

SB

382

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.

THE
FOLLOWING
DOCUMENT(S)
ARE
POOR
ORIGINAL
COPIES

delegated his statutory authority to the Interior authorizing the State of Alaska for specified purposes in a Land Title Ass'n, 667 U.S. 1040, 88 (1984).

shall not be construed to limit the right-of-way or other easements created by the court on 14, 1966, by the court. The court required under the court Stat. 418. (§ 3 ch 118)

shall apply to patents issued by the court in 1938, 43 U.S.C. & 1701. State v. Alaska Land Title Ass'n, 667 U.S. 1040, 88 (1984), cert. denied, 79 L. Ed. 2d 168 (1984). The court does not apply to the court's public land order issued under the court's order under which the court delegated his statutory authority to the Interior authorizing the State of Alaska for specified purposes in a Land Title Ass'n, 667 U.S. 1040, 88 (1984).

shall appeal that

it is to be applied is

proceedings in condemnation and those under the court's authority and an order for the court's v. 3.60 Acres, More or Less, 138 F. 544 (9th Cir. 1905). The court shows authority and the right of eminent domain on behalf of a public use in the taking of property in the complaint or petition in plain and affirmative authority for the court of the property for such purposes, 138 F. 544 (9th Cir. 1905).

ent in eminent domain clear, positive statement condemned is necessary law, 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 Sur. 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 condemnor 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

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

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: "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 *V. 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).

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



ALASKA STATE LEGISLATURE

SENATE COMMITTEE ON COMMUNITY & REGIONAL AFFAIRS

Senator Bert K. Stedman, Chair

Official Business

Senator Tom Wagoner, Vice-Chair
Senator Kim Elton
Senator Georgianna Lincoln
Senator Gary Stevens

State Capitol, Room 30
Juneau, AK 99801-1182
Phone: (907) 465-4989
Fax: (907) 465-3922

April 14, 2004
1:30 - 3:30 PM
Fahrenkamp 203

AGENDA

I. Call To Order

II. New Business

SB 132 Minto Flats Game Refuge

Sponsor Testimony:

*Senator Georgianna Lincoln (D-Rampart), District C
Mark Stopha, Staff Senator Lincoln*

Invited Testimony:

Chief

*Andrew Jimmy, Minto, Alaska
Available for Questions (Via Phone)
Wyn Menefee, Chief of Ops, Div Mining, Land & Water, DNR
Joe Joyner, Div Mining, Land & Water, DNR*

Public Testimony

SB 382 Eminent Domain/Replat of Boundary Changes

Sponsor Testimony:

*Senator John Cowdery (R-Anch), District O
Richard Schmitz, Staff Senator Cowdery*

Invited Testimony:

*Peter Putzier, Asst Atty Gen, Transportation, Dept Of Law
Jeff Ottesen, Director, Div of Program Development, DOT*

Public Testimony

III. Adjourn

*John Mackinnon
MacKinnon*

SB 382

Subject: Conceptual Amendments—SB 382
Date: Tue, 13 Apr 2004 17:00:08 -0800
From: "Peter Putzier" <Peter_Putzier@law.state.ak.us>
To: <Richard_Schmitz@Legis.state.ak.us>
CC: <Sam_Kito@ci.juneau.ak.us>

Richard:

DOT&PF has opened a dialogue with various municipalities. Those discussions have resulted in a few suggestions for changes to the existing legislation.

Section 1: Amend the PURPOSE AND INTENT to read: "(a) The purpose of this Act is to confirm the municipal role in eminent domain proceedings, including the right of municipalities to regulate remnant parcels, while at the same time . . ."

Section 3: Add a new AS 44.42.085(b)(1), and renumber the following subsections:

"(b)(1) must be narrowly tailored to establish minimum baseline procedures or standards particular to replat issues arising in eminent domain proceedings, and may not unnecessarily, or without good cause, infringe on general municipal zoning powers or authority."

Section 3: Change subpart (c) as follows: "shall allow the municipal authority to elect to provide preliminary and final replat approval." [replaces "may" with "shall"]

The foregoing reflects the changes that have been discussed so far. The CBJ may be asking for additional language of some sort which would require DOT&PF to get review and comment from relevant platting authorities prior to adopting regulations. In the absence of specific language changes, DOT&PF is amenable to committing on the record that it will include the impacted platting authorities in the regulation drafting process.

I will contact you sometime before noon tomorrow with an update. Please feel free to give me a call, if you would like any additional information or clarification.

Thank you.


Peter Putzier
Assistant Attorney General
Transportation Section
(907) 465-6712 (direct line)
(907) 465-6735 (fax)
Email: peter_putzier@law.state.ak.us

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Peter Putzier

From the office of . . . Senator John J. Cowdery
State Capitol Building, Rm # 101
Juneau, AK 99801
907-465-3879 phone
907-465-2069 fax

MEMORANDUM

DATE: April 5, 2004
TO: SENATOR BERT STEDMAN
Chair, Senate Committee on Community and Regional Affairs
FROM: Senator John J. Cowdery 
RE: SB 382

Please schedule, at your earliest convenience, a hearing for **CSSB 382(TRA)** "an act relating to replat approval; relating to the platting of right-of-way acquired through eminent domain proceedings; and providing for an effective date."

A copy of the bill, sponsor statement, sectional analysis and fiscal note is attached.

Thank you for your attention to this matter.

ALASKA STATE LEGISLATURE

SESSION

State Capitol, Rm 30
Juneau, Alaska 99801-1182
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(907) 465-3922 Fax
(877) 463-3873 Toll Free
Senator_Bert_Stedman@legis.state.ak.us



INTERIM

50 Front Street
Ketchikan, AK 99901-6442
Phone (907) 225-8088
Fax (907) 225-0713

SENATOR BERT K. STEDMAN

MEMORANDUM

DATE: April 20, 2004

TO: Don Bullock
Legal Services

FROM: Miles Baker for Senator Bert K. Stedman *MS*

SUBJECT: Floor Amendment CSSB 382 (CPA)

I would like to request an amendment for CSSB 382(CRA) for today's 11:00am Senate floor session:

The amendment is to add the following text to Page 3, line 11 of AS44.42.085 (c):

"Unless a regulation adopted by the department under this section expressly preempts local platting provisions which conflict with such regulation, a municipality may apply additional platting requirements beyond those identified in (b)(1) above as long as such platting requirements are consistent with those applied to other landowners."

Please contact Miles Baker at 4906 for information and questions.

Thank you for your quick response.

DISTRICT A

Ketchikan • Sitka • Petersburg • Wrangell
Pelican • Elfin Cove • Port Alexander • Saxman • Meyers Chuck • Thorne Bay • Coffman Cove • Hollis

ALASKA STATE LEGISLATURE

SESSION

State Capitol, Rm 30
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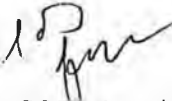
SENATOR BERT K. STEDMAN

MEMORANDUM

DATE: April 15, 2004

TO: Peter Putzier, Asst Attorney General, Transportation, Dept of Law
Jeff Ottesen, Director, Program Development, DOT

CC: Senator John Cowdery
Senator Tom Wagoner
Co-Chairs, Senate Transportation Committee

FROM: Senator Bert K. Stedman 

SUBJECT: Proposed Amendment to CSSB 382 (CRA)

Yesterday the Senate Community & Regional Affairs Committee heard SB 382, an act dealing with eminent domain and replat of boundary changes. The committee heard testimony from representatives of the Department of Law and the Department of Transportation and passed out a new committee substitute – CSSB 382(CRA).

During yesterday's testimony, DOT indicated that they had opened a dialogue with the affected municipalities and solicited their suggestions regarding this legislation. However, due to the speed with which this bill has progressed, they stated that they had yet to get responses from a few of the larger municipalities. I was unaware at that time that the Ketchikan Gateway Borough was one of those that had yet to comment.

This morning, I met with the Ketchikan Gateway Borough's attorney. Ketchikan's concern is that even though it is DOT's stated intent to get comments from the relevant platting authorities prior to adopting department regulations governing eminent domain replat procedures and standards; there is no specific requirement for them to do so in this bill. Further, since Sec 44.42.085 (c) exempts DOT from municipal platting requirements that may conflict with the State's as yet unwritten regulations, SB 382 may have the unintended consequence of trumping local procedures. I think they have a valid concern.

DISTRICT A

Ketchikan • Sitka • Petersburg • Wrangell
Pelican • Elfin Cove • Port Alexander • Saxman • Meyers Chuck • Thorne Bay • Coffman Cove • Hollis

MEMORANDUM
RE: Amendment to CSSB 382 (CRA)
April 15, 2004
Page 2 of 2

I realize this bill is in the Rules Committee and will be heading to the Senate Floor, but I'm hoping there is some way we can address their concern as this legislation continues to the House. I would like to suggest an amendment to CSSB 382(CRA) that I believe would alleviate Ketchikan's concern.

Amendment 1 CSSB 382 (CRA)

Amend section 44.42.085 (c) by deleting the bracketed text:

“The department is exempt from municipal platting requirements that are in conflict with this section.[AND THE REGULATIONS ADOPTED BY THE DEPARTMENT UNDER (B) OF THIS SECTION.]”

Thank you for your attention to this request. Please let me know if I can be of further assistance.

KETCHIKAN GATEWAY BOROUGH

Office of the Borough Attorney • 344 Front Street • Ketchikan, Alaska 99901 Scott A. Brandt-Erichsen
Borough Attorney
(907) 228-6635
Fax: (907) 247-6625
E-Mail: boroatty@borough.ketchikan.ak.us

April 16, 2004

Faxed and Mailed

Senator John Cowdery
Chair, Senate Rules Committee
State Capitol
Juneau, AK 99801-1182

Re: CSSB 382 CRA

Dear Senator Cowdery,

I am writing in reference to CSSB 382 CRA regarding eminent domain and right of way platting. This bill is currently in the rules committee. DOT has requested the bill in order to address a problem created by a 2002 Alaska Supreme Court decision in Suzuki v. Municipality of Anchorage. That decision held that the current language in AS 9.55.275 precluded a modified plat process for right of way plats involving condemnation, and requires substantially similar procedures for such plats and any other subdivision plat.

One reason that this is a concern is that right of way plats are different than most subdivision plats as they do not require extension of roads and utilities to the lots in the subdivision. Additionally, where most subdivision plats require the signature of the property owner on the plat, right of way plats often affect property with numerous property owners who own property affected by the project, some of whom are adverse to the project having been on the opposite side of a condemnation proceeding. As a result, several jurisdictions, Ketchikan included, have adopted right of way plat procedures which do not require such signatures. Ketchikan worked with the DOT in developing the ordinance, but also retained some requirements which are important to local planning objectives.

The Suzuki decision brings these procedures into question as they are different from the rules for other subdivisions, an apparent violation of the last sentence of the current AS 9.55.275. The Ketchikan Gateway Borough agrees that this is a problem which should be addressed.

The method proposed by CSSB 382 CRA, as currently drafted, causes concern due to the broad preemption of local platting regulations embodied in the proposed AS 44.42.085 (c). This section provides that the department (DOT) is exempt from municipal platting requirements that are in conflict with either the proposed AS 44.42.085 or regulations which the DOT will adopt, but which have not yet been prepared. In the most recent amendments language was added to the purpose statement which confirms the right of municipalities to regulate remnant parcels. This is merely palliative language as it is not substantive. The statutory language would preempt municipal regulations where there is a conflict. It cannot be determined where such conflicts will arise. Normally where there is a conflict the municipal provision will prevail if there is not

an expressed preemption and the issue is primarily a local concern. If the only local requirement identified by DOT which is causing problems is the requirement for signatures from all property owners affected by the plat, then express preemption of such a requirement would be more direct and more appropriate. A blanket preemption to be defined later in a subject area which is primarily a local concern is undesirable.

The Ketchikan Gateway Borough wants to assist in addressing the problem identified by DOT. We agree that right of way plats are fundamentally different from other subdivisions, and may appropriately be addressed under different, more streamlined, procedures. To this end we have consulted with the Attorney General's office and endorse a modification prepared by that office which alleviates our concerns. Specifically, the proposed change would amend the bill by adding the following text to the end of the proposed AS 44.42.085 (c):

"Unless a regulation adopted by the department under this section expressly preempts local platting provisions which conflict with such regulation, a municipality may apply additional platting requirements beyond those identified in (b)(1) above so long as such platting requirements are consistent with those applied to other landowners."

Thank you for your attention to this issue.

Sincerely,



Scott A. Brandt-Erichsen
Borough Attorney
Ketchikan Gateway Borough

Enclosure

cc: Senator Burt Stedman
Representative Bill Williams
Kevin Ritche, Alaska Municipal League
Peter Putzier, Assistant Attorney General - 6712



ALASKA STATE LEGISLATURE

SENATE COMMITTEE ON COMMUNITY & REGIONAL AFFAIRS

Senator Bert K. Stedman, Chair

Official Business

Senator Tom Wagoner, Vice-Chair
Senator Kim Elton
Senator Georgianna Lincoln
Senator Gary Stevens

State Capitol, Room 30
Juneau, AK 99801-1182
Phone: (907) 465-4989
Fax: (907) 465-3922

CSSB 382 (CRA)

Version 23-LS1879\H dated 4/14/04

Eminent Domain/Replat of Boundary Changes

Draft changes to CSSB 382 (TRA)

Change 1

Section 1: PURPOSE AND INTENT has been amended to read:

"(a) The purpose of this Act is to confirm the municipal role in eminent domain proceedings, including the right of municipalities to regulate remnant parcels, while at the same time....."

Change 2:

Section 3: AS 44.42.085, inserts a new (b)(1) and renumbers the subsections that follow (2), (3) and (4):

"(b)(1) must be narrowly tailored to establish minimum baseline procedures or standards particular to replat issues arising in eminent domain proceedings, and may not unnecessarily, or without good cause, infringe on general municipal zoning powers or authority."

Change 3:

Section 3: AS 44.42.085 (b) (4) [*previously subsection (3)*]:

"(4) shall [may] allow the municipal authority to elect to provide preliminary and final replat approval."

23-LS1879H
Bullock
4/14/04

CS FOR SENATE BILL NO. 382()
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-THIRD LEGISLATURE - SECOND SESSION

BY

Offered: .
Referred:

Sponsor(s): SENATE TRANSPORTATION COMMITTEE

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to replat approval; relating to the platting of right-of-way acquired
2 through eminent domain proceedings; and providing for an effective date."

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

4 * Section 1. The uncodified law of the State of Alaska is amended by adding a new section
5 to read:

6 PURPOSE AND INTENT. (a) The purpose of this Act is to confirm the municipal
7 role in eminent domain proceedings, including the right of municipalities to regulate remnant
8 parcels, while at the same time clarifying that that role is not intended to require the same
9 substantive review or procedures for review of replats for the acquisition of property by the
10 state or a municipality as required in replats for private landowner subdivisions or zoning
11 reviews. Regulations adopted by the Department of Transportation and Public Facilities shall
12 be the primary and governing authority for these replat approval proceedings.

13 (b) It is the intent of the legislature to

14 (1) confirm the authority of an agency of the state or a municipality to conduct

1 condemnation proceedings so long as the agency of the state or municipality obtains
2 preliminary replat approval as provided for in this Act, notwithstanding challenges to
3 particular municipal replat ordinances, review standards, procedures, or applications; and

4 (2) apply secs. 1 and 2 of this Act retrospectively to July 1, 1999, and to
5 existing litigation such as State of Alaska v. Hartman, 3AN-03-13875 CI and State of Alaska
6 v. Hinkel, 3AN-04-4768 CI.

7 * Sec. 2. AS 09.55.275 is repealed and reenacted to read:

8 **Sec. 09.55.275. Replat approval.** An agency of the state or municipality
9 acquiring property in fee that results in a boundary change located within a
10 municipality exercising the powers conferred by AS 29.35.180 or 29.35.260(c) shall
11 conform to this section and AS 44.42.085 by obtaining preliminary approval of a
12 replat showing clearly the location of the proposed public street or other acquisition of
13 property. The platting authority may establish applicable review procedures and
14 standards, consistent with AS 44.42.085 and regulations adopted under that section,
15 for a replat made for the purpose of a right-of-way acquisition or condemnation. If no
16 municipal standards and procedures are in effect, then the provision of AS 44.42.085
17 and the regulations adopted under that section shall apply. Final approval of replat
18 shall also be obtained. However, if a state agency clearly demonstrates an overriding
19 state interest, a waiver of the municipal approval requirements in this section may be
20 granted by the governor.

21 * Sec. 3. AS 44.42 is amended by adding a new section to read:

22 **Sec. 44.42.085. Platting of right-of-way acquired through eminent domain**
23 **proceedings.** (a) Except as provided in (c) of this section, the department shall
24 comply with AS 09.55.275 when exercising eminent domain powers in municipalities
25 that exercise the powers conferred by AS 29.35.180 or 29.35.260(c).

26 (b) The department shall adopt regulations providing for uniform procedures
27 and standards for replatting required by (a) of this section. The regulations

28 (1) must be written narrowly to establish minimum baseline
29 procedures or standards particular to replat issues arising in eminent domain
30 proceedings and may not unnecessarily or without good cause infringe on general
31 municipal zoning powers or authority;

1 (2) must be consistent with AS 09.55.240 - 09.55.460, AS 34.60.010 -
2 34.60.150, and 42 U.S.C. 4601 - 4655 (Uniform Relocation Assistance and Real
3 Property Acquisition Policies Act of 1970), as amended;

4 (3) must provide for a review by the platting authority of the
5 municipality in which the property subject to the eminent domain proceeding is
6 located; and

7 (4) shall allow the municipal authority to elect to provide preliminary
8 and final replat approval.

9 (c) The department is exempt from municipal platting requirements that are in
10 conflict with this section and the regulations adopted by the department under (b) of
11 this section.

12 (d) Neither the adequacy of the municipal replat process or standards, if any,
13 nor the failure of a municipality to follow its own replat process and standards shall
14 deprive the state of the authority to exercise its power of eminent domain.

15 * Sec. 4. The uncodified law of the State of Alaska is amended by adding a new section to
16 read:

17 RETROACTIVITY. Sections 1 and 2 of the Act are retroactive to July 1, 1999.

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

SENATE COMMITTEE REPORT

DATE: 04/02/04

FURTHER:

DATE TURNED
IN TO OFFICE: 4/14/04

Community and Regional Affairs Committee considered SENATE BILL NO. 382

SB 382 EMINENT DOMAIN/REPLAT OF BOUNDARY CHANGES

"An Act relating to replat approval; relating to the platting of right-of-way acquired through eminent domain proceedings; and providing for an effective date."

and recommends:

- be replaced with C.R. CS SB382 (CRA)
- adopt previous _____ CS _____ (_____)
- attached amendment(s)
- adopt Letter of Intent by _____ Committee
- further referral to _____ Committee

Senate Bill:	
<input checked="" type="checkbox"/> Same Title	
<input type="checkbox"/> New Title	
House Bill:	
<input type="checkbox"/> Same Title	
<input type="checkbox"/> Technical Title Change	
<input type="checkbox"/> New Title w/ SCR # _____	

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#
DOT	3/31/04			✓	1

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC	AMEND
<i>Demetrius Lewis</i>			✓	
<i>Thomas H. Wynn</i>	✓			
<i>K. [Signature]</i>			✓	
CHAIR: <i>Bert K. [Signature]</i>	✓			

23-LS1879\H
Bullock
4/14/04

CS FOR SENATE BILL NO. 382()
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-THIRD LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATE TRANSPORTATION COMMITTEE

Changes are highlighted

A BILL

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12 be the primary and governing authority for these replat approval proceedings.

13 (b) It is the intent of the legislature to

14 (1) confirm the authority of an agency of the state or a municipality to conduct

1 condemnation proceedings so long as the agency of the state or municipality obtains
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12 replat showing clearly the location of the proposed public street or other acquisition of
13 property. The platting authority may establish applicable review procedures and
14 standards, consistent with AS 44.42.085 and regulations adopted under that section,
15 for a replat made for the purpose of a right-of-way acquisition or condemnation. If no
16 municipal standards and procedures are in effect, then the provision of AS 44.42.085
17 and the regulations adopted under that section shall apply. Final approval of replat
18 shall also be obtained. However, if a state agency clearly demonstrates an overriding
19 state interest, a waiver of the municipal approval requirements in this section may be
20 granted by the governor.

21 * Sec. 3. AS 44.42 is amended by adding a new section to read:

22 **Sec. 44.42.085. Platting of right-of-way acquired through eminent domain**
23 **proceedings.** (a) Except as provided in (c) of this section, the department shall
24 comply with AS 09.55.275 when exercising eminent domain powers in municipalities
25 that exercise the powers conferred by AS 29.35.180 or 29.35.260(c).

26 (b) The department shall adopt regulations providing for uniform procedures
27 and standards for replatting required by (a) of this section. The regulations

28 (1) must be written narrowly to establish minimum baseline
29 procedures or standards particular to replat issues arising in eminent domain
30 proceedings and may not unnecessarily or without good cause infringe on general
31 municipal zoning powers or authority;

1 (2) must be consistent with AS 09.55.240 - 09.55.460, AS 34.60.010 -
2 34.60.150, and 42 U.S.C. 4601 - 4655 (Uniform Relocation Assistance and Real
3 Property Acquisition Policies Act of 1970), as amended;

4 (3) must provide for a review by the platting authority of the
5 municipality in which the property subject to the eminent domain proceeding is
6 located; and

7 (4) shall allow the municipal authority to elect to provide preliminary
8 and final replat approval.

9 (c) The department is exempt from municipal platting requirements that are in
10 conflict with this section and the regulations adopted by the department under (b) of
11 this section.

12 (d) Neither the adequacy of the municipal replat process or standards, if any,
13 nor the failure of a municipality to follow its own replat process and standards shall
14 deprive the state of the authority to exercise its power of eminent domain.

15 * Sec. 4. The uncodified law of the State of Alaska is amended by adding a new section to
16 read:

17 RETROACTIVITY. Sections 1 and 2 of the Act are retroactive to July 1, 1999.

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

CS FOR SENATE BILL NO. 382(TRA)
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-THIRD LEGISLATURE - SECOND SESSION

BY THE SENATE TRANSPORTATION COMMITTEE

Offered: 4/2/04

Referred: Community and Regional Affairs

Sponsor(s): SENATE TRANSPORTATION COMMITTEE

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to replat approval; relating to the platting of right-of-way acquired
2 through eminent domain proceedings; and providing for an effective date."

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

4 * Section 1. The uncodified law of the State of Alaska is amended by adding a new section
5 to read:

6 PURPOSE AND INTENT. (a) The purpose of this Act is to confirm the municipal
7 role in eminent domain proceedings while at the same time clarifying that that role is not
8 intended to require the same substantive review or procedures for review of replats for the
9 acquisition of property by the state or a municipality as required in replats for private
10 landowner subdivisions or zoning reviews. Regulations adopted by the Department of
11 Transportation and Public Facilities shall be the primary and governing authority for these
12 replat approval proceedings.

13 (b) It is the intent of the legislature to

14 (1) confirm the authority of an agency of the state or a municipality to conduct

1 condemnation proceedings so long as the agency of the state or municipality obtains
2 preliminary replat approval as provided for in this Act, notwithstanding challenges to
3 particular municipal replat ordinances, review standards, procedures, or applications; and

4 (2) apply secs. 1 and 2 of this Act retrospectively to July 1, 1999, and to
5 existing litigation such as State of Alaska v. Hartman, 3AN-03-13875 CI and State of Alaska
6 v. Hinkel, 3AN-04-4768 CI.

?

7 * Sec. 2. AS 09.55.275 is repealed and reenacted to read:

8 **Sec. 09.55.275. Replat approval.** An agency of the state or municipality
9 acquiring property in fee that results in a boundary change located within a
10 municipality exercising the powers conferred by AS 29.35.180 or 29.35.260(c) shall
11 conform to this section and AS 44.42.085 by obtaining preliminary approval of a
12 replat showing clearly the location of the proposed public street or other acquisition of
13 property. The platting authority may establish applicable review procedures and
14 standards, consistent with AS 44.42.085 and regulations adopted under that section,
15 for a replat made for the purpose of a right-of-way acquisition or condemnation. If no
16 municipal standards and procedures are in effect, then the provision of AS 44.42.085
17 and the regulations adopted under that section shall apply. Final approval of replat
18 shall also be obtained. However, if a state agency clearly demonstrates an overriding
19 state interest, a waiver of the municipal approval requirements in this section may be
20 granted by the governor.

21 * Sec. 3. AS 44.42 is amended by adding a new section to read:

22 **Sec. 44.42.085. Platting of right of way acquired through eminent domain**
23 **proceedings.** (a) Except as provided in (c) of this section, the department shall
24 comply with AS 09.55.275 when exercising eminent domain powers in municipalities
25 that exercise the powers conferred by AS 29.35.180 or 29.35.260(c).

26 (b) The department shall adopt regulations providing for uniform procedures
27 and standards for replatting required by (a) of this section. The regulations

28 (1) must be consistent with AS 09.55.240 - 09.55.460, AS 34.60.010 -
29 34.60.150, and 42 U.S.C. 4601 - 4655 (Uniform Relocation Assistance and Real
30 Property Acquisition Policies Act of 1970), as amended;

31 (2) must provide for a review by the platting authority of the

Eminent Domain Regs
State Relocation
Real Prop Acquisition Practices

1 municipality in which the property subject to the eminent domain proceeding is
2 located; and

3 (3) may allow the municipal authority to elect to provide preliminary
4 and final replat approval.

5 (c) The department is exempt from municipal platting requirements that are in
6 conflict with this section and the regulations adopted by the department under (b) of
7 this section.

8 (d) Neither the adequacy of the municipal replat process or standards, if any,
9 nor the failure of a municipality to follow its own replat process and standards, shall
10 deprive the state of the authority to exercise its power of eminent domain.

11 * Sec. 4. The uncodified law of the State of Alaska is amended by adding a new section to
12 read:

13 RETROACTIVITY. Sections 1 and 2 of the Act are retroactive to July 1, 1999.

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

STATE OF ALASKA

DEPARTMENT OF LAW

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SECTIONAL ANALYSIS—SB 382

Section 1 of this bill sets forth a general explanation. The overall goals of the bill are (1) to confirm the municipal role in review of property acquisitions by eminent domain for public infrastructure projects, while maintaining flexibility in how the municipal review is conducted; (2) to standardize the replat process through implementation of regulations defining how the replat approval process is to be conducted, and (3) to confirm DOT&PF's authority to condemn property in cases where it has already applied for, and received, replat approval pursuant to existing municipal law from a municipality, such as in State of Alaska v. Hartman (C Street Extension in Anchorage), and State of Alaska v. Hinkel (Kenai River Bridge in Soldotna).

Section 2 of this bill repeals and reenacts AS 09.55.275. This section references AS 44.42.085, which will require that DOT&PF adopt regulations setting replat procedures, and standards, under AS 09.55.275. The other primary change is to delete the last sentence of present AS 09.55.275:

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.

The foregoing sentence has been used in two existing court cases to challenge DOT&PF's authority to condemn property. The challengers contend that existing municipal ordinances do not comply with the foregoing sentence, and thus DOT&PF lacks authority to condemn property. The deletion of the sentence above, together with other changes to this section, make clear that the legislature is not trying to mandate a particular and specific municipal replat review process but, instead, to grant some municipal discretion in how to conduct the review.

Section 3 of this bill requires DOT&PF to implement regulations standardizing the broad replat approval process under AS 09.55.275. In addition, while DOT&PF remains subject to local review, the adequacy of the process or standards chosen by the local government cannot be used as a basis to deprive DOT&PF of condemnation authority.

Section 4 of this bill provides for a retroactive effective date to 1999, a time preceding existing litigation in State of Alaska v. Hartman, 3AN-05-13875 CI and State of Alaska v. Hinkel, 3AN-04-4768 CI. The retroactive effective date will enable DOT&PF to use the legislation as evidence of statutory intent.

Section 5 of this bill provides for an immediate effective date.

General: The broad purpose of this bill is to harmonize two important public goals:

- (1) That state and municipal transportation projects may reasonably proceed with right-of-way acquisition that is done in accord with federal and state laws.
- (2) Ensuring the responsible review and approval of right-of-way acquisition under the replatting process administered by local government.

The goal is to preserve a balance between the need for public transportation projects, on the one hand, with reasonable local review on the other.

Two lawsuits have been filed challenging DOT&PF's authority to condemn needed right-of-way for public projects (C Street Extension project/Kenai River Bridge project). The argument being made to the courts is that the last sentence of AS 09.55.275 is evidence that the legislature intended to define a specific local review process. The argument continues that any deviation from the alleged, defined legislative procedure is therefore a violation of AS 09.55.275, and deprives DOT&PF of the authority to condemn property. DOT&PF believes there was never a legislative intent to define a specific procedure.

Both the Municipality of Anchorage, and the Kenai Peninsula Borough, for example, have specific replat review procedures in place for right-of-way acquisitions. Not surprisingly, those procedures differ in some respects from other replat review proceedings, such as might be found for a typical subdivision replat. The lawsuits argue that the court must deny DOT&PF the authority to condemn, since the ordinances for right-of-way acquisition replat review differ from review procedures which might apply to a typical subdivision. Notably, DOT&PF properly applied for, and received, replat approval from both the Municipality of Anchorage, and the Kenai Peninsula Borough, yet may still be found to have no authority to proceed with condemnation.

If the Anchorage or Kenai Superior Courts uphold this novel legal theory, DOT&PF will be held to have no authority to proceed with condemnation. The potential for significant delay of many important projects is great. Many of these projects were approved by the voters as bond projects, and untimely project completion could cause the project costs to increase. In addition, litigation concerning DOT&PF's authority to condemn property obviously jeopardizes the scheduling of current, and future, public construction projects. For example, the construction seasons might be lost both for the C Street extension project in Anchorage, as well as for the Kenai River Bridge project in Soldotna.

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number: _____
Bill Version: SB382-DOT-CO-3-31-04
() Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: DOT&PF
Title Replating 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 ()						
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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 (FY2004) cost: 0.0

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

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Nona Wilson Phone 465-6973
Division Legislative Liaison Date/Time 3/31/04 12:29 PM
Approved by: John MacKinnon Date 3/31/2004
Agency Deputy Commissioner