SB

382

Suggestion on Language to resolve the replat conflict on condemnation proceedings

March 23, 2003

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

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

PURPOSE AND INTENT. (a) The purpose of the amendments to AS 09.55.275, and AS 44.42, is to confirm the municipal role in eminent domain proceedings, while at the same time clarifying that such role is not intended to require an identity of substantive review or procedure between private landowner subdivision or zoning review processes, and proceedings for review of replats for the acquisition of property by government agencies or municipalities. ~~proceedings for review of replats for the acquisition of property by government agencies.~~ The Department of Transportation and Public Facilities is directed by AS 44.42.085 to adopt regulations that will be the primary and governing authority over replat approval proceedings.

(b) It is the intent of the legislature in amending AS 09.55.275 and AS 44.42 to confirm ~~confirm~~ the authority of an agency of the state or municipality to conduct ~~of an agency of the state or municipality to conduct~~ condemnation proceedings so long as the agency of the state or municipality obtained preliminary replat approval, notwithstanding challenges to particular municipal replat ordinances, review standards, procedures or applications.

(c) This guidance on legislative intent may be applied to past or present interpretation of AS 09.55.275, and to existing litigation such as the State of Alaska v. Hartman, 3AN-03-13875 CI or the State of Alaska v. Hinkle, 3AN-04-4768 CI.

*** Sec. 2. AS 09.55.275 is amended to read:**

Sec. 09.55.275. Replat approval. An agency of the state or municipality [MAY NOT ACQUIRE] **acquiring** property **in fee that results in a boundary change** located within a municipality exercising the powers conferred by AS 29.35.180 or 29.35.260(c) [THAT RESULTS IN A BOUNDARY CHANGE] **shall conform to this section and AS 44.42.085 by obtaining** [UNLESS THE AGENCY OR MUNICIPALITY FIRST OBTAINS FROM THE MUNICIPAL PLATTING AUTHORITY] preliminary approval of a replat showing clearly the location of the proposed acquisition of private property. **The platting authority may establish applicable review processes and standards for replats made for the purpose of right-of-way acquisition or condemnation consistent with AS 44.42.085, and regulations adopted under AS 44.42.085. If no municipal standards and process are in effect, then the provisions of AS 44.42.085, and regulations adopted under AS 44.42.085, shall be followed.** Final approval of replat shall ~~be similarly~~[BE SIMILARLY] also be 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. ~~**It is not the intent of this section to confer rights to individual landowners. As applied to acquisitions of property identified herein, the platting authority is subject solely to the requirements of this section and AS 44.42.085.**~~ [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.]

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

Sec. 44.42.085 Platting of right-of-way acquired through eminent domain proceedings.

When exercising eminent domain powers, in municipalities exercising the powers of AS 29.35.180 or 29.35.260(c), the department shall comply with AS 09.55.275. The department is exempt from municipal platting requirements that are in conflict with regulations adopted under this section, with other state eminent domain requirements, with AS 34.60, or with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (42 U.S.C. 4601 *et seq.*). The department shall set, by regulation, uniform standards for preparing replats with or without replat approval from municipal platting authorities -exercising the powers conferred by AS 29.35.180 or 29.35.260(c) consistent with this section. The regulations must contain provision for municipal platting authority review, including the municipal platting authority's elective right to provide preliminary, and final, replat approval. As to acquisitions identified herein, the state is subject solely to the standards of this section, regulations adopted under this section, and AS 09.55.275. Neither the adequacy of municipal replat processes or standards, if any, nor the failure of a municipality to follow its own replat processes and standards, shall provide a basis to deprive the state of eminent domain authority.

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

RETROSPECTIVITY. This Act is retrospective to July 1, ~~2001~~1999.

6971. Jeff Otteson.

Suggestion on Language to resolve the replat conflict on condemnation proceedings

March 23, 2003

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

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

PURPOSE AND INTENT. (a) The purpose of the amendments to AS 09.55.275, and AS 44.42, is to confirm the municipal role in eminent domain proceedings, w

hile at the same time clarifying that such role is not intended to require an identity of procedure between private landowner subdivision or zoning review processes, and replat approval proceedings. The Department of Transportation and Public Facilities is directed by AS 44.42.085 to adopt regulations that will be the primary and governing authority over replat approval proceedings.

(b) It is the intent of the legislature in amending AS 09.55.275 and AS 44.42 to confirm authority in condemnation proceedings so long as an agency of the state obtained preliminary replat approval, notwithstanding challenges to particular municipal replat review standards or procedures or applications.

(c) This guidance on legislative intent may be applied to past or present interpretation of AS 09.55.275, and to existing litigation in the case of State of Alaska v. Hartman, 3AN-03-13875 CI.

*** Sec. 2. AS 09.55.275 is amended to read:**

Sec. 09.55.275. Replat approval. An agency of the state or municipality [MAY NOT ACQUIRE] **acquiring** property **in fee that results in a boundary change** located within a municipality exercising the powers conferred by AS 29.35.180 or 29.35.260(c) [THAT RESULTS IN A BOUNDARY CHANGE] **shall conform to this section and AS 44.42.085 by obtaining** [UNLESS THE AGENCY OR MUNICIPALITY FIRST OBTAINS FROM THE MUNICIPAL PLATTING AUTHORITY] preliminary approval of a replat showing clearly the location of the proposed acquisition of private property. **The platting authority may establish applicable review processes and standards for replats made for the purpose of right-of-way acquisition or condemnation consistent with AS 44.42.085, and regulations adopted under AS 44.42.085. If no municipal standards and process are in effect, then the provisions of AS 44.42.085, and regulations adopted under AS 44.42.085, shall be followed.** 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. **It is not the intent of this section to confer rights to individual landowners. As applied to acquisitions of property identified herein, the platting authority is subject solely to the requirements of this section and AS 44.42.085.** [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.]

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

Sec. 44.42.085 Platting of right-of-way acquired through eminent domain proceedings.

When exercising eminent domain powers, in home rule municipalities, the department shall comply with AS 09.55.275. The department is exempt from municipal platting requirements that are in conflict with regulations adopted under this section, with other state eminent domain requirements, or with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (42 U.S.C. 4601 *et seq.*). The department shall set, by regulation, uniform standards for preparing replats with or without replat approval from municipal platting authorities exercising the powers conferred by AS 29.35.180 or 29.35.260(c) consistent with this section. The regulations must contain provision for municipal platting authority review, including the municipal platting authority's elective right to provide preliminary, and final, replat approval. As to acquisitions identified herein, the state is subject solely to the standards of this section, regulations adopted under this section, and AS 09.55.275. Neither the adequacy of municipal replat processes or standards, if any, nor the failure of a municipality to follow its own replat processes and standards, shall provide a basis to deprive the state of eminent domain authority.

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

RETROSPECTIVITY. This Act is retrospective to July 1, 2001.

THE
FOLLOWING
DOCUMENT(S)
ARE
POOR
ORIGINAL
COPIES

STATE OF ALASKA

FRANK H. MURKOWSKI, GOVERNOR

DEPARTMENT OF TRANSPORTATION
AND PUBLIC FACILITIES
OFFICE OF THE COMMISSIONER

3132 CHANNEL DRIVE
JUNEAU, ALASKA 99801-7898

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

March 24, 2004

The Honorable John Cowdery
Alaska State Senate
State Capitol, Room 101
Juneau AK 99811-1182

The Honorable Jim Holm
Alaska House of Representatives
State Capitol, Room 416
Juneau AK 99811-1182

Dear Senator Cowdery and Representative Holm:

Thank you for taking the time to meet with my staff person, Jeff Ottesen, on proposed legislation to address the replats resulting from land acquired under eminent domain or condemnation proceedings. As Jeff indicated, this issue just came to our attention due to a lawsuit filed on the C-Street extension. Based on discussion between the Department of Law and staff in this department whom specialize in right-of-way issues, my concern quickly grew. Just this 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 is new is the interpretation that the state cannot fulfill the typical replat provisions required of local government (mandated by AS 09.55.275) while also fulfilling the legal processes associated with condemnation. While the state will vigorously defend against these lawsuits, I must say that we are fearful of the consequence of an adverse decision. Several major projects across the state are at risk. Most critical is the Soldotna project that is slated for construction this summer.

We have provided your office with a draft of suggested legislation (copy enclosed) to address this matter. While knowing it is late in the session, I view the passage of this legislation this year as critical to the public expectation of project delivery of several important projects. We stand ready to offer testimony on the details of this legislation and the importance it plays to our department's delivery of vital transportation.

I'm sure it goes without saying that an adverse decision on either of these cases before the court would create a legal precedent that could be applied to all other projects in the state that require condemnation.

The draft we provided was prepared in close alliance with the Department of Law. We anticipate they will also assist with any legal questions that may rise during testimony in committee hearings.

Thank you again for your support. Please call upon my staff or I for any assistance you may need.

Sincerely,

Mike Barton
Commissioner

Enclosure

cc: Mike Tibbles, Legislative Liaison, Office of the Governor
Gregg D. Renkes, Attorney General, Department of Law
James Cantor, Chief Asst. Attorney General, Transportation Section, Dept. of Law
John MacKinnon, Deputy Commissioner of Highways & Public Facilities, DOT&PF
Gary Hogins, Chief Engineer, Division of Design & Engineering Services, DOT&PF
Jeff Ottesen, Director, Division of Program Development, DOT&PF
Gary L. Paxton, Southeast Regional Director, DOT&PF
Andrew Niemiec, Northern Regional Director, DOT&PF
William Robertson, Central Regional Director, DOT&PF
Nona Wilson, Legislative Liaison, Office of the Commissioner, DOT&PF

Suggestion on Language to resolve the replat conflict on condemnation proceedings

March 23, 2003

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

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

PURPOSE AND INTENT. (a) The purpose of the amendments to AS 09.55.275, and AS 44.42, is to confirm the municipal role in eminent domain proceedings, while at the same time clarifying that such role is not intended to require an identity of substantive review or procedure between private landowner subdivision or zoning review processes, and proceedings for review of replats for the acquisition of property by government agencies or municipalities. The Department of Transportation and Public Facilities is directed by AS 44.42.085 to adopt regulations that will be the primary and governing authority over replat approval proceedings.

(b) It is the intent of the legislature in amending AS 09.55.275 and AS 44.42 to confirm the authority of an agency of the state or municipality to conduct condemnation proceedings so long as the agency of the state or municipality obtained preliminary replat approval, notwithstanding challenges to particular municipal replat ordinances, review standards, procedures or applications.

(c) This guidance on legislative intent may be applied to past or present interpretation of AS 09.55.275, and to existing litigation such as the State of Alaska v. Hartman, 3AN-03-13875 CI or the State of Alaska v. Hinkle, 3AN-04-4768 CI.

*** Sec. 2. AS 09.55.275 is amended to read:**

Sec. 09.55.275. Replat approval. An agency of the state or municipality [MAY NOT ACQUIRE] **acquiring** property **in fee that results in a boundary change** located within a municipality exercising the powers conferred by AS 29.35.180 or 29.35.260(c) [THAT RESULTS IN A BOUNDARY CHANGE] **shall conform to this section and AS 44.42.085 by obtaining** [UNLESS THE AGENCY OR MUNICIPALITY FIRST OBTAINS FROM THE MUNICIPAL PLATTING AUTHORITY] preliminary approval of a replat showing clearly the location of the proposed acquisition of private property. **The platting authority may establish applicable review processes and standards for replats made for the purpose of right-of-way acquisition or condemnation consistent with AS 44.42.085, and regulations adopted under AS 44.42.085. If no municipal standards and process are in effect, then the provisions of AS 44.42.085, and regulations adopted under AS 44.42.085, shall be followed.** Final approval of replat shall [BE SIMILARLY] also be 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.]

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

Sec. 44.42.085 Platting of right-of-way acquired through eminent domain proceedings.

When exercising eminent domain powers, in municipalities exercising the powers of AS 29.35.180 or 29.35.260(c), the department shall comply with AS 09.55.275. The department is exempt from municipal platting requirements that are in conflict with regulations adopted under this section, with other state eminent domain requirements, with AS 34.60, or with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (42 U.S.C. 4601 *et seq.*). The department shall set, by regulation, uniform standards for preparing replats with or without replat approval from municipal platting authorities exercising the powers conferred by AS 29.35.180 or 29.35.260(c) consistent with this section. The regulations must contain provision for municipal platting authority review, including the municipal platting authority's elective right to provide preliminary, and final, replat approval. As to acquisitions identified herein, the state is subject solely to the standards of this section, regulations adopted under this section, and AS 09.55.275. Neither the adequacy of municipal replat processes or standards, if any, nor the failure of a municipality to follow its own replat processes and standards, shall provide a basis to deprive the state of eminent domain authority.

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

RETROSPECTIVITY. This Act is retrospective to July 1, 1999.

Interim:
716 West 4th Ave.
Anchorage, AK 99501

Phone: 907-269-0222
Fax: 907-269-0223

Senator
John J. Cowdery

Session:
State Capitol Bldg.
Juneau, AK 99801

Phone: 907-465-3879
Fax: 907-465-2069
Toll Free: 1-888-269-3879

FAX COVER

DATE: 28 March 2004 **TIME:** 10:28

TO: Peter Putzier

FAX: 67[illegible]35 **PHONE:** 3600

FROM: Richard Schmitz

FAX: 2069 **PHONE:** 4921

NUMBER OF PAGES: (INCLUDING COVER) 6

NOTES: FYI

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM March 29, 2004

SUBJECT: Retrospective application of statutes relating to replats and eminent domain proceedings (Work Order No. 23-LS1879\A)

TO: Senator John Cowdery
Attn: Richard Schmitz

FROM: Donald M. Bullock Jr.
Legislative Counsel

Enclosed with this memorandum is a preliminary draft of a bill relating to eminent domain and the replat of boundary procedures.

Due to present workload, I do not have sufficient time to thoroughly research the issues the bill is attempting to resolve. This draft is based on the language you provided to me that I believe is from people at the Department of Transportation and Public Facilities. I made some stylistic changes and reorganized some of the language, but I think the meaning is the same as what you provided. I suggest you pass this draft by the people in DOTPF who are advising you on this bill regarding the technicalities of the replat process.

I made some revisions to the legislative findings and intent in sec. 1 of the bill draft. Findings and intent are not substantive law, but may help a court to interpret the substance of an Act. The language I removed from the findings and intent were repetitions of the substantive provisions in the body of the bill.

I point out to you an issue relating to the retroactive application of this bill. As you know, litigation is proceeding in at least two cases (the Hartman and Hinkle cases mentioned in sec. 1) in which the failure to perform a replat under AS 09.55.275 is alleged as an affirmative defense to the state's eminent domain action. The affirmative defense in each case states that the taking by the state will require a boundary change that requires a replat. In both cases, the defendant property-owners believe the failure to obtain a replat as required under AS 09.55.275 is a basis for preventing the state's taking of their property.

Our state Supreme Court, in *Municipality of Anchorage v. Suzuki*[1] concluded that the municipality was required to obtain a replat before acquiring an easement in two pieces

[1] 41 P.3d 147 (Alaska 2002).

of property. In reaching its decision, the court noted that the power of eminent domain is to be strictly construed against the condemning party and in favor of the property owner. The court quoted the superior court's finding that the purpose of the replat "is to ensure that land acquisitions by condemning agencies . . . comply with all local planning and zoning ordinances and local regulations in the same manner and to the same extent as other landowners."[2]

A court could find that a requirement to obtain a replat before the acquisition of an owner's property is part of the due process an owner is entitled to before property is taken. If this is so, the retroactive application of the Act could be found to be unconstitutional. On the other hand, a court could conclude that the purpose of AS 09.55.275 is merely to allow a municipality the opportunity to review whether the taking by eminent domain is compatible with its planning and zoning laws. Under this latter interpretation, a replat would not part of the due process required to take land from its owner.

If I may be of further assistance, please advise.

DMB:med
04-333.med

Enclosure

---

[2] 41 P.3d at 149.

23-LS1879\A
Bullock
3/29/04

SENATE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - SECOND SESSION

BY THE SENATE TRANSPORTATION COMMITTEE

Introduced:
Referred:

A BILL

FOR AN ACT ENTITLED

"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."

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

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

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

(b) It is the intent of the legislature to

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

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

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

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

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

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

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

(b) The department shall adopt regulations providing for uniform standards for preparing replats that are consistent with AS 09.55.240 - 09.55.460, AS 34.60.010 - 34.60.150, and 42 U.S.C. 4601 - 4655 (Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970), as amended. The regulations must provide for a review by the platting authority of the municipality in which the property subject to the eminent domain proceeding is located and may allow the municipal

authority to elect to provide preliminary and final replat approval.

(c) 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.

(d) Neither the adequacy of the municipal replat process or standards, if any, nor the failure of a municipality to follow its own replat process and standards, shall provide a basis to deprive the state of the interest in land that is the subject of its eminent domain action.

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

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

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

23-LS1879\D
Bullock
3/31/04

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:
Referred:

Sponsor(s): SENATE TRANSPORTATION COMMITTEE

A BILL

FOR AN ACT ENTITLED

"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."

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

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

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

(b) It is the intent of the legislature to

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

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

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

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

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

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

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

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

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

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

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

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

(c) 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.

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

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

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

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

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

Frank H. Murkowski, Governor

P.O. BOX 110300
DIMOND COURT HOUSE, 6TH FLOOR
JUNEAU, ALASKA 99811-0300
PHONE: (907)465-3600
FAX: (907)465-6735

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-03-13875 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.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

Frank H. Murkowski, Governor

P.O. BOX 110300
DIMOND COURT HOUSE, 6TH FLOOR
JUNEAU, ALASKA 99811-0300
PHONE: (907)465-3600
FAX: (907)465-6735

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-03-13875 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.

KENAI PENINSULA BOROUGH
LEGAL DEPARTMENT
144 N. Binkley Street
Soldotna, Alaska 99669

Tel. (907) 714-2120
Fax (907) 262-8686

April 14, 2004

Sent via electronic mail

Peter Putzier
Assistant Attorney General
Office of the Attorney General
P.O. Box 110300
Juneau, AK 99811-0300

Dear Mr. Putzier:

Thank you very much for requesting comments from the Kenai Peninsula Borough regarding CSSB 382 as proposed April 15, 2004. The Kenai Peninsula Borough administration has reviewed the proposed changes and generally has no objection to them. We wish to confirm that pursuant to the stated purpose and intent the Kenai Peninsula Borough will retain the right to regulate remnant parcels including the ability to require that a note be placed on the plat as provided in KPB 20.04.080(E) which states:

E. Remainder parcels. No remainder parcel resulting from the right-of-way plat shall be allowed which does not conform to applicable city and borough codes unless:
   1. A note is placed on the plat indicating that damages have been paid to the owner of the remainder and that the nonconforming remainder cannot be developed without first being replatted so as to conform to applicable city and borough codes; or
   2. The remainder meets the requirement for exception under KPB 20.20.190 C, or KPB 20.24.010.

Also, the proposed wording of AS 09.55.275 authorizes municipalities to establish authority to review procedures that are consistent with AS 44.42.085 and the regulations adopted under that section. Please confirm that this would not prevent the borough from adopting stricter rules than in AS 44.42.085 and the regulations, provided they are consistent with those laws.

Additionally, we respectfully request that either the statutes or the regulations require notice of the replat be provided by the state at least to the owners of properties subject to the

eminent domain proceedings. If this bill is enacted we would appreciate the opportunity to review and comment upon the regulations when they are drafted.

Please note that this letter does not represent the view of the borough assembly which has not had the opportunity to review the latest amendments.

Thank you again for the opportunity to comment.

Yours Very Truly,

/s/

Colette G. Thompson
Borough Attorney

cc: Dale Bagley, Mayor
Max Best, Planning Director
Pete Sprague, Assembly President
Ron Long, Assembly Member

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.

On 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

G:\LAW\Letters\Cowdery.b382..doc

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: Replatting provisions of Eminent Domain Right of Way
RDU: Administration & Support
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						
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 (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

(Revised 12/2003 OMB)

 2029 DOW.

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

Peter Putzier

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

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

This is a privileged and confidential communication. If you are not the intended recipient, you must: (1) Notify the sender of the error; (2) Destroy this communication entirely, including deletion of all associated attachment files from all individual and network storage devices; and (3) Refrain from copying or disseminating this communication by any means.

ALASKA STATE LEGISLATURE

SESSION
State Capitol, Rm 30
Juneau, Alaska 99801-1182
(907) 465-3873 Phone
(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 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.

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.

Move and ask unanimous consent that we return to second for the purpose of an amendment.

SB 382 – ROW - Amendment

- Section 3 of this bill speaks to new standards the department would like to implement – and this is the section with which municipalities are having concerns.
- The part of Section 3 that is important for the projects and the lawsuits is subsection (d).
- So, this amendment deletes Section 3, except for subsection (d) and makes housekeeping changes to the rest of the legislation as a result of the deletion.
- Subsection (d) is inserted in Section 2 – which is reflected on lines 14-16 of this amendment.

23-LS1879\I.3
Bullock
4/20/04

AMENDMENT

OFFERED IN THE SENATE BY SENATOR WAGONER

TO: CSSB 382(CRA)

Page 1, lines 11 - 12:

Delete "Regulations adopted by the Department of Transportation and Public Facilities shall be the primary and governing authority for these replat approval proceedings."

Page 2, line 11:

Delete "and AS 44.42.085"

Page 2, line 14:

Delete ", consistent with AS 44.42.085 and regulations adopted under that section,"

Page 2, lines 15 - 17:

Delete "If no municipal standards and procedures are in effect, then the provision of AS 44.42.085 and the regulations adopted under that section shall apply."

Insert "Neither the adequacy of the municipal replat process or standards, if any, nor the failure of a municipality to follow its own replat process and standards shall deprive the state of the authority to exercise its power of eminent domain."

Page 2, line 21, through page 3, line 14:

Delete all material.

Renumber the following bill sections accordingly.

AMENDMENT ON 4/21/04

23-LS1879\I

CS FOR SENATE BILL NO. 382(CRA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - SECOND SESSION

BY THE SENATE COMMUNITY AND REGIONAL AFFAIRS COMMITTEE

Offered: 4/15/04
Referred: Rules

Sponsor(s): SENATE TRANSPORTATION COMMITTEE

A BILL

FOR AN ACT ENTITLED

"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."

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

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

PURPOSE AND INTENT. (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 clarifying that that role is not intended to require the same substantive review or procedures for review of replats for the acquisition of property by the state or a municipality as required in replats for private landowner subdivisions or zoning reviews. ~~Regulations adopted by the Department of Transportation and Public Facilities shall be the primary and governing authority for these replat approval proceedings.~~

delete

(b) It is the intent of the legislature to

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

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

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

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

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

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

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

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

(1) must be written narrowly 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;

* Old Sec. 3 (d).

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

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

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

(c) 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.

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

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

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

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

delete

INSERT

??? IF Need this.

insert on page 2, line 15.

States delegated his statutory
ry of the Interior authorizing
nds in Alaska for specified
Alaska Land Title Ass'n, 667
cert. denied, 464 U.S. 1040,
. 2d 168 (1984).

hall not be construed to
ıy right-of-way or other
April 14, 1966, by the
tion acquired under the
3, 61 Stat. 418. (§ 3 ch

not apply to patents issued
Act of 1938, 43 U.S.C. &
ealed). State v. Alaska Land
(Alaska 1983), cert. denied,
704, 79 L. Ed. 2d 168 (1984).
of 1966 does not apply to
a public land order issued
ive order under which the
States delegated his statutory
y of the Interior authorizing
nds in Alaska for specified
Alaska Land Title Ass'n, 667
cert. denied, 464 U.S. 1040,
2d 168 (1984).

, it shall appear that
aw;

ich it is to be applied is

n proceedings in condemna-
of taking and those under a
emnation and an order for
line Co. v. 3.60 Acres, More or
a 1975).
nly show authority and
— The right of eminent do-
ied in behalf of a public use
in the taking of property
use the complaint or petition
t show plainly and affirma-
e statutory authority for the
sity of the property for such
. Lyng, 138 F. 544 (9th Cir.

fficient in eminent domain
be a clear, positive statement
o be condemned is necessary
d by 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 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.

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.

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

A BILL

FOR AN ACT ENTITLED

"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."

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

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

PURPOSE AND INTENT. (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 clarifying that that role is not intended to require the same substantive review or procedures for review of replats for the acquisition of property by the state or a municipality as required in replats for private landowner subdivisions or zoning reviews. Regulations adopted by the Department of Transportation and Public Facilities shall be the primary and governing authority for these replat approval proceedings.

(b) It is the intent of the legislature to

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

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

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

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

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

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

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

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

(1) must be written narrowly 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;

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

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

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

(c) 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.

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

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

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

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

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."

ALASKA STATE LEGISLATURE
SENATE DISTRICT O

Interim:
716 West 4th Ave.
Anchorage, AK 99501
Phone: 907-269-0222
Fax: 907-269-0223
Toll Free: 1-888-269-3879

Session:
State Capitol Building
Juneau, AK 99801
Phone: 907-465-3879
Fax: 907-465-2069
Toll Free: 1-888-269-3879

John J. Cowdery
Senate Rules, Chair
Senate Transportation Committee, Chair
World Trade State & Federal Relations, Chair
State Affairs, Legislative Council

DRAFT

FACT SHEET: SB 382

SUMMARY:

- SB 382 clarifies an ambiguity in existing eminent domain law that unnecessarily limits municipalities in their consideration of replat approval petitions.

  The bill authorizes municipalities to adopt replat approval procedures targeted specifically to the eminent domain process. At the same time, DOT will adopt regulations lending some uniformity to the replat approval process in eminent domain proceedings.

BENEFITS:

1. Greater municipal flexibility in the processes used to review replat approval petitions in eminent domain proceedings, and …
2. Achieve a ground level statewide uniformity in the eminent domain replat approval process, and …
3. conform 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 litigants' 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.

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.

Subject: [Fwd: AS 09.55.275]
Date: Fri, 19 Mar 2004 12:55:25 -0900
From: Jeff Ottesen <jeff_ottesen@dot.state.ak.us>
To: John Cowdery <senator_john_cowdery@legis.state.ak.us>,
Nona Wilson <nona_wilson@dot.state.ak.us>
CC: Michael A Tibbles <michael_tibbles@gov.state.ak.us>,
"Rebecca L Hultberg (E-mail)" <becky_hultberg@gov.state.ak.us>,
John Mackinnon <John_Mackinnon@dot.state.ak.us>

For some this may be a repeat, but Peter Putzier tells me the proposed fix language has been further edited from earlier emails. Peter is also working on a summary memo of what's at stake, which I'm hearing could be dozens of projects across the entire state, including many Garvee and GO bonded projects. Failing to deliver these on time could affect our standing with bonding authorities, as well as public opinion.

Apparently, the new creative argument by the land owners attorney, whom specializes in condemnation law, could be easily replicated on any other state project requiring a right-of-way acquisition.

I will share the memo from Peter when prepared.

-------- Original Message --------
Subject: AS 09.55.275
Date: Fri, 19 Mar 2004 11:47:25 -0900
From: Peter Putzier <Peter_Putzier@law.state.ak.us>
To: jeff_ottesen@dot.state.ak.us

Jeff:

I have attached language for a proposed fix, plus the underlying court briefing which is set for oral argument in Anchorage.

Many projects are potentially jeopardized. Both Northern and Central regions are preparing a list of those projects. I will provide you with additional information as it becomes available. I do not have a final electronic version of the "opposition" (the document was finalized in Anchorage), but the attached gives you a sense of the state's opposition arguments.

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

disseminating this communication by any means.

Legislative Fix1.doc	**Name:** Legislative Fix1.doc **Type:** WINWORD File (application/msword) **Encoding:** base64 **Download Status:** Not downloaded with message

Memo - Motion to Dismiss.pdf	**Name:** Memo - Motion to Dismiss.pdf **Type:** Acrobat (application/pdf) **Encoding:** base64 **Download Status:** Not downloaded with message

Reply to Opp to Dismiss.pdf	**Name:** Reply to Opp to Dismiss.pdf **Type:** Acrobat (application/pdf) **Encoding:** base64 **Download Status:** Not downloaded with message

Opposition to A&N7.doc	**Name:** Opposition to A&N7.doc **Type:** WINWORD File (application/msword) **Encoding:** base64 **Download Status:** Not downloaded with message

all attached

AS 09.55.275 is amended to read:

An agency of the state or municipality man 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. **The platting authority may establish the applicable review process and standards. However, replat approval shall not be unreasonably withheld.** 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. **It is not the intent of this section to confer rights to landowners potentially impacted by an acquisition. As applied to acquisitions of property identified herein, the platting authority is subject solely to the requirements of this section.** [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].

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA, DEPARTMENT OF TRANSPORTATION & PUBLIC FACILITIES, Plaintiff, vs. DAVID H. HARTMAN; LINDA J. HARTMAN; AMERICAN EXCHANGE PROPERTIES, LLC; MUNICIPALITY OF ANCHORAGE; LAND TITLE COMPANY OF ALASKA; FIRST NATIONAL BANK OF ALASKA; and 4.435 ACRES (193,189 SQ. FT.), more or less, Defendants.	)	**Project No. 54281** **"C" Street-O'Malley Road to Dimond Boulevard** **Parcel 24** Case No. 3AN-03-13875 Civil

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

I. INTRODUCTION.

The narrow issue presented to this court is whether the State of Alaska, Department of Transportation & Public Facilities' ("DOT/PF") use of the right-of-way plat procedures in AMC 21.15.123[1] is sufficient to meet the pre-condemnation preliminary plat approval requirement explicitly mandated by AS 09.55.275. AS 09.55.275 requires pre-condemnation takings to be platted "in the same manner as replat petitions originated by private landowners."

[1] *See* Exhibit C, attached.

In this case, the DOT/PF has complied only with the municipal ordinance guiding right of way plats. This sets forth an abbreviated non-public procedure for obtaining replat approval drastically different from the procedures and substantive requirements that private landowners seeking replat approval must meet. The question is whether DOT/PF must, as the language of AS 09.55.275 expressly requires, file for preliminary plat approval under the same procedures and meet similar standards applicable to private landowners. It is ultimately a question of whether the State should abide by local platting and planning policies.

Although this precise question has not been addressed by Alaska courts before, the recent decision in *Municipality of Anchorage v. Suzuki*[2] offers a helpful framework in which to examine this question. The analysis in *Suzuki* supports the conclusion that the procedure used by DOT/PF in this case does not meet the statutory requirements of AS 09.55.275.

The Hartmans request that this court interpret the plain meaning of the legislative mandate set forth in AS 09.55.275 as requiring that a preliminary plat must be filed by DOT/PF and approval received in the same manner as preliminary plats are filed and approved by private landowners. The Hartmans further request, based on this interpretation, that the Court dismiss this taking.

The project for which the Hartmans' property[3] has been partially taken is summarized in great detail in the Decisional Document filed with the State's complaint. To summarize, this project is the third segment of C Street improvements that will extend from O'Malley

---

[2] 41 P.3d 147 (Alaska 2002).

Road to Tudor Road. This phase of the project extends C Street from O'Malley Road to Dimond Boulevard in areas where road improvements are either nonexistent or very rudimentary, and will reconstruct the intersections at O'Malley Road and Dimond Boulevard.[4]

The C Street right-of-way takes approximately 4.435 acres from the Hartmans' Tract A, King Subdivision, Addition No. 1, Plat No. 73-24 ("Property"). It will leave a remainder parcel of approximately 12.291 acres.[5] The Property is located generally south of Dimond Boulevard and west of improved King Street. The taking is in fee simple. There is no dispute that the taking causes a "boundary change," and thus is a subdivision of property for the purposes of AS 09.55.275 that requires replat approval.[6]

This condemnation takes all rights of access to the C Street right-of-way from the remainder of the Property. As a result, although the Property earlier abutted a platted but unimproved street denominated Dallas Street that extended to Dimond Boulevard, after the taking there will be controlled (i.e., no) access along the entire western boundary of the property. The property continues to have platted access along "A" Street and East 91st Street and a partial right-of-way along West 88th Avenue.[7]

II. DISCUSSION.

---

[3] It has been designated as Parcel 24 in the project right of way map.

[4] *See* Decisional Document at 1.

[5] Schedule B-1 to Complaint.

[6] *See* 41 P.3d at 152.

[7] This is pictorially depicted on Schedule B-1, also attached to the State's complaint.

A. Subdivisions Created By Takings For Roads Are Subject To Replatting Procedures And Should Be Acted Upon "In The Same Manner As Replat Petitions Originated By Private Landowners."

AS 09.55.275 states in its entirety:

> **AS 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. [Emphasis added]

The public policy set forth in requiring replat approval of subdivisions caused by State acquisitions is not unique to AS 09.55.275. AS 40.15.200 provides in relevant part:

> **Application to State and Political Subdivisions.**
> All subdivisions of land made by the state, its agencies, instrumentalities, and political subdivisions are subject to the provisions of AS 40.15.010 -- 40.15.200 and AS 29.40.070 -- 29.40.160, or home rule ordinances or regulations governing subdivisions, and shall comply with ordinances and other local regulations adopted under AS 40.15.010 -- 40.15.200 and AS 29.40.070 -- 29.40.160 or former AS 29.33.150 -- 29.33.240, or under home rule authority, in the same manner and to the same extent as subdivisions made by other landowners. [Emphasis added]

This statute is part of the general state statutes governing subdivisions and dedications and reflects the policy of subjecting state subdivisions to local platting laws and procedures.[8]

Finally, AS 35.30.020 provides in relevant part:

> **Compliance With Municipal Ordinances.**
> A department shall comply with local planning and zoning ordinances and other regulations in the same manner and to the same extent as other landowners.

AS 35.30.020 is part of a chapter generally dealing with the requirement that State public works comply with local land use regulations under the same rules and to the same extent as other landowners.

AS 09.55.275 is thus a specific statute governing eminent domain procedures to require state agencies to comply with local platting and planning ordinances, prior to acquiring property.

In *Municipality v. Suzuki*, the court was presented with the issue of whether the use of a right of way easement or a public use easement taking by the Municipality of Anchorage triggered the requirement of preliminary plat approval under AS 09.55.275. The Supreme Court concluded that the purposes of the Act, construed broadly to achieve its aim, would be best served if the term "boundary change" encompassed changes by right-of-way easement as well as takings of a fee simple interest. *Suzuki* does not address the issue in this case, which

---

[8] There is no substantive difference between the reference to "boundary change" in AS 09.55.275 and "subdivisions" in AS 40.15.200. "Subdivision" is defined in relevant part by AS 40.15.900(5)(A) as ". . . the division of a tract or parcel of land into two or more lots

is whether the preliminary plat approval the State must undertake should be the same as or more akin to that imposed upon private landowners.

However, *Suzuki* does recite certain controlling principles of law and discusses legislative history of the Act in a helpful way. The first principle is that "[A] grant of the power of eminent domain is to be strictly construed against the condemning party and in favor of the property owner . . . ."[9]

The second set of principles guides the analysis to employ in interpreting AS 09.55.275. The court construes the meaning of the statute by looking at: "'the meaning of the language, the legislative history, and the purpose of the statute in question.' Our goal 'is to give effect to the legislature's intent, with due regard for the meaning the statutory language conveys to others.'"[10] In this case, the Alaska Supreme Court has already recognized that the legislative history for AS 09.55.275 is "sparse."[11] The Court in *Suzuki* noted that the primary purpose of the Act's intent is clearly evidenced by the session law which was entitled "AN ACT Relating to state compliance with local planning, platting and zoning ordinances," and amended AS 35.10.020[12] as well as AS 09.55.275. Thus, *Suzuki*

---

by the landowner or by the creation of public access, excluding common carrier and public utility access."

[9] *Id.* at 150; *quoting Bridges v. Alaska Housing Authority*, 349 P.2d 149, 154 (Alaska 1959).

[10] *Id.* (footnotes omitted).

[11] *Id.* at 152.

[12] As quoted in *Suzuki*, 41 P.3d at 152, AS 35.10.020 was amended to provide:

establishes that the legislative intent behind AS 09.55.275 is that it should be read broadly "to achieve coordination between the state and local governments."[13]

Given a broad construction in favor of the interests of the landowner, and the fact that the power of eminent domain should be construed strictly and narrowly against the condemning party, what is the specific meaning and intent behind the last sentence of section 275? The explicit answer is in the statute, the standards, procedures and policies applicable to private landowners should control:

> 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. [Emphasis added]

It is the Hartmans' contention that this clear legislative mandate does not allow the state to seek replat approval through a procedure available only to condemning agencies and governmental bodies that differ in marked and significant ways from the manner in which replat petitions originated by private landowners are treated. The actual manner of how this replat was treated is discussed next in Section B. That section will outline the contrast

---

> CONSULTATION WITH MUNICIPAL PLANNING COMMISSIONS. Before the construction of a public works in a municipality, the department shall confer with the planning commission of the municipality to determine that the welfare of the public is properly protected and its agencies and zoning ordinances and the local regulations in the same manner and to the same extent as other landowners. However if a state agency clearly demonstrates an overriding state interest, a waiver to the compliance requirement may be granted by the governor.

[13] *Id.* at 153.

between the light review given to state right-of-way plats by ordinance and the intensive review to which private landowners are subjected, as well as the differing standards imposed.

B. A Unique Abbreviated Right Of Way Plat Procedure Is Not Consistent With The Requirement Of AS 09.55.275.

By letter of September 9, 2002, K. Kim Rice, Chief Right of Way Agent, DOT/PF submitted to Jerry Weaver, the Platting Officer for the Municipality of Anchorage, one full-size and 10 half-size plats sets for the C Street Project "submitted for preliminary approval." The request specifically asked:

> Please schedule this project for action by the Platting Officer.[14]

By transmittal of December 5, 2002, the Zoning and Platting section replied that on October 14, 2002, the Platting Authority acted positively on the petition which was given the file number "S10989 Right of Way Acquisition."[15]

The special provisions used to approve this plat as set forth in AMC 21.15.123 are not procedures that treat state replat applications in the "same manner as replat petitions originated by private landowners." AMC 21.15.123, the text of which is attached in its entirety as Exhibit C, states explicitly in section A:

> Generally. A plat for a subdivision created by a government agency's acquisition of a street, railroad or trail right-of-way is subject to approval under this section and is not subject to any other approval procedure for plats under this chapter. [Emphasis added]

---

[14] *See* Exhibit A.

[15] *See* Exhibit B.

Essentially, AMC 21.15.123's right-of-way acquisition plat procedure allows a plat to be subject to only narrow requirements that vary drastically from those required by private landowners. First, a right-of-way acquisition plat is not subject to the same submission requirements that private landowners are required to submit under Title 21.[16] This comparison requires a review of the interplay between AMC 21.15.100, which sets forth the general procedures applicable to private subdivision plats, and AMC 21.15.123. Most notably, a private owner is required to have his plat application heard at a public hearing,[17] to submit to a pre-application meeting unless waived by the platting officer,[18] and to submit the extensive documents and studies which are detailed explicitly in AMC 21.15.100 and 21.15.110. Further, a private landowner must subject itself to the requirements of AMC 21.85 which sets forth the general standards applicable to subdivision and subdivision improvements.[19]

By contrast, a right-of-way acquisition plat is explicitly exempt from chapter 21.85, and survey requirements are established by agreement rather than the survey requirements applicable to private landowners.[20] An exhaustive listing of all of the differences between the provisions of the right-of-way plat approval and those applicable to private landowners would be mind-numbing. However, it is significant that AMC 21.15.123 explicitly exempts

---

[16] AMC 21.15.123.C.1.

[17] AMC 21.15.100.B.2.

[18] AMC 21.15.100.C.

[19] The text of AMC 21.85 is attached as Exhibit D.

DOT/PF and other acquiring agencies (including the Municipality itself!) from local platting rules.[21] This alone leads to the conclusion that following AMC 21.15.123 cannot be sufficient to meet the mandate that the right of way plat approval be treated in the same manner as replat petitions by private landowners as required by AS 09.55.275.

There are substantive differences between the right of way platting procedure under AMC 21.15.123 and the procedure applicable to everyone else under AMC 21.15.100 that demonstrate that the approval under § 123 does not treat DOT/PF in the same manner as private landowners. The first is that a public hearing is not required prior to a right-of-way preliminary plat approval. Public hearings have value in the context of land use adjudication both by providing a forum to bring facts to decision-makers and forcing findings necessary to support decisions. The right to notice and a prior public hearing for decisions that affect the property interests of a landowner are basic tenets of procedural due process protection.[22]

Public hearings are mandatory for private landowners and, upon information and belief, no public hearing was held in this case.[23] Because no public hearing was held, there was no notice given to the public and no opportunity to comment. AMC 21.15.005, "Notice of public hearings" requires 21 days' notice of a public hearing to all persons within 500 feet

---

[20] AMC 21.15.123.C.3

[21] AMC 21.15.123.A.

[22] *See City of Homer v. Campbell*, 719 P.2d 683, 685 (Alaska 1986)(right to a prior hearing prior to deprivation or infringement of property rights; *cf. Griswold v. Homer*, 34 P.3d 1280, 1286 (Alaska 2001)(amendments to zoning ordinances may deserve greater scrutiny, minor amendments in that case did not require resubmission for a public hearing).

of the outer boundary of the land subject to the replat application and all owners of land subject to the application as well as posting on the land subject to the application. Notice, of course, allows members of the public who may have concerns about the nature of the subdivision and the application of municipal law and/or policy (or simply good planning) to have an opportunity to raise their concerns directly with the platting board. Further, since there was no notice of the meeting, there was no actual notice of the timing of the approval which essentially precludes any ability to appeal the decision of the platting officer even though an appeal is nominally provided for in AMC 21.15.123.D.4.

The significance of the right of a hearing on this is demonstrated by recent platting review of the Hartmans' own application for replat approval of the Property. There are repeated references in the subdivision file of the requirement that the State right of way be identified and tracted out.[24] The State's right of way plat, by contrast, was approved with little or no comment by the affected landowners, over a year before the Hartmans' application, in November 2002, with substantive impact on the Hartmans' platting process, e.g., the identification of additional setbacks and landscaping requirements.[25]

Second, the decision-maker under the right-of-way plat is the platting officer[26] unless the government agency requests a public hearing before the platting board. The delegation to

---

[23] Discovery is still pending on this issue.

[24] *See* Exhibit E at p.43, item 13.

[25] *See* Exhibit E at 38 (OS&HP setbacks); at 38 (Subdivision Landscaping).

[26] AMC 21.15.123.d(2).

the platting officer of the power to act on the plat approval is in marked contrast to the authority of the platting board to act on private citizen subdivisions. AMC 21.10.020.A.1 grants to the platting board, not the platting officer, the power and duty to hear applications for plat approval in accordance with applicable law, and more specifically to hear any applications for variances from the revisions of Chapters 21.80 and 21.85 which set forth the general standards of subdivision approval. By contrast, DOT/PF can elude review by this public board and apparently need not apply for variances from AMC 21.85, since it does not apply.

Third, this exemption from the provisions of 21.85, of course, exempts DOT/PF from having to comply with the substantive requirements applicable to all private subdivisions. One notable exemption is AMC 21.85.190 which requires a subdivider to provide landscaping as required under 21.80.340. 21.80.340 grants the platting authority the authority to require buffer or screening landscaping

> . . . to separate property from incompatible uses or structures, including but not limited to streets designated for collector or greater capacity on the official streets and highways plan, railroads, commercial or industrial uses. The area containing the landscaping shall be shown as an easement or dedication on the plat. The landscaping shall be installed before final plat approval, or its installation shall be guaranteed under Chapter 21.87 or by other performance guarantees acceptable to the authority. The landscaping shall be maintained by the property owner or his designee.

In this instance, DOT/PF (and the Municipality on its own projects) is exempted from the requirements of Municipal Code that all other landowners may be required to comply

with, which is to provide for buffer landscaping next to arterial roads such as C Street. The effect of this is to impose upon adjacent landowners, especially those adjoining collector or greater capacity streets such as this controlled access facility, substantial landscaping requirements when they develop or subdivide their property. As a result, greater burdens are imposed on private landowners, which in the first instance should have been imposed upon DOT/PF and the project had it complied with the policies and procedures applicable to all other subdivision plats.

The court should find that compliance with AMC 21.15.123 does not meet the requirements of AMC 21.15.275.[27]

C. The Legislature's Use Of Right Of Way Plats In Non-Locally-Regulated Jurisdictions Suggests its Intent Is That Plats Should Follow The Procedure Applicable To Private Landowners In Anchorage.

The legislature's recognition of right-of-way plats and its failure to provide for such procedures for subdivisions in locally-regulated jurisdictions, indicates a legislative intent that the right-of-way plat provisions of AMC 21.15.123 do not meet the requirements of AS 09.55.275. The state legislature has sanctioned the use of right-of-way plats in areas outside of municipalities where local platting and planning powers are not exercised. AS 40.15.380 sets out a procedure for recording a right-of-way plat in areas outside of municipalities that exercise the power of land use regulation. The right-of-way acquisition plat process

---

[27] Another impact is the requirement of a 65-foot setback from the centerline of the new road. *See* AMC 21.45.140. This affects all of the proposed improvements along the road.

essentially is similar to the process set forth in AMC 21.15.123, except the commissioner of the Department of Natural Resources acts as the decision-maker on the right-of-way acquisition plat.[28] It deals primarily with recording information regarding road location, survey data, and project information. The fact that the legislature provided for this procedure in unorganized areas in the same chapter where it explicitly required that the State follow procedures applicable to private landowners in areas subject to municipal platting and planning regulation provides a clear legislative intent that the abbreviated right-of-way plat procedure used by the Municipality of Anchorage is not an allowable substitute for the procedures applicable to private landowners. The doctrine of "*expressio unius est exclusio*

---

[28] **AS 40.15.380. Applicability to Governmental Bodies; Right-of-Way Acquisition Plats.**

(c) A right-of-way acquisition plat must contain the

(1) location and name of the acquisition project;

(2) approximate timetable for the acquisition and construction;

(3) dimensions and area of the proposed tract, parcel, or parcels to be acquired and the remainder of the parcel or parcels;

(4) name of the record owner or owners of the subject parcels;

(5) signature and seal of the surveyor preparing the plat.

(d) The commissioner shall review each right-of-way acquisition plat for compliance with this section. If the plat does not meet the requirements of this section, it shall be returned to the submitting agency with an explanation of the deficiencies. A plat for which the commissioner's approval is required under AS 40.15.305 may not be recorded under AS 40.17 without the commissioner's approval endorsed on the plat.

(e) After approval by the commissioner, the original plat shall be filed with the appropriate district recorder within 30 days by the submitting agency.

alterius" mandates that the legislature's specific directive that the State must follow the replat procedures applicable to private landowners in areas subject to municipal control dictates that any other alternative, such as utilizing the procedure available in unorganized areas, simply is not an option and would be contrary to statutory construction principles.[29]

Additionally, there is some legislative history that the State has read, on one occasion, that AS 09.55.275 imposed the requirement to follow local platting procedures applicable to landowners. The transmittal letter from Governor Jay Hammond for Chapter 97 SLA 1975 (which enacted the current AS 09.55.275) raised the concern that the requirement of preliminary plat approval and final plat approval could require the signature of affected landowners on a plat for its validity. Typically a plat is signed by all affected landowners including lenders and those who have an interest in the land prior to its recordation. Governor Hammond, in his transmitted letter noted that "[t]he Department of Law has not been able to determine precisely how the compliance requirements of SB 125 will be implemented, and so has been unable to clarify the potential problems raised by the Department of Highways . . . ."[30] At passage, then, the DOT/PF's predecessor agency was concerned about the complexities imposed by following local platting procedures.

It is anticipated that DOT/PF will again raise any number of practical problems with following the requirement of § 275. The need for a signature of landowners on the plat,

---

[29] *See Ellingstad v. State, Dept. of Natural Resources*, 979 P.2d 1000 (Alaska 1999)("expressio unius est exclusio alterius" doctrine holds that the expression of one thing means the exclusion of others).

however, is one easily dispensed with, given the fact that the complaint for eminent domain names all necessary parties and further any acquisition without the use of eminent domain requires signoffs by all affected parties. Only a final plat requires signatures; the issue here is the submission to the planning process prior to a taking and approval of a preliminary plat, which does not require signatures. However, it is not necessary for the Hartmans to answer or assuage the concerns of the Department as to the potential difficulties caused by following the clear mandate of the law. The Department has access to the legislature, rule-making authority, and other resources to address these issues, including the governor's waiver of the requirement. What it should not be allowed to do is to circumvent the intent of AS 09.55.275 entirely by using a special procedure not available to private landowners, and in the process avoid the substantive burdens imposed upon its neighbors in the new "subdivisions" or roads, and impact private property rights without a prior hearing.

---

[30] *See* Exhibit F.

D. The Appropriate Remedy For Noncompliance With AS 09.55.275 Is Dismissal.

The language of AS 09.55.275 clearly predicates the right to acquire property upon proper compliance with preliminary plat approval. It states explicitly "an agency of the state . . . may not acquire property . . . unless the agency . . . first obtains from the municipal platting authority preliminary approval of replat clearly showing the location of the proposed streets, easements, rights-of-way, and other takings of private property." This is a clear condition precedent to the validity of the State's action as a statutory predicate to the exercise of eminent domain. As such, the appropriate remedy is to dismiss the action until the State has complied. Dismissal of a lawsuit when a condemning agency fails to meet its statutory obligations is a recognized remedy. *See State v. 2.072 Acres*[31].

The court should construe the requirements of section 275 as mandatory, not directory. The operative sentence states that the platting authority "shall" treat applications in the same manner as private landowner's replat petitions. "Shall" generally denotes a mandatory intent unless the context indicates otherwise.[32] The court has articulated three factors for construing a statute as directory rather than mandatory:

(1) that the statutory wording was affirmative rather than prohibitive;

(2) that the legislative intent was to create "guidelines for the orderly conduct of public business; and

(3) that serious practical consequences would follow from a finding that

---

[31] 652 P.2d 465, 469 (Alaska 1982)(state's failure to establish authority and necessity for its taking justifies dismissal of the action without prejudice).

[32] *Fowler v. City of Anchorage*, 583 P.2d 817, 820 (Alaska 1978).

the statute was mandatory."[33]

Here, the earlier use of the words "first obtains" is more prohibitive than affirmative. "Prohibitive" as used in *Ryman* refers to negative words.[34] The case cited by the court in *Ryman, Anaconda Co. v. Dept. of Revenue*,[35] construed the term "not otherwise" as negative in the context of an assessment. Although "first obtains" may not be as negative as "not otherwise" it is a clear legislative expression of what should occur first before land acquisition – a proper replat approval. Further, not each test set forth in *Ryman* must be met to determine the requirement is mandatory.[36]

Second, the intent here goes well beyond creating an "orderly conduct of public business." There is in fact a substantive public policy served by requiring DOT/PF to first engage in the same public process private landowners are subject to before taking land; that process may very well shape and affect the decision to take land or alter details of that taking. Our courts have on several occasions, when interpreting statutory requirements for planning functions, required that the planning precedes, as a mandatory matter, the actual

---

[33] *Lazy Mountain Land Club v. Matanuska-Susitna Borough Board of Adjustment and Appeals*, 904 P.2d 373, 379 n.21 (Alaska 1995) *citing City of Yakutat v. Ryman*, 654 P.2d 785, 789-91 (Alaska 1982).

[34] *Ryman*, 654 P.2d at 789.

[35] 565 P.2d 1084, 1088 (Or. 1977).

[36] In *Lazy Mountain, supra*, at 379 n.21 the court found the Comprehensive Plan requirement to be a mandatory requirement even though the statutory language was not negative.

decisions affecting land.[37]

Finally, the reclassification of a portion of the Hartmans' property, here done in October 2002, without a procedure to provide notice to them, without a public hearing, is a due process violation and cannot be cured by an after-the-fact hearing.[38]

Dismissing the action will have the effect of avoiding a due process violation. The question remains whether there will be serious potential impacts from the interpretation that this process is mandatory. Although DOT/PF may claim such impacts in this case, it had over a year to follow the proper procedure, as this matter was brought to its attention in another matter long before this taking.[39] If it is not made mandatory, there will continue to be an incentive to file first and beg forgiveness later, to the derogation of the planning process and the rights of affected landowners. There is no good reason that a proper application cannot be timely made on projects to fulfill the goals set by AS 09.55.275.

For these reasons the requirement should be held to be mandatory.

Even if the court finds the statute to be directory, the court will have to find whether

---

[37] *See Lazy Mountain, supra* at 379 (AS 29.40.030(b) requires municipalities to adopt a comprehensive plan prior to zoning regulations); *Alaska Survival v. State, DNR*, 723 P.2d 1281, 1290 (Alaska 1986)(failure to adopt a regional plan is a serious procedural violation that "may well have affected the agency's disposal decision").

[38] *Homer v. Campbell*, 719 P.2d 683, 686 (Alaska 1986).

[39] *See* Exhibit G, letter dated November 14, 2002 from Don McClintock to Jerry Weaver and copied to James E. Cantor, Chief of Transportation Section at the State Department of Law.

there was substantial compliance with the statute.[40] The burden is on the State to demonstrate substantial compliance here.[41] For the reasons stated in Part B, the Hartmans do not believe the State can show substantial compliance.

For these reasons the Hartmans request that the State's case be dismissed.

III. HEARING STATUS.

Alaska Rule of Civil Procedure 72(h)(2) sets up an expedited proceeding for hearing issues on authority and necessity and possession. The court contemplates that either party has the right to request a hearing. Because of the expedited nature of the matter, key witnesses have not yet been deposed. It is anticipated that those depositions will be concluded prior to time for a hearing. The Hartmans reserve the right to submit additional evidence gleaned from the depositions into the record and at the hearing.

IV. CONCLUSION.

The case should be dismissed without prejudice to refile after a subdivision plat is filed.

ASHBURN & MASON, P.C.
Attorneys for Defendants David H. Hartman
and Linda J. Hartman

By: _____
Donald W. McClintock
Alaska Bar No. 8108061

---

[40] *City of Yakutat v. Ryman*, 654 P.2d 785, 791 (Alaska 1982).

[41] *Id.*

By: _____
Dani R. Crosby
Alaska Bar No. 9809041

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was . hand delivered . faxed . mailed on the _____ day of January 2004 to:

Peter Putzier, Assistant Attorney General
Dimond Courthouse
P.O. Box 110300
Juneau, AK 99811

Sharon K. Elliott
American Exchange Properties, LLC
4730 Business Park Blvd., H-14
Anchorage, AK 99503

Michael A. Martin
First National Bank Alaska
101 West 36th Avenue, Suite 305
Anchorage, AK 99503

C. James Mathis
Municipality of Anchorage
P.O. Box 196650
Anchorage, AK 99519-6650

ASHBURN & MASON, P.C.

By_____
D.J. Lilley-Bloom

P:\Clients\10058\Memo - Motion to Dismiss.doc

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA, DEPARTMENT OF TRANSPORTATION & PUBLIC FACILITIES, Plaintiff, vs. DAVID H. HARTMAN; LINDA J. HARTMAN; AMERICAN EXCHANGE PROPERTIES, LLC; MUNICIPALITY OF ANCHORAGE; LAND TITLE COMPANY OF ALASKA; FIRST NATIONAL BANK OF ALASKA; and 4.435 ACRES (193,189 Sq. Ft.) more or less, Defendants.	)	**THE HARTMANS' REPLY TO THE STATE OF ALASKA'S OPPOSITION TO THEIR MOTION TO DISMISS** **Project No. MGE-0527(14)/ 54281, Parcel No. 24 "C" Street-O'Malley Road to Dimond Boulevard** Case No.: 3AN-03-13875 Civil

The Hartmans request that this court require the Department of Transportation and Public Facilities ("DOT") to follow the clear language of AS 09.55.275 and AS 40.15.200, which require the State to follow a preliminary plat procedure that is "in the same manner and to the same extent as subdivisions made by other landowners,"[1] prior to filing its Declaration of Taking.[2] In opposition, the State urges this court to disregard the plain meaning of AS 09.55.275 and AS 40.15.200 and excuse the State's noncompliance because the process it followed substantially met the purpose of the statute and is the one

[1] AS 40.15.200.

[2] AS 09.55.275.

required by the Municipality of Anchorage ("MOA"). This court should not accept these *post hoc* rationalizations for the following reasons:

(1) The Hartmans have a constitutionally protected property interest not to have their property subdivided without actual notice and an opportunity to comment at a pre-deprivation hearing.

(2) The process followed by the State failed to give actual notice to the Hartmans of the State's preliminary plat application and the opportunity to comment. This defect violates the Hartmans' due process rights to adequate notice and the opportunity to participate at a pre-deprivation hearing. This constitutional violation voids the plat approval under AMC 21.15.123 regardless of whether its procedures meet the intent of AS 09.55.275 and AS 40.15.200.

(3) The State follows a different process for subdivisions for roads than the process it follows for subdivisions for buildings. However, the same standards in AS 09.55.275 and AS 40.15.200 apply to both types of subdivisions.

(4) The right-of-way plat procedure is not similar to the short plat criteria that individuals can use and, for that reason, the right-of-way plat procedure does not meet the mandate of AS 09.55.275 and AS 40.15.200.

(5) The process followed by the State failed to permit review by the independent public body, the platting board, that is charged with the administration of platting decisions and DOT's self-controlled administration of its Environmental Impact

Statement and Design Study Report process cannot substitute for the review by the platting board in a manner that meets AS 09.55.275 and AS 40.15.200.

(6) The MOA is a party to the case and is required to follow the court's order, should the court find the procedures used in this case under AMC 21.15.123 to be either constitutionally or statutorily defective. Further, the State did not avail itself of procedural steps allowed by AMC 21.15.123 that would have provided the Hartmans with actual notice and a chance to participate at a hearing. DOT's failure to meet statutory or constitutional standards should not be excused when it failed to do what it had the power to do to meet the law.

Further, the remedies suggested by the State should be rejected because they are substantively wrong for the reasons stated above, and for the following reasons:

A. The State should not ask this court to excuse its noncompliance with state law when the executive branch through the governor's office has the power to exempt this project from the application of AS 09.55.275, and thus moot any claim of delay to the project.

B. After-the-fact hearings do not cure procedural due process violations.

C. Dismissal is consistent with the mandatory requirements of AS 09.55.275; it is a condition precedent to the exercise of the power of eminent domain.

Even if the court chooses to grant the Hartmans' motion, but stay the order, such stay must be short lived or include substantial protections to the Hartmans' interest as their property interest will be compromised pending the re-submittal of the plat application.

These points will be discussed in depth below. However, discovery has illuminated certain historical facts which bear on the discussion that should be outlined first.

I. HISTORY OF DOT COMPLIANCE WITH AS 09.55.275.

It is undisputed that before the MOA adopted AMC 21.15.123, the State did not in any way comply with AS 09.55.275[3] on its road projects.[4]

---

[3] AS 09.55.275 was passed in 1975. *See generally Municipality of Anchorage v. Suzuki,* 41 P.3d 147, 152-53 (Alaska 2002). AMC 21.15.123 was enacted in 1983 by AO No. 83-180.

[4] As Jim Sharp, R.O.W. Engineering Supervisor, the DOT official in charge of seeking preliminary plat approval, testified:

> Q And to your knowledge, did Lavern Buller [his predecessor] ever indicate that there was a time when the Department did not submit for a preliminary right-of-way plat approvals in organized municipalities?
>
> A I know that there was a time, prior to the platting requirements developing to where they are today, that the Department did not submit plans.

Sharp depo. at 15, ll.4-10.

Mr. Weaver, the Platting Officer for the MOA for more than twenty years, concurred with this as well.

> Q Okay. Prior to the passage of Section 123, how were these

The drafting of a right-of-way plat procedure by ordinance, AMC 21.15.123, was initiated by the MOA "in cooperation with the Department of Transportation."[5] After it was passed, the DOT started complying with the ordinance.[6] The MOA initiated the ordinance to address problems with remnant parcels that did not comply with code as to lot size and access, and to enforce survey standards.[7]

---

sorts of subdivisions processed?

A Procedurally, what the Department of Transportation did was record a drawing after the conclusion of their project, after they had acquired property, constructed the facility, and did their final survey work. And there may have been some administerial (sic) things that they had to do with the -- if, you know, Federal Highway Administration -- but once it was pretty well complete, they recorded a document that showed the property, the project, the parcel takings, just showed the project as they finished it.

Q And in that process were the drawings ever submitted to the Municipality for its review or comment?

A Not for platting purposes.

Weaver depo. at 8, l.16 through 9, l.5.

[5] Weaver depo at 7, ll.19-23.

[6] Weaver depo. at 21, ll.5-10.

[7] Q And is it fair to say that one of the goals is also to ensure that properties meet certain minimum criteria?

A There are criteria that go hand-in-hand with the subdivision process, that's correct.

Q Okay.

A In addition to the survey standards which are 21.80 and 85.

Q And those minimum criteria, I think you mentioned lot size would be one. Other ones would be perhaps setbacks, access, those are all things that would be reviewed as part of the general platting process?

A The lot sizes -- lot size, access, those are criteria that we would

Under AMC 21.15.123, no mailed notice of the hearing was provided by DOT or the MOA to the landowners whose property is being subdivided; nor is notice sent of the approval of the preliminary plat and the right to object or appeal its approval.[8] No actual hearing is held unless requested by DOT; it is simply a desk review.[9] No check is made to ensure DOT has proper title to the property being platted through a certificate of plat, unlike a conventional plat application.[10] As a result, no mailed notice was ever delivered to the Hartmans of the pending plat application. It is notable, given the lack of actual notice to the Hartmans of the State's replat of their property, that the State was well aware of how to contact them. During this time and even before DOT applied for its preliminary plat approval in September of 2002, DOT appraisers were already in contact with Mr. Hartman.[11] It is perhaps not surprising given the lack of effective notice under this procedure, that during the 20 years Mr. Weaver has served as platting officer, the MOA has never held a public hearing on a right-of-way plat application.[12]

As will be developed below, the State's use of AMC 21.15.123 so as to not provide for effective actual notice to individuals whose property is being subdivided

---

evaluate.

Weaver depo. at 11, ll.4-16.

[8] Sharp depo. at 22, ll.7-11; Weaver depo. at 23, ll.3-6; 25, ll.17-24; 42, ll.1-11.

[9] Weaver depo. at 28, ll.12-20; 42, ll.5-9.

[10] Weaver depo. at 44, ll.3-16.

[11] *See* Exhibit I attached.

[12] Weaver depo. at 21, l.23 through 22, l.6.

ensures that the State's preliminary plat application does not face scrutiny by either the public or the Platting Board.

II. DISCUSSION.

A. The Process Followed By The State Using AMC 21.15.123 Fails To Give Effective And Actual Notice To The Affected Landowners.

1. No Actual Notice Was Given To Affected Landowners.

AMC 21.15.123 allows for public hearing before the platting board in two instances: if DOT requests one, or if the platting officer's desk approval is timely appealed.[13] The practice of DOT with respect to the C Street Extension project not to request a public hearing is not unusual; Weaver acknowledged that a public hearing has not been held under AMC 21.15.123 for over 20 years.[14]

In this instance, DOT did not request a hearing.[15] DOT did not give any notice to affected landowners of the plat approval.[16] The notice was published once in the Anchorage Chronicle three weeks before the Municipality's decision.[17] The newspaper print notice itself is inaccurate and brief; the notice appears as Exhibit A to Jerry Weaver's affidavit submitted by the State. Proof of publication was not even kept in the

---

[13] AMC 21.15.123.D.2 and D.4.
[14] Weaver depo. at 21, l.23 to 22, l.6.
[15] Sharp depo. at 34, ll.4-6.
[16] Sharp depo. at 22, ll.7-11.
[17] Weaver depo. at 28, ll.3-11.

right-of-way plat file.[18] The notice states it is a short plat notice under AMC 21.15.125, not a right-of-way plat. No detail is given other than the plat file ("S 109891"), identification of the petitioner ("State of Alaska D.O.T."), and the request ("Road Improvements for Dimond Blvd. to O'Malley Road along "C" St."). No information is given as to affected property owners, number of lots subdivided, and no community council was notified ("unknown" was noted on the notice).

The State did not notify any individual landowner about the pending preliminary plat or its approval.[19] A letter was in fact submitted to Mr. Weaver on another parcel dated November 14, 2002, complaining about the impact of the project on access.[20] Even this November 14, 2002, letter went unanswered even though it was sent after the retroactive approval date of October 14, 2002, and only a few weeks before the December 5, 2002 written notice of approval.[21] The process in AMC 21.15.123 is clearly not designed for effective notice, a defect compounded by DOT's failure to send its own notice or trigger the provision of AMC 21.15.123 to provide for public hearing.

2. Due Process Requires Effective Notice By Mailing To Affected Landowners.

The applicable due process standard articulated by the Alaska Supreme Court is:

---

[18] *See* the Right-of-Way file, attached as Exhibit C to Weaver deposition; Weaver depo. at 27, ll.18-21.

[19] Sharp depo. at 22, ll.2-11; Weaver depo. at 25, ll.17-24.

[20] *See* Sharp depo. at 34, l.7 through 35, l.23; Weaver depo. at 35, ll.9-19.

[21] *Id.*

> For due process to be implicated, there must be a deprivation of a liberty or property interest sufficient to warrant constitutional protection. Once such an interest is established, the procedural safeguards required are determined by a balancing of the private and public interest involved.[22]

(a) The Hartmans have a protected property interest in notice of a preliminary plat that subdivides their property.

The State does not directly suggest that the Hartmans lack a property interest in their property that can be adversely affected by the State plat application. In *Horn v. County of Ventura*,[23] the court held that preliminary subdivision proceedings are adjudicative in nature and subject to due process protection. There, the court found that a landowner had a property interest in an adjacent subdivision plat because it could affect his access to public streets and increase congestion and air pollution.[24]

Here, the Hartmans have a protected property interest much more tangible than presented in *Horn* because the State is subdividing their property. The subdivision approval is final if not appealed.[25] The requirement for final plat recording involves only the agreement of the MOA and DOT; there is no provision for landowners' consent or

---

[22] *Gates v. City of Tenakee Springs*, 822 P.2d 455, 461-62 (Alaska 1992)(citations omitted).

[23] 596 P.2d 1134, 1139 (Cal. 1979).

[24] *Id.* at 1139. *See also, Dulaney v. Oklahoma State Dept. of Health*, 868 P.2d 676, 680-82 (Okla. 1993)(subsurface mineral rights holder and neighbors have a due process right of notice of approval of a landfill permit).

[25] AMC 21.15.123.D.4.

signature.[26] Access, like in *Horn*, has been affected because the prior Dallas Street platted right-of-way will now be controlled access (i.e., no direct access) once "C" Street is built.[27]

The Hartmans' own subsequent subdivision of their property has been impacted by the "C" Street taking. The Hartmans' condition of approval #11 required as a condition of recording their final plat:

> Coordinating with the Alaska Department of Transportation and Public Facilities (ADOT) to verify that the exact configuration of the "C" Street – West 92nd Avenue right-of-way acquisition tract is accurately shown on the final plat.[28]

Thus, for many reasons, the Hartmans have a protected property interest in a plat that subdivides their property sufficient to trigger due process protection.[29]

In response, the State incorrectly recharacterizes the Hartmans' request for notice and hearing as a pre-condemnation hearing.[30] From this, they draw the legal conclusion that no pre-condemnation hearing is required. Besides suffering from a logical flaw, the State's position is not a proper characterization as the preliminary plat application precedes condemnation, is statutorily required, and in no way obligates the Department to

---

[26] AMC 21.15.123.D and E.

[27] Sharp depo. at 23, l.1 through 24, l.6.

[28] *See* Exhibit A to Weaver depo., Attachment H hereto.

[29] Weaver discusses the conditions of plat approval on the Hartmans' property that could well be implicated by the State's action, such as provision for a drainage easement. Weaver depo. at 48-50.

[30] *See* Opposition at 34-35.

follow through on its action by filing a taking. Here, the preliminary plat approval occurred in October 2002, preceding this condemnation action by 14 months. If the project was delayed, or the taking not commenced, the impact could be of even greater duration. During this period of time, the Hartmans' ability to subdivide their own property has definitely been impacted by the pendency of the preliminary plat approval. Further, *Municipality of Anchorage v. Suzuki*[31] has already established that compliance with AS 09.55.275 is a limitation on the power of eminent domain and a prerequisite to the exercise of that power. Thus, although other jurisdictions may not mandate a hearing on the subdivision plat before filing eminent domain proceedings, AS 09.55.275 does so by its explicit language. At a minimum, the Hartmans were entitled to effective actual notice to allow them to participate in whatever limited hearing AMC 21.15.123 provided.

(b) Published Notice Was Insufficient.

The Hartmans discussed *City of Homer v. Campbell*[32] in their opening brief. In that case, the court found that procedural due process requires effective notice of proposed public hearings that revoking contract zoning rights the Campbells had earlier been granted. Although the Campbells were on notice of the threat of termination by a letter from the City, and the possibility of future action by the City, the court held they

---

[31] 41 P.3d 147 (Alaska 2002).

[32] 719 P.2d 683 (Alaska 1986).

were entitled to be notified of the actual hearings that revoked their contract zoning.[33] The court explicitly rejected the contention that an after-the-fact hearing was sufficient to cure the due process violation.[34]

The standard for the type of notice to be given is whether it is "notice reasonably calculated, under all the circumstances, to inform interested parties of action affecting their property rights."[35] In California, it is well settled that affected property owners are entitled to reasonable notice and an opportunity to be heard before approval of a preliminary subdivision plat occurs.[36]

In *Wickersham v. C.F.E.C.*,[37] the court held that the failure of the C.F.E.C. to give actual mail notice to potential permit applicants of permit application deadlines was constitutionally inadequate. In *Ogle v. Salamatof Native Association, Inc.*,[38] U.S. District Court J. Singleton noted that "[n]otice by mail or some other means to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely

---

[33] *Id.* at 686.

[34] *Id.* at 686-87. The State's distinction between zoning or platting matters is frivolous. The test is whether a protected property interest has been affected.

[35] *Id.* (citations omitted).

[36] *See Van't Rood v. County of Santa Clara*, 6 Cal. Rptr. 3d 746, 763 (Cal. Ct. App. 2003)("whenever approval of a tentative subdivision map will constitute a substantial or significant deprivation of the property rights of other landowners, the affected persons are entitled to a reasonable notice and an opportunity to be heard before the approval occurs." *quoting Horn v. County of Ventura*, 596 P.2d 1134 (Cal. 1979)).

[37] 680 P.2d 1135, 1147 (Alaska 1984).

[38] 906 F.Supp. 1321 (Alaska 1995).

affect the liberty or property interest of any party, if the party's name and address are reasonably ascertainable."[39] Here, there is no question the State had the Hartmans' address to notify them of the preliminary plat application because the State was already actively corresponding with them on other matters.[40] Further, the preliminary plat application required the State to list all property owners by parcel.[41]

Thus, virtually no effort was required by DOT to advise affected individuals of the pendency of the plat application or to provide it to the MOA with a request to provide actual mail notice of the preliminary plat procedure. Nothing prevented DOT from giving actual mail notice itself of the preliminary plat application to the affected landowners. AMC 21.15.123's failure to require actual mail notice makes it a constitutionally deficient procedure and cannot provide refuge to DOT to avoid the requirements of both state and federal due process.[42] Further, discussed below, DOT always had the power to request a public hearing under AMC 21.15.123.D.2 and thus trigger actual mail notice to all affected landowners.

---

[39] *Id.* at 1330, *citing Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983).

[40] The Hartmans had been contacted by an appraiser from DOT to value the future taking several months before the preliminary plat application decision date of October 14, 2002. *See* letter dated August 26, 2002, marked as Exhibit I.

[41] AMC 21.15.123.B.4.

[42] *See also American Oil Corp. v. City of Chicago*, 331 N.E.2d 67 (Ill. App. 1975) (in rezoning matters, where name and addresses are actually known to a government entity, due process mandates actual notice to the affected parties).

(c) Other Public Hearings And Planning Documents Do Not Substitute For Actual Notice.

DOT, in support of its substantial compliance argument, details the planning process that took place in 1999 and 2001 and argues that it is a substitute for the hearing required by AMC 21.55.275. As will be detailed in Section 5, these hearings are not the same as platting board review and do not meet the intent of either AS 09.55.275 or AS 40.15.200. Further, they do not satisfy the due process requirement of adequate actual notice and the right to participate in a pre-deprivation hearing itself. The court in *Horn v. County of Ventura*[43] dispensed with a similar argument. There, the county claimed that Horn's failure to participate in the Environmental Quality Act proceedings barred a complaint of no notice of the plat proceedings. As the court noted, similar to the Environmental Impact Statement and Design Study Report proceedings discussed in Section 5, the purpose for those proceedings are different. It does not focus on the "individual concerns of particular landowners" but rather it focuses on the "general assessment of effects . . . on private property and the quality of life. . . ."[44] Notice by posting and only to the individuals who requested notice was rejected as inadequate:

> Those persons significantly affected by a proposed subdivision cannot reasonably be expected to place themselves on a mailing list or "haunt" county offices on the off-hand chance that a pending challenge to those interests will thereby be revealed. Other forms of notice appear better calculated to apprise directly affected persons of

---

[43] 596 P.2d 1134 (Cal. 1979).

[44] *Id.* at 1140.

a pending decision.[45]

For these reasons, the case should be dismissed because the Hartmans did not have adequate notice of a pre-deprivation hearing as required by due process and were denied such a hearing as a result. This constitutional defect alone is sufficient to invalidate the approval of the right of way plat and dismiss this case for non-compliance with AMC 21.55.275.

3. The State's Interpretation of AS 09.55.275 and AS 40.15.200 Requirements as Creating A Double Standard For Road Subdivisions And Other State Subdivisions Is A Distinction That Is Not Supported By State Statute.

The State argues that the MOA should be free to craft its own procedures to comply with AS 09.55.275 and 40.15.200. However, neither AS 09.55.275 nor AS 40.15.200 are restricted to government subdivisions created by road project takings. They instead refer generically to "all subdivisions" or "applications for replat by government entities." As Jerry Weaver testified, all governmental non-right-of-way takings are in fact subject to the same "conventional hearing before the Platting Board" as any other private party.[46]

The State's interpretation of AS 9.55.275 and its relationship to AMC 21.15.123

---

[45] *Id.* at 1141. Note here that Sharp testified that there was no procedure for mailing out notice of the plat (Sharp depo. at 22, ll.7-11.) Thus, the mailing lists submitted by Carl Nelson with his affidavit are misleading by suggesting that actual notice was undertaken.

[46] Weaver depo. at 23, l.16 through 24, l.2

woefully fails to explain why a different procedure for right-of-way plats is consistent with the statutes' intent. The attempted distinction that AS 09.55.275 only requires "applications for replat" to be treated as having no substantive meaning, vis-à-vis conventional procedures makes no sense when read with AS 40.15.200's clear and unequivocal requirement that "[a]ll subdivisions . . . shall comply with ordinances . . . in the same manner and to the same extent as subdivisions made by other landowners."[47] In "the same manner" and "to the same extent" does not leave room for DOT's distinction between procedure and substance. Clearly, the purpose of the statutes is to allow local policy input into the subdivision process and permit coordination between state and local governments.[48] At the same time, individual input and participation in the plat approval process are mandatory, not only for the due process reasons discussed above, but to ensure that the purpose of the statute is respected.

Clearly, when read together, the two statutes require DOT to comply with the same platting process as individuals which include participation by affected individuals. AS 09.55.275 added the requirement that the preliminary plat approval be "first obtain[ed]." Compliance with AMC 21.15.123, at least in the manner pursued in this

---

[47] As a result of this double standard in favor of roads, DOT escapes any formal platting or planning and zoning board review of the projects; review that is required of other types of government projects. *See* Weaver correction page and *see generally* AMC 21.15.015. Sharp acknowledged that no State plan review was undertaken for the project by DOT. Sharp depo. at 40, l.1 through 41, l.9.

[48] *Municipality of Anchorage v. Suzuki*, 41 P.3d 147, 153 (Alaska 2002)

case, did not meet these requirements.

4. This Right-Of-Way Plat Procedure Is Not Analogous To A Short Plat Under AMC 21.15.215.

The State suggests that AMC 21.15.123 meets the intent of section .275 because it is similar to the short plat process in AMC 21.15.125, which is also applicable to individuals. However, the "C" Street project does not and cannot fit within that procedure. In fact, it is doubtful that most projects could fit under AMC 21.15.215.

(a) A short plat is only allowed in certain situations, none of which apply to the "C" Street project.

The most significant reason why the short plat reference does not apply is that AMC 21.15.125 specifically does not allow government agencies to use a short plat.[49] In fact, if the State were to subdivide its own property for a state building, then both under State law and municipal law, it would have to follow full "long" plat procedures. As Mr. Weaver acknowledged, non-right-of-way state acquisitions must follow the same "long" plat procedures as landowners.[50]

Further, the text of AMC 21.15.125 shows that right-of-way plats do not fit easily within its requirements. AMC 21.15.125.B.1 does not allow a right-of-way plat that

---

[49] AMC 21.15.125.A:

> . . . provided that preliminary plats described in subsections B.1 and B.2 of this section are not subject to approval under this section where the applicant for preliminary plat approval is an agency of the municipal, state or federal governments. [Emphasis added]

[50] Weaver depo. at 23, l.16 through 24, l.2.

moves or eliminates a lot line when it would "deny adequate access to and from all lots or tracts created by the subdivision or those adjacent to it." The project at issue will leave parcels land-locked or without adequate access. The Hartmans' property alone would have its entire Dallas Street frontage (over which "C" Street is constructed with its additional right-of-way taking) designated as controlled access, not allowing direct access to "C" Street[51]

Further, the MOA planning department and DOT knew that the "C" Street project would have at least one land-locked parcel. The DOT Right of Way subdivision file contained a letter dated November 14, 2002, addressed by Don McClintock to Jerry Weaver.[52] That letter stated:

> However, if the access from "C" Street is limited, including to West 86th Court, it will become landlocked. This is a violation of standard subdivision approval standards and a private landowner/subdivider would not be allowed to do this.[53]

Short plats are specifically not allowed if movement of a lot line will serve to deny adequate access to and from all lots or tracts created by the subdivision.[54]

Mr. Weaver was aware of this issue at the time of application. As Mr. Weaver stated, he discussed this issue with the landowners previously and, "you know, these were

---

[51] Sharp depo. at 23.
[52] *See* Motion to Dismiss, Exhibit G.
[53] Exhibit G at 3.
[54] *See* AMC 21.15.125.B.1.c and B.2.b.

issues that needed to be resolved with the State and so I didn't take any action on it."[55] Mr. Weaver acknowledged that a Platting Board would have general authority to designate access to an adjacent street in a conventional subdivision plat, but he did not think it was under his purview with the right-of-way plat.[56]

In fact, after a copy of the McClintock November 14, 2002 letter was received by Mr. Sharp, he realized that DOT had not received plat approval of the project.[57] Mr. Sharp contacted Mr. Weaver who subsequently issued the December 5, 2002, letter noting the preliminary plat had been approved on October 14. No notice of this action was given to any third party or to the Hartmans to allow an appeal.[58] No one considered the fact that a short plat would not have been permissible here, or was given the opportunity to object and ask for a full hearing.

The other permissible basis for a short plat is that it applies to subdivisions of eight lots or less or three tracts or less. This project has 42 parcels designated for acquisition.[59] In sum, the right of way plat procedure does not fit within the short plat exception to the long plat procedure.

---

[55] Weaver depo. at 34, ll.9-25 through 35, ll.1-14.
[56] *Id.*
[57] Sharp depo. at 29, l.25 through 30, l.10.
[58] *See* Affidavits of Linda and David Hartman.
[59] Weaver depo., Exhibit C (Right-of-Way map).

(b) The exception of AMC 21.85 requirements for road right-of-way does not meet the intent of AS 09.55.275.

The other defect in AMC 21.15.123 is that it exempts DOT entirely from AMC 21.85 which is applicable to all subdivisions other than road right-of-way. The State argues that DOT meets AASHTO standards as to typical AMC 21.85 requirements such as erosion, curb and gutters, utilities, sidewalks, and traffic control and, for that reason, need not comply with AMC 21.85. The State acknowledges that landscaping is a separate AMC 21.85 requirement, but suggests landscaping is a budget issue. However, all subdivision amenities are a budget issue. The platting board generally gets to resolve conflicts regarding what is required for subdivisions. Although it would be irrational to require DOT to not meet AASHTO standards, AS 09.55.275 contemplates that local bodies could, consistent with its standards applicable to individuals, impose higher standards. AMC 21.15.123's wholesale exemption of all AS 21.85 requirements defeats this statutory goal.

(c) The Hartmans have substantive concerns to raise before a Platting Board.

The State, as an attack on the Hartmans' motives, suggests that the Hartmans are concerned only with money and that they have no concerns about the taking or project design.

As an initial point, this criticism is weak when made by an agency that has not given actual notice and an opportunity for a meaningful pre-deprivation hearing for over

twenty years. The Hartmans did not assert rights they were unaware they had, rights that DOT was charged with informing them about as a matter of due process.

The criticism is also factually wrong. There is much about the taking that affects the Hartmans. Project landscaping was discussed in the opening brief. The area of taking from the Hartmans includes developable wetlands and the development of the road project could well very impact the development of the adjacent property. Most significantly, the Hartmans discussed the issue of access with DOT representatives.

David Williams submitted an affidavit that no discussions regarding access were held with Mr. Hartman during their right-of-way acquisition discussions.[60] However, this is factually inaccurate. Exhibit 4, page 6 to Mr. William's Affidavit states:

> I thanked him (Hartman) for providing the road building cost estimate and I informed him that the State now would mostly not construct the road [88th Ave.] as part of this project but would offer it to Mr. DeLong as damages. Mr. Hartman would then have to get with Mr. DeLong to make sure the road actually gets built. I informed him that the road was no longer part of these negotiations and the State was firm on the FMV offer of 1.50 sf.

Clearly, the State's own notes reflect Mr. Hartman's interest in the extension of an access road. The taking removes all access to Dallas Street by making it a controlled access facility, and Mr. Hartman has a material interest in ensuring his remaining access is appropriate.

---

[60] *See* Exhibit 4, ¶ 3.

The Department is free to pay an adjacent landowner the monetary equivalent of access; however, with platting board review, Mr. Hartman could have asked that the same access be built and not just paid for as such access implicates more than just one parcel. Actual notice and an opportunity to request a pre-deprivation hearing before the platting board would address such substantive matters and is not simply a procedural ploy.

(d) DOT originally understood AS 09.55.275 to require compliance with conventional plat procedures.

The State's argument that the governor's bill signature letter has no extrinsic evidence value of legislative intent misses the mark. The governor, as the head of the executive branch, and thus DOT, clearly read AS 09.55.275 as subjecting road plats to conventional platting requirements because of the expressed concern that the signatures of landowners would be required, as it is for conventional plats. The fact that DOT disregarded the standard entirely until AMC 21.15.123 was hand-crafted to ensure partial compliance shows that DOT never understood any other process to apply when the statute was enacted.

(e) The Right-of-Way Plat Process is defective because it fails to give adequate notice consistent with due process.

Finally, the rationale that AMC 21.15.123 comports with the minimum requirement of the statute does not cure its due process deficiency. The single greatest problem with the argument that short plat process is sufficient compliance with both due

process and AS 09.55.275 is that unlike an individual's application for his own short plat, the State subdivides other people's property without their knowledge. When DOT applies for a right of way plat, no notice by mail is given to any affected landowner to ensure actual notice. Such notice would be required by a long plat procedure or would have been required if the State had requested a public hearing under AMC 21.15.123.D.2.

Under AMC 21.15.005, a public hearing notice requires mailed notice to everyone within 500 feet of the project. Affected landowners whose land is being subdivided are included in the group assuming they are not the applicant. Notice is by publication, mailing, and posting on the property. This difference alone undercuts the analogy that State seeks to make in arguing that a right-of-way plat procedure suffices because it is analogous to the short plat procedure available to individuals. No individual could covertly subdivide another's property without giving them actual notice, even assuming they would be allowed to file for the plat in the first instance. Here, not only is the Department allowed to subdivide another's property without effective notice, they cannot record a final plat without providing title.

Mail notice is the effective notice that should be required, both as a statutory matter and a due process matter. Absent such notice, AMC 21.15.123 cannot be said to comply with AS 09.55.275 even if otherwise short plat procedures were sufficient. A

pre-deprivation hearing is generally required by procedural due process.[61] The right of effective notice of a hearing and the right to present concerns to the platting board is an important goal that § 275 sought to preserve for landowners.

5. The Process Followed By The State Did Not Substantially Comply With AS 21.55.275 And AS 40.15.200.

The State details at length the environmental impact and design studies undertaken by the State as part of the required federal procedures for this federally funded project.

However, the purpose of those studies, although they may allow some private and public impact considerations into the design process, do not substitute for the submission of these projects to the same platting authority, the platting board, that presides over individual landowner plat applications.

As an initial matter, the Hartmans object to the partial introduction of these documents into the record.[62] The studies cited only tangentially apply to the requirement of coordination with and submission to local planning personnel. The vast majority of

---

[61] *City of Homer v. Campbell*, 719 P.2d 683, 687 (Alaska 1986); *Horn v. County of Ventura*, 596 P.2d 1134, 1141 (Cal. 1979)("Notice must, of course occur sufficiently prior to a final decision to permit a meaningful predeprivation hearing to affected landowners.")(citations omitted).

[62] Evidence Rule 106 provides:

> **Remainder of, or Related Writings or Recorded Statements**
> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

the documents are internal review of project compliance with applicable federal standards and coordination with other federal and state agencies. The selective excerpts grossly magnify the impact and role of local planners and individuals on these studies, which are driven more by other State agencies, DOT and its consultants.

The focus of the studies is on a different scale and focus than the property-specific concerns of Title 21 regarding drainage, access, and the lot sizes. Although some concerns may overlap with the platting concerns found in Title 21, they are clearly not the focus of these studies. The difference between these studies and an actual preliminary plat hearing was expressly discussed by the California Supreme Court when it rejected the argument that an environmental quality assurance process could substitute for actual notice and the right to participate in a subdivision proceeding.[63]

Second, the environmental impact analysis and design study process spans from 1999 to 2001, a year before the preliminary plat was filed. It requires substantial sophistication and experience to track the environmental impact statement process, the location study and the design study report process to glean the small snippets of attention paid to one individual property (which is rarely identified) and ascertain what will happen to one property. The focus of those documents is not on impacts on a property-by-property basis. Instead, their focus is on the project as a whole.

Finally, as noted in Section 2, these procedures do not meet the minimal due

---

[63] *Horn*, *supra*, at 1140.

process requirement that they give actual notice of the preliminary plat process and advise individuals that they have an opportunity to ask for a public hearing before a third party tribunal, the platting board, to rule on potential conflicts. The burden on the State to give such notice is minimal as it was already corresponding with landowners to appraise their properties. The process employed by the State here, and the process contemplated by AS 09.55.275 and AS 40.15.200 are fundamentally different, as will be examined next.

(a) The right to have issues heard by the platting board is an important goal of AS 09.55.275 and AS 40.15.200.

It is the platting board that has the power to hear applications for plat approval under Title 21.[64] Under the platting procedure as applied to individuals, the platting board acts as the final arbiter to make final decisions between the interested parties on a plat, in the event the parties cannot reach the agreement. For instance, as Mr. Weaver testified regarding utilities:

> A . . . every subdivision's approved with a requirement to resolve utilities. And so if they can't resolve them with the utility company, you know, the petitioner will bring it back to the Platting Board to arbitrate it.
>
> Q And make a final decision?
>
> A Uh-hum (affirmative).[65]

---

[64] AMC 21.10.020.

[65] Weaver depo. at 30, l.22 through 31, l.3.

A conventional subdivision is routed to about 26 different agencies; by comparison, a right of way plat only goes to four or five agencies.[66] When a matter goes to public hearing, then the public is given a chance to put its comments on record, forming a part of the decision of the platting board.[67] No such opportunity was allowed here. Mr. Nelson's affidavit also reflects a pattern of resistance by the Department to submission of its plans for municipal planning review and approval. The February 22, 2002 memorandum from the State of Alaska, Michael L. Downing, P.E., states the AS 35.30.010 requires plans be submitted to the planning commission for the municipality for review and approval.[68] However, as Mr. Weaver corrected his deposition after investigation, DOT has not submitted this project to any commission of the MOA for review and approval. As Mr. Weaver states in his correction page:

> In my deposition, I indicated that the State Department of Transportation was required and was processing their public facility projects to the Planning and Zoning Commission for review under AMC 21.12.015 A. 2. After the deposition, I inquired to see how many had been processed in the recent past to find that the State of Alaska had not processed any of its public facilities to the Planning and Zoning Commission.

[Signed February 11, 2004] Mr. Sharp, similarly, was unaware of any submissions of the

---

[66] *See* Weaver depo. at 29, ll.1-23; 31, ll.10-15.

[67] Weaver depo. at 40, l.19 through 41, l.10.

[68] State's Exhibit 2 at 11.

project for site plan review.[69]

Thus, the mere fact that DOT accepts letters and comments from individuals in its own controlled environmental impact statement process or Design Study Report process is far different from DOT following the legislative mandate to seek municipal planning commission review and approval. Apparently, AS 35.30.010 has not been complied with at all, and AS 09.55.275 and AS 40.15.200 have been followed using a facially defective municipal procedure.

These mark significant differences between the focus of a conventional preliminary plat application and the procedure the State undertook in this case. The opportunity for individuals with actual notice of the hearing to comment, wider agency review comment and a final decision by the same municipal platting board that applies policy to plats submitted by individuals is far different from the DOT-controlled process described in the environmental impact statement or design study report process. The court should reject this effort to show substantial compliance.

6. The Municipality Of Anchorage As A Party To This Action Is Bound By The Court's Order; and Compliance With Its Procedures Does Not Excuse Non-Compliance With AS 09.55.275.

The MOA is a party to this action and is on notice of this attack on the sufficiency of AMC 21.15.123 to comply with the state statute. Any holding by this court that the process in AMC 21.15.123 does not pass constitutional due process standards or that it

[69] Sharp depo. at 40, ll.1-9.

does not meet the state law, is binding on the MOA. There is no limitation on the power of this court to act.

The State argues that because it followed municipal procedures, it should be excused if those procedures are found lacking. This argument should be rejected for several reasons. First, it is irrational to argue that a state taking that fails to follow state law is excused, when presumably a city taking based upon its own flawed procedure would not be excused. Second, there is no other meaningful way to have the issue heard because no one other than the affected landowners would be motivated to challenge the sufficiency of AMC 21.15.123.

Third, and more importantly, DOT itself had the ability to give actual notice to landowners of their right to provide comment on the preliminary plat and object to it so as to trigger a public hearing. DOT had the right even under AMC 21.15.123.D.2 to ask that a public hearing be held which would have triggered the mailing notice requirement under AMC 21.15.005. The fact that AMC 21.15.123 may set minimum standards does not excuse DOT from failing to apply it in a way that protects the due process rights of affected landowners.

For these reasons, the State should not be allowed to avoid compliance with the state law and constitutional due process by relying on flawed municipal procedures.

III. REMEDIES.

The State spends considerable time arguing why its noncompliance should be

excused and why the Hartmans should be denied an effective remedy.

First, the allegations as to the motives in bringing this motion are without factual support. DOT ignores the fact that for 20 years the Department apparently has been successful in not advising landowners that they have the right to notice and to comment on the preliminary plat as well as to object and seek a hearing before the platting board.

The aspersion that Mr. Hartman is motivated by his financial interests in bringing this motion ignores the facts that Mr. Hartman will be affected by this subdivision. If Mr. Hartman is correct that DOT has violated not only his due process rights, but the rights of every other owner of the 42 parcels in this project, plus countless projects preceding this one, then it is time that someone brought the matter to resolution. The State's arguments are designed to inspire bias; the Department seeks to don the cloak of the defender of the public good and paint Mr. Hartman as the subverter of established order. Its argument should be disregarded. The question of remedy is and should be, what remedy best effects the legislative goals of the statute and protects the Hartmans' constitutional rights.

A. Standards Used In Fashioning Remedies.

Alaska Civil Rule 72(h)(2)(A) provides:

> In the event the objections are found to be valid, the court may dismiss the action, remand to the condemning entity for further findings, or order such other relief as allowed by law.

Here, the second action contained in the rule – remand to the condemning entity for further findings – is not applicable because this action does not constitute an appeal

from a formal decision, nor does this motion attack the decisional document of the agency.[70] Accordingly, the court may either dismiss the action (as the Hartmans have requested) or order other relief as allowed by law.

Based on the last sentence of Alaska Civil Rule 72(h)(2)(A), DOT argues that the court has the discretion to fashion "any remedy it deems to be appropriate." DOT Brief at 41. However, the rule only permits the court to order "such other relief as allowed by law." Accordingly, it is necessary for the court to consider Alaska law regarding a court's discretion to fashion remedies.

In *Revelle v. Marston*,[71] the Alaska Supreme Court reversed the trial court's determination that, where a municipal library violated the Open Meetings Act, the remedy of awarding a former head librarian back pay and benefits was not appropriate. The court explained that, when a trial court fashions a remedy to address a violation of a statute, the court must consider the purposes of a particular law in order to arrive at the most appropriate remedy for a violation:

> Thus, in assessing the remedial benefits to be gained in light of the Act's goals, the superior court should have considered the goals of maximizing informed and principled decision-making in individual cases and deterring future violations, as well as the goal of encouraging "public participation and input in the operation of government." The superior court should have weighed these benefits against the prejudice likely to accrue to the public if Revelle is

---

[70] *See, e.g., Ship Creek Hydraulic Syndicate v. State, Dept. of Transp. and Pub. Facilities*, 685 P.2d 715 (Alaska 1984).

[71] 898 P.2d 917 (Alaska 1995).

awarded back pay and benefits.[72]

The court also noted that "Ideally, the goal of the Open Meetings Act is to place Revelle in the position he would have been in had the violation never occurred."

If the court grants the Hartmans' motion, the court should fashion a remedy that furthers the goals of AS 09.55.275 and AS 40.15.200. The purpose of those statutes is to ensure that a government right-of-way plat is subject to same requirements as private plats. The statutes also serve the purpose of assuring the Hartmans a pre-deprivation hearing before the property is subdivided. To ensure that these goals are met, the court should not fashion a remedy that bypasses the very essence of the private plat approval process; a public hearing prior to plat approval is essential. Any remedy offering less than an opportunity for the public to review and comment on the plat application prior to approval would not meet the statutory goals of AS 09.55.275 and AS 40.15.200, and such a remedy would run afoul of the court's pronouncement in *Revelle*.

B. The State Has The Means To Avoid Any Adverse Impact Of This Ruling By Executive Order.

The State asks this court to do what DOT has the power to do unilaterally. AS 09.55.275 clearly grants the governor the power to exempt this project from AS 09.55.275 in the public interest. DOT would rather ask this court to excuse its failure to follow the law because a gubernatorial exemption would concede the applicability of the

---

[72] *Id.* at 924.

very requirement it seeks to avoid. DOT's claims of the severe impact that delay imposes on the public good should be disregarded by this court because the DOT has the power to excuse itself by executive action, but refuses to exercise it.

C. Due Process Violations Are Not Effectively Cured By After The Fact Proceedings.

The Alaska court has on more than one occasion invalidated actions taken in disregard of due process requirement.[73]

The Alaska Supreme Court has stated:

> If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented . . . . [N]o later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred.[74]

Here, allowing an after-the-taking hearing makes little sense after the State has already filed its declaration of taking. The only remedy that effectively preserves the right is to dismiss the action and require the preliminary plat hearing prior to condemnation, or allow the State to exercise it gubernatorial exemption.

D. Dismissal Is Consistent With AS 09.55.275.

AS 09.55.275 clearly states property acquisitions cannot occur unless the agency "first obtains" preliminary plat approval from the "municipal platting authority."

---

[73] *See City of Homer v. Campbell,* 719 P.3d 683, 686-87 (Alaska 1986) (subsequent hearing did not cure failure to give adequate notice) and cases cited therein.

[74] *Id. (quoting Fuentes v. Shevin*, 407 U.S. 67, 81-82 (1972)).

Dismissal is appropriate because the directive to comply with § 275 was mandatory and should not be excused by this court. The remedy of dismissal is wholly consistent with requiring DOT to proceed in the proper order of steps before it files and uses its declaration of taking powers. An after-the-fact hearing would only serve to replicate the decision already made by the Department. Further, because a proper notice and hearing may provide new information of the Department, its decision to take property without that input is arbitrary and should be dismissed.[75]

The Department requests a stay of this action rather than dismissal while the platting process continues. That poses the defect of holding the Hartmans' land as subject to a Declaration of Taking, and thus divested of title,[76] during this period of time, with no provision for just compensation, unless some provisions for just compensation were made specifically part of the order. Any order for stay should also require that the Declaration of Taking has no substantive impact on the proceedings before the platting board and thus could not be referred to by the Department. A stay, unless carefully crafted, would serve as a vehicle for DOT to justify its plat application by its final taking decision as set forth in this case. A better procedure would be to stay dismissal for ten

---

[75] *State v. 0.644 Acres More or Less*, 613 P.2d 829 (Alaska 1980). Here the input of the Platting Board is deemed important information to the taking decision even if one rejects the argument that DOT lacks eminent domain power to the property in excess of its preliminary plat approval.

[76] *See* AS 09.55.440(a) (vesting of title occurs upon filing of the declaration of taking and estimated just compensation).

days to allow the State to elect a gubernatorial exemption, and if not exempted, then order the case to be dismissed and direct DOT to proceed to a proper hearing.

IV. CONCLUSION.

DOT has used its hand-crafted adaptation of AS 09.55.275 and AS 40.15.200 for over twenty (20) years to successfully escape submitting its projects to comment and review by affected individuals and the platting board. The process it followed is violative of the Hartmans' due process rights and does not meet the clear intent of the statutes.

Dismissal is the proper remedy both for the due process violation and to fulfill the statutory requirements imposed by AS 09.55.275. Excusing noncompliance will serve only to perpetuate future noncompliance. A stay is not a preferable way to proceed because of the danger that the Department's taking decisions will adversely affect the platting board's actions, and the fact that the stay works a taking of the Hartmans' property.

The case should be dismissed without prejudice to refile once the DOT has complied with AS 09.55.275 and AS 40.15.200.

ASHBURN & MASON, P.C.
Attorneys for Defendants David H. Hartman
and Linda J. Hartman

DATED:_____ By:_____
Donald W. McClintock
Alaska Bar Member #8108061

DATED:_____ By:_____

Dani R. Crosby
Alaska Bar Member #9809041

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was . hand delivered . faxed . mailed on the _____ day of February 2004 to:

Peter Putzier, Assistant Attorney General
Dimond Courthouse
P.O. Box 110300
Juneau, AK 99811

Michael A. Martin
First National Bank Alaska
101 West 36th Avenue, Suite 305
Anchorage, AK 99503

C. James Mathis
Municipality of Anchorage
P.O. Box 196650
Anchorage, AK 99519-6650

ASHBURN & MASON, P.C.

By_____
D.J. Lilley-Bloom

P:\Clients\10058\Reply to Opp to Dismiss.doc

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA, DEPARTMENT OF TRANSPORTATION & PUBLIC FACILITIES, Plaintiff, vs. DAVID H. HARTMAN; LINDA J. HARTMAN; AMERICAN EXCHANGE PROPERTIES, LLC; MUNICIPALITY OF ANCHORAGE; LAND TITLE COMPANY OF ALASKA; FIRST NATIONAL BANK ALASKA; AND 4.435 ACRES (193,189 SQ.FT.), MORE OR LESS, Defendants.	Project No. 54281/MGE-0527(14) "C" Street-O'Malley Road to Dimond Boulevard Parcel 24 CASE NO: 3AN-03-13875 CI

OPPOSITION TO AUTHORITY CHALLENGE

The Department of Transportation and Public Facilities ("DOT&PF") strictly followed the requirements of AS 09.55.275 and AMC 21.15.123. DOT&PF filed an application for replat approval with the Municipality of Anchorage ("MOA") platting authority in September, 2002, and DOT&PF received MOA's right-of-way replat approval, after public notice, on October 14, 2002. There can be no dispute over those facts.

David Hartman and Linda Hartman (the "Hartmans") imply that DOT&PF was trying to circumvent AS 09.55.275. DOT&PF simply followed a local ordinance, AMC 21.15.123, which has been in place for over 20 years, and which up until now, has never been challenged. The MOA legal department performed a detailed review of AS 09.55.275 in 1986, and found that AMC 21.15.123 was consistent with AS 09.55.275.[1] Accordingly, the MOA followed a process it believed to be valid. At the same time, DOT&PF followed those steps required of it by Alaska Statutes, and by MOA ordinance.

Far from trying to avoid compliance with applicable local zoning rules, DOT&PF specifically sought comment from the MOA on whether planning and zoning ordinances had been complied with. On September 10, 2003, DOT&PF wrote the MOA as follows:

> Enclosed are the plans and specifications of the above mentioned project for your review and comment. Additionally please specifically review for compliance with:
>
> **"Alaska Statute Compliance with municipal ordinances.** *A department shall comply with local planning and zoning ordinances and other regulations in the same manner and to the same extent as other landowners."*[2]

The MOA did not respond, but had the opportunity to do so. DOT&PF, through its environmental and design process coordinated extensively with the MOA before and after

---

[1] Ex. 1, 1986 MOA Legal Memorandum, at 8-9.
[2] Ex. 2, Nelson Affidavit, February 2, 2004, at ¶ 8 & 6 of 24.

submitting for replat approval in September, 2002, including multiple submissions to the MOA of design plans starting in September, 2001.[3]

DOT&PF did all that it could do within the existing statutory and ordinance framework. The C Street project started with a series of meetings open to the public as part of the Anchorage Metropolitan Transportation Planning and Programming (AMATS) planning process. DOT&PF also provided public notice of the C Street project during the environmental and design stages preceding its right-of-way application. Public meetings occurred, and some of the meeting records, and public comment, are attached to this motion. After DOT&PF filed its right-of-way replat application, additional public notice was provided by the MOA in the Alaska Journal of Commerce. The MOA invited any public comments. Despite the public notice surrounding the C Street project, there is no record that the Hartmans attended any hearings, or that the Hartmans provided any comments either to DOT&PF, or to the MOA.

If the court finds that DOT&PF did err in some manner (DOT&PF contends it strictly followed all applicable replat approval processes), DOT&PF at the very least substantially complied with the requirements of AS 09.55.275. In addition to the public notice and meetings preceding DOT&PF's application for replat approval, DOT&PF engaged in an extensive public planning process. That public planning process included

---

[3] Ex. 2, Nelson Affidavit February 2, 2004, at ¶ 6.

engineering and design work which all occurred prior to DOT&PF ever filing for replat approval. The local needs, public needs, environmental issues, and design and zoning issues, are all thoroughly canvassed over the course of many years in the planning of a project such as the proposed C Street extension. Unlike a private landowner, whose entire proposed subdivision may be analyzed only within the context of the replat approval process, DOT&PF has engaged in extensive planning, environmental and design work in conjunction with the MOA, and in conjunction with state and federal regulatory bodies. This planning, environmental, and design work will both precede, and follow, DOT&PF's application for replat approval. The fact that the replat approval process itself may differ in some particulars does not, in any fashion, establish that DOT&PF is not treated "in the same manner" as private landowners. To the contrary, DOT&PF is held to much higher standards overall than the typical private developer.

What is at issue is quite straightforward: is the MOA's ordinance, AMC 21.15.123, contrary to AS 09.55.275? If so, what is the appropriate remedy? Alaska Civil Rule 72(h)(2)(A) provides the court with broad discretion in fashioning an appropriate remedy. including the possibility for remand for further findings, or "such other relief as allowed by law." Therefore, dismissal is certainly not required, even assuming that the Hartmans establish a technical violation.[4]

---

[4] The Hartmans have not submitted any affidavits in support of their motion, and the Hartmans

Notwithstanding the enormous differences between private subdivision projects and public highway projects such as the C Street extension, the Hartmans suggest that the procedure for private landowners who apply for replat approval must be identical to the procedure applied to government entities who apply for right of way acquisition replat approval. The legislative history does not reflect that intent. Furthermore, the Hartmans would effectively require the court to begin direct intervention in municipal zoning, or planning, on a case-by-case basis.[5] For example, the Hartmans' argument demands the court: (1) to decide whether municipalities can make any distinctions between private landowners who intend to subdivide and sell property for resale, and governmental right-of-way acquisitions, and (2) to decide which procedure applying to private landowners should apply to government right of way acquisitions,[6] and (3) to specify the process that is due,

---

were not listed as witnesses who had any facts in support of either an authority or necessity challenge. (See David H. Hartman's and Linda J. Hartman's Response to State of Alaska's, Department of Transportation and Public Facilities First Discovery Request, January 23, 2004, at Interrogatories 3 & 4.) The only witnesses listed by the Hartmans who have any information relevant to facts in dispute pertaining to authority or necessity were (1) James Sharp (a former DOT&PF Right of Way Engineering Supervisor); (2) Kim Rice (Central Region DOT&PF Chief Right of Way Agent); (3) Jerry Weaver, the MOA Platting Officer; (4) Hank Wilson, Central Region Acting Preconstruction Engineer at the time of filing. Id. The Hartmans appear to assert primarily a procedural due process violation. Notably, if the Hartmans' land has been negatively impacted in some manner, that is a damages issue for this condemnation proceeding, and is not a proper element of an authority challenge.

[5] Of course, in this case, the sole issue presented is whether the MOA replat approval process is consistent with AS 09.55.275. The Hartmans do not have standing to challenge processes that may be in place in other municipalities.

[6] Sometimes more than one private landowner replat procedure exists. For example, the MOA has separate private landowner procedures outlined in AMC 21.51.100-120 and AMC 21.15.125.

and even which substantive zoning ordinances should apply. This level of intervention into local planning, platting and land use regulation is not a reasonable reading of AS 09.55.275, or the legislative history surrounding that statute.

ANALYSIS

I. Applications For Replat From Governmental Entities Are Treated In The Same Manner As Short Plat Petition Requests From Private Property Owners

To the extent that the phrase "in the same manner" has been interpreted, courts have treated the phrase as a procedural requirement, not a substantive requirement.[7] The phrase has received some analysis in real property cases, such as for permitting and assessments, and courts have interpreted "in the same manner" to be procedural in that context as well.[8] Procedurally, short plat applications from private landowners (AMC 21.15.125) and right-of-way acquisition applications for replat (AMC 21.15.123) are treated the same.

A second point to note about AS 09.55.275 is that the last sentence only refers to treating the applications in the same manner, not the actual replat petitions or plats. In other

---

[7] Woolum v. Woolum, 723 N.E.2d 1135, 1138 (Ohio App. 1999) ("in the same manner" is a procedural reference); Mississippi Valley Sav. & Loan Ass'n, 316 N.W.2d 673, 675 (Iowa 1982) (under varying circumstances, other courts have found that the phrase "in the same manner" is procedural); McQuillan v. Southern Pacific Co., 115 Cal.Rptr. 418, 421 (Ct. App. 1974) ("in the same manner" requires that the same procedure be followed); Greenwald v. Murvin, 31 Pa. D. & C2d 748, 750-752 (1963) ("in the same manner" interpreted as being procedural only).

[8] Carstens v. California Coastal Comm'n, 227 Cal.Rptr. 135, 145 (Ct. App. 1986) (applications treated in the same manner if the same notice and procedural requirements met); Whitemarsh Township Auth. v. Elwert, 196 A.2d 843, 847 (Pa. 1964) (phrase "in the same manner" merely indicates that procedural rules are to be followed).

words, the procedural act of presentation to the MOA of the application, and public notice of the application, and some review of the application by the platting authority, must occur, but substantive treatment of the plat or petition in the identical manner as private landowners is not necessary. Alternatively stated, the application to the MOA must occur, but identical substantive treatment of the petition itself is unnecessary. This interpretation protects the MOA's ability to review the right-of-way replat request, and protects the legislature's goal of coordination and consultation, without prescribing specific zoning rules or specific identity of zoning rules.

Neither AS 35.30.020, nor AS 40.15.380, makes a similar distinction between the application, and the petition or plat.

Alaska Statute 09.55.275 places only a few direct obligations on DOT&PF: DOT&PF must show the "location of proposed public streets, easements, rights-of-way, and other taking of private property." The Hartmans do not contest that DOT&PF met these requirements.

A final point to note about AS 09.55.275 is that it leaves open which private landowner procedure is to apply. MOA ordinances provide for at least two private landowner procedures: one, a so-called "long-plat" procedure in AMC 21.15.100-120, and a second, the so-called "short-plat" procedure in AMC 21.15.125.[9] The MOA legal counsel

[9] Ex. 3, Weaver Affidavit, February 2, 2004, at ¶ 6.

concluded that short plat procedure for private landowners was a closer analogue to right-of-way acquisition replat petitions than the "long plat" process in AMC 21.15.100-120.[10] Jerry Weaver, the present Platting Officer agrees with that analysis:

> The short plat procedure is authorized in, among other situations, those circumstances in which the boundary changes result in no increase in the permitted density of residential units, do not allow a change in the permitted use under existing zoning law, and do not deny adequate access to and from lots created by the subdivision. The vast majority of right-of-way acquisitions involve similar boundary changes. Therefore, the municipality follows the private landowner short plat procedures set out in AMC 21.15.125.D. for right-of-way acquisition plats.[11]

The MOA treats applications for replat approval for right of way acquisitions (AMC 21.15.123) the same as for short plats (AMC 21.15.125). MOA legal counsel explained in the 1986 memorandum:

> Both sets of procedures provide that the platting officer, rather than the platting board, is the platting authority for preliminary plat approval. Public hearings are not required under either procedure. The only significant procedural difference is that publication of notice is required before preliminary approval of an abbreviated plat but not required at all for right-of-way plats. It's my understanding, however, that Mr. Weaver has been routinely publishing notice of right-of-way plats prior to granting preliminary approval. It's my judgement that such notice is required in order for there to be compliance with the statute. With such notice, it's my judgment that a right-of-way acquisition plat is "treated in the same manner" as an

[10] Ex. 1, 1986 MOA Legal Memorandum, at 8.
[11] Ex. 3, Weaver Affidavit, February 2, 2004, at ¶ 6 (emphasis added).

> abbreviated plat and that AMC 21.15.123 is not in violation of AS 09.55.275.[12]

Jerry Weaver confirms that the practice of providing public notice under AMC 21.15.123 by publication continues, and was followed in this case.[13] Attached to Jerry Weaver's affidavit is a copy of the public notice which provided, in part:

> Anyone who believes he/she has information that should cause an application to be denied, modified, or rejected must present that information to the Platting Officer no later than Friday, October 11, 2002.

The Hartmans did not deliver information at any time to the MOA. Notably, the Hartmans never raised <u>any</u> issues regarding potential zoning violations at any point during its many months of one-on-one negotiations during 2003 with the DOT&PF contracted right-of-way agent, David Williams. The Hartmans' sole expressed concern was that not enough money was being offered for DOT&PF's partial acquisition.[14] One would reasonably assume that if the Hartmans harbored a genuine belief that the MOA's replat approval process in some way prejudiced them, that they would have made their concerns known. This is especially true since the Hartmans submitted their own application for replat review, admit that they were aware of the DOT&PF replat approval, yet stood silent

---

[12] Ex. 1, 1986 MOA Legal Memorandum, at 8.
[13] Ex. 3, Weaver Affidavit, February 2, 2004, at ¶ 3 & Affidavit Ex. A.
[14] Ex. 4, Williams Affidavit, January 22, 2004, at ¶ 3.

and made no comments to either DOT&PF directly, or to DOT&PF's contracted right-of-way agent, David Williams.[15]

In short, the MOA treats private landowner applications in the same manner as it does right-of-way acquisition replat requests.[16]

II. A One-Size-Fits-All Replat Review Process Does Not Exist, And Should Not Be Mandated Of The MOA Given The Numerous And Obvious Distinctions Between Private Landowner Petitions, and Government Right-Of-Way Petitions

A. The MOA Has Discretion To Apply Appropriate Review Processes Based On The Particular Application Before It

The MOA does not have a single private landowner plat review process. Many different processes potentially apply. It has a long-plat process (AMC 21.15.100-120), a short-plat process[17] (AMC 21.15.125), the right to waive any review (AS 29.40.090(b)), and the right-of-way acquisition process (AMC 21.15.123). The Hartmans' arguments do not work unless the court finds that the only way to meet the last sentence of AS 09.55.275 requires AMC 21.15.123 to be identical, substantively and procedurally, to AMC

---

[15] Memorandum in Support of Motion to Dismiss, January 15, 2004, at 11 (references "recent platting review of the Hartmans' own application for replat approval" and that the DOT&PF plat approval had a "substantive impact on the Hartmans' platting process").

[16] Because the last sentence of AS 09.55.275 only references procedural treatment of the replat applications, it is not necessary to address the AMC 21.85 exemption in AMC 21.15.123. AMC 21.85 will be discussed in more detail below.

[17] Alaska Statute 29.40.090(a) does not mandate a particular short-plat procedure, and leaves it to the discretion of the municipality to set the appropriate procedure.

21.15.100-120. This finding, in turn, would substitute the court's judgment for local zoning discretion in what procedure best suits the type of application being presented.

What is partially at stake in this proceeding is the right of the MOA to make reasoned distinctions in how it treats replat applications or petitions which come before it. Different applicants will merit different treatment based on the type of application or plat presented. The MOA's general authority to make planning and zoning decisions is recognized by state statute.[18] The fact that different applicants may have different substantive or procedural rules applied to them is also recognized by AS 29.40.090, which mandates that municipalities have an abbreviated procedure for small subdivisions, and waiver of any application requirement for certain larger subdivision parcels. The MOA's treatment of governmental right-of-way applications in a manner similar to short-plat applications is no more than an exercise of its discretion to determine which procedure best suits the particular type of replat application before it.[19]

B. Private Landowner Applications Under Long-Plat Procedures Are Different In Kind From Right-Of-Way Applications For Replat

Trying to apply private landowner subdivision long-plat petitions to the context of governmental right-of-way acquisitions is to try and force a square peg into a round hole: "The two procedures in AMC 21.15.100 and AMC 21.15.123 address fundamentally

---

[18] See AS 29.40.010-200.

[19] The analysis is considerably complicated by the fact that not all municipalities follow the same

different situations, and a single procedure applying to both situations does not serve the public's purpose."[20] The two situations are not comparable, and private developers and DOT&PF stand on different substantive and procedural footings at the time of replat petition.[21]

At the most basic level, the goals are different. Private landowners seeking to subdivide intend to offer property for resale at a profit.[22] To this end, lots are often subdivided to the highest and best use while minimizing and limiting expenditure of funds on infrastructure such as roads, sewer, water, and utilities.[23] The goal of government agencies is different. Government agencies acquire and develop property utilizing public funds for public services, and for the public benefit, in this case to build a major arterial highway.[24] The relatively large scope of the public projects imposes correspondingly detailed notice requirements, and review requirements, which do not apply to private developers.[25]

The level of public notice, environmental review, and design review which occurs prior to replat approval requests differs significantly between private subdivision projects

---

repla' procedures. (Ex. 9, Sharp Affidavit, January 23, 2004, at ¶ 3.)
[20] Ex. 6, Knox Affidavit, February 2, 2004, at ¶ 2.
[21] Ex. 5, Rice Affidavit, February 4, 2004, at ¶ 9.
[22] Ex. 3, Weaver Affidavit, February 2, 2004, at ¶ 5.
[23] Ex. 5, Rice Affidavit, February 4, 2004, at ¶ 3.
[24] Id. at ¶ 4.
[25] See id.

and road projects. As Kim Rice, the DOT&PF Central Region Chief Right of Way Agent points out, the first and potentially only time that the MOA will see a private developer's plans is at the time of submission for subdivision replat approval:

> Potentially, the only time a subdivider's neighbors, the community, the platting authority's partner agencies (which include DOT&PF) get public notice and opportunity to review and comment on a proposed subdivision is through the replat process described in AMC 21.15.[26]

Tom Knox, the MOA Municipal Surveyor, concurs in Kim Rice's assessment, and gives special recognition to the significantly higher environmental and design work preceding a request for replat approval as compared to private landowners:

> On highway or road projects, government agencies, especially in federally funded projects, go through extensive environmental and design review procedures that typically encompass numerous public hearings and notices prior to gaining approval to construct the project. Many of those procedures occur before the government agency applies for replat approval. By contrast, a private developer who seeks to subdivide property has no similar requirements, and typically submits an application for replat approval without the same extensive pre-application review and work having been completed, and without public notice of any type. In my estimation, requiring government agencies to go through the same steps as private landowners would result in needless duplication of review processes and would cause needless delays and add additional cost to road projects .[27]

---

[26] Id. at ¶ 3; Ex. 6, Knox Affidavit, February 2, 2004, at ¶ 4 (subdivision projects by a private developer are reviewed primarily, if not exclusively, within the context of the plat approval process).

[27] Ex. 6, Knox Affidavit, February 2, 2004, at ¶ 2.

Mr. Knox explains that for government projects, MOA reviews of proposed highway projects occur both before the DOT&PF replat petition, and after the DOT&PF replat petition. The highway development project is "progressive and cumulative," and each phase builds on prior phases.[28] The entire highway development and construction process subjects DOT&PF plans to multiple levels of scrutiny at multiple construction milestone marks[29] during the project process -- both prior to, and after, the request for replat approval -- that makes application of AMC 21.85 unnecessary and duplicative.[30]

For DOT&PF, the request for replat approval is just one part of a comprehensive (environmental, design, public notice) review process, but for private developers, the entire plan generally will be analyzed only within the context of the replat approval process.[31] There is very little that is similar about private developer replat applications, and applications from government entities for approval of right-of-way acquisitions. It would be nearly impossible to list all the stringent pre-construction requirements and checks imposed on government agencies seeking to construct a public highway, but below are

---

[28] Ex. 5, Rice Affidavit, February 4, 2004, at ¶ 8.
[29] Ex. 2, Nelson Affidavit, February 2, 2004, at ¶ 6.
[30] Ex. 6, Knox Affidavit, February 2, 2004, at ¶ 3: Ex. 5, Rice Affidavit, February 4, 2004, at ¶ 9.
[31] Ex. 6, Knox Affidavit, February 2, 2004, at ¶¶ 4, 6; Ex. 4, Rice Affidavit, February 4, 2004, at ¶ 3.

some salient highlights.[32]

1. Level Of Public Input

The MOA review process starts through its participation in a Metropolitan Planning Organization via the Anchorage Metropolitan Area Transportation Solutions (AMATS).[33] The AMATS organization is responsible, in part, for identifying transportation needs in the Anchorage area.[34] The various AMATS group meetings are open to the public. Accordingly, public transportation projects invite public comment and participation from the very earliest planning stages. The AMATS process is multi-disciplinary, and contains multiple state and local official members that seek to integrate local needs and requirements, with federal and state requirements, and thereby to plan, identify, and develop, overall public transportation needs and projects.[35]

---

[32] The Hartmans argue that listing the differences between right-of-way replat approval compared to private landowners would be "mind-numbing," primarily because of the AMC 21.85 exemption. (Memorandum in Support of Motion to Dismiss, January 15, 2004, at 9.) What is, perhaps, equally "mind-numbing," is the Hartmans' implication that DOT&PF is in some manner exempt from planning, zoning and design criteria, or that the MOA has no meaningful role, or input, into the planning, zoning or design of highways within the MOA. In point of fact, the MOA, and the MOA assembly, gets input into the highway design process many years before a highway is even constructed, and at multiple environmental and design milestones before, and after, DOT&PF submits for a right-of-way replat approval.

[33] See generally 23 C.F.R. § 450, Subpart C. The municipal website for the MPO is located at www.muni.org/transplan/amats.cfm.

[34] Ex. 5, Rice Affidavit, February 4, 2004, at ¶ 6.

[35] See generally id.

In addition to the meetings during which the MOA, DOT&PF and federal and state regulatory agencies scoped the C Street project, many meetings advertised to the general public occurred.[36] This public involvement is a cornerstone to project development.[37] DOT&PF environmental planners publicly noticed a meeting held on January 15, 1995, and sent out a project newsletter on January 9, 1995, with an update newsletter on April 23, 1997. Thirty-two comments were received from the public responding to the Draft Environmental Impact Statement ("EIS"). Another EIS was released on May 10, 1999, with a public hearing on June 23, 1999. Forty-eight comments were received. Concerns were summarized by DOT&PF by order of frequency, and responses to the concerns were provided. Concerns raised, and addressed, included: "1. Project purpose, need, schedule, and process; 2. Trails, greenways, and open space; 3. Access/crossings; 4. Residential land use; 5. Safety/traffic signals; 6. Air quality; 7. Wetlands; 8. Transit/land use; 9. Drainage; 10. Utilities; 11. Winter cities design consideration; 12. Wildlife; 13. Hazardous Waste.[38] Any and all comments were welcome, and numerous zoning related topics were specifically raised as concerns. Nothing prevented the Hartmans from

---

[36] The federal public meeting requirements can be found, in part, in 23 C.F.R. § 309; 23 C.F.R. § 710.305; and 23 C.F.R. § 771.111.
[37] Ex. 5, Rice Affidavit, February 4, 2004, at ¶ 5.
[38] Ex. 7, Childers Affidavit, January 23, 2004, at 7.

participating in this process, and raising any concerns that they might have had. Relevant portions of the Final and Draft Environmental Impact Statements are attached.[39]

The design phase also provided multiple opportunities for public comment. DOT&PF design planners publicly noticed a hearing for Wednesday, November 14, 2001, and a newsletter was mailed out to all adjacent property owners.[40] Public notice was also provided so that comments could be sent directly to DOT&PF.[41] A copy of the mailing list is attached.[42] Many impacted property owners attended the design meetings. Relevant excerpts from the Design Study Report, with public comments, is attached hereto as an exhibit.

Unlike private property owners, DOT&PF engaged in extensive meetings with the MOA, with federal regulatory agencies, and with the general public all prior to filing its request for replat approval.

2. Level Of Environmental And Design Review

Private landowners will not have gone through the same public process noted above, and will not have gone through the same extensive environmental and design work which DOT&PF has undertaken before a petition for replat approval is filed.

---

[39] Ex. 7, Childers Affidavit, January 23, 2004.
[40] Ex. 8, Grier Affidavit, January 22, 2004. The Hartmans were not in attendance. Id.
[41] Id.
[42] See id. at ¶ 3. The Hartmans were on the mailing list (#120).

The environmental and design work which DOT&PF undertakes prior to filing for replat approval is too extensive to fully catalogue in this motion, but the procedures are at least partially outlined in the Alaska Preconstruction Manual, and Alaska Environmental Procedures Manual, both available on-line at the DOT&PF website.[43] Additional requirements are found at 23 C.F.R. Part 771.[44] Coordination with the Army Corp of Engineers occurs.[45] The Alaska Preconstruction Manual summarizes required environmental work:

> All projects require the following activities:
>
> 1. analysis of environmental impacts;
>
> 2. coordination with local governments and other agencies;
>
> 3. obtainment of required environmental permits and clearances; and
>
> 4. completion of a public involvement process.[46]

Private landowners have no similar comprehensive environmental requirements, and do not typically undertake environmental work until at, or during, the time of replat approval consideration. Long before DOT&PF submits its application for replat approval

---

[43] The path is through the main page, www.dot.state.ak.us, and then through the pull down menu as follows: Documents QuickLinks/Design & Constr. Standards.
[44] Ex. 5, Rice Affidavit, February 4, 2004, at ¶ 7.
[45] Id.
[46] Alaska Preconstruction Manual at Section 440.10.

to the MOA, extensive environmental work has been performed consistent with the Alaska Preconstruction Manual, and Alaska Environmental Procedures Manual.[47] The environmental requirements, like most requirements, are on-going, and Carl Nelson provides examples of the wetlands mitigation work which DOT&PF undertook on the C Street project.[48] That environmental work is required of DOT&PF quite apart from whether or not review occurs as part of the replat application process. After the public meetings (noted above) and regulatory review, the final product of the initial environmental work is an approved environmental document.

After the environmental document is approved, the project will be funded at the design stage. This work is still far in advance of DOT&PF submitting its request for right-of-way replat approval. The actual design work must comply as closely as practicable to nationally recognized design standards adopted by the American Association of State Highway and Transportation Officials (AASHTO).[49] These design standards and associated DOT&PF manuals have been recognized by the Alaska Supreme Court.[50] In additional, DOT&PF must comply with all applicable requirements specified in 23 C.F.R. Subchapter G (23 C.F.R. §§ 620-669), including 23 CFR Part 620, Part 625, Part 630, Part 640, Part

---

[47] See generally Ex. 5, Rice Affidavit, February 4, 2004, at ¶ 7.
[48] Ex. 2, Nelson Affidavit, February 2, 2004, at ¶ 11.
[49] Alaska Statute 19.10.160; Ex. 2, Nelson Affidavit, February 2, 2004, at ¶ 7; see also Ex. 5, Rice Affidavit, February 4, 2004, at ¶ 8 (general description of design phase and AASHTO standards).
[50] See, e.g., Wells v. State, 46 P.3d 967, 970 (Alaska 2002).

645, Part 650, and Part 652.[51] The purpose of the federal design standards are to "designate those standards, policies, and standard specifications that are acceptable to the Federal Highway Administration (FHWA) for application in the geometric and structural design of highways."[52] The project goes through many phases of design review, and the MOA gets copies of the design at the different stages for its review and comment on design and zoning related issues.[53] Carl Nelson, a Project Manager for DOT&PF, points out that the design documents are distributed to various MOA sections.[54]

A summary of the MOA sections involved in the design review process, which precedes DOT&PF submitting its right-of-way replat approval request, includes:

Parks & Recreation

Public Works Dept.

--Design & Constr. Section
--Traffic Engineer
--Public Services
--Street Maintenance Division

Community Planning Dept.

--Physical Planning

Transit Dept.

---

[51] Ex. 2, Nelson Affidavit, February 2, 2004, at ¶ 7; Ex. 5, Rice Affidavit, February 4, 2004, at ¶ 8.
[52] 23 C.F.R. § 625.1 (2003).
[53] Ex. 2, Nelson Affidavit, February 2, 2004, at ¶¶ 6, 8.
[54] Id. at ¶ 5.

--Transit Operations

Fire Dept.[55]

Some questioning of Mr. Weaver during his deposition[56] suggested that the Hartmans believed inadequate distribution existed as part of the replat process, but the Hartmans overlook the on-going involvement of various MOA sections/departments prior to, and after, DOT&PF filing for replat approval. To describe all the different opportunities that the MOA had to provide comments would be beyond the reasonable scope of this brief, but a short summary of the MOA opportunities for input during project development is attached to Carl Nelson's affidavit.[57] DOT&PF policy specifically notes the importance of cooperation and coordination with the MOA:

> As partners in maintaining a local transportation system, it is in the interests of the public for the state and the involved municipality to agree on project planning and design. As a matter of policy the project engineer shall:
>
> -- Involve the municipality early in the project planning and design processes as described below;
> -- Respond to comments from municipalities timely in writing as described below; and

---

[55] Id. at 20, 21-24. The letter at page 15 of Mr. Nelson's affidavit includes as attachments those materials between pages 16 – 24. The 1986 memorandum between DOT&PF and the MOA provided for a central point of contact in the MOA through which distribution of design plans to and from DOT&PF would occur.

[56] The depositions taken by the Hartmans are not yet available at the time of filing this opposition brief.

[57] Ex. 2, Nelson Affidavit, February 2, 2004, at 11-13.

-- Make a good faith effort to come to agreement on all identified issues within the time frames identified below before proceeding. In the event the municipality is not satisfied with the project manager's formal disposition of comments, the municipality may elevate.[58]

Again, the Hartmans overlook the fact that a private developer will not have typically gone through the same multi-year review process, with the same level of prior MOA involvement, before filing for replat approval. The MOA is directly and substantially involved in road projects long before DOT&PF files for replat approval. The Hartmans' suggestion that DOT&PF somehow gets a "pass" on MOA scrutiny ignores the existing review process, and defies the very nature of the public road construction process.

DOT&PF's application of the extensive and detailed design criteria is the equivalent of the MOA's use of AMC 21.85 during the replat review process for a private developer.[59] For DOT&PF, however, that review process begins long before DOT&PF submits a request for replat approval. The design process includes MOA agency review, public review, regulatory review, and on-going modifications in response to input from all sources.

When the design work is approximately 70% complete, the right of way phase is initiated and funded.[60] At this time, at least three phases are operating concurrently: the design continues to be developed, the right-of-way process is initiated, and final utility

---

[58] Id. at 11.
[59] Ex. 5, Rice Affidavit, February 4, 2004, at ¶ 8 (collectively, these documents are to a highway engineer comparable to the standards set out in AMC 21.75-85).
[60] See generally id. at ¶ 9 (describes Right-of-Way stage).

relocation plans and agreements are prepared.[61] It is not until this phase that the DOT&PF will submit a request for replat approval pursuant to AS 09.55.275 and AMC 21.15.123.

By the time DOT&PF submits its right-of-way replat approval application, DOT&PF will have already wound its way through a veritable labyrinth of planning and regulatory reviews, and private and public meetings, over the span of many years. In addition, by this stage, the MOA (including multiple departments and personnel) will have seen and reviewed at least two C Street design plans prior to DOT&PF requesting replat approval.[62] Of course, the MOA also provided right-of-way input already through the AMATS process and resulting Official Streets and Highways Plan, a "primary purpose" of which is to "identify right-of-way requirements of the highway transportation system."[63]

For the Hartmans to suggest that there was no public notice, or that MOA or the public had inadequate input, or that inadequate design review has occurred without the AMC 21.15.100-120 procedure, is to fundamentally miscomprehend the comprehensive regulatory structure underpinning the entire highway planning, development, environmental, design, right-of-way, and construction process.

---

[61] Ex. 5, Rice Affidavit, February 4, 2004, at ¶ 9.
[62] Ex. 2, Nelson Affidavit, February 2, 2004, at ¶ 6.
[63] Official Streets and Highways Plan, Section 3.3 (Right-of-Way Requirements).

C. Application Of AMC 21.85

The requirements of AMC 21.85 only need to be addressed if the court finds that AS 09.55.275 requires substantively similar treatment of private landowners and government entities. DOT&PF believes that AS 09.55.275 only requires procedurally similar treatment of private landowners and the government, but addresses the substantive requirements of AMC 21.85 out of an abundance of caution.

As noted above, the MOA and DOT&PF take the position that the level of public notice, regulatory review, and long and short term planning and design work which occurs on a DOT&PF public project prior to submission for replat approval makes application of AMC 21.85 "unnecessary" and "duplicative."[64] Submission of DOT&PF's application for right-of-way acquisition replat to all the same MOA entities as a private landowner during the replat approval process is not necessary for the same reason.[65] Many MOA departments are already involved in the C Street project through the design review phase, as noted

---

[64] Ex. 6, Knox Affidavit, February 2, 2004, at ¶ 3; Ex. 5, Rice Affidavit, February 4, 2004, at ¶ 10 (prior to submission for replat approval, DOT&PF has engaged in more in-depth, comprehensive and compatible standards than in AMC 21.85).

[65] Ex. 6, Knox Affidavit, February 2, 2004, at ¶ 5. As part of the replat review process, the request for replat approval may not be circulated to certain Anchorage departments (utilities, traffic engineer, physical planning, etc.) that a private landowner request under AMC 21.15.100-120 might be circulated to. However, many of these committees are already members of the AMATS Technical Advisory Committee board whose task involves, in part, "recommendations to the Public Committee in its review of federal and state funded transportation projects and programs." (From AMATS website.) Another review of projects by committee members involved in the public transportation review and scoping process is unnecessary as part of the replat approval process.

above. In addition, many of the MOA entities have been involved from an early stage in the AMATS process, and further review under AMC 21.15.123 is unnecessary for that reason as well.[66]

Analysis of AMC 21.85 compared to pre-existing requirements imposed on DOT&PF supports the conclusion that the AMC 21.85 requirements are indeed duplicative and unnecessary.

The streets listed in AMC 21.85.050-070 are classified as local and minor collector streets.[67] DOT&PF does not build, operate or maintain those kind of streets because they are not part of the National Highway System (NHS) back-bone. Generally, the standards have no direct applicability to DOT&PF.[68] DOT&PF does take the local or minor collector streets into consideration to the extent of their intersection, or encroachment, with DOT&PF owned, operated, or maintained streets.

Other AMC 21.85 requirements, such as erosion,[69] curbs and gutters, utilities,[70] sidewalks, traffic control,[71] lighting, and so on, are all addressed in AASHTO, or in other

---

[66] Ex. 6, Knox Affidavit, February 2, 2004, at ¶ 5 (given pre-construction review process, "it is not necessary for all of the municipal entities that review private landowner's plat approval applications to review right-of-way acquisition replat applications").

[67] See generally American Association of State Highway and Transportation Officials, *A Policy On Geometric Design of Highways and Streets* 11-12, 15 (1990) (introductory discussion of minor and major urban collector roads, and urban local roads).

[68] Ex. 5, Rice Affidavit, February 4, 2004, at ¶ 9.

[69] See also erosion control requirements in 23 C.F.R. Part 650.

[70] See also utilities requirements in 23 C.F.R. Part 645.

relevant Code of Federal Regulation requirements.[72] The Alaska Preconstruction Manual expands on almost all of the foregoing requirements.[73] For example, utilities coordination is addressed at the pre-design phase in Sections 440.30.1 and 440.30.2; during the design phase, utilities coordination is addressed at 450.40.1.

Landscaping appears to be the only provision of AMC 21.85 which may not apply to DOT&PF directly by federal or state standards. However, landscaping is a decision in which the MOA is involved through AMATS, and through the budgeting process. Landscaping is a "political and monetary issue," and is effectively analyzed on a case-by-case depending on the particular transportation project.[74] Accordingly, the MOA does get input into whether or not landscaping will be provided on a given project. DOT&PF would also note that AMC 21.85.190 is not necessarily intended to apply to government entities. Landscaping is only for lots wherein a "certificate of occupancy" is issued (AMC 21.85.190), and utilities are exempted under AMC 21.80.340. Furthermore, landscaping is optional under AMC 21.80.340 (the platting authority "may" require . . .), and therefore

---

[71] See also traffic control requirements in 23 C.F.R. Part 655.

[72] See, e.g., American Association of State Highway and Transportation Officials, *A Policy On Geometric Design of Highways and Streets* 531-32, 542-46, 558-59 (1990) (addressing curbs and shoulders, drainage, borders and sidewalks, pedestrian crossings, utilities, traffic control devices (which references the Manual on Uniform Traffic and Control Devices (MUTCD), also adopted by DOT&PF – see Design & Const. Standards/Traffic and Safety links at DOT&PF web page), erosion control, and lighting).

[73] See Alaska Preconstruction Manual, Section 410.1 (specifically adopting federal environmental and design requirements).

presents no more of a hard-and-fast rule than the case-by-case analysis which occurs under the AMATS review process.

Even if the court finds that each and every requirement of AMC 21.85 must apply to governmental entities in precisely the same way as applies to private landowners under AMC 21.15.100-120 or AMC 21.15.125 – and DOT&PF strongly believes AMC 21.85 should not be applied in this fashion – the requirements of AMC 21.85 have either been met, substantially met,[75] and/or exceeded through a thorough public review, and through an equally thorough environmental and design process prior to DOT&PF ever filing for replat approval.[76] This process incorporates local, state, and federal regulations and authorities which, when taken together, meet or exceed the requirements of AMC 21.85.

---

[74] Ex. 5, Rice Affidavit, February 4, 2004, at ¶ 11.

[75] The Alaska Supreme Court recognized the doctrine of substantial compliance in State, Dep't of Pub. Safety v. Vernandes, 946 P.2d 1259, 1261 (Alaska 1997). The doctrine has also been applied in the context of eminent domain when justified on the particular facts of the case. See, e.g., City of Winner v. Bechtold Investments, Inc., 488 N.W.2d 416, 418 (S.D. 1991) (strict compliance considered together with substantial compliance); District Bd. of Trustees of Dayton Beach Cmty. Coll. v. Allen, 428 So.2d 704, 706 (Fla. Dist. Ct. App. 1983); 6 Julius L. Sackman, Nichols on Eminent Domain § 24.06[3], at 24-51 (3d ed. rev. 2003).

[76] Ex. 6, Knox Affidavit, February 2, 2004, at ¶ 6 (government right-of-way acquisition projects are subject to more scrutiny and review than a private landowners' subdivision projects in light of the procedures and review processes which apply to those projects, above and beyond the municipal replat process, and issues such as setbacks, drainage and landscaping are addressed as part of the overall design project during the review processes).

III. DOT&PF Properly Coordinated With The MOA Consistent With The Intent Of AS 09.55.275

The MOA is satisfied that DOT&PF properly coordinated with it.[77] Prior to AS 09.55.275, DOT&PF did not necessarily coordinate with local governments when conducting right of way acquisitions.[78] Accordingly, DOT&PF would acquire right-of-way without the affected municipality or other local government entity having any say or input into the process.

In 1975, the legislature passed AS 09.55.275 which mandated that DOT&PF coordinate with local government agencies. This "clear" legislative purpose was described in some detail in the case of Municipality of Anchorage v. Suzuki , 41 P.3d 147 (Alaska 2002). The Hartmans argue that if Suzuki is read with a "broad construction in favor of the interests of the landowner," and a "strict" and "narrow" construction against DOT&PF, then a conflict exists between AS 09.55.275 and the last sentence of AMC 21.15.123.[79]

No such conflict is apparent based on any of the court's statements in Suzuki. The court repeatedly emphasizes that the clear purpose of AS 09.55.275 is simply to require cooperation between state agencies and local governments. Absent such legislation, case

---

[77] Ex. 3, Weaver Affidavit, February 2, 2004, at ¶ 3 ("DOT&PF complied with municipal requirements, and properly coordinated with the Municipality on its request for replat approval").
[78] Ex. 3, Weaver Affidavit, February 2, 2004, at ¶ 2; Ex. 9, Sharp Affidavit, January 23, 2004, at ¶ 2.
[79] Memorandum in Support of Motion to Dismiss, January 15, 2004, at 7.

law suggests that DOT&PF need not necessarily consult with local government agencies.[80]

The Suzuki court explains:

> The legislative history for AS 09.55.275 is sparse. The primary source of legislative purpose for AS 09.55..275 is thus the act itself.
>
> The municipality argues that the act's purpose is "abundantly clear"; it is to **require coordination between state and local governments**. The municipality concludes that Suzuki and Lim's interpretation of the statue does nothing to further this purpose. We agree that this clear purpose is evidenced by the session law. The act is introduced as "**AN ACT Relating to state compliance with local planning, platting and zoning ordinances**." Section of the act amends AS 35.10.020:
>
> CONSULTATION WITH MUNICIPAL PLANNING COMMISSIONS. Before the construction of a public works in a municipality, the department shall confer with the planning commission of the municipality to determine that the welfare of the public is properly protected and its agencies and zoning ordinances and the local regulations in the same manner and to the same extent as other landowners. However if a state agency clearly demonstrates an overriding state interest, a waiver of the compliance requirement may be granted by the governor.
>
> The language of section AS 09.55.275 makes it clear that the act was intended to **require the state to confer with local governments on projects**. Section two amends AS 09.55 by adding the replat approval section, quoted above in Part II. This act is evidence that the legislature intended the statute to be read broadly to achieve coordination between the state and

---

[80] See generally, 29A C.J.S. Eminent Domain § 219, at 514 (1992) (in the absence of constitutional or statutory requirement, it is not necessary to obtain, as a condition precedent to the acquisition of private property, the consent of the municipality).

> local governments. If it had been the state rather than the municipality improving the road, this purpose would have led us to interpret "boundary change" broadly, to **require coordination and cooperation between state agencies and local governments**.[81]

In this case there is no question that DOT&PF complied with the procedures set forth by the MOA. The MOA does not contest that DOT&PF properly coordinated and cooperated with the MOA in order to obtain the preliminary plat approval.[82] As noted in the introductory section of this brief, DOT&PF specifically submitted a request to the MOA trying to ensure that all applicable zoning rules and ordinances had been met:

> Enclosed are the plans and specifications of the above mentioned project for your review and comment. Additionally please specifically review for compliance with:
>
> **"Alaska Statute Compliance with municipal ordinances.** *A department shall comply with local planning and zoning ordinances and other regulations in the same manner and to the same extent as other landowners."*[83]

DOT&PF went on to request that if differences with local planning or zoning ordinances existed, that the MOA "identify any instances where the project fails to comply with AS 35.30.020."[84] The overall legislative intent, which was to require DOT&PF to coordinate

---

[81] Suzuki, 41 P.3d at 152-53 (bold and underline added)
[82] Ex. 3, Weaver Affidavit, February 2, 2004, at ¶ 3.
[83] Ex. 2, Nelson Affidavit, February 2, 2004, at ¶ 8 & 6 of 24.
[84] Id.

with the MOA, and to make itself subject to local zoning laws, was fulfilled based on the facts of this case.

The Hartmans seek to employ the doctrine of "strict construction" to read into AS 09.55.275 a requirement that is simply not there, i.e., that municipalities must apply identical substantive and procedural zoning/platting requirements to private landowners as to governmental right-of-way acquisition replat approval requests. The Hartmans further maintain that the substantive and procedural requirements must be identical to those used in the long-plat application process (AMC 21.15.100-120), rather than the short plat process (AMC 21.15.125) discussed above.[85] Neither the requirement to use identical substantive and procedural standards, nor the requirement to only use long-plat procedures, are required by AS 09.55.275. Nor can the doctrine of strict construction be applied to read these requirements into AS 09.55.275:

> [E]minent domain statutes are not so strictly construed as to defeat the evident purpose of the legislature in granting the power.[86] Statutes authorizing condemnation of property by counties will be so construed as to give effect to the intention of the legislature . . . Strict construction cannot be invoked in the matter of carrying out the provisions of a statute that plainly confers the power of eminent domain, but rather in such a case there should be a liberal and reasonable

---

[85] The long-plat process basically applies to more complex subdivisions, and is described in Jerry Weaver's affidavit. (Weaver Affidavit, February 2, 2004, at ¶ 6.)

[86] City of Tacoma v. Welcker, 399 P.2d 330, 335 (Wash. 1965).

construction so as to effectuate the purpose of the statute.[87]

"Strict construction" does not mean the opposite of "liberal construction":

> Strict construction is not, however, the exact converse of liberal construction, for it does not require that the words of a statute be given the narrowest meaning of which they are susceptible. The language used by the legislature may be accorded a full meaning that will carry out its manifest purpose and intention in enacting the statute, but the operation of the law will then be confined to cases which plainly fall within its terms as well as its spirit and purpose.[88]

Applying strict construction in the manner suggested by the Hartmans would mean that in every instance where a municipality or other local government agency differentiates, to any degree, between state right-of-way replat applications and private landowner long-plat applications, authority would be lacking, and the condemnation would fail. This interpretation goes far beyond any reasonable reading of Suzuki.

IV. DOT&PF Is Not The "Platting Authority" Referenced In The Last Sentence Of AS 09.55.275

Even assuming that a violation of the last sentence of AS 09.55.275 occurred, DOT&PF is not the proper entity to target for relief. The last sentence of AS 09.55.275 is not directed at DOT&PF, but at the MOA platting authority:

---

[87] 11 Eugene McQuillin, The Law of Municipal Corporations § 32.19 (3d ed. rev. 2000) (footnotes omitted).

[88] Coon v. City and County of Honolulu, 47 P.3d 348, 362 n. 18 (Haw. 2002).

> 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.[89]

The "platting authority" is not DOT&PF, but the MOA. To the extent that DOT&PF had a requirement in AS 09.55.275, it was to obtain replat approval from the MOA. DOT&PF did obtain replat approval.[90] The MOA's responsibility, in turn, is to comply with the last sentence cited above. The MOA had a full and fair opportunity to identify to DOT&PF any particular instances where the department "did not comply with local planning and zoning ordinances and other regulations in the same manner and to the same extent as other landowners."[91] In addition, the Hartmans had an opportunity to provide comment either in response to the public notice, or in its person-to-person discussions with the DOT&PF assigned right-of-way agent.

The Hartmans have leveled an authority challenge against DOT&PF, but DOT&PF did all it was required to do by AS 09.55.275, and by local ordinance. At no time prior to the Hartmans' authority challenge did either the Hartmans (or the MOA) express any zoning concerns to DOT&PF, express any notice concerns, or express any other procedural

---

[89] The general rule is that a municipal zoning ordinance may not impinge on the sovereign's right to exercise the power of eminent domain. 1 Julius L. Sackman, Nichols on Eminent Domain § 1.141[6] (3d ed. rev. 2003). However, the legislature can voluntarily choose to subject itself to local zoning rules. Id. at § 24.06[1].

[90] Ex. 3, Weaver Affidavit, February 2, 2004, at ¶ 3.

[91] Ex. 2, Nelson Affidavit, February 2, 2004, at ¶ 8 & 6 of 24 (emphasis added).

or substantive concerns about the eminent domain process. The Hartmans' only expressed concern up until the point of filing an authority challenge was monetary.[92]

Municipal zoning authority is reserved to the MOA per AS 29.40.010-200. The general rule is that municipal ordinances are presumed to be constitutional and reasonable.[93] Furthermore, there is a "presumption that the proceedings of a local government are valid."[94] Given that recognized presumption, it is patently unfair to DOT&PF to dismiss this action where it complied with a presumptively correct ordinance.

Under any standard of interpretation, strict or liberal, the last sentence of AS 09.55.275 is a requirement on the "platting authority" only. Accordingly, filing an authority challenge against DOT&PF is to target the wrong entity. Assuming the Hartmans have suffered any damage, it is theoretically possible that the Hartmans may have a claim against the MOA.[95] However, given the multiple levels of MOA review, the extensive pre-construction planning and public notices, the environmental and design work and reviews which occur before and after replat approval, the likelihood of success of such a claim against the MOA is remote, to say the least.

---

[92] Ex. 4, Williams Affidavit, January 22, 2004, at ¶ 3.
[93] Municipality of Anchorage v. Anchorage Police Dept. Employees Ass'n, 839 P.2d 1080, 1093 (Alaska 1992).
[94] City of St. Mary's v. St. Mary's Native Corp., 9 P.3d 1002, 1008 (Alaska 2000).
[95] It is not clear what the nature of that claim would be, and the MOA would appear to have many very valid defenses.

V. A Pre-Condemnation Hearing Is Not A Procedural Due Process Requirement

The Hartmans imply that pre-condemnation proceedings are a pre-requisite for procedural due process protections.[96] That is incorrect, and confuses the issues. Accordingly, DOT&PF separately addresses pre-condemnation hearing requirements in this section of the brief.

The sole question presented is whether AS 09.55.275 requires a hearing based on the fact that the MOA's long-plat process (AMC 21.15.100-120) includes a hearing requirement. As noted above, the Hartmans do not satisfactorily explain why the long plat process is the only appropriate "private landowner" procedure. The MOA believes that the short plat procedure more closely resembles right-of-way acquisitions.[97] A hearing is not always required for private landowners, and no hearing should be required in this case.

A more fundamental point, however, is that no hearing is necessary before an eminent domain action is filed. The case cited by the Hartmans, City of Homer v. Campbell, 719 P.2d 683 (Alaska 1986), was not an eminent domain proceeding. A pre-condemnation hearing is not required by any statute, or by the rules of eminent domain.[98] Eminent domain authorities consistently hold that a pre-condemnation hearing is not

---

[96] Memorandum in Support of Motion to Dismiss, January 15, 2004, at 10.
[97] Ex. 3, Weaver Affidavit, February 2, 2004, at ¶ 6.
[98] See AS 09.55.270 (prerequisites to condemnation do not include a pre-condemnation hearing).

required.[99] Of course, the eminent domain process contains, as part of that process, the right to an authority and necessity hearing, and the right to challenge compensation, but no separate pre-condemnation hearing is necessary.

VI. Existing Case Law Leaves Unclear Whether A Local Government's Improper Replat Approval Can Be Imputed To The Condemnor To Deny Authority

Most authority and necessity case law, and secondary authorities, address situations where either a local government agency, or the state, are alleged to have breached one, or more, of their statutory eminent domain obligations. Cases where the condemnor (whether state or local entities) is without authority,[100] because of actions undertaken by third parties, are more difficult to find.

In this case, a unique interaction exists: procedurally, DOT&PF must obtain replat approval from the MOA; pursuant to the last sentence of AS 09.55.275, the MOA must treat

---

[99] See, e.g., Golden State Corp. v. Sullivan, 314 A.2d 152, 154 (R.I. 1974) (the right to a hearing before the taking or private property by eminent domain is not a right encompassed within the fourteenth amendment); 11A Eugene McQuillin, Municipal Corporations § 32.125 (3d ed. rev. 2003) (notice need not be given to property owners of proceedings, meetings, appointments, etc., which are preliminary or preparatory to condemnation unless the statute requires it, and due process of law is sufficiently afforded if the owner has notice and an opportunity to be heard at any time before final judgment); 7 Julius L. Sackman, Nichols on Eminent Domain § 2.03 (3d ed. rev. 2003) (the taking hearing generally occur at some point within, and is a part of, the condemnation proceeding itself).

[100] The Hartmans have not argued that DOT&PF does not have general authority to condemn. See generally 1A Julius L. Sackman, Nichols on Eminent Domain §§ 3.01-04 (3d ed. rev. 2003) (discussion of capacity to condemn); 29A C.J.S. Eminent Domain § 222, at 520 (1992) (when the right of petitioner to exercise the power of eminent domain is made out satisfactorily, the courts cannot deny it for any extraneous reasons which do not affect defendant, or the real merits of the case).

DOT&PF's application "in the same manner" as applications from private landowners which, as argued above, is also primarily a procedural requirement.

The Hartmans have cited no cases to suggest that the actions of the MOA can be imputed to DOT&PF in such a way as to deprive DOT&PF of authority. For the Hartmans' challenge to succeed, it would appear that the following must be true: (1) the MOA violated the last sentence of AS 09.55.275 by and through the MOA's application of AMC 21.15.123; (2) the MOA's violation of the last sentence of AS 09.55.275 deprived the Hartmans of due process; (3) the MOA's violation may be imputed to DOT&PF, where DOT&PF's only obligation was to obtain replat approval in accordance with what the local zoning laws required (AMC 21.15.123); (4) the imputed wrong-doing is of a kind that deprives DOT&PF of program authority to proceed with the condemnation action. The chain of proof required to deny authority is quite complex, and the Hartmans' arguments have been focused on the first step of the foregoing evidentiary chain, with the assumption that a violation of step one automatically denies due process under step two. The Hartmans' analysis is insufficient, and incomplete.

As applied to DOT&PF, the requirement to obtain replat approval from the MOA is procedural: DOT&PF does not actually apply a local governing authority's zoning provisions, and has no authority to do so. DOT&PF merely submits an application for approval consistent with what is required by municipal law (in this case, AMC

21.15.123),[101] and must cooperate, and coordinate, in good faith. A liberal interpretation is authorized where a question relates solely to a procedural matter.[102] Here, DOT&PF applied for and received a municipal replat approval, and under any standard of statutory construction, strict or liberal, DOT&PF had proper authority, notwithstanding MOA errors (if any) in treatment of DOT&PF's application.

If "non-compliance" exists in the MOA's application of AMC 21.15.123, such non-compliance by the MOA should not deprive DOT&PF of authority. Absent legal authority to impute the error (if any) of the MOA to DOT&PF, the court should find that DOT&PF had authority when it filed this condemnation action.[103]

VII. Neither AS 40.15.380, Nor The Bill Signature Letter, Has Any Relevance

A. Alaska Statute 40.15.380 Cannot Be Used To Interpret AS 09.55.275

The Hartmans note that the right-of-way acquisition plat procedure in AS 40.15.380 for areas not exercising land use regulation powers resembles the procedure in AMC

---

[101] Only limited information needs to be submitted. Alaska Statute 09.55.275 provides that replat must show clearly the "location of the proposed public streets, easements rights-of-way, and other taking of private property."

[102] 6 Julius L. Sackman, Nichols on Eminent Domain § 24.06[3], at 24-48 to 24-49 (3d ed. rev. 2003).

[103] If the court finds that DOT&PF had authority, the court could nevertheless apply Alaska Civil Rule 72(h) to correct errors, if any, that the court believes may have occurred in the MOA replat review process.

21.15.123. The procedure in AS 40.15.380 (applying to areas not exercising land use regulation) differs from the procedure required in AS 09.55.275 (applying to areas that do exercise land use regulations). The Hartmans conclude that the doctrine of *expressio unius est exclusio alterius* "mandates . . . that the State must follow the replat procedures applicable to private landowners in areas subject to municipal control . . . ."[104]

The Hartmans' reference to AS 40.15.380 does not help determine whether or not AMC 21.15.123 violates AS 09.55.275's last sentence. The doctrine of *expressio unius est exclusio alterius* does not "mandate" anything at all in terms of what procedure DOT&PF was required to follow in this case. That doctrine has been described as follows:

> Under the principle *expressio unius est exclusio alterius*, courts presume that a statute designating only certain things or acts, excludes all other things or acts not designated.[105]

Under AS 40.15.380, the commissioner of DNR has the authority to make reviews and determinations on right of way acquisition plats filed in areas not exercising land use controls. Applying the doctrine of *expressio unius est exclusio alterius*, one might assume that commissioners from other departments could not exercise that same authority, for example. The doctrine may aid in some basic, common sense construction of AS 40.15.380, but has no further applicability:

---

[104] Memorandum in Support of Motion to Dismiss, January 15, 2004, at 15.
[105] Agnabooguk v. State, 26 P.3d 447, 455 (Alaska 2001) (footnote omitted).

> Although the expressio unius maxim has had widespread legal application, there is nothing peculiarly legal about it. It is a product of "logic and common sense." It acts merely as an aid to determine legislative intent and does not constitute a rule of law. It expresses the learning of common experience that when people say one thing they do no mean something else. The maxim is not inflexible and should be applied to realize legislative intent.[106]

In 1998, the legislature specified certain right-of-way acquisition procedures in AS 40.15.380. This says nothing about the legislative intent in AS 09.55.275.

Alaska Statute 40.15.380(d) does not mention "applications," but simply refers to analysis of the plat: "The commissioner shall review each right-of-way acquisition plat for compliance with this section." The language in AS 09.55.275 is different, referring not to a government agency's plat, but to the "applications for replat."

The two statutory sections were drafted roughly 20 years apart, and address different topics, with different wording, in a different fashion. The two sections cannot be convincingly used to interpret each other.

B. SB 125 Signature Letter[107]

The Hartmans incorrectly indicate that they provided the court with a Governor's transmittal letter as evidence of legislative intent. The letter is a bill signature letter, not a transmittal letter, and therefore only offers very limited evidence of legislative intent.

---

[106] 2A Norman J. Singer, Sutherland Statutory Construction § 47.24, at 319-320 (6th ed. 2000) (footnotes omitted).

A transmittal letter is a letter from the governor which may accompany the bill introduction, and which provides evidence of legislative intent.[108] By contrast, a bill signature letter is written after the legislative debate has concluded, and although it may be still a part of the legislative process, is not itself evidence of legislative intent, although it may still be considered in determining such intent.[109]

DOT&PF also notes that the signature letter does nothing more than raise concerns about how complying with local zoning requirements might impact DOT&PF. Far from advancing the Hartmans' arguments, DOT&PF's concern demonstrates that it took its statutory obligation to comply with local zoning requirements seriously.

VIII. Remedy

The Hartmans' authority challenge is essentially a negotiating gambit: if the Hartmans can succeed in outright dismissal on authority grounds, DOT&PF may be forced into a position where it must either resolve its differences on valuation immediately, or potentially sacrifice the C Street project. For a number of reasons, DOT&PF does not believe that dismissal is either appropriate, or necessary.

DOT&PF contends that there has been no violation of AS 09.55.275 either by it, or by the MOA. DOT&PF complied with AS 09.55.275. DOT&PF does not make local

---

[107] The correct citation is 96 SLA 1975, not 97 SLA 1975.
[108] See, e.g., Hertz v. State, 8 P.3d 1144, 1147 n.11 (Alaska App. 2000).
[109] Hammond v. Hickel, 588 P.2d 256, 272 n. 33 (Alaska 1978).

zoning rules, and has no direct authority to make local zoning decisions. Indeed, there is nothing more that DOT&PF could have done on the facts of this case by way of compliance with MOA replat procedures.

If the court finds that AS 09.55.275 was, in fact, violated, dismissal is not the only possible remedy. Alaska Civil Rule 72(h)(2)(A) provides:

> In the event the objections are found to be valid, the court may dismiss the action, remand to the condemning entity for further findings, or order such other relief as allowed by law.

(Emphasis added.) Accordingly, the court may fashion any remedy as it deems to be appropriate, without having to dismiss. DOT&PF is frankly unable to determine what additional notice, environmental, design, or other work could be provided by DOT&PF at this point in time. DOT&PF has complied with all the prerequisites necessary before filing this condemnation action, and there is really nothing more than can be required of DOT&PF.

If the Hartmans contend that the "platting authority" erred in the zoning review process, one possible remedy may be some form of direct action against the MOA, but DOT&PF should be allowed to continue with this condemnation action.

Another option is to find that, at the time of filing, DOT&PF did indeed have authority either by complying with AS 09.55.275 or, on the facts of this case, substantially complying with the spirit and intent of that statute.

If the court finds that the AMC 21.15.123 review process conducted by the MOA was, in some manner, flawed, the court may find that no basis exists to impute the wrongdoing to DOT&PF. Instead, the court could find that DOT&PF had authority at the time of filing.

Although there does not appear to be anything else that DOT&PF could have done by way of compliance with local ordinances administered by the MOA, if some form or corrective action is necessary, a stay is preferable to dismissal. Of course, the Hartmans would far prefer to dismiss this case because of the potential negotiating leverage they would have.[110] However, this action could be stayed, and the Hartmans could be afforded whatever remedy the court deems necessary or appropriate.[111] Given the broad discretion this court possesses under Alaska Civil Rule 72(h)(2), the court can craft an appropriate remedy which allows the C Street project to progress in a timely fashion but which, at the same time, allows for correction of any perceived violations of AS 09.55.275.

The Hartmans rely on a line of cases involving necessity (rather than authority)

---

[110] As the Hartmans are well aware, dismissal would in all likelihood mean that the construction season would be missed, or funding for the project potentially jeopardized.

[111] DOT&PF points out that landowner concerns about impact to their property are not generally appropriate for pre-condemnation consideration. Questions pertaining to damages to property, and compensation, must be addressed in the context of the eminent domain proceedings. See, e.g., State ex rel. Dungan v. Superior Court, 279 P.2d 918, 921 (Wash. 1955).

challenges as a basis for supporting a finding that dismissal is appropriate.[112] Necessity challenges focus on whether or not a project has a proper public purpose, or whether or not it is reasonably necessary to take the property at issue[113]; an authority challenge, by contrast, generally attacks the condemnation on the ground that certain statutory conditions precedent have not been met.[114]

The cases cited by the Hartmans do not provide a helpful framework in the context of an authority challenge to a specific statute. The case cited by the Hartmans, State v. 2.072 Acres, 652 P.2d 465 (Alaska 1982), is distinguishable because it involved a challenge to the determination of necessity, rather than an authority challenge. In that case, the court found that DOT&PF had failed to consider "critical information," and therefore failed to establish that the taking was compatible with the greatest public good and least private injury.[115] The court concluded that DOT&PF's conduct was "arbitrary."[116] The same standard of arbitrariness was applied in State, Dep't of Transp. & Pub. Facilities v. 0.644 Acres, 613 P.2d 829 (Alaska 1980), where "critical information" was not considered. In both cases, the issue was one of necessity, and in each case, a "critical" error or omission

---

[112] The Hartmans also spend considerable time on the issue of whether or not "shall" is mandatory or directory. However, no one would appear to dispute that the last sentence of AS 09.55.275 requires some type of review.
[113] See, e.g., 7 Julius L. Sackman, Nichols on Eminent Domain § 1.05, at 1-7 (3d ed. rev. 2004).
[114] Id. § 2.05[1].
[115] 2.072 Acres, 652 P.2d at 468-69.
[116] Id. at 469.

was made such that the court found that it should substitute its judgment for that of DOT&PF's judgment.[117]

Assuming that the foregoing cases did apply, DOT&PF's conduct hardly raises to the level of "arbitrary" conduct. Numerous public hearings were held; public comments were received, considered, and responded to; a right of way agent was hired to specifically work with, and negotiate with, the Hartmans; DOT&PF filed the request for replat approval mandated by the MOA; DOT&PF received replat approval.

IX. Hearing Status

Given the compressed discovery schedule, DOT&PF reserves the right to supplement the record as additional information is received. The Hartmans have not listed any witnesses who have knowledge of facts supporting an authority and necessity challenge other than MOA or DOT&PF employees, and it is not clear at this time whether a hearing will be required under Alaska Civil Rule 72(h)(2)(A). The content of the Hartmans' reply brief may also largely dictate whether further discovery, or a hearing, is necessary.

CONCLUSION

The C Street Extension project comes as a surprise to nobody. The proposed C Street Extension has received exhaustive public review and comment for many years, and

---

[117] See State, Dep't of Transp. & Pub. Facilities v. 0.644 Acres, More or Less, 613 P.2d 829, 833 (Alaska 1980) (a court should not substitute its judgment for that of the condemnor, but may set aside the condemnor's decision if it is "arbitrary, capricious, and abuse of discretion").

has received public comments from MOA committees, from members of the public, and from other interested parties. Indeed, the Hartmans nowhere question the public need for this project. The project will eventually occur, regardless of whether the Hartmans are successful in their challenge to AS 09.55.275. The only apparent beneficiary of the Hartmans' authority challenge is the Hartmans, who seek negotiating leverage over DOT&PF.

DOT&PF submits that the Hartmans' challenge to DOT&PF's authority should be denied. DOT&PF already fulfilled its obligations under AS 09.55.275. DOT&PF's application to the MOA was not only treated in the same manner as private landowners, but overall, DOT&PF was held to much higher standards than private landowners. DOT&PF also engaged in far greater joint efforts with the MOA than private landowners, from planning, to environmental, to design, and to every other phase of the C Street project.

The Hartmans demand that the court read AS 09.55.275 as requiring an exactly identical replat review process; the Hartmans further demand that only one process – the long plat process – can apply. The Hartmans place form over substance. Alaska Statute 09.55.275 does not require identical substantive treatment. Alaska Statute 09.55.275 also does not specify either a particular process, or a particular process as matched to a particular class of private landowner.

If the court orders some form of corrective action – presumably directed at the MOA – DOT&PF requests a stay rather than dismissal. A stay would allow corrective action to be taken, while still theoretically keeping the existing funding, and construction schedule, in place.

Dismissal, on the other hand, would almost certainly mean that the 2004 construction season would be missed, and existing funding could be jeopardized. The C Street Extension project is necessary to address a number of existing problems in the Anchorage area including: (1) traffic congestion resulting from increasing traffic on Anchorage's north-south corridors; (2) reduced safety caused by congestion; (3) circuitous travel required between Anchorage's south residential and midtown commercial developments.[118] Dismissal would leave existing traffic patterns in place in Anchorage for the foreseeable future. The real loser if this case is dismissed is the Anchorage travelling public. Commuters would be deprived of all the benefits noted in the Decisional Document filed with DOT&PF's complaint.

DOT&PF properly followed the right-of-way acquisition replat approval process, and this court should deny the Hartman's authority challenge.

Dated: February 4, 2004.

GREGG D. RENKES
ATTORNEY GENERAL

By _____

Peter Putzier
Assistant Attorney General
Alaska Bar No. 9311089

[118] See Complaint, Schedule D at 3.