

SB

382



Official Business

ALASKA STATE LEGISLATURE

SENATOR THOMAS H. WAGONER

- Co-Chair, Senate Transportation Committee
- Vice-Chair, Senate Resources Committee
- Vice-Chair, Community & Regional Affairs
- Member, Legislative Council

Session: January – May
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DATE: May 5, 2004

TO: Representative Jim Holm, Chair
House Transportation Committee

FROM: Senator Tom Wagoner

RE: Scheduling of SB 382 – Eminent Domain/Replat of Boundary
Changes

I would appreciate your scheduling this bill, pending referral, before your House Transportation Committee.

I am electronically attaching information regarding the bill for your review and inclusion with your committee packet.

Thank you for your time and consideration.

Sponsor Statement
Prepared by Alaska Department of Transportation and Public Facilities
April 1, 2004
In Support of SB 382

In late March, Commissioner Barton wrote to both Senate and House Transportation, requesting legislation be prepared to address an urgent problem regarding the method used to perform property line changes associated with right-of-way for new transportation projects. His concern was based on a recent lawsuit filed on the C Street extension project in Anchorage. Based on discussion between the Department of Law and right-of-way staff within the department, there was a concern the argument used in the lawsuit could be extended to several other projects across the state. Indeed, that same week, a second lawsuit was filed on the Kenai River bridge project at Soldotna, based on the same legal argument.

The novel legal theory being advanced in the C-Street and Kenai River cases is based on a state law that dates back to 1975. What's new is the interpretation that the state cannot fulfill the typical replat provisions required by local governments (mandated by AS 09.55.275) while also fulfilling the legal processes associated with property acquisition under eminent domain powers.

While the state will vigorously defend against these lawsuits, we are quite fearful of the consequence of an adverse decision as well as the time delay associated with such litigation. Several major projects across the state are at risk. Most critical is the Soldotna project that is slated for construction this summer and several others slated for construction in 2005. If either case is decided in favor of the landowner, the state's ability to use eminent domain powers will be virtually extinguished.

Our principal concern with the current language in AS 09.55.275 is that it requires:

"The platting authority shall treat applications for replat made by state or local governmental agencies in the same manner as replat petitions originated by private landowners.

Inherently, a replat associated with property acquired under eminent domain proceedings, is different than a replat a property owner pursues voluntarily. Accordingly, boroughs with platting authority have created different procedures for such replats involving right-of-way. The argument being advanced in court is that having two separate procedures violates the 1975 legislative intent. The state strongly disagrees with this position, but it is possible that an Alaska Superior Court judge could find that the separate procedures are not treated in the "same manner," and could therefore also find that the state has no authority to acquire needed property.

To prevent further project delay, the legislation before you is offered. It ensures that a state or municipal entity can still reasonably proceed with property acquisition under eminent domain while retaining the local government's locally structured replat procedure.

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delegated his statutory authority to the Interior authorizing the Alaska Land Title Ass'n, 667 U.S. 1040, 118 S.Ct. 1884 (1994).

not be construed to limit the right-of-way or other easement acquired under the Alaska Stat. 418. (§ 3 ch 118)

apply to patents issued under the Alaska Stat. of 1938, 43 U.S.C. & Alaska Stat. (1983), cert. denied, 464 U.S. 1040, 118 S.Ct. 1884 (1994). 79 L. Ed. 2d 168 (1984). 366 does not apply to public land order issued under which the Interior delegated his statutory authority to the Alaska Land Title Ass'n, 667 U.S. 1040, 118 S.Ct. 1884 (1994).

shall appear that

is to be applied is

findings in condemnation proceedings and those under a public use order for less than 3.60 Acres, More or Less

low authority and right of eminent domain for a public use taking of property by eminent domain complaint or petition for a public use. Plainly and affirmatively authority for the taking of property for such a public use. 138 F. 544 (9th Cir. 1905).

in eminent domain proceedings, positive statement that taking of property is necessary and supported by a

statement of facts from which the court can see that the property is intended to be used for that purpose. *Miocene Ditch Co. v. Lyng*, 138 F. 544 (9th Cir. 1905).

Authority and necessity must be found by court before condemnation. — This section has been construed as requiring the court to find the use is authorized by law and the taking is necessary "before condemnation." *Bridges v. Alaska Hous. Auth.*, 349 P.2d 149 (Alaska 1960).

Necessity of findings. — It is upon findings made in accordance with this section that there is established a basis for further proceedings. The findings constitute the decision of the court upon the vital question of whether or not the property sought to be taken can be condemned at all. *Van Dyke v. Midnight Sun Mining & Ditch Co.*, 177 F. 85 (9th Cir. 1910).

Questions to be considered by court. — Ordinarily the only questions to be considered by the courts in condemnation proceedings are: First, whether the petitioner has the power to exercise the right of eminent domain; second, whether the property itself is of a nature subject to condemnation; third, whether the property is being taken for a public or a private use; and fourth, whether the power is being used for taking an excessive amount of property. *Town of Seward v. Margules*, 9 Alaska 354 (1938).

Absolute necessity not required. — Although the condemnor may have the burden of making a prima facie showing of necessity, the language of this section ought to be construed to require no more than that the particular taking be shown to be "reasonably requisite and proper for the accomplishment of the purpose for which it is sought." *City of Fairbanks v. Metro Co.*, 540 P.2d 1056 (Alaska 1975).

Particular questions left to discretion of condemning authority. — In general condemnation proceedings under this article, once the condemnor has presented sufficient evidence to support a finding that a particular taking is "reasonably requisite" for the effectuation of the authorized public purpose for which it is sought, particular questions as to the route, location or amount of property to be taken are to be left to the sound discretion of the condemning

authority absent a showing by clear and convincing evidence that such determinations are the product of fraud, caprice or arbitrariness. *City of Fairbanks v. Metro Co.*, 540 P.2d 1056 (Alaska 1975).

Burden of proof. — One seeking to show that a particular taking is excessive or arbitrary has a heavy burden of proof in the attempt to persuade the court to substitute its judgment for that of the condemnor. *City of Fairbanks v. Metro Co.*, 540 P.2d 1056 (Alaska 1975).

Relative private injury. — That certain property owners suffer relatively greater injury than others, or are less directly benefited by the project, does not establish that the taking of their property is unnecessarily injurious or unwarranted. *City of Fairbanks v. Metro Co.*, 540 P.2d 1056 (Alaska 1975).

While it is true that the inability of a particular condemnee to obtain immediate beneficial use from the project may be considered as a factor in weighing the project's impact in terms of the degree of private injury involved in a proposed route or location, the interest in minimizing private injury is not absolute and must always be weighed in relation to the goals and efficacy of the project in its entirety at the time such determinations are made. *City of Fairbanks v. Metro Co.*, 540 P.2d 1056 (Alaska 1975).

City clearly met its initial burden of demonstrating that its taking certain parcels of land for purposes of the construction of a sewer line was reasonably necessary under the circumstances. *City of Fairbanks v. Metro Co.*, 540 P.2d 1056 (Alaska 1975).

Complaint held sufficient. — Where a complaint used the words "imperatively required" for a public use and alleged facts supporting the same, this was sufficient to show necessity under this section. *Town of Seward v. Margules*, 9 Alaska 354 (1938).

Appeal from interlocutory order finding use authorized and taking necessary. — See *Van Dyke v. Midnight Sun Mining & Ditch Co.*, 177 F. 85 (9th Cir. 1910); *Northern Mining & Trading Co. v. Alaska Gold Recovery Co.*, 20 F.2d 5 (9th Cir. 1927).

Collateral references. — Sufficiency of condemnor's negotiations required as preliminary to taking in eminent domain, 21 ALR4th 765.

Sec. 09.55.275. Replat approval. An agency of the state or municipality may not acquire property located within a municipality exercising the powers conferred by AS 29.35.180 or 29.35.260(c) that results in a boundary change unless the agency or municipality first obtains from the municipal platting authority preliminary approval of a replat showing clearly the location of the proposed public streets, easements, rights-of-way, and other taking of private property. Final approval of replat shall be similarly obtained. However, if a state agency clearly demonstrates an overriding state interest, a waiver to the approval requirements of this section may be granted by the governor. The platting authority shall treat applications for replat made by state or local governmental agencies in the same manner as replat petitions originated by private landowners. (§ 2 ch 96 SLA 1975; am § 23 ch 74 SLA 1985)

Revisor's notes. — In 1994, in the first sentence of this section, "An agency of the state or municipality may not" was substituted for "No agency of the state

or municipality may" to conform the section to the current style of the Alaska statutes.



Alaska State Legislature

Senate Majority Web: <http://www.akrepublicans.org>

Sponsor: Senate Transportation Committee
Current Version: CSSB 382 (CRA) am
Contact: Mary Jackson, 465-4937
Date: April 20, 2004

Fact Sheet for: Senate Bill 382

Short Title: Eminent Domain/Replat of Boundary Changes

Summary:

- Clarifies an ambiguity in existing eminent domain law that unnecessarily limits municipalities in their consideration of replat approval petitions.
- Authorizes municipalities to adopt replat approval procedures targeted specifically to the eminent domain process.

Benefits:

- Gives municipalities greater flexibility in the processes used to review replat approval petitions in eminent domain proceedings.
- Conforms state law to municipal treatment of eminent domain replat approval petitions.

Background:

DOT proposed this legislation following the recent filing of a lawsuit over the C Street Extension in Anchorage. The state's legal staff believed the litigant's legal theory would extend the suit to many other DOT construction projects, including the Kenai River bridge in Soldotna. The state is defending against the lawsuit, yet the consequences of an adverse ruling would be severe. This legislation ensures that DOT or a municipality can reasonably proceed with property acquisition under eminent domain while retaining local government's replat procedures.

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number: 1
 Bill Version: CSSB 382(TRA)
 (S) Publish Date: 4/2/04

Revision Date/Time (Note if correction): _____ Dept. Affected: DOT&PF
 Title Replatting provisions of Eminent RDU Administration & Support
Domain Right of Way Component Commissioner's Office
 Sponsor Senate Transportation
 Requester Senate Transportation Component No. 530

Expenditures/Revenues (Thousands of Dollars)

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

| OPERATING EXPENDITURES | FY 2005 | FY 2006 | FY 2007 | FY 2008 | FY 2009 | FY 2010 |
|------------------------|------------|------------|------------|------------|------------|------------|
| 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 () | | | | | | |
|-------------------------------|--|--|--|--|--|--|

FUND SOURCE (Thousands of Dollars)

| FUND SOURCE | FY 2005 | FY 2006 | FY 2007 | FY 2008 | FY 2009 | FY 2010 |
|---|------------|------------|------------|------------|------------|------------|
| 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 (FY2004) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

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|-----------|--|--|--|--|--|--|
| Full-time | | | | | | |
| Part-time | | | | | | |
| Temporary | | | | | | |

ANALYSIS: *(Attach a separate page if necessary)*

Prepared by: Nona Wilson
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 Approved by: John MacKinnon
 Agency: Deputy Commissioner

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