SB

278

HOUSE COMMITTEE REPORT

(7)
Date Referred to Committee: April 25, 2002 **FURTHER REFERRALS: Finance**

Date of Committee Action: 5·3·02

The JUDICIARY Committee considered: **CSSB 278(FIN)**

CS FOR SENATE BILL NO. 278(FIN) **TAKING PROPERTY BY EMINENT DOMAIN**

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

Recommends it be replaced with H **CS** FOR CSSB278 (JUD) [✓] **Same Title** [ ] **New Title**
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent _____Committee

List of Abbrev. for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LAA
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

***NEW* FISCAL NOTES**
*For Chief Clerk's Office Use Only

List by Dept(s):	*FN#	Fiscal	Indet.	Zero
DOT		✓		

***PREVIOUS* FISCAL NOTES**

List by Dept(s):	FN#	Fiscal	Indet.	Zero
CRT	1			✓

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	PEKOWITZ			✓	
	Meyer			✓	
	Kookesh	✓			
	Coghill	✓			
Chair:	ROKSBERG	✓			
Chair:					

22-LS1399\S
Kurtz
5/3/02

Adopted 5.3.02 Amended

HOUSE CS FOR CS FOR SENATE BILL NO. 278(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SECOND LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATORS TORGERSON, Taylor, Wilken

A BILL

FOR AN ACT ENTITLED

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

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

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

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

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

(2) the taking is necessary to the use;

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

(4) except where the consent of a property owner cannot be obtained due to incapacity, inability to convey legal title, or absence, the condemnor has made a reasonable and diligent effort to acquire the property by negotiation as provided in (b) and (c) of this section.

Concept #2 Amend. Adopted

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

(b) Before taking property ~~valued~~ estimated by the condemnor at $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 reasons 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 located in a manner that is most compatible with the greatest public good and the least private injury; **and**

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

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

(a) Upon the filing of the declaration of taking and the deposit with the court of the amount of the estimated compensation stated in the declaration, title to the estate as specified in the declaration vests in the plaintiff, and that property is condemned and taken for the use of the plaintiff, and the right to just compensation for it vests in the persons entitled to it. The compensation shall be ascertained and awarded in the proceeding and established by judgment. **If the court finds that the plaintiff has not complied with AS 09.55.270(b), the court may award a sum** ~~equal~~ **up to 10 percent of the** ~~value of the property~~ **final settlement amount as additional compensation.** The judgment must include interest at the rate of 10.5 percent a year on the amount finally awarded that exceeds the amount paid into court under the declaration of taking. The interest runs from the date title vests to the date of payment of the judgment.

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

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
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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 simply 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.

ALASKA STATE LEGISLATURE

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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 any alternative means of satisfying the public purpose for which the property is sought. Subsection (c) provides that if the conditions in (b) are met than 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 deals with "declarations of taking" 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.

Sec. 4: AS 09.55.460 authorizes the court to divest the authority of its new title if it is ultimately shown that the taking was not necessary. Section 4 would amend AS 09.55.460(b) by authorizing the court to also divest the condemnor of title when it was ultimately shown that a "reasonable and diligent effort" to purchase the property had not been made. Without Section 3, 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.

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						
CHANGE IN REVENUES ( )						

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 Colo
Date 2/28/02
Agency: Alaska Court System

(Revised 9/2001 OMB)

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: 3
Bill Version: CS SB278 (JUD)
(S) Publish Date: 4/18/2002

Revision Date/Time (Note if correction):
Dept. Affected: DOT&PF
Title: An Act requiring a good faith effort to purchase property before that property is taken...
BRU
Component
Sponsor: Torgerson
Requester: Senate Finance
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	**	**	**	**	**	**
CHANGE IN REVENUES ( )						

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 4/12/02 4:16 PM
Approved by: Joseph L. Perkins, Commissioner
Date 4/12/2002
Agency: Alaska Department of Transportation and Public Facilities

(Revised 9/2001 OMB)

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

BILL NO. CSSB 278(JUD) #3

ANALYSIS CONTINUATION

AKDOT&PF acquires approximately 500 parcels a year. The department estimates that at least 50% of the property owners would contract for their own appraisals if AKDOT&PF was paying for them. The average cost per appraisal is $2,500. 250 parcels X $2,500 = $625,000 per year. The increased cost of property acquisition will cause a reduction in the amount of capital funding available for design and construction of projects. The Department is unable to determine if federal project sponsors will participate in funding the increased right-of-way costs.

The Department would not have any control over the performance of the appraisal or the complexity of the assignment. This bill is also likely to result in the delay of projects.

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.

2. State Agency and Local Government Assessment of Proposed Regulations

Arizona

Legislation passed in 1995 (Ariz. Rev. Stat. Ann., 9-500.12, 9.500.13, 11-810, 11-811) establishes an administrative appeals process whereby a property owner may appeal a municipal or county dedication or exaction of real property required as a condition of the property's use, improvement or development. The law does not apply to a dedication or exaction required by a municipal or county legislative act in which the administering agency has no discretion in determining the nature or extent of the action. The municipality or county must appoint a hearing officer to hear appeals. Once an appeal is made, the municipality or county must prove that there is an essential nexus between the dedication or exaction and a legitimate public purpose, and that the action is roughly proportional to the impact of the proposed property use. The law further requires every municipality with a population greater than 2,000 and every county to prepare administrative procedures to facilitate the administrative appeals process.

Every municipality and county to which the law applies has prepared administrative procedures. The League of Arizona Cities & Towns reports that there have been at least two appeals filed under the law, both in the city of Scottsdale (a third appeal was resolved before going to hearing). One concerned a scenic corridor easement, the other the dedication of a right-of-way for a water and sewer line. The city lost both appeals and withdrew the dedication or exaction. There have been no appeals in Phoenix, the largest city in the state. The Phoenix Development Services Department has indicated that it meets with property owners informally before a dedication or exaction is finalized in an attempt to resolve potential appeals.

There are two sets of costs that a municipality or county may incur under the law. The first is the *process* costs of performing individual analyses of proposed dedications or exactions to ensure that they comply with the essential nexus and rough proportionality requirements of United States Supreme Court decisions. The city of Phoenix plans to use existing plan review staff to perform these analyses. The city acknowledges that "this may cause some degradation of plan review turnaround time" and that "the overall fee schedule may have to be increased to recover the costs of individualized analyses since customers cannot be directly charged." The city of Scottsdale estimates that handling the appeals process incurs costs equivalent to approximately one-half day to one day of a staff person's time.

The second set of costs is the *capital* costs of having to purchase foregone right-of-way dedications and improvements of real property in order to maintain, in the words of one Phoenix official, "a safe, functional and aesthetically pleasing municipality." As of April 30, 1996, the city of Phoenix estimated that the value of foregone dedications and exactions in the first year of the law's operation amounted to $690,000.

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

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DOCUMENT(S)
ARE
POOR
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general's guidelines, and submit to the governor and the attorney general a written report by Jan. 1, 1997.

The attorney general prepared guidelines to assist state agencies in evaluating the takings implications of proposed government actions on Dec. 21, 1995. The Department of Health and Environment, the primary state agency responsible for issuing rules and regulations that may affect property rights, adopted procedures to prepare the written report required under the law on July 16, 1996. Each bureau within the department prepares the written report on proposed government actions as required under the law. The department's Office of Legal Services answers the questions posed in the attorney general's guidelines.

The department has indicated that it routinely conducted some type of takings assessment on proposed rules and regulations prior to passage of the Private Property Protection Act in 1995, and that its assessments had been reviewed by the attorney general's office before implementing a proposed rule or regulation. No proposed rules or regulations have been found by the department or the attorney general's office to constitute a taking, and none have been revised based on that determination. The department has not incurred any additional costs to comply with the 1995 legislation's takings assessment requirements.

The Department of Health and Environment submitted its evaluation of existing rules and regulations to the governor and the attorney general on Oct. 21, 1996. After consulting the attorney general's guidelines, the department determined that none of its existing rules and regulations constitutes a taking.

North Dakota

Legislation enacted in 1995 (N.D. Cent. Code, 28-32-02.5) requires a state agency to prepare a written assessment of the takings implications of any proposed rule that might limit the use of private real property. The agency assessment must:

- Assess the likelihood that a proposed rule may result in a taking.
- Clearly identify the purpose of the proposed rule.
- Explain why the proposed rule is necessary.
- Identify alternatives to the proposed rule.
- Estimate the cost to government if the proposed rule results in a taking.
- Certify that the benefits of the proposed rule exceed the estimated costs if compensation is required.

The Department of Health has reviewed its proposed rules to determine if a takings assessment is necessary. It determined that a takings assessment was not necessary for its ground water monitoring well rules (the only rules proposed since enactment of N.D. Cent. Code, 28-32-02.5) because their implementation would not result in a taking. The Office of Attorney General subsequently approved the rules. The department has incurred some additional costs to determine whether a takings assessment is necessary, but not

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 actions, 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.

Four agencies prepared a total of 139 TIAs during FY 1996, with the Texas Natural Resources Conservation Commission (TNRCC) preparing 116 of the TIAs. Agency costs for preparing the TIAs ranged from $500 to $1,250 per agency. Agencies project that their FY 1997 costs for preparing TIAs will range from $500 to $5,000 per agency based on an increase in the number of TIAs being prepared (from 139 in FY 1996, to between 148-156 in FY 1997).

Based on comments received from government agencies, the comptroller made the following recommendations to the legislature:

- Clarify the types of agencies that are required to prepare TIAs.
- Clarify the types of government actions covered under the act.
- Clarify the rights of adjacent landowners to relief from actions undertaken by government agencies.
- Clarify the agency responsible for preparing the TIA, where more than one agency is involved in undertaking an action that affects a property owner.

Utah

Utah's 1993 takings assessment law (Utah Code Ann., 63-90-1 et seq.) provides very specific criteria for the composition of state agency assessments. It requires state agencies to adopt guidelines to assist them in identifying and evaluating government actions that have constitutional takings implications. Each assessment must include an analysis of:

- The likelihood that the proposed action will result in a taking.
- Alternatives to the proposed action.
- The estimated costs to the state for compensation should the action result in a taking, and the source of payment within the agency's budget.

The law further requires a state agency to:

- Clearly identify the public health or safety risk created by the property use.
- Ensure that the proposed action substantially advances a legitimate public purpose.
- Establish that the conditions imposed by the action are proportionate to the impacts caused by the property use.

The law was expanded in 1994 (Utah Code Ann., 63-90a-1 et seq.) to require each political subdivision in the state to enact an ordinance establishing similar guidelines to those developed by state agencies. The law does not specify criteria to be included in a local government takings assessments; it merely requires each political subdivision to consider the guidelines when taking an action that might result in a taking. It further states that the guidelines are only advisory.

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

office noted, however, that he was surprised by the limited reference to the guidelines by local governments preparing growth management plans.

West Virginia

The Private Real Property Protection Act of 1994 (W.Va. Code, 22-1A-1 et seq.) requires the Division of Environmental Protection to prepare an assessment of any action that is reasonably likely to result in a taking of private property. The assessment goes beyond a determination of the takings implications of a proposed regulation to include:

- Identifying the risk of the regulated activity and the benefits to be achieved by the regulation.
- The potential effects on other landowners and the environment without the regulation.
- How the regulation mitigates the risk.
- Why the division believes the regulation may result in a taking requiring compensation.
- Alternative actions to the regulation.
- Estimated costs to the state if compensation is required.

The statute contains an exclusion that significantly limits its application. An assessment is not required for agency actions undertaken pursuant to state or federal statutes, rules or regulations. The Division of Environmental Protection has determined that none of its regulatory actions are taken independent of state or federal statutes, rules or regulations. It has not, therefore, prepared any assessments or assumed any additional costs to comply with the law.

3. Compensation for Regulatory Takings

Louisiana

Louisiana's 1995 Right to Farm and Forest Act (La. Rev. Stat. Ann., 3:3601 et seq.) authorizes the owner of agricultural or forest land to bring an action against a state or local government agency to determine whether a government action has reduced the value of the property by 20 percent or more. If the court determines that a government action has reduced the value of the land by 20 percent or more, the property owner is entitled to compensation for the reduction and retention of title to the property, or, in the case of agricultural land only, recovery of the fair market value of the property and transfer of title to the government agency. As an option, the government agency may rescind the action resulting in the regulatory taking; the government agency remains liable for damages incurred while the action is in effect. The Louisiana Department of Agriculture and Forestry has reported that no actions have been filed against it or any local government agency seeking compensation for a regulatory action covered under the law.

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.

Under the dispute resolution provisions of the act, a landowner who believes that a development order or an enforcement action of a government entity is unreasonable or unfairly burdens the use of the property may request relief from a special master mutually agreed upon by the landowner and the governmental entity responsible for the order or action. Before initiating a proceeding before a special master, the landowner must exhaust all nonjudicial administrative appeals. All hearings conducted by the special master must be informal, open to the public and not require an attorney. The role of the special master is to act as a mediator between the two parties in order to reach a mutually acceptable resolution of the dispute.

If an acceptable solution is not reached, the special master must make a written recommendation to both parties. If the special master determines that the development order or enforcement action is not unreasonable or does not unfairly burden the use of the owner's property, the special master must recommend that the order or action remain in place. If the special master determines that the order or action is unreasonable or unfairly burdens the use of the owner's property, the special master may recommend alternatives that protect the public interest but reduce the restrictions on the use of the property. The government entity may accept, modify or reject the recommendation. Regardless of the government's response, the property owner may seek judicial relief through the courts.

There has been no litigation alleging that a government action to which the law is applicable has placed an inordinate burden on the use of private real property. The courts have not determined what types of government actions or what level of reduction in property value constitute an inordinate burden. The courts have not awarded compensation to any property owner under the act. At least one county has not issued a development order drafted before passage of the act because of concern that it might be interpreted to place an inordinate burden on the use of private property if challenged in the courts.

According to the Florida Conflict Resolution Consortium, at least 30 cases have proceeded under the dispute resolution provisions of the act; 28 cases have been filed against county or municipal government actions, with one each having been filed against a regional water management district and the state Department of Environmental Protection. At least five of the cases have resulted in a mutually acceptable solution between the property owner and the government entity. The difficulty in determining the exact number of cases is that there is no central location for initiating the dispute resolution process and selecting a special master. Some cities and state agencies are developing procedural guidelines to assist in the dispute resolution process. The Florida Conflict Resolution Consortium has developed "Model Procedural Guidelines for Special Master Proceedings," and has begun a training program for special masters.

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?

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

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

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

4 P 1

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

FROM: MIKE LOHMAN
WASILLA BAR
376-0948 HOME/MESSAGES
376-0947 FAX

SUBJ: HIGHWAY RIGHT OF WAY ACQUISITION

IN RESPONCE 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 2½ 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

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 THE 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 ONTO A DOT FRONTAGE ROAD, ALTHOUGH IT IS LEGAL TO DO SO PER THE CITY AND BOROUGH 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. AS, 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. (OH REALLY)

6. BEST USE OF THE PROPERTY WAS MENTIONED IN THE APPRAISAL BUT VALUED IN THE APPROACH

P 5 4

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 LANDOWNERS IN A SIMILAR SITUATION, A DEVELOPER, A BUILDER, A REALESTATE 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.

By 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 276 I WILL READ UPON IT AND CONTACT SENATOR LYDA GREEN

Mike

STATE OF ALASKA

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

OFFICE OF THE COMMISSIONER

TONY KNOWLES, GOVERNOR

3132 CHANNEL DRIVE
JUNEAU, ALASKA 99801-7898

TEXT : (907) 465-3652
FAX: (907) 586-8365
PHONE: (907) 465-3900

May 1, 2002

Honorable Norman Rokeberg
Alaska State Legislature
State Capitol, Room 118
Juneau, AK 99801

Dear Representative Rokeberg:

One of the biggest challenges facing transportation departments on the national level is the ability to deliver projects in a timely manner. Federally required planning processes, national environmental laws, and property acquisitions are costly, time consuming and provide a fertile field for litigation. It currently takes from 6-10 years to get a project ready to bid in urban areas. My colleagues from the other 50 state transportation departments and I, the American Association of State Highway and Transportation Officials, trucking associations, as well as the design and construction industry are all working diligently on the federal level to streamline the project delivery process. The upcoming reauthorization of TEA-21 is a golden opportunity for us to achieve some changes of Federal requirements.

Property acquisition can be a major factor in project delay and is generally governed by State Statutes. Currently, Alaska has a very fair, efficient, and proven property acquisition process. We settle 93% of our acquisitions in the negotiation process. I am concerned that Senate Bill 278 will add an unnecessary step in the property acquisition process that will result in lengthy delays in delivering projects especially in urban areas. By requiring the department to prove in court, that we have been reasonable and diligent in our negotiations with property owners before we can divest them of title, the bill can cause significant project delays and cost increases. This could, in Alaska's case, effectively negate any gains made in changes to Federal rules and result in extensive litigation for many projects.

Currently, the department can acquire title to property by proving authority and necessity, relatively objective standards, in court. We then either finalize negotiations or litigate over the fair market value of the property. This bill gives an unhappy property owner one more tool to delay a project regardless of the reason. For example, an urban project that has public support and requires the acquisition of forty properties could be delayed at

great expense due to one unhappy property owner challenging the reasonableness of the department in the negotiation process, a very subjective standard to prove.

At a time when we are trying to streamline the project delivery process at the Federal level, I would urge the committee not to add unnecessary State of Alaska steps by passing Senate Bill 278.

Sincerely,

Joseph L. Perkins, P.E.
Commissioner

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: CS SB278 (FIN)
() Publish Date: 5/1/2002

Revision Date/Time (Note if correction): 05/01/02 11:30am
Dept. Affected: DOT&PF
Title: An Act requiring a good faith effort to purchase property before that property is taken...
BRU
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
CHANGE IN REVENUES ( )						

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

(Revised 9/2001 OMB)

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

BILL NO. CS SB278 (FIN)

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.

SB 278

Considerations:

- The DOT&PF regards the acquisition of property through Eminent Domain as a serious matter and we respect the rights and concerns of property owners. Our guidance to the Department's staff begins by describing the rights of individual property owners as they are stated in the Alaska Constitution and the Fifth Amendment of the U.S. Constitution
- The current process works well
    - Acquisitions take place under the Federal Uniform Act and Alaska Statutes
    - By law we are required to offer fair market value. Property owners are allowed to rebut our appraisal or offer their own
    - Our Right-of-Way Manual guidance stresses the importance of fairness and just compensation
    - There is exhaustive case law on Eminent Domain
    - Review appraisals are required by FHWA
    - Under existing law, a judge already decides the issues of authority, necessity and fair market value
- Percentage of condemnations in Alaska is low – approximately 7% of the acquisitions
- The bill encourages additional litigation during the acquisition process
- The bill will shift Federal-Aid Highway funds from hard assets like new pavement and safety improvements toward additional attorney fees without giving the property owner anything more than the just compensation that they are already entitled to
- The bill will result in project delays
- The bill may cause expenses to be ineligible for federal reimbursement. If Section 2.b.1 of the bill intends that the Department purchase the property at the property owners appraised value rather than the value determined under the CFR's then any expense in excess of that amount will be ineligible for federal reimbursement
- Alternatives proposed by the property owner under Section 2.b.2 may be outside of approved environmental document. In order to accept the proposal, we would have to stop all design, utility and right-of-way work until we had a revised environmental document approved by the FHWA

DOT&PF is addressing the issues:

- ADOT&PF is willing to consider the concerns of the sponsor or other interested parties without the passage of SB 278
- We have amended our internal delegation of authority to require that the appeal of a Master's decision be approved by the Department's Chief Engineer\
- We are working with the FHWA to develop a pilot project of bonuses to sellers who are willing to settle quickly
- Existing statutes, AS 19.05.120, allow us to address the concerns of the ANCSA Corporations regarding purchase property for the purpose of exchange
- We have initiated a review of our processes relating to ANSCA Corporations so that we have a structured policy in place to follow when we have a request for an exchange of lands in lieu of a purchase

SIMPLIFIED PROJECT DEVELOPMENT FLOW CHART

Project Phase

Planning

Environmental Document

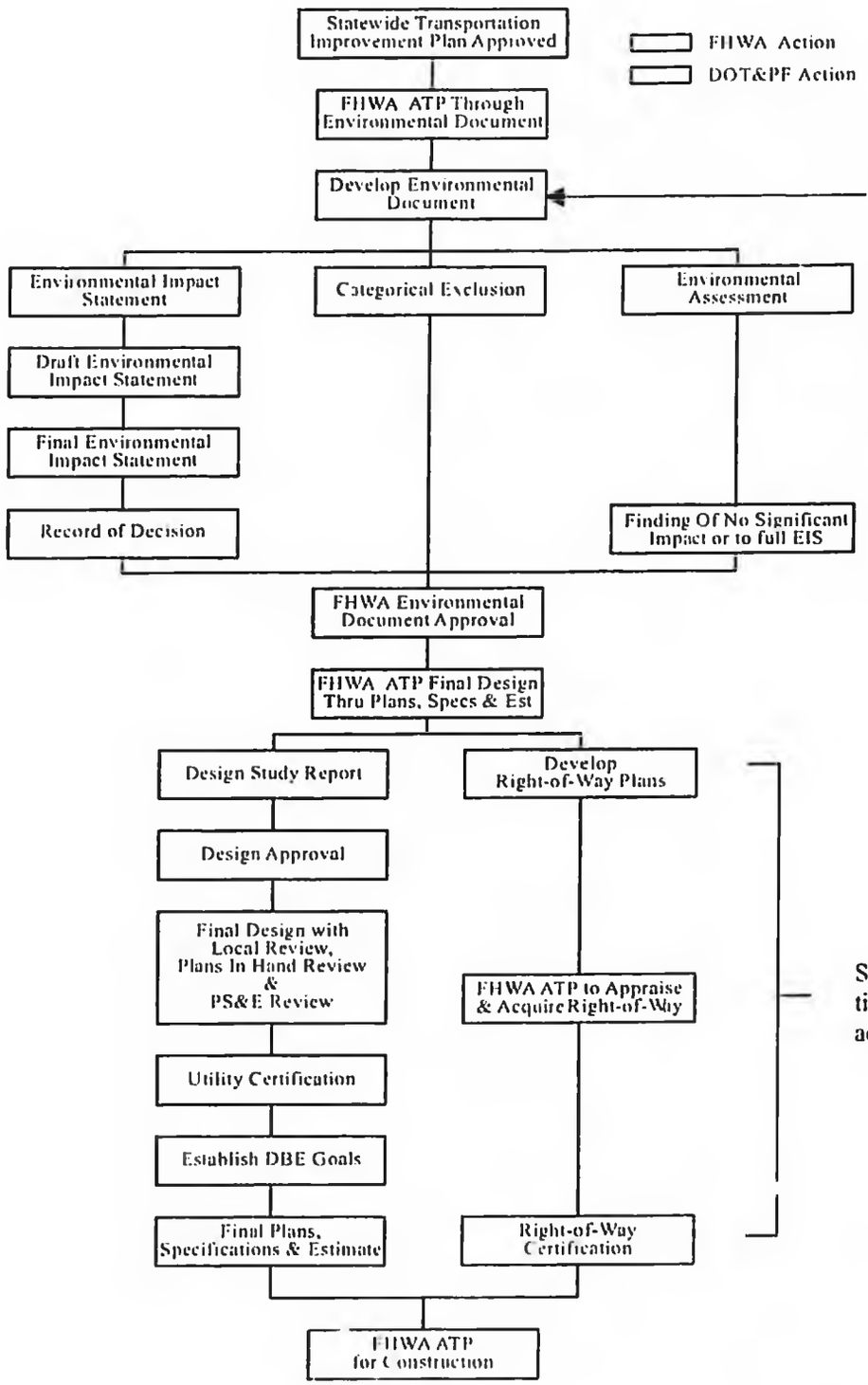
Preliminary Design

Final Design

Utilities

Right-Of-Way*

Construction



If the "Alternate Means" proposed under Section 2.b.2 is not consistent with the approved environmental document, then to accept the proposal DOT&PF must stop all work and revert back to this step until a revised environmental document is approved by FHWA.

SB 278 will extend the time required for ROW acquisition.

*ROW Acquisition is very often on the critical path of project development

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."

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. Swarthout, 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

THE IMPACT OF SB 278 UPON ORGANIZATIONS OTHER THAN DOT&PF

The amendments proposed to AS 09.55.270 and 09.55. 430 and 09.55. 470 will have an impact upon the following entities that have the authority to exercise the power of eminent domain, which are in addition to Department of Transportation and Public Facilities land acquisitions for highway construction for which it has presented testimony and addressed in its fiscal note.

- Lessees under the Alaska Right of Way Leasing Act who are delegated the state's eminent domain power under AS 38.35.130. (Gas pipelines and oil pipelines)
- Public Utilities under AS 42.05.631
- Municipalities under AS 29.35.030
- The Alaska Railroad under AS 42.40.385

Subject: acquisition statistics
Date: Fri, 03 May 2002 11:14:32 -0800
From: Rick Kauzlarich <rick_kauzlarich@dot.state.ak.us>
Organization: Alaska DOT/PF
To: Michael L Downing <mike_downing@dot.state.ak.us>,
Dennis R Poshard <dennis_poshard@dot.state.ak.us>

Mike and Dennis,

Here are the statistics you asked for:

1999 - 2001 Statewide Acquisitions
parcels acquired under $15,000 = 670
parcels acquired over $15,000 = 310

These figures include several projects with minor type strip takings, consequently the totals reflected are not typical. My experience is that AKDOT acquires more properties above the $15,000 range.

Also none of our condemnation acquisitions are under $15,000. The average dollar amount for condemnation acquisitions is $140,000.

State Right of Way Chief
State of Alaska DOT&PF
Statewide Design & Engineering Services