

**HB**

**49**

# ALASKA STATE LEGISLATURE

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Session:  
State Capitol Building, Room 126  
Juneau, Alaska 99801-1182  
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REPRESENTATIVE CRAIG JOHNSON  
HOUSE DISTRICT 28

## SPONSOR STATEMENT

### House Bill 49

"An Act further limiting the exercise of eminent domain"

HB 49 strengthens the individual's property rights by protecting privately owned recreational structures from the exercise of eminent domain for recreational purposes.

Eminent domain is an important right of the government. However, it should only be used for the most judicious of purposes, and every effort should be made to minimize its impact to the right of the individual to own private property.

AS 09.55.240 limits the government's authority to exercise eminent domain and seize personal residences by clearly outlining its legitimate use (namely the construction and/or expansion of roads, schools, and public buildings) and by prohibiting its exercise for the purpose of economic development or to generate increased government revenues.

HB 49 affords privately owned recreational structures the same protection from government seizure already granted to personal residences in AS 09.55.240.

The right to own private property is one of the most important rights of Alaskans. By prohibiting government seizure of privately owned recreational structures for recreational purposes, HB 49 strengthens that right and ensures the continued use of land in the greatest of ways – that of private ownership.

**CS FOR HOUSE BILL NO. 49(JUD)**

**IN THE LEGISLATURE OF THE STATE OF ALASKA**

**TWENTY-SIXTH LEGISLATURE - FIRST SESSION**

**BY THE HOUSE JUDICIARY COMMITTEE**

**Offered:**

**Referred:**

**Sponsor(s): REPRESENTATIVES JOHNSON, Ramras**

**A BILL**

**FOR AN ACT ENTITLED**

1 **"An Act relating to the prohibition of the exercise of the power of eminent domain**  
2 **against a recreational structure for the purposes of developing a recreational facility or**  
3 **project."**

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

5 **\* Section 1. AS 09.55.240(e) is amended to read:**

6 (e) The power of eminent domain may not be exercised for the purpose of  
7 developing a recreational facility or project if the property to be acquired includes an  
8 individual landowner's personal residence or recreational structure or that portion of  
9 an individual's property attached to and within 250 linear feet of an individual  
10 landowner's personal residence or recreational structure unless the landowner  
11 consents either before or after a condemnation proceeding has been filed. In this  
12 subsection, "recreational structure" means a permanent structure that is used by  
13 the owner or beneficiary of a trust holding legal title to the structure as a  
14 dwelling for seasonal recreational purposes.

1 \* Sec. 2. AS 09.55.240(h)(3) is amended to read:

2 (3) "personal residence" means a structure that is the dwelling place of  
3 an individual that

4 (A) must be used by the owner or beneficiary of a trust holding  
5 legal title to the structure as a dwelling unit, as opposed to a rental, storage, or  
6 other commercial space;

7 (B) must be inhabited by the owner, prior owner, or beneficiary  
8 of a trust holding legal title to the structure for at least 90 days during the 12-  
9 month period immediately before the date an action for the exercise of the  
10 power of eminent domain is filed;

11 (C) must constitute an ordinary home for general living  
12 purposes [, AS OPPOSED TO A DWELLING USED ONLY FOR  
13 SEASONAL RECREATIONAL OR TEMPORARY PURPOSES]; and

14 (D) may not have been constructed, placed, or occupied for the  
15 purpose of avoiding eminent domain proceedings;



## HOUSE JUDICIARY COMMITTEE

STATE CAPITOL, ROOM 120  
(907) 465-4990

### COMMITTEE MEMBERS

Rep. Jay Ramras  
Chairman  
Room, 118  
(907) 465-3004

Rep. Nancy Dahlstrom  
Vice-Chairman  
Room 409  
(907) 465-3783

Rep. John Coghill  
Room 214  
(907) 465-3719

Rep. Bob Lynn  
Room 104  
(907) 465-4931

Rep. Carl Gatto  
Room 108  
(907) 465-3743

Rep. Max Gruenberg  
Room 110  
(907) 465-4940

Rep. Lindsey Holmes  
Room 405  
(907) 465-4919

### MEMORANDUM

Date: February 9, 2009

To: Don Bullock  
Leg. Legal

From: Jane W. Pierson

Re: JUD CS for HB49

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Don,

Might you please make the following change to HB 49:

Amendment #1, page 1, line 13 delete the word **of**.

Thank you

# FISCAL NOTE

**STATE OF ALASKA**  
**2009 LEGISLATIVE SESSION**

Fiscal Note Number: \_\_\_\_\_  
 Bill Version: \_\_\_\_\_  
 () Publish Date: \_\_\_\_\_

Identifier (file name): HB49-DOT-CO-2-06-09  
 Title: Eminent Domain: Recreational Structures  
 Sponsor: \_\_\_\_\_ Rep. Johnson  
 Requester: \_\_\_\_\_ H Jud  
 Dept. Affected: DOT&PF  
 RDU: Administration and Support  
 Component: Commissioner's Office  
 Component Number: 530

**Expenditures/Revenues** (Thousands of Dollars)

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

	Appropriation Required	Information						
		FY 2010	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015
<b>OPERATING EXPENDITURES</b>								
Personal Services								
Travel								
Contractual								
Supplies								
Equipment								
Land & Structures								
Grants & Claims								
Miscellaneous								
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>								
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<b>CHANGE IN REVENUES ( )</b>								
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts								
1003 GF Match								
1004 GF								
1005 GF/Program Receipts								
1037 GF/Mental Health								
Other Interagency Receipts								
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2009) cost: \_\_\_\_\_

**POSITIONS**

Full-time								
Part-time								
Temporary								

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

There is no fiscal impact to the Department of Transportation and Public Facilities

Prepared by: Mary Siroky, Legislative Liaison  
 Division: Department of Transportation and Public Facilities  
 Approved by: Nancy Slagle, Admin Director  
Department of Transportation and Public Facilities

Phone 465-4772  
 Date/Time 2/6/09 11:31 AM  
 Date 2/6/2009



Alaska Association of REALTORS  
*The Voice of Real Estate in Alaska*  
4205 Minnesota Drive  
Anchorage, Alaska 99503  
(907) 563-7133

February 4, 2009

The Honorable Craig Johnson  
Alaska House of Representatives  
State Capitol Building  
Juneau, Alaska 99801

RE: House Bill 49 - "An Act relating to the prohibition of the exercise of the power of eminent domain against a recreational structure for the purposes of developing a recreational facility or project."

Dear Representative Johnson,

The Alaska Association of REALTORS® with over 1,600 members statewide supports House Bill 49, which relates to eminent domain and recreational structures.

The Association supported HB 318, the eminent domain legislation which defined whether or not it is appropriate to take a person's private property for economic development and whether it is appropriate to take all or part of one's primary residence for recreational opportunities of another.

We favor this consumer protection legislation because it would change the definition of primary residences to include recreational structures and second homes which are very common throughout Alaska.

The Association encourages the passage of House Bill 49.

Sincerely,

Art Clark  
AAR President

(f) Notwithstanding the limitations on the power of eminent domain in (d) and (e) of this section, the legislature may approve the exercise of eminent domain against private property in an Act, the subject of which is limited to the transfer of the property for a purpose otherwise restricted under (d) or (e) of this section.

(g) The power of eminent domain may only be delegated by statute.

(h) In this section,

(1) "common carrier" has the meaning given in AS 04.16.125;

(2) "economic development" means development of property for a commercial enterprise carried on for profit or to increase tax revenue, tax base, or employment;

(3) "personal residence" means a structure that is the dwelling place of an individual that

(A) must be used by the owner or beneficiary of a trust holding legal title to the structure as a dwelling unit, as opposed to a rental, storage, or other commercial space;

(B) must be inhabited by the owner, prior owner, or beneficiary of a trust holding legal title to the structure for at least 90 days during the 12-month period immediately before the date an action for the exercise of the power of eminent domain is filed;

(C) must constitute an ordinary home for general living purposes, as opposed to a dwelling used only for seasonal recreational or temporary purposes; and

(D) may not have been constructed, placed, or occupied for the purpose of avoiding eminent domain proceedings;

(4) "private person" means a person that is not a public corporation as defined in AS 45.77.020 or a government as defined in AS 11.81.900;

(5) "recreational facility or project"

(A) means a facility or project, the primary purpose of which is recreational;

(B) includes a park, trail or pedestrian pathway, greenbelt, amusement park, fresh water boat harbor, sports facility, playground, infrastructure, or other facility related to or in support of an indoor or outdoor recreational facility or project;

(C) does not include

(i) a highway, sidewalk, or path within the right-of-way of a highway;

(ii) a path, trail, or lane used as a safe route to a school program;

(iii) a wayside or rest stop;

(iv) a development, the primary purpose of which is not recreational, such as a path, trail, or lane developed to reduce congestion, or to encourage use of an alternate, gas-saving mode of transportation;

(v) a path or trail to or between villages or from a village to a facility or resource;

(vi) a stormwater retention or treatment facility or wetland, habitat, or other acquisition required to obtain a permit for a highway, airport, or other public project;

(vii) a taking under AS 19.05.110, 19.05.120, AS 19.22.020, AS 27.21.300, AS 35.20.040, 35.20.050, or AS 41.35.060;

(viii) a taking not prohibited by law before January 1, 2007, under AS 41.21; and

(ix) a path, trail, road, or site for which no reasonable alternative exists and which is necessary to preserve or establish public access to or along publicly owned land or water, if the use of the path, trail, road, or site itself is for transportation to or to facilitate use of publicly owned land or water. (§ 13.01 ch 101 SLA 1962; am § 2 ch 72 SLA 1972; am § 1 ch 62 SLA 1973; am § 24 ch 3 FSSLA 1973; am § 15 ch 59 SLA 1982; am §§ 2, 3 ch 84 SLA 2006)

**Cross references.** -- For statement of legislative intent and findings for the 2006 amendment of (a) of this section and addition of (d) -- (h) of this section, see § 1, ch. 34, SLA 2006, in the 2006 Temporary and Special Acts.

**Effect of amendments.** -- The 2006 amendment, effective October 3, 2006, added "Except as provided in (d) and (e) of this section" at the beginning of

subsection (a), inserted paragraph (a)(8), renumbering paragraphs (a)(8) -- (12) as (a)(9) -- (13), added subsections (d) through (h), and made a minor stylistic change.

**Editor's notes.** -- Under § 6, ch. 34, SLA 2006, the 2006 amendment of (a) of this section and addition of (d) -- (h) of this section apply "only to condemnation actions filed on or after October 3, 2006."

**Opinions of:**  
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- I. General Con
- II. Power to Con
- III. Public Uses.
  - A. Generally
  - B. Mines.
  - C. Tramway

**I. GENERA**

**Eminent domain**  
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**Strict construction**  
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**Appropriation deemed**  
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d/Highways v. Crosby, 410 P

**Improvements to right**  
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d/strand v. Alaska, 131 F. S  
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d/bureau, 923 P.2d 768 (Alaska, 19  
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**II. POWER TO CON**

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d/Recovery Co. v. Northern Mining  
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**Opinions of attorney general.** — The state may use its condemnation powers for a state office complex to be constructed by and leased from a private developer. In order to insure that the leasing arrangement clearly qualifies as a public use, however, the

department should enter into a long-term lease with the developer, and should not grant the developer any sort of purchase option at the conclusion of the lease term. April 17, 1981, Op. Att'y Gen.

NOTES TO DECISIONS

- I. General Consideration.
- II. Power to Condemn.
- III. Public Uses.
  - A. Generally.
  - B. Mines.
  - C. Trolley Lines.

I. GENERAL CONSIDERATION.

**Eminent domain proceedings are unique, and** are governed by comprehensive rules of procedure applicable to condemnation actions alone. *Stewart & Grindle, Inc. v. State*, 524 P.2d 1242 (Alaska 1974).

**Strict construction.** — Eminent domain statutes are universally construed strictly, particularly where a different construction would render the act of doubtful validity. *Northern Mining & Trading Co. v. Alaska Gold Recovery Co.*, 20 F.2d 5 (9th Cir. 1927).

**Public subject matter.** — The subject matter of eminent domain proceedings is one of public rather than of private interest. *Alaska Gold Recovery Co. v. Northern Mining & Trading Co.*, 7 Alaska 386 (1926).

**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).

**Appropriation deemed exercise of power of eminent domain.** — Neither the failure of the state to institute a condemnation action nor the owners' assertion of a claim based on the theory of trespass changed the essential nature of the state's action in appropriating the owners' property from one of the exercise of the power of eminent domain. *State, Dept of Highways v. Crosby*, 410 P.2d 724 (Alaska 1966).

**Improvements to right of way reserved in patent.** — While the original reservation of a right-of-way and election provided for in former § 41-1-4 ACLA 1949 was without limitation as to initial choice on the part of either the federal government or Alaska, once the right-of-way has been selected and defined, later improvements necessitating the utilization of land upon which the road is not already located can only be accomplished pursuant to the condemnation and compensation provisions of this article. *Hilstrand v. Alaska*, 131 F. Supp. 219 (D. Alaska 1960), petition for interlocutory review denied, 352 P.2d 633 (1960).

**Cited in Mount Juneau Enters., Inc. v. City of Juneau**, 92: P.2d 768 (Alaska 1996).

II. POWER TO CONDEMN.

**Inherent power in government.** — The power of eminent domain is inherent in the government and does not depend upon the constitution. *Alaska Gold Recovery Co. v. Northern Mining & Trading Co.*, 7 Alaska 386 (1926).

**Constitution only acts as limitation on power.** — See *Alaska Gold Recovery Co. v. Northern Mining & Trading Co.*, 7 Alaska 386 (1926).

The right of a municipality to proceed in eminent domain is conferred, when this section is considered in connection with the express statutory grant of power to municipalities to provide for the location, construction, and maintenance of the necessary streets, alleys, crossings, sidewalks, sewers, and wharves. *Ashby v. City of Juneau*, 174 F. 737 (9th Cir. 1910).

The power to locate and construct a street can only be exercised by a municipality, and can only be made effective by invoking the power of eminent domain. *Ashby v. City of Juneau*, 174 F. 737 (9th Cir. 1910).

**Borough.** — A borough's authority to condemn land for a school can be inferred from the eminent domain statutory scheme. *Greater Anchorage Area Borough v. 10 Acres More or Less*, 563 P.2d 269 (Alaska 1977).

The express and exclusive authority to operate a school system, coupled with the statutory permission to condemn land for public buildings for school districts, conferred upon a borough the authority to condemn land for a school. *Greater Anchorage Area Borough v. 10 Acres More or Less*, 563 P.2d 269 (Alaska 1977).

**Pipeline company as agent of state.** — Although pipeline company could, upon delegation from state, exercise power of eminent domain through declaration of taking or otherwise, its statutory authority does not extend so far as to immunize it from liability for trespass if it has not initiated eminent domain proceedings. *Ostrom v. Alyeska Pipeline Serv. Co.*, 648 P.2d 986 (Alaska 1982).

**Right of foreign or domesticated corporations to condemn lands.** — See *Miocene Ditch Co. v. Lyng*, 138 F. 544 (9th Cir. 1905).

III. PUBLIC USES.

A. Generally.

**"Public use" extends to use for public welfare.** — The term "public use" has received enlarged scope and meaning, and the test is no longer confined to use by the public, but use for the public welfare. The power of a state to work out from the conditions existing in a mining region the largest welfare of its inhabitants has often been recognized. *Alaska Gold Recovery Co. v. Northern Mining & Trading Co.*, 7 Alaska 386 (1926).

**Question of public use is ultimately for jury.** — The question whether the use is in fact public or not, so as to justify the taking without the consent of the owner, is, ultimately, one which the courts alone may determine. *Alaska Gold Recovery Co. v. Northern*



HB 49 - House Judiciary, 2/09/09, 1:00 p.m.

People available to testify/answer questions:

**In person to Testify:**

Carol Winton      Realtor in Juneau

**In Person to Answer Questions**

Don Bullock      Legislative Legal – drafted the bill

**Offnet to Answer Questions**

Wyn Menefee      Division Operations Manager with Division of Mining,  
Land and Water/DNR

Joe Joyner      Natural Resources Manager with Division of Mining,  
Land and Water/DNR

Jim Cantor      Chief Assistant Attorney General – Transportation Section  
with the Dept. of Law