u>	<u>Language</u>
	Model Eminent Domain Code	Uniform Law Commissioner's Model Eminent Domain Code 1974 Act §306	<i>Except as provided in Section 308, an action to condemn property may not be maintained over timely objection by the owner unless the condemnor made a good faith effort to acquire property by purchase before commencing the action.</i>
	Alabama	Ala. Code §18-1A-22	<i>Before commencing a condemnation action, the condemnor shall establish an amount based on an appraisal which it believes to be just compensation therefor and promptly shall submit to the owner an offer to acquire the property for the full amount so established. The amount shall not be less than the condemnor's established amount of just compensation for the property.</i>
	Colorado	Colo. Rev. Stat. §38-1-102	<i>In all cases where the right to take private property for public or private use without the owner's consent...is conferred by general laws...and the compensation to be paid for, in respect of property sought to be appropriated or damaged for the purposes mentioned, cannot be agreed upon by the parties interested; or in the case the owner of the property is incapable of consenting, or his name or residence is unknown, or he is a nonresident of the state, it is lawful for the party authorized to take or damage the property to apply to the judge....</i>
	Connecticut	Conn. Gen. Stat. §48-12	<i>The procedure for condemning land or other property for any of the purposes specified in sections..., if those desiring to take such property cannot agree with the owner upon the amount to be paid him for any property taken, shall be as follows:</i>



Idaho

Idaho Code
§7-707(6)

The complain [for condemnation] must contain:

...
(6) In all cases where the owner of the lands sought to be taken resides in the county in which said lands are situated, a statement that the plaintiff has sought, in good faith, to purchase the lands so sought to be taken, or settle with the owner for the damages which might result to his property from the taking thereof, and was unable to make any reasonable bargain therefor, or settlement of such damages, but in all other cases these facts need not be alleged in the complaint, or proved.



Illinois

Ill. Rev. Stat.
§5/7-102

Where the right to take private property for public use...has been heretofore and shall hereafter be conferred by general law or special charter...and the compensation to be paid for or in respect of the property sought to be appropriated or damaged for the purposes mentioned cannot be agreed upon by the parties interested, or in case the owner of the property is incapable of consenting, or the owner's name or residence is unknown, or the owner is a nonresident of the state, the party authorized to take or damage the property...may apply to the circuit court...



Indiana

Ind. Code
§32-11-1-1

Before proceeding to condemn, such person, corporation or other body may enter upon any land for the purpose of examining and surveying the property sought to be appropriated or right sought to be acquired; and shall make an effort to purchase for the use intended such lands, right-of-way, easement or other interest therein or other property or right.



Kentucky

Ky. Rev. Stat. Ann. §416.550

Whenever any condemnor cannot, by agreement with the owner thereof, acquire the property right, privileges or easements needed...the condemnor may condemn such property...It is not a prerequisite to an action to attempt to agree with an owner who is unknown or who, after reasonable effort, cannot be found within the state or with an owner who is under a disability.



Michigan

Mich. Comp. Laws §213.55

Except as provided in section 25(4), before initiating negotiations for the purchase of property, the agency shall establish an amount which it believes to be just compensation and promptly shall submit to the owner a good faith offer to acquire the property for the full amount so established... If an agency is unable to agree with the owner for the purchase of the property, after making a good faith written offer to purchase the property, the agency may file a complaint for the acquisition of the property in the circuit court in the county in which the property is located.



Missouri

Mo. Rev. Stat. §523.010

In case land, or other property, is sought to be appropriated...and such corporation and the owners cannot agree upon the proper compensation to be paid, or in the case the owner is incapable of contracting, be unknown, or be a nonresident of the state, such corporation may apply to the circuit court...



Nebraska

Neb. Rev. Stat. §76-704

If any condemnee shall fail to agree with the condemnor with respect to the acquisition of property sought by the condemnor, a petition to condemn the property may be filed by the condemnor in the county court of the county where the property or some part thereof is situated.



**New
Hampshire**

N.H. Rev. Stat.
Ann. §498-A:4

Before making the offer provided for in paragraph II, the condemnor shall make reasonable efforts to negotiate with the condemnees or their personal representatives for the purchase of the property, but failure to confer or negotiate shall not be a defense to condemnation of the property.

...No property shall be taken unless the condemnor shall serve upon the condemnee a written notice of offer to purchase...



New Jersey

N.J. Rev. Stat.
§20:3-5

...[W]henever any condemnor...shall have determined to acquire land or other property pursuant to law...but cannot acquire title thereto or possession thereof by agreement with a prospective condemnee, whether by reason of disagreement concerning the compensation to be paid or for any other cause...the condemnation of such property...shall be governed...in the manner provided by this act;



**New
Mexico**

N.M. Stat. Ann.
§42A-1-4

A condemnor shall make reasonable and diligent efforts to acquire property by negotiation.



New York

N.Y. Em. Dom.
Law §303

The condemnor shall make a written offer to acquire the property for one hundred per centum of the valuation so established. In no event shall such amount be less than the condemnor's highest approved appraisal. Wherever practicable, the condemnor shall make this offer prior to acquiring the property, and shall also, wherever practicable, include within the offer an itemization of the total direct, the total severance or consequential damages and benefits as each may apply to the property.



**North
Dakota**

N.D. Cent. Code
§32-15-06.1

A condemnor shall make every reasonable and diligent effort to acquire property by negotiation.



Ohio

Ohio Rev. Code
Ann §163.04

Appropriation shall be made only after the agency is unable to agree, for any reason, with the owner...or when any owner is incapable of contracting...or is unknown, or is not a resident of this state, or his residence is unknown to the agency and cannot with reasonable diligence be ascertained.



Oklahoma

Okla. Stat.
tit. 27, §13

Every reasonable effort shall be made to acquire, expeditiously, real property by negotiation.



Oregon

Or. Rev. Stat.
§35.235

...[T]he condemnor shall...attempt to agree with the owner with respect to the compensation to be paid therefor, and the damages, if any, for the taking thereof.



Texas

Tex. Prop. Code
Ann. §21.012

If the United States, [or] this state...wants to acquire real property for public use but is unable to agree with the owner of the property on the amount of damages, the condemning entity may begin a condemnation proceeding by filing a petition in the proper court.

The petition must...state that the entity and the property owner are unable to agree on the damages.



Vermont

Vt. Stat. Ann. tit.
24, §2805

When the location of a municipal building is determined...and the owner refuses to release or convey the same to such municipality for a reasonable price...the mayor...shall set out the necessary lands and cause the same to be surveyed. They shall appoint a time and place for hearing...



Virginia

Va. Code Ann.
§26-46.5

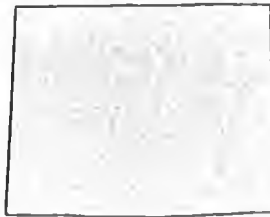
No proceedings shall be taken to condemn property until a bona fide but ineffectual effort has been made to acquire from the owner by purchase the property sought to be condemned, except where such consent cannot be obtained because of the incapacity of one or more of the owners or because one or more of such owners is unable to convey legal title to such property or is unknown or cannot with reasonable diligence be found in this State.



Wisconsin

Wis. Stat.
§32,06(2a)

Before making the jurisdictional offer under sub. (3) the condemnor shall attempt to negotiate personally with the owner or one of the owners...for the purchase of the property.



Wyoming

Wyo. Stat.
§1-26-509

A condemnor shall make reasonable and diligent efforts to acquire property by good faith negotiation.

And at the federal level...



**Federal
Uniform
Relocation and
Assistance and
Real Property
Acquisition
Policies Act of
1970**

Sec. 301, P.L. 91-646

Note: Pursuant to §102 of the Act, the policies of §301 do not affect the validity of individual condemnation actions. However, they do govern the use of federal funds by states "to the greatest extent practicable under State law." Sec. 305(1).

In order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts...and to promote public confidence in Federal land acquisition practices...

(1) The head of a Federal agency shall make every reasonable effort to acquire expeditiously real property by negotiation.

(2) Real property shall be appraised before the initiation of negotiations, and the owner...shall be given an opportunity to accompany the appraiser during his inspection of the property.

When a licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others...it may acquire the same by the exercise of the right of eminent domain....



**Federal Energy
Regulatory
Commission**

16 U.S.C. §814



ALASKA STATE LEGISLATURE

SENATOR JOHN TORGERSON

CHAIR, SENATE RESOURCES COMMITTEE

CHAIR, SENATE COMMUNITY AND REGIONAL AFFAIRS COMMITTEE

CHAIR, JOINT COMMITTEE ON NATURAL GAS PIPELINES

Session:

State Capitol, Room 427, Juneau, AK 99801
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Sectional Analysis of SB 278

Title 09.55.240-460 constitutes the statutory proceedings regarding the state's authority of eminent domain. Under present law, property owners whose land is to be condemned are faced with an unfairly steep barrier when trying to negotiate a fair settlement with the state. This bill will require that the state make a "reasonable and diligent effort" to negotiate equitably when trying to purchase land from private citizens through eminent domain.

Sec. 1: AS 09.55.270 lists the matters that any condemning authority must prove before it can condemn property through a judicial eminent domain complaint. The statute is amended by adding subsection (4) that requires the state to make a "reasonable and diligent effort" when trying to purchase land through eminent domain.

Sec. 2: AS 09.55.270 is amended by adding new subsections (b) and (c) that define "reasonable and diligent effort." Subsection (b) requires a condemnor to invite the property owner to secure an appraisal from a real estate appraiser certified under AS 08.87 or offer to exchange the property for a parcel of comparable value. Subsection (c) provides that if the conditions in (b) are met then a condemnor must either accept the offer or provide a reasonable explanation otherwise. If the property owner does not meet the conditions of (b), the condemnor may commence eminent domain proceedings.

Sec. 3: AS 09.55.430 considers "declarations of takings" which differ from eminent domain complaints in that once a declaration is filed, the property is taken immediately, rather than after judicial proceedings are completed. Before 1976, the state could take land under a declaration of taking without proving the necessity for the taking. In 1976, however, the legislature added subsection (7), which required the declaration to contain a statement explaining how the taking was necessary. Section 3 further amends the statute to add a subsection (8) to include a statement verifying that, where possible, the condemning authority has made a "reasonable and diligent effort" to purchase the land.

REPRESENTING THE KENAI PENINSULA

Anchor Point Bear Creek Clam Gulch Cooper Landing Crown Point Fritz Creek Happy Valley Halibut Cove Homer Hope Kachemak City Kachemak Selo Kaslof Lowell Point Moose Pass Nanwalek Nikolaevs Ninilchik Port Graham Razdolna Seward Seldovia Soldotna Stariski Sterling Voznesenka


Sec. 4: AS 09.55.460 authorizes the court to require the State to pay a penalty of up to 10 percent of the value of the property if the State has not complied with the reasonable and diligent effort requirement in AS 09.55.270(b). Without Section 4, Section 2 of the bill would be meaningless, since the state would be obliged to make a statement that the "reasonable and diligent effort" requirement had been met but the landowner would have no remedy in any case where the statement proved untrue.

Sec. 5: Sets an effective date of the Act.

Appendix Analysis of Takings Laws by Category of Legislation


1. Attorney General Review of Proposed Regulations

Delaware



One of the first states to pass takings legislation, Delaware's 1992 law (Del. Code Ann., 29-605) requires the attorney general to review all proposed state agency regulations before they go into effect and to inform the issuing agency of their potential to result in a taking of private property requiring compensation. Most state agencies are aware that they should ask a deputy attorney general assigned to their agency for an evaluation of a proposed regulation before it is issued. The attorney general's office will give a written response to any regulation submitted for review. The office has taken a position that if a proposed regulation will in any way restrict the use of private property, it will advise the agency that there is a potential for a taking and that a more meaningful analysis can only be done on a property-specific basis. In the 18-month period ending June 30, 1996, the office estimates that there may have been six to 12 proposed regulations that, depending on how they are implemented by a state agency, have the potential to constitute a taking. No litigation has been filed against a state agency by a landowner as a result of those regulations reviewed by the attorney general's office. The office has absorbed the staff time necessary to review the proposed regulations within its existing budget.

Indiana



Similar to Delaware's law, Indiana's 1993 legislation (Ind. Code Ann., 4-22-2-32) requires the attorney general to review all proposed state agency regulations before they go into effect for their potential takings implications. If the attorney general determines that a proposed regulation may constitute a taking, it must inform the governor and the issuing agency. The attorney general's advice is protected under attorney-client privilege. The office has indicated that most proposed regulations are of such a general nature that it is difficult to determine if they will constitute a taking until they are applied on a property-specific basis. The office has provided state agencies with a process for evaluating proposed regulations. Because of the attorney-client privilege afforded advice to state agencies, the effect of consultations between the attorney general's office and state agencies on the issuance of regulations cannot be determined. No litigation has been filed against a state agency as a result of regulations reviewed by the attorney general under the statute. The attorney general's office reports that it has always conducted a thorough review of proposed regulations for other purposes; as a result, it has been able to absorb any additional costs relating to the takings legislation within its existing budget.

Idaho



The stated purpose of Idaho's 1994 legislation (Idaho Code, 67-8001 et seq.) is to "establish an orderly, consistent review process that better enables state agencies to evaluate whether proposed regulatory or administrative actions may result in a taking of private property without due process of law." The statute goes on to stipulate that its purpose is not to "expand or reduce the scope of private property protections provided in the state and federal constitutions." It requires the attorney general to establish a process and a checklist to assist state agencies in evaluating proposed regulations or administrative actions for their takings implications (the most recent guidelines were prepared in October 1995). The state agency review process is protected by attorney-client privilege. The law was extended to cover local government regulations or administrative actions in 1995 (Chapter 182).

The Idaho Office of the Attorney General has indicated that the evaluation process is informal and undocumented, but that implicit in the Department of Environmental Quality's permitting and rulemaking processes is a practical and legal evaluation of any takings implications. State agency budgets have not increased as a result of conducting the evaluations; additional costs, if any, are from minimal legal training for staff on takings issues. The Department of Environmental Quality has not revised any proposed regulations or administrative actions based on the takings evaluations. Comparable information for local governments has not been available.

Kansas



The 1995 Private Property Protection Act (Kan. Stat. Ann., 77-701 et seq.) requires the attorney general to prepare guidelines to assist state agencies in evaluating whether a proposed government action constitutes a taking as articulated by the United States Supreme Court and the Kansas Supreme Court. State agencies must use the guidelines in preparing a written report on each proposed action that may constitute a taking. The report must:

- Identify the risk to the public health, safety or welfare of the use of private property that the action proposes to regulate.
- Describe how the proposed action will substantially advance the public interest.
- State the facts used to justify the proposed action.
- Assess the takings implications of the proposed action.
- Identify alternatives; if any, to the proposed action.

State agencies must submit a copy of each written report to the governor and the attorney general before implementing a government action for which a report has been prepared. Unlike other state takings assessment laws, the Kansas legislation requires state agencies to review and evaluate all existing rules and regulations in accordance with the attorney

enough to justify seeking a budget increase. The department has not revised any proposed rules based on its takings assessment.

Tennessee



Legislation enacted in 1994 (Tenn. Code Ann., 12-1-201 et seq.) requires the attorney general to develop guidelines to assist state agencies in identifying and evaluating proposed government actions that might result in a taking of private property. The initial guidelines were published in July 1995. They were revised in August 1996. The attorney general's office considers consultation with state agencies to be covered by attorney client privilege. As a result, it cannot divulge how state agencies have used the guidelines or whether the office has suggested modifications to proposed regulations. Because state agencies are not required to prepare written assessments of their proposed action, it is difficult to determine the effect of the guidelines on their final actions.

Texas



The 1995 Private Real Property Rights Preservation Act (Tex. Gov't Code Ann., 2007.001 et seq.) contains both takings assessment and mitigation/compensation provisions. The law requires the attorney general to prepare guidelines to assist government agencies in preparing takings impacts assessments (TIAs) of proposed actions covered under the law. The guidelines were published in the *Texas Register* on Jan. 12, 1996. In addition to determining whether the proposed action constitutes a taking, the assessment must demonstrate how the proposed action substantially advances its stated purpose, the burdens placed on private real property, the benefits to the public of the proposed action, and alternatives that might accomplish the same purpose as the proposed action. The law also required the state comptroller to present a report to the legislature before the convening of the 1997 session on how well government agencies are complying with the assessment provisions and what the compliance costs have been. The comptroller submitted its report on Jan. 15, 1997.

The comptroller sent a written survey to 131 state agencies to obtain compliance information; 119 agencies responded. The responses addressed two sets of costs; those for preparing procedures to determine whether a government action requires a TIA, and the actual costs of preparing the TIA. Ninety-five agencies indicated that they took no actions in FY 1996 that are covered under the act. Twenty-five agencies responded that they either took actions in FY 1996 that are covered under the act, or that they anticipate taking actions during FY 1997 that are covered under the act. Five agencies prepared specific procedures in FY 1996 to help them determine whether a proposed action requires a TIA; 11 agencies anticipate preparing specific procedures during 1997. Nine agencies will determine on an ad hoc basis whether a TIA is necessary. Agency costs for preparing specific procedures in FY 1996 ranged from zero to \$11,000 per agency.

The Department of Environmental Quality has not prepared any takings assessments under the law. The reason relates to the definition of the term "government action" for which a takings assessment is required. Government action means "proposed rules and emergency rules by a state agency that if adopted and enforced may limit the use of private property *unless its provisions are in accordance with applicable state or federal statutes* [emphasis added]." The department has stated that all of its actions have been "in accordance with applicable state or federal statutes," and, therefore, do not require the preparation of a takings assessment. The department has also noted that if it were required to conduct the assessments, it would need additional financial resources.

Comments received from the Utah Association of Counties suggest that local governments may not be aware of the takings assessment requirement; there is little communication between local governments and the state attorney general's office. To the degree political subdivisions are aware of the takings assessment requirement, the association feels that they are already in compliance with the law. County governments in Utah are very sensitive to the effects of land use regulation on private property and on the county's property tax base.

Washington



A section of the state's Growth Management Act passed in 1991 (Rev. Code Wash., 36.70A.370) requires the attorney general to develop an orderly, consistent process to help state agencies and local governments evaluate proposed regulations to ensure that they do not constitute a taking of private property. The attorney general must review and update the process annually to reflect any changes in court decisions. Local governments that prepare comprehensive growth management plans must use the process. A property owner may not bring an action against a local government, however, for failure to use the process. The process is protected by attorney client privilege.

The attorney general completed the initial guidance document in February 1992 (the first state to do so), and revised it in April 1993. The most recent update was prepared in 1995. The document consists of a "recommended process" and an "advisory memorandum" for evaluating proposed regulations. The recommended process suggests to local governments and state agencies that they review the advisory memorandum with their legal counsel and distribute it to all decision makers and key staff under their jurisdiction. The advisory memorandum contains warning signals that local governments and state agencies should use as a checklist to determine if a proposed regulation might go too far. The advisory memorandum concludes with a list and summary of relevant federal and state takings cases.

Two provisions of the statute make it difficult to determine the extent of local government and state agency use of the takings guidelines: (1) there is no requirement that a written takings assessment be completed; and (2) review of proposed regulations by legal counsel is protected by attorney client privilege. One attorney in the state attorney general's

Mississippi



Mississippi was the first state to enact legislation requiring compensation for a regulatory taking. Passed in 1994 and amended in 1995, the Mississippi Agricultural and Forestry Activity Act (Miss. Code Ann., 49-33-1 et seq.) grants a cause of action to seek compensation to an owner of forest or agricultural land whose property value is reduced by more than 40 percent as a result of a state or local government action. The government agency may repeal the action before a final court decision is reached. As in Louisiana, the government agency remains liable for damages incurred while the action is in effect. The attorney general's office has indicated that no legal actions have been taken against the state seeking compensation under the act.

Texas



Texas' 1995 Private Real Property Rights Preservation Act (Tex. Gov't Code Ann., 2007.001 et seq.) defines a "taking" to include a reduction in value of private real property of 25 percent or more caused by a state or local government action. It authorizes a property owner to bring suit to determine whether a government action constitutes a taking. If a court determines that a taking has occurred, the court may invalidate the action. The government agency responsible for the action may elect to pay compensation in lieu of rescinding the action. The law exempts actions that are reasonably taken to comply with state or federal mandates.

The Texas Natural Resource Conservation Commission (TNRCC) has reported that no litigation has been filed against the state alleging that a government action has reduced property value by 25 percent or more. The TNRCC has been sued, however, by landowners adjacent to a confined animal feed lot who argue that they have no recourse under the takings law to allege a reduction in their property value associated with the permit the TNRCC issued for the feed lot.

4. Dispute Resolution

Florida



The 1995 Bert J. Harris, Jr., Private Property Rights Protection Act (Fla. Stat. Ann., 70.001 et seq.) provides judicial relief for a property owner resulting from a state or local government action that inordinately burdens the use of real property, and a dispute resolution process to resolve a property owner's grievance outside of court. "Inordinate burden" is defined to mean a government action that restricts the use of private real property such that the owner is unable to obtain reasonable, investment-backed expectations from its use, or that places a disproportionate share of the burden to protect the public interest on the property owner. If a court determines that a government action amounts to an inordinate burden, it may require financial compensation for the actual loss in the property's fair market value.

Maine



Chapter 537 of the 1996 session laws (Me. Rev. Stat. Ann., 5-3341) established a land use mediation program in the Court Mediation service to provide private landowners with an alternative to litigation for resolving disputes over state and local government land use actions. The act establishes a fee not to exceed \$175 for every four hours of mediation services to be paid by the landowner. Eligible landowners are those who have suffered significant harm as a result of a government action denying a land use permit. Use of the mediation services does not prevent a landowner from seeking judicial review of a permit decision.

One case has been filed under the land use mediation program. It involved a challenge to a local government denial of a variance. The mediator successfully resolved the issue to the satisfaction of the property owner and the local government in four hours at a cost of \$175 to the landowner.

STATE'S Questions

The State of Alaska Department of Transportation recently took a portion of your property. Please respond to the following questions.

1. Were the people who contacted you from the State informative, courteous and fair?
2. Was the State's appraiser informative, courteous and fair?
3. Did the State provide you with a copy of their complete appraisal report and Market Data Book?
4. Were you able to settle with the State on the basis of that appraisal, and did you feel the compensation was adequate and fair? (If No, please answer the following questions.)
5. Did the appraisal fairly set forth the value of the Taking and the consequences to the Remainder Property?
6. In the appraisal of your property was the "BEFORE the Taking Value", based on the Highest and Best Use of the property rather than the existing use?
7. Were the following items fairly considered in analyzing the effects of the Right-of-way Taking on your property:
 - Loss of parking
 - Change in Highest and Best Use
 - Decline in Market Appeal
 - Change in the Business Use of the property
 - Decline in Market Value
8. Was it necessary for you to hire experts (attorney, appraiser, etc) to assist you in your negotiations?
 - What are the costs?
 - How much time have you spent?
9. Did the State fairly consider the damages to your property resulting from the Take?

TO: PHILIP EVANS
NORTH GATE SQUARE
479-5403 FAX
479-5407

FROM: MIKE LOHMAN
WASILLA S.P.R.
376-0948 HOME/MESSAGE
376-0947 FAX

SUBJ: HIGHWAY RIGHT OF WAY ACQUISITION

IN RESPONSE TO YOUR INQUIRY REGARDING THE STATE TAKING A PORTION OF MY PROPERTY FOR HIGHWAY RIGHT OF WAY THE FOLLOWING ADDRESSES MY SITUATION:

PROPERTY DESCRIPTION

MY BAR/NIGHTCLUB SITS ON 2 1/2 ACRES. THE BUILDING IS 25 FEET FROM THE FRONTAGE ROAD WHICH ALLOWS PARKING FOR 15 VEHICLES AT OR NEAR THE FRONT ENTRANCE. A WAREHOUSE/RETAIL SPACE IS BEHIND AND OFFSET TO THE BAR WHICH SHARES PARKING WITH THE BAR. FOR OVER 23 YEARS THE BAR HAS USED THE AREA OF LAND BETWEEN THE BAR AND FRONTAGE ROAD FOR CUSTOMER PARKING. ALSO IN 1995 WHEN WE

Pg 2

PURCHASED THE BUSINESS AND PROPERTY AND REMODELED THE BAR, THE PARKING SPACE BEING TAKEN BY THE STATE WAS APPROVED AND PERMITTED BY THE CITY OF WASILLA. THE PROPOSED ACQUISITION WILL TAKE 15 PRIME PARKING SPACES IN FRONT OF THE BAR. I NEED ALL THE SPACE THAT I CURRENTLY HAVE FOR PARKING, ESPECIALLY IN SUCH A CONVENIENT LOCATION TO BE ENTRANCE TO THE BAR.

ANSWERING YOUR QUESTIONS AS NUMBERED:

1. THE REPRESENTATIVE OF THE STATE WAS COURTEOUS AND INFORMATIVE, BUT NOT COMPLETELY ACCURATE. I WAS TOLD THAT PARKING COULD CONTINUE ON THE RIGHT OF WAY WHEN IN FACT 1) A CONCRETE CURB IS TO BE INSTALLED, 2) A MULTI USE PATH IS TO BE BUILT BETWEEN THE CURB AND MY BUILDING, AND 3) IT IS NOT LEGAL TO BACK FROM A PARKING SPACE ON TO A DET FRONTAGE ROAD, ALTHOUGH IT IS LEGAL TO DO SO PER THE CITY AND BURROUGH CODES ON THE MAINTAINED ROADS.

2. THE STATE APPRAISER WAS COURTEOUS, BUT IN WRITING THAT HE VERBALLY TOLD ME THAT I WOULD LOSE THE PARKING SPACE, BUT CONSIDERABLY UNDER APPRAISED THE AREA BEING TAKEN PER OTHER APPRAISERS THAT I CONTACTED.

Pg 3

- THE APPRAISAL ALLOWED A VALUE FOR A TEN FOOT STRIP THE WIDTH OF THE PROPERTY, BUT DID NOT GIVE AN ALLOWANCE FOR THE REMAINING FIFTEEN FEET BETWEEN THE RIGHT OF WAY AND MY BUILDING THAT WILL BE USELESS. BEST USE IS GONE. ONLY FLOWERS CAN BE PLANTED WHERE INCOME HAD BEEN GENERATED.
3. I DID GET A COPY OF THE APPRAISAL REPORT, BUT DO NOT KNOW WHAT THE MARKET DATA BOOK IS.
 4. I HAVE NOT RESPONDED TO THE STATE YET OTHER THAN VERBALLY. NO, THE OFFER IS NOT FAIR.
 5. THE APPRAISAL DID NOT SET FORTH THE VALUE OF THE TAKING AND THE CONSEQUENCES OF THE REMAINDER OF THE PROPERTY. ALTHOUGH, THE APPRAISER STATES THE MARKET VALUE AFTER THE TAKING IS THE SAME AS BEFORE. (ON REALLY)
 6. BEST USE OF THE PROPERTY WAS MENTIONED IN THE APPRAISAL BUT VALUED IN THE APPROACH

P 59

7. • LOSS OF PARKING WAS NOT FAIRLY CONSIDERED

- CHANGE IN HIGHEST AND BEST USE WAS NOT CONSIDERED

- MARKET ~~VALUE~~ APPEAL WILL BE HIGHLY IMPACTED NEGATIVELY

- MARKET VALUE WAS STATED AS THE SAME BOTH BEFORE AND AFTER. THIS IS NOT REALISTIC.

- BUSINESS USE OF THE PROPERTY REMAINS THE SAME, BUT INCOME WILL BE NEGATIVELY IMPACTED.

8. I AM WORKING WITH AN APPRAISER AND AN ATTORNEY AT THIS TIME. COSTS ARE NOT KNOWN YET BUT WILL EXCEED THE OFFER PRICE BY THE STATE. I HAVE SPENT TIME OFF AND ON OVER THE LAST FIVE MONTHS MOSTLY WAITING ADVICE FROM THE APPRAISER. IN THE INTERIM I HAVE BEEN TALKING TO OTHER HANDOWNERS IN A SIMILAR SITUATION, A DEVELOPER, A BUILDER, A REALSTATE BROKER AND A SECOND OPINION APPRAISER. ALL FEEL IT IS UNFAIR FOR THE STATE TO TAKE PROPERTY AND NOT JUSTLY COMPENSATE THE OWNER FOR THE DAMAGES IT CAUSED.

Pg 5

9. THE STATE DOES NOT RECOGNIZE ANY
DAMAGE TO MY PROPERTY AT THIS TIME.

IF YOU WOULD LIKE TO CONTACT ME FEEL
FREE TO CALL OR FAX. NOW THAT I KNOW
OF PROPOSED SB 278 I WILL READ UP ON
IT AND CONTACT SENATOR LYDA GREEN

Mike

22-LS1399\1

Kurtz

5/7/02

HOUSE CS FOR C, FOR SENATE BILL NO. 278(FIN)
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-SECOND LEGISLATURE - SECOND SESSION

BY THE HOUSE FINANCE COMMITTEE

Offered:

Referred:

Sponsor(s): SENATORS TORGERSON, Taylor, Wilken

A BILL

FOR AN ACT ENTITLED

1 "An Act requiring a good faith effort to purchase property before that property is taken
2 through eminent domain; and providing for an effective date."

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

4 * Section 1. AS 09.55.270 is amended to read:

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

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

8 (2) the taking is necessary to the use;

9 (3) if already appropriated to a public use, the public use to which it is
10 to be applied is a more necessary public use; and

11 (4) the condemnor has made a reasonable and diligent effort to
12 acquire the property by negotiation as provided in (b) and (c) of this section,
13 unless the property owner is

14 (A) unable to negotiate due to incapacity;

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(B) unable to convey legal title; or
(C) absent.

* Sec. 2. AS 09.55.270 is amended by adding new subsections to read:

(b) Before taking property estimated by the condemnor to be worth \$15,000 or more, a condemnor shall invite the property owner, within a reasonable period of time set by the condemnor, to obtain an appraisal from a real estate appraiser certified under AS 08.87 and offer to

(1) sell the property to the condemnor for the appraised value plus the cost of appraisal; or

(2) exchange the property for a parcel of comparable value.

(c) If a property owner makes an offer under (b) of this section within the reasonable period of time set by the condemnor, the condemnor must either accept the offer, or reject the offer and provide a reasonable explanation of the reason for the rejection along with a reasonable counter offer. If a condemnor invites the property owner to make an offer to sell the property as described in (b) of this section and the property owner fails to respond within a reasonable period of time, or if the property owner rejects a reasonable counter offer made under this subsection, the condemnor may commence eminent domain proceedings under AS 09.55.290.

* Sec. 3. AS 09.55.430 is amended to read:

Sec. 09.55.430. Contents of declaration of taking. The declaration of taking must contain

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

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

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

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

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

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

(7) a statement that the property is taken by necessity for a project

1 located in a manner that is most compatible with the greatest public good and the least
2 private injury; and

3 (8) except where the consent of a property owner cannot be
4 obtained due to incapacity, inability to convey legal title, or absence, a statement
5 that the plaintiff has complied with AS 09.55.270(b) and (c), if applicable.

6 * Sec. 4. AS 09.55.440(a) is amended to read:

7 (a) Upon the filing of the declaration of taking and the deposit with the court
8 of the amount of the estimated compensation stated in the declaration, title to the
9 estate as specified in the declaration vests in the plaintiff, and that property is
10 condemned and taken for the use of the plaintiff, and the right to just compensation for
11 it vests in the persons entitled to it. The compensation shall be ascertained and
12 awarded in the proceeding and established by judgment. If, following the award of
13 just compensation in the proceedings, the court finds as a matter of law that the
14 plaintiff has not complied with AS 09.55.270(b) and (c), the court may award an
15 additional sum of up to 10 percent of the award of just compensation as
16 additional compensation. The judgment must include interest at the rate of 10.5
17 percent a year on the amount finally awarded that exceeds the amount paid into court
18 under the declaration of taking. The interest runs from the date title vests to the date
19 of payment of the judgment.

20 * Sec. 5. This Act takes effect immediately under AS 01.10.070(c).

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: 1
 Bill Version: SB 278
 (S) Publish Date: 3/1/02

Revision Date/Time (Note if correction): _____ Dept. Affected: _____
 Title Taking property by eminent domain BRU Alaska Court System
 Component Trial Courts
 Sponsor Senator Torgerson
 Requester Senate Comm. and Reg. Affairs Component No. 768

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2002) cost: 0.0
 Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)
 The court system does not anticipate any fiscal impact from the passage of SB 278.

Prepared by: Douglas Wooliver Phone 463-4750
 Location: Alaska Court System Date/Time 2/28/02 8:59 AM
 Approved by: Stephanie Cole Date 2/28/02
 Agency: Alaska Court System

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: 4
 Bill Version: HCS SB 278(JUD)
 (H) Publish Date: 5/6/02

Revision Date/Time (Note if correction): 05/01/02 11:30am Dept. Affected: DOT&PF
 Title: An Act requiring a good faith effort to BRU
purchase property before that property is taken... Component _____
 Sponsor: Torgerson
 Requester: House Judiciary Component No. _____

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES	1,313.0	1,313.0	1,313.0	1,313.0	1,313.0	1,313.0
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2002) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

** See attached analysis.

Prepared by: Dennis R. Poshard, Assistant to Commissioner
 Division: Commissioner's Office
 Approved by: Joseph L. Perkins, Commissioner
 Agency: Alaska Department of Transportation and Public Facilities

Phone: 465-3904
 Date/Time: 5/1/02 11:46 AM
 Date: 5/1/2002

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

BILL NO. HCSSB278JUD

ANALYSIS CONTINUATION

The Department acquired 980 parcels statewide during 1999 to 2001 (an average of 327 parcels per year). Sixty-seven (67) parcels (7%) out of the 980 parcels were acquired through condemnation action.

On average, 23 parcels per year are acquired through condemnation action.

Currently there is one (1) Authority and Necessity (A&N) Challenge per year. If SB 278 passes the likelihood of A&N challenges to acquisitions will substantially increase due to new legal requirements to prove "reasonableness and due diligence."

Authority and Necessity (A&N) Challenges cost an average of \$36,500 per challenge to defend (based on Department of Law figures).

With passage of SB 278, we predict that the number of condemnation parcels will increase (from 7% to 14%) as well as an increase in A&N Challenges (18 to 46 A&N Challenges per year) for an estimate of \$657,000 to \$1,350,500* in legal fees to only defend against the challenges.

* 327 parcels per year at 7% condemnation rate = 23 parcels
23 parcels X 80% A&N Challenge rate = 18 parcels
18 parcels X \$36,500 = \$657,000 increased cost to defend.

* 327 parcels per year at 14% condemnation rate = 46 parcels
46 parcels X 80% A&N Challenge rate = 37 parcels
37 parcels X \$36,500 = \$1,350,500 increased cost to defend.

Notes:

- The property owner does not prevail with the A&N Challenge they will be responsible for their legal fees.
- If the State loses the A&N Challenge, then the property owner's legal fees will be paid by the State.