ALASKA LEGISLATURE COMMITTEE FILES 1985-1986 8672

4073 SJUD SB 168 - SB 193

949

said not to create a suspect classification as long as it applied equally to blacks of both sexes, and all religions and socioeconomic backgrounds. The fact that a group's members may possess certain characteristics with respect to which they are treated equally does not preclude a finding of invidious discrimination with respect to the primary characteristic of the group.

In *Sail'er Inn, Inc. v. Kirby*,[150] the California Supreme Court, according "suspect" treatment for the first time to a classification based on sex,[151] described suspect classifications as those based on immutable traits, usually fortuitious circumstances of birth, that bear no relation to an individual's ability to contribute to society.[152] Another factor in the court's determination of a suspect classification was the historical "stigma of inferiority and second-class citizenship associated with" the classification.[153]

Like the federal factors of suspectness, the California definition of suspect classifications clearly embraces deafness. Congenital deafness is "a status into which the class members are locked by the accident of birth."[154] The adventitiously deaf are likewise condemned to that status through circumstances beyond their control. As has been previously noted, deafness alone does not bear on an individual's ability to contribute as a juror.[155] Furthermore, the unequal treatment historically accorded deaf persons[156] is a stigma of inferiority and a badge of second-class citizenship. Deaf persons, therefore, are properly considered a suspect class in California.

3. *The State's Compelling Interest*

It appears from the foregoing that the strict standard of equal protection scrutiny should apply to California's exclusion of deaf persons from jury service since either the existence of a suspect classification or the infringement of a fundamental right may be shown under the federal or state constitution. Thus, if the exclusion is to be constitutionally

150. 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).
151. *Id.* at 18, 485 P.2d at 540, 95 Cal. Rptr. at 340.
152. *Id.*
153. *Id.* Most of this language, which seems to have originated in *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1173-74 (1969), was used nearly verbatim in *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). For this reason, these factors are considered by some to be part of the federal indicia of suspectness. *See* Krass, *The Right to Public Education for Handicapped Children: A Primer for the New Advocate*, 1976 U. ILL. L.F. 1016, 1038-39 (1976). Since a majority of the Court did not join the *Frontiero* opinion, these elements are not properly placed among the federal criteria of suspectness.
154. 5 Cal. 3d at 18, 485 P.2d at 540, 95 Cal. Rptr. at 340.
155. See text accompanying notes 61-105 *supra*.
156. See note 60 *supra*.

valid, it must be necessary in the furtherance of some compelling state interest.

Clearly, the responsibility to secure a fair trial to litigants is a compelling state interest. But a total exclusion of deaf jurors is neither necessary, nor the least restrictive means, to achieve that goal. Not *every* potential deaf juror in *every* case raises the spectre of an unfair consideration of the case. As has been pointed out, jury service is a matter of individual capabilities in the context of a particular case.[157] Thus, a total ban on deaf jurors overreaches the state's interest. The least restrictive means to accomplish the goal of a fair trial for litigants is the availability of a challenge for cause against those individual jurors in those particular cases where it appears that a litigant's right to a fair trial may be in jeopardy.[158]

C. *The Lesser Standards of Review*

The discussion of the compelling state interest test was premised upon finding jury service to be a fundamental right or deafness a suspect classification. Dismissing these rigorous requirements, however, it is apparent that jury service, if not fundamental, is an "important" right, and deafness, if not suspect, is a "sensitive" classification with respect to jury service. Thus, in *Meyer v. Zolin*,[159] the first equal protection challenge to California's exclusion of deaf persons from jury service, the plaintiffs urged, and the trial court found, the exclusion properly reviewable under the intermediate equal protection analysis.[160] This standard requires that the exclusion be substantially related to achievement of an important state objective.[161]

Since actual trial experience with deaf jurors has resulted in no apparent diminution of the right to a fair trial,[162] the total exclusion cannot be said to be substantially related to achievement of that objective. Likewise, applying the traditional equal protection analysis,[163] actual trial experience makes it doubtful that the exclusion is even rationally related to the goal of a fair trial in many instances.

Conclusion

Experience in actual trial settings has shown that the right to have a case fairly considered is not necessarily infringed by the seating of a

157. See text accompanying note 105 *supra*.
158. See note 104 and accompanying text *supra*.
159. No. C 302883 (L. A. Super. Ct., Dec. 20, 1979); see note 3 *supra*.
160. *Id.* (ruling on Demurrer, at 2) (copy on file at the *Pacific Law Journal*).
161. See text accompanying note 113 *supra*.
162. *See* Letter on Oakland Deaf Juror, *supra* note 5.
163. See text accompanying note 108 *supra*.

deaf juror. While there exist thec
tion by a deaf juror, these do no
without regard to the circumstanc
has no basis for infringing the ri
considered for jury service as me

Likewise, the state has no basis
ble participatory opportunity in
interest in guaranteeing that juri
the cases before them can be acc
than denying all deaf persons th
citizenship.

Action by the legislature and tl
rights of both litigants and deaf
Code of Civil Procedure Section
no person shall be d emed incom
loss of hearing in any degree.
Code Section 754 is required to
ing an interpreter when a deaf p
remove all bars to the presence
ing deliberations. At the same
trial as stated in Code of Civil P
Section 1181 must be amended
the part of an interpreter during

In the judicial sphere, the deci
persons equal protection in jury
courts must insure cooperation
trial to minimize disruptions fr
ror is seated.

Such actions on the part of th
strate the state's commitment to
ship on the "truly silent minori

164. No. C 302883 (L.A. Super. Ct.,

deaf juror. While there exist theoretical obstacles to a fair consideration by a deaf juror, these do not support a total ban on deaf jurors without regard to the circumstances of particular cases. The state thus has no basis for infringing the right of litigants to have deaf persons considered for jury service as members of the community.

Likewise, the state has no basis for stripping deaf persons of a valuable participatory opportunity in the form of jury service. The state's interest in guaranteeing that juries will render a fair consideration of the cases before them can be accomplished by a means less restrictive than denying all deaf persons the chance to exercise a prerogative of citizenship.

Action by the legislature and the courts is necessary to safeguard the rights of both litigants and deaf persons. The jury selection statute, Code of Civil Procedure Section 198, must be amended to provide that no person shall be deemed incompetent as a juror solely because of the loss of hearing in any degree. Additionally, extension of Evidence Code Section 754 is required to explicitly govern procedures for selecting an interpreter when a deaf person is a juror. The legislature must remove all bars to the presence of an interpreter in the jury room during deliberations. At the same time, however, the grounds for a new trial as stated in Code of Civil Procedure Section 657 and Penal Code Section 1181 must be amended to include instances of misconduct on the part of an interpreter during deliberations.

In the judicial sphere, the decision in *Meyer v. Zolin*,[164] denying deaf persons equal protection in jury selection, must be reversed. The trial courts must insure cooperation on the part of all persons involved in a trial to minimize disruptions from the normal routine when a deaf juror is seated.

Such actions on the part of the legislature and the courts will demonstrate the state's commitment to conferring the full privileges of citizenship on the "truly silent minority."

Harold Craig Manson

164. No. C 302883 (L.A. Super. Ct., Dec. 20, 1979).

APPENDIX

Following the completion of this comment, a mock trial featuring two deaf jurors was conducted in the Center for Legal Advocacy ("Courtroom of the Future") at McGeorge School of Law. The trial was sponsored by the *Pacific Law Journal* and the McGeorge Trial Advocacy Program, in cooperation with the California Association of the Deaf. Most of the concepts regarding a fair consideration of a case discussed in the comment were illustrated in the trial. The proceedings were recorded by the courtroom's videotape cameras. The trial was a regularly scheduled proceeding of the Trial Advocacy Program, in which third year law students prepare and pursue case ·m pleadings through trial. Typically, members of the local bar or ben. s judges. Juries usually consist of first year law students, college studen d other members of the community.

The mock "deaf juror" trial involved a damage suit for personal injuries. The plaintiff was allegedly shot and beaten by a grocery store security guard who had accused the plaintiff of stealing a small food item. The defendant in the case was the security guard's corporate employer. This case was selected at random for the deaf juror experiment.

Four third year law students were attorneys in the case. A member of the California bar with six years' experience in civil litigation presided as trial judge. The jury consisted of first year law students, two deaf persons, and the hearing wife of one of the deaf men. The deaf persons, both over sixty, were Mr. F.A. Caligiuri, Executive Director of the California Association of the Deaf, and Mr. Willis Berke, a retired draftsman. The interpreters were Debra Parker of the Nor-Cal Center on Deafness in Sacramento, and Ed Santillanes of the California Association of the Deaf. Ms. Parker has had extensive experience interpreting legal proceedings for deaf persons. Both interpreters are members of the National Registry of Interpreters for the Deaf.

The attorneys were informed approximately two weeks prior to trial that a deaf person might be included on the jury. The *Pacific Law Journal* provided the attorneys with a package entitled "Trial with a Deaf Juror: Selected Materials for Attorneys." This package, which the attorneys received one day before the trial, included a list of suggested voir dire questions; a copy of the Code of Ethics for Interpreters; and a copy of the letter from Assistant Alameda County District Attorney Thomas Deal regarding the Oakland "deaf juror" trial discussed in this comment. The attorneys did not receive any information about the deaf persons. The attorneys were told not to make any adjustments in their planned trial presentations.

The judge likewise was provided with a package prepared by the *Pacific Law Journal*, entitled "Trial with a Deaf Juror: Selected Materials for the Court." This package, which the judge received the morning of the trial, included an explanatory letter; all the materials given the attorneys; and California Evidence Code Sections 750, 752, and 754. Copies of the attorneys' materials and the judge's materials are on file at the *Pacific Law Journal*.

The deaf persons were not given any information about the case prior to the trial. In fact, the seating of Mr. Berke before the trial commenced.

During the attorneys' opening staten slightly behind the attorneys before tl nesses, the interpreter was seated on a the deaf jurors were able to observe th well as the interpreter. The two inter switching during natural breaks in te point, however, the interpreters switc called by the plaintiff. This was accor tions with the deaf jurors.

A considerable amount of medical t direct contradiction to the contention the comment, the deaf jurors had no This became apparent in discussions was also apparent in the jury's deli cameras.

Problems during the presentation o one point, the interpreter indicated spoken trial judge. This observation who were also having difficulty at tim another point for the interpreter to a little slower. Finally, during the testi received an emergency call on her e terpreters.

Jury deliberations in this mock c preter accompanied the two deaf ju and the interpreter sat at the end of sat across from the deaf men. The c a time. Occasionally, however, sev terpreter kept up with as many as p within moments. No critical inform

The deaf jurors were valuable pa jury accepted two suggestions made of liability against the corporate d theory, *respondeat superior*, and w negligent supervision, when Mr. C this point. Accepting his reasonin issue of plaintiff's damages for lost to accept the amount suggested by gested figure was premised upon again. The evidence, Mr. Caligiu totally disabled and in fact was ca jury then reduced the proposed a per cent.

trial. In fact, the seating of Mr. Berke as a juror was decided only minutes before the trial commenced.

During the attorneys' opening statements, the interpreter stood next to and slightly behind the attorneys before the jury. During the testimony of witnesses, the interpreter was seated on a raised chair next to the witness. Thus, the deaf jurors were able to observe the facial expressions of the witnesses as well as the interpreter. The two interpreters took turns interpreting, usually switching during natural breaks in testimony or between witnesses. At one point, however, the interpreters switched during the testimony of a doctor called by the plaintiff. This was accomplished with no break in communications with the deaf jurors.

A considerable amount of medical testimony was put on by the plaintiff. In direct contradiction to the contention made in *Eckstein v. Kirby*, discussed in the comment, the deaf jurors had no difficulty understanding this testimony. This became apparent in discussions with the deaf jurors after the trial, but was also apparent in the jury's deliberations, which were taped by hidden cameras.

Problems during the presentation of evidence were virtually nonexistent. At one point, the interpreter indicated that she could not hear the rather soft-spoken trial judge. This observation benefitted several of the hearing jurors who were also having difficulty at times hearing the judge. It was necessary at another point for the interpreter to ask a nervous student attorney to speak a little slower. Finally, during the testimony of a defense witness, the interpreter received an emergency call on her electronic pager, requiring a change of interpreters.

Jury deliberations in this mock case were especially insightful. One interpreter accompanied the two deaf jurors into the jury room. Both deaf jurors and the interpreter sat at the end of the oblong jury table. The jury foreman sat across from the deaf men. The other jurors made an effort to speak one at a time. Occasionally, however, several conversations began at once. The interpreter kept up with as many as possible. The jury usually returned to order within moments. No critical information was lost to the deaf jurors.

The deaf jurors were valuable participants in the deliberations. In fact, the jury accepted two suggestions made by Mr. Caligiuri. There were two theories of liability against the corporate defendant. The jury had dismissed the first theory, *respondeat superior*, and was prepared to discount the other theory, negligent supervision, when Mr. Caligiuri pointed out a flaw in the defense on this point. Accepting his reasoning, the jury found for the plaintiff. On the issue of plaintiff's damages for lost future wages, several jurors were prepared to accept the amount suggested by counsel. Mr. Caligiuri noted that the suggested figure was premised upon the plaintiff never working at *any* job *ever* again. The evidence, Mr. Caligiuri said, indicated that the plaintiff was not totally disabled and in fact was capable of working at a number of jobs. The jury then reduced the proposed award of lost future earnings by nearly fifty per cent.

After the verdict was announced, all participants and several observers received questionnaires about the trial. All respondents were impressed with the capabilities of the deaf persons in the trial. Nearly all respondents said they would not object to having their own cases, civil or criminal, tried by a jury that included a deaf juror. Most had no suggestions as to how the proceedings could have been more efficiently conducted. Those who did make suggestions said that speaking more slowly by all parties, in their opinion, might have been helpful.

The deaf persons felt that no adjustments would be needed to improve their participation. They said they enjoyed the experience and had no trouble understanding the evidence.

The interpreters both agreed that the trial presented no problems for them at all. They indicated that the medical testimony was not at all difficult to convey. The one interpreter who had not previously participated in legal proceedings said he enjoyed the experience so much that he hope[d] to do more legal interpreting, perhaps on a permanent basis.

As noted previously, the trial was recorded by videotape cameras. The tape reveals a virtually flawless trial with respect to the presence of the deaf jurors. There were no delays whatsoever attributable to the deaf persons.

Copies of the various materials discussed in this appendix, including the questionnaires given to participants and observers, are on file at the *Pacific Law Journal*. The videotape of the trial is available at the Law Library at McGeorge School of Law. Further information about the videotape is available from the *Pacific Law Journal*.

Permanent Tempo College Teachers a Process Clause

At the outset it may be observed the provisions of the school cod

State educational policy requi cilable goals. On one hand is t teaching personnel whose mem and able to give continuity to t the need for flexibility in meeti course demands. This dilemma most states, by the adoption of sonnel. Contract[2] and regular[3] tricts for long-term stability substitute[4] and temporary[5] teac flexibility in the hiring, assignr dichotomy betw en these two c

1. 58 Cal. App. 189, 190, 208 P. 356.

2. Contract employees were formerl CODE §87602(a). The purpose of this class board sufficient opportunity to evaluate the The governing board is strictly limited to §§87476, 87604, 87605.

3. Regular employees were formerly ferred to as tenured teachers. Classificatior tions 87601(d) and 87602(b) of the Educat elected to the position by the community failure of the community college district to v. Fullerton Union High School Dist., 24 C working of the temporary teacher reclassi *infra*.

4. The substitute teacher classificatio for elementary and secondary school teac between temporary and substitute employe tion Code. *See* CAL. EDUC. CODE §87604

5. The word temporary has become tion see Sections 87478 and 87480-87482 o 18-27 *infra*.

6. Peralta Fed'n of Teachers, Local 369, 390 n.6, 595 P.2d 113, 126 n.6, 155 Ca v. Peralta Junior College Dist., 11 Cal. 3d 92 (1974). For the role played by tempor Los Rios Community College Dist., EER

Sec. 18.05.060. Penalty for violation. A person who violates a provision of this chapter or a regulation adopted under this chapter is guilty of a misdemeanor and, upon conviction, is punishable by a fine of not more than $500, or by imprisonment for not more than one year. Each day that a person continues a violation is a separate offense. (§ 40-1-6(c) ACLA 1949)

Revisor's notes. — The words "rule or" were deleted preceding "regulation" and the word "adopted" was substituted for "promulgated" following "regulation" by the revisor of statutes pursuant to AS 01.05.031.

Sec. 18.05.070. Definitions generally. In this chapter

(1) "department" means the Department of Health and Social Services;

(2) "commissioner" means the commissioner of health and social services. (§ 40-1-1 ACLA 1949; am § 2 ch 149 SLA 1968; am § 6 ch 104 SLA 1971)

Revisor's notes. — The text of a former subsection (b), defining "impairment" as used in AS 18.05.044 and 18.05.046, was relocated to those sections by the revisor of statutes under authority of AS 01.05.031.

Legislative history reports. — For report on ch. 149 SLA 168 (CSHB 358 am S), see 1968 House Journal, p. 475.

Chapter 06. Rights of Blind and Otherwise Physically Disabled Persons.

Section

10. State policy
20. Rights
30. Rights as pedestrians
40. Penalty for denying rights
50. Definitions

Collateral references. — 15 Am. Jur. 2d, Civil Rights, §§ 1-4.

14 C.J.S., Civil Rights Supplement, §§ 1-18.

Exclusion of person (for reason other than color or race) from place of public entertainment or amusement. 1 ALR2d 1165.

Businesses or establishments falling within state civil rights statute provisions prohibiting discrimination. 87 ALR2d 120.

Municipal corporation's power to enact civil rights ordinance. 93 ALR2d 1028.

Recovery of damages as remedy for wrongful discrimination under state or local civil rights provisions. 85 ALR3d 351.

Construction and effect of state legislation forbidding job discrimination on account of physical handicap. 90 ALR3d 393.

Sec. 18.06.010. State policy. It is the policy of this state to encourage and enable the blind, the visually handicapped, and the otherwise physically disabled to participate fully in the social and economic life of the state and to engage in remunerative employment. (§ 2 ch 19 SLA 1972)

Sec. 18.06.020. Rights. (a) The blind, the visually handicapped, and the otherwise physically disabled have the same right as the able-bodied to the full and free pedestrian use of the streets, highways, sidewalks, walkways, public buildings, public facilities, and other public places.

(b) The blind, the visually handicapped, and the otherwise physically disabled are entitled to full and equal accommodations, advantages, facilities, and privileges of all common carriers, airplanes, motor vehicles, railroad trains, motor buses, street cars, boats or any other public conveyances or modes of transportation, hotels, lodging places, places of public accommodation, amusement or resort, and other places to which the general public is invited, subject only to the conditions and limitations established by law and applicable alike to all persons.

(c) Totally or partially blind persons have the right to be accompanied by a guide dog, especially trained for the purpose, in any of the places listed in (b) of this section without being required to pay an extra charge for the guide dog; however, the person with the guide dog is liable for any damage done to the premises or facilities by the dog. (§ 2 ch 19 SLA 1972)

Sec. 18.06.030. Rights as pedestrians. The driver of a motor vehicle approaching a totally or partially blind pedestrian who is carrying a cane predominantly white or metallic in color, with or without a red tip, or using a guide dog shall take all necessary precautions to avoid injury to the pedestrian, and a driver who fails to take all necessary precautions and causes injury to the pedestrian is liable in damages for the injury caused. A totally blind or partially blind pedestrian not carrying a cane as described in this section or using a guide dog in any of the places, accommodations or conveyances set out under AS 18.06.020 has all of the rights and privileges conferred by law upon other persons, and the failure of a totally or partially blind pedestrian to carry a cane as described in this section or to use a guide dog is not by itself evidence of contributory negligence. (§ 2 ch 19 SLA 1972)

Sec. 18.06.040. Penalty for denying rights. A person who denies or interferes with admittance to or enjoyment of the public facilities set out in AS 18.06.020 or otherwise interferes with the rights of a totally or partially blind or otherwise disabled person is guilty of a misdemeanor and upon conviction is punishable by a fine of not more than $1,000, or by imprisonment for not more than 60 days, or by both. (§ 2 ch 19 SLA 1972)

Sec. 09.20.010. Qualification of jurors. A person is qualified to act as a juror if the person is

(1) a citizen of the United States;

(2) a resident of the state;

(3) at least 18 years of age;

(4) of sound mind;

(5) in possession of the person's natural faculties; and

(6) able to read or speak the English language. (§ 2.01 ch 101 SLA 1962; am § 3 ch 245 SLA 1970; am § 1 ch 66 SLA 1981)

Effect of amendments. — The 1981 amendment substituted "18" for "19" in paragraph (3).

NOTES TO DECISIONS

Qualifications subject for legislation. — To define the qualification of jurors and prescribe the mode of their selection is a rightful subject of legislation. Tynan v. United States, 297 F. 177 (9th Cir.), cert. denied, 266 U.S. 604, 45 S. Ct. 91, 69 L. Ed. 463 (1924).

Exclusionary method of jury selection held invalid. — Any method of jury selection which is in reality a subterfuge to exclude from juries systematically and intentionally some cognizable group or class of citizens in the community must be held invalid. Hampton v. State, Sup. Ct. Op. No. 1487 (File No. 2741), 569 P.2d 138 (1977), cert. denied, 434 U.S. 1056, 98 S. Ct. 1225, 55 L. Ed. 2d 757, rehearing denied, 435 U.S. 981, 98 S. Ct. 1634, 56 L. Ed. 2d 75 (1978).

Quoted in City of Kotzebue v. Ipalook, Sup. Ct. Op. No. 588 (File No. 1033), 462 P.2d 75 (1969).

Collateral references. — Unfamiliarity with English as affecting competency of juror, 34 ALR 194.

Effect of exclusion of women from jury list, 52 ALR 922.

Intelligence or character test of qualifications of juror, 126 ALR 507.

Religious test of qualifications of juror, 126 ALR 526.

Loyalty test of qualifications of juror, 126 ALR 529.

Women as jurors, 157 ALR 561.

Deafness of juror as ground for impeaching verdict; waiver of objection thereto, 15 ALR2d 534, 537.

Validity of requirement of oath of allegiance, 18 ALR2d 294.

Proper procedure upon illness or other disability of civil case juror, 99 ALR2d 684.

Claustrophobia or other neurosis of juror as subject of inquiry on voir dire or of disqualification of juror, 20 ALR3d 1420.

Validity of enactment requiring juror to be an elector or voter or have qualifications thereof, 78 ALR3d 1147.

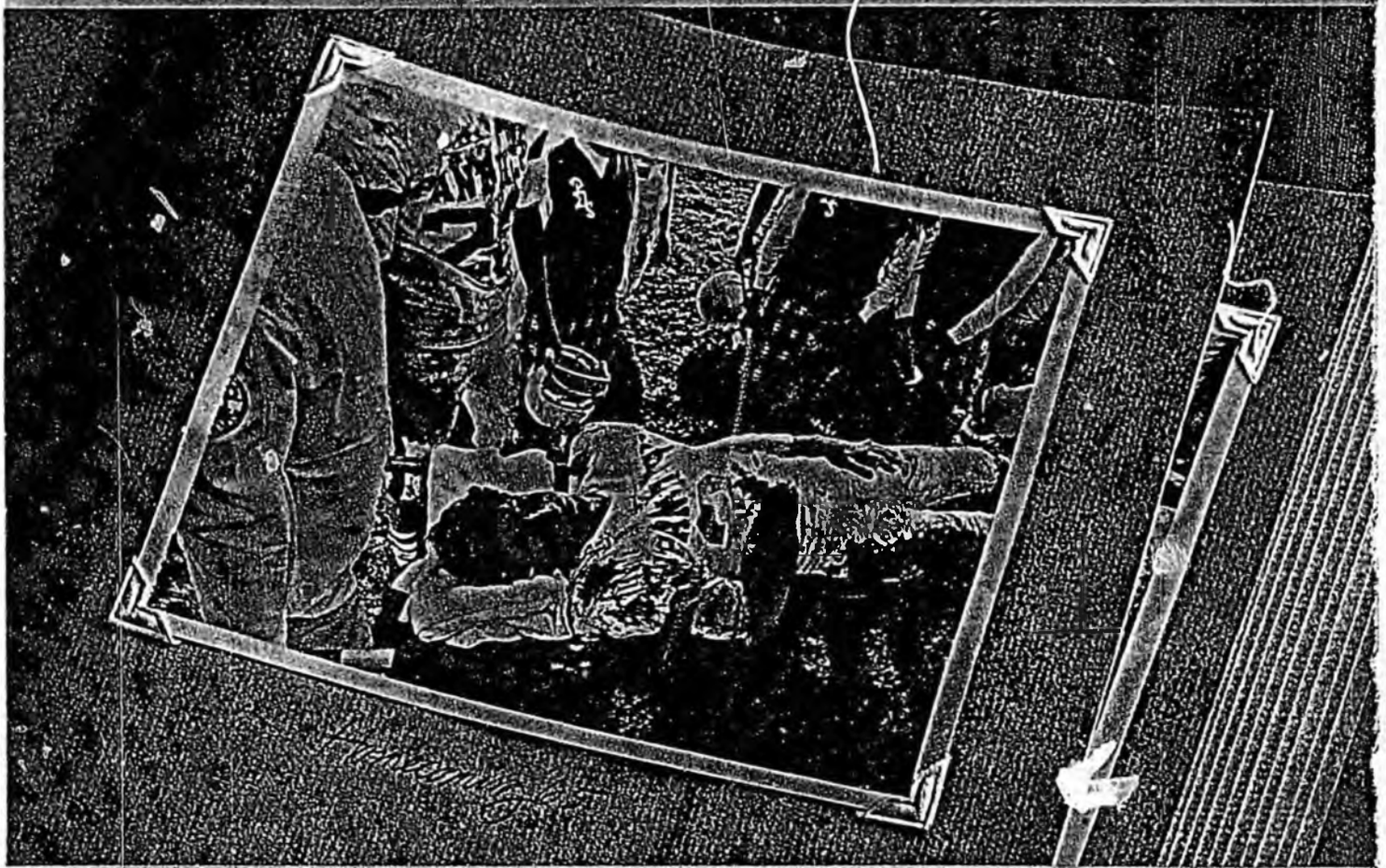
Validity of requirement of practice of selecting prospective jurors exclusively from list of registered voters, 80 ALR3d 869.

Sec. 09.20.020. Disqualification of jurors. A person is disqualified to act as a juror if the person

(1) has served as a juror in the state within one year of the time of examination for service;

(2) has been convicted of a felony and the civil rights of the person have not been restored. (§ 2.02 ch 101 SLA 1962)

SHOULD YOU PAY FOR SOMETHING THAT STARTED LONG BEFORE HE WAS HIRED?



Should you foot the entire bill because an old injury was aggravated on the job?

Or go to court to find out it was an old injury?

Like it or not, that's what you've been up against.

Until now.

At CIGNA, we've integrated Connecticut General's group medical and INA's workers' compensation protection. So for the first time, both areas can share their medical claim information which may reveal ongoing treatment of pre-existing problems. The result: better informed evaluations. And fairer adjustments.

We call it 24 Hour Coverage.

In short, 24 Hour Coverage means that the left hand now knows what the right hand is doing. It also prevents duplicate payments when both workers' compensation and group medical claims are submitted—a condition that happens far more often than you may think.

And because they're both serviced as a single package, you have more control, more convenience, more efficient management. You could also have faster processing, fewer errors. Not to mention, better experience ratings.

So to ease the burden on your company's two largest insurance expenditures, write to CIGNA Corp., Dept. R3, One Logan Square, Phila., PA 19103. After all, you've been carrying the ball long enough.

CIGNA

Injured Workers

every Wednesday

7:00 p.m

MT View

Elementary School

Insurance Industry

Briefing

"Blame the Victim"

Captain Cook

Friday Oct. 25 8:30 a.m

- all day -

Rule 24. Trial Jurors.

(a) **Examination.** The court may permit the defendant or his attorney and the prosecuting attorney to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the prosecuting attorney to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

(b) **Alternate Jurors.** The court may direct that not more than 4 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, and 2 peremptory challenges if 3 or 4 alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by these rules may not be used against an alternate juror.

(c) **Challenges for Cause.** After the examination of prospective jurors is completed and before any juror is sworn, the parties may challenge any juror for cause. A juror challenged for cause may be directed to answer every question pertinent to the inquiry. Every challenge for cause shall be determined by the court. The following are grounds for challenges for cause:

(1) That the person is not qualified by law to be a juror.

(2) That the person is biased for or against a party or attorney.

(3) That the person shows a state of mind which will prevent him from rendering a just verdict, or has formed a positive opinion on the facts of the case or as to what the outcome should be, and cannot disregard such opinion and try the issue impartially.

(4) That the person has opinions or conscientious scruples which would improperly influence his verdict.

(5) That the person has been subpoenaed as a witness in the case.

(6) That the person has already sat upon a trial of the same issue.

(7) That the person has served as a petit juror in a civil case based on the same transaction.

(8) That the person was called as a juror and excused either for cause or peremptorily on a previous trial of the same action, or in another action by the same parties for the same cause of action.

(9) That the person is related within the fourth degree (civil law) of consanguinity or affinity to one of the parties or attorneys.

(10) That the person is the guardian, ward, landlord, tenant, employer, employee, partner, client, principal, agent, debtor, creditor, or a member of the family of the defendant, of the person alleged to be injured by the crime charged in the indictment, complaint, or information, of the person on whose complaint the prosecution was instituted, or of one of the attorneys.

(11) That the person within the previous two years:

(i) has been a party adverse to the challenging party or attorney in a civil action; or

(ii) has complained against or been accused by the challenging party or attorney in a criminal prosecution.

(12) That the person has a financial interest other than that of a taxpayer in the outcome of the case.

(13) That the person was a member of the grand jury returning an indictment in the cause.

(14) That the person is employed by an agency, department, division, commission, or other unit of the State of Alaska, including a municipal corporation, which is directly involved in the case to be tried.

(d) **Peremptory Challenges.** After all challenges for cause are completed, the parties shall make or waive their peremptory challenges. First the plaintiff and then the defendant may exercise one or more peremptory challenges alternately until each party successively waives further peremptory challenges or all such challenges have been exercised. A party who waives peremptory challenge as to the jurors in the box does not thereby lose the challenge but may exercise it as to new jurors who may be called. A juror peremptorily challenged is excused without cause. If the offense is punishable by imprisonment for more than one year, the state is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year, or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

(e) **Replacement of Challenged Jurors.** After a challenge for cause is sustained or a peremptory challenge exercised, another juror shall be selected and examined before further challenges are made. Such jurors shall be subject to challenge as are other jurors.

(f) **Oath of Jurors.** The jury shall be sworn by the clerk substantially as follows:

"You and each of you do solemnly swear (or affirm) that you will well and truly try the issues in the matter now before the court solely on the evidence introduced and in accordance with the instructions of the Court; so help you God."

(Amended by Supreme Court Order 276 effective June 30, 1977; and by Supreme Court Order 428 effective September 1, 1980)

(a) **CROSS REFERENCE:** AS 12.45.010

9/12

will testify

CONTACT SHEET
RIGHTS OF DEAF, BLIND & DISABLED

Al Berke 563-4713
AK Association for the Deaf
P.O. Box 4-64
Anchorage, AK 99509

David Maltman 274-3658 (Jonathan Katcher, Supervising Atty.)
Protection and Advocacy for the Developmentally Disabled (PADD)
325 East 3rd 2nd Floor
Anchorage, AK 99501

James Omvig, Director ~~272-7223~~ 248-7770
Sensory Impairment Center
3710 E. 20th Ave.
Anchorage, AK 99508

Clyde Vincent
Center for Deaf Adults
1020 E 4th Ave
Suite 2 99501

Dorothy Truran, Director 479-6507
Governor's Council for the Handicapped & Gifted
600 University Ave., Suite C
Fairbanks, AK 99701

Bob Franken
331-3160

Michael Morgan, Director
Division of Voc. Rehab.
DOE
Pouch F
Juneau 99811

Stan Ridgeway 561-4466 message left 10/7
State Coordinator for Deaf Services
Division of Voc. Rehab. 10/10 may attend - will notify
3600 Bragaw
Anchorage, AK 99508

Janet Bradley, Executive Director 276-7474 left message
Human Rights Commission
431 W. 7th Ave., Suite 105
Anchorage, AK 99501

Karla Forsythe, General Counsel 264-[redacted]
Alaska Court System 8234
303 K Street
Anchorage, AK 99501

Stephanie Cole
264-8230

Bob Fischer

MOA Community Support Services Program
Disability Access Board
Josef Reum, Manager
Pouch 6-650
Anchorage, AK 99502

Juneau:

Karen Donnelly
6590 Glacier Hwy #215
Juneau
780-6088

Pam Guy, President
Juneau Assn. for the Deaf
(Vice-Pres. AK Assn. for the Deaf)
780-4551

Access Alaska
3710 Woodland Park Dr., Suite 900
Anchorage 99517
✓ 248-4777 will attend
X
Duane French
Program Operations Supervisor

Interpreter Referral Service
~~Tracy~~ 277-3323
Annie

Interpreter: Terry Griswold
$20/hour.

Bob Gregovich
DH+SS 465-[redacted]
3370

Official Business

Alaska State Legislature

Senate

Committee on Judiciary

Pouch V
State Capitol
Juneau Alaska 99811

For Immediate Release:
October 10, 1985

Further Information:
Ann Plunkett 276-6731

SENATE TO STUDY RIGHTS OF DISABLED

The rights of physically and mentally disabled persons will be the topic when the Senate Judiciary Committee meets Tuesday, October 22, 1:00-4:00 in the Anchorage Legislative Information Office building. The committee, chaired by Senator Pat Rodey (D-Anchorage), will address SB168, "An Act relating to rights of deaf, blind and disabled persons," and HB393, "An Act relating to the rights of physically and mentally disabled persons."

Major issues within the legislation include allowing deaf and blind persons to serve on state juries, and amending the state human rights statute to prohibit discrimination on the basis of deafness, blindness or disability. Interpreters will be provided for those members of the deaf community wishing to testify.

According to Senator Rodey, "It is our job, as lawmakers, to make sure that deaf or blind individuals, along with other people with disabilities, enjoy full human rights protections. I believe this legislation represents an affirmative step in the quest for equal rights for all handicapped persons."

#

Official Business

Alaska State Legislature

Senate

Committee on Judiciary

Pouch V
State Capitol
Juneau, Alaska 9981

MEMORANDUM

TO: Senate Judiciary Committee

FROM: Senator Pat Rodey, Chairman

DATE: October 7, 1985

RE: Hearing on Rights of Disabled Persons
October 22, 1985
1:00-4:00
Anchorage LIO

The Senate Judiciary Committee will be conducting a hearing on two bills currently in committee relating to the rights of disabled persons:

SB168 - "An Act relating to rights of deaf, blind, and disabled persons."

HB393 - "An Act relating to the rights of physically and mentally disabled persons."

We anticipate a good level of participation from individuals and agencies involved in meeting the needs of disabled persons. All committee members are urged to attend.

If you require any further information, contact Ann Plunkett at 276-6731.

Alaska State Legislature

Senate

Committee on Judiciary

Official Business

Pouch V
State Capitol
Juneau, Alaska 99811

MEMORANDUM

TO: File - SB168 & HB393

Conversation with Annie - Interpreter Referral Service
9/18/85

Interpreter requested for October 22 hearing on SB 168 and HB 393

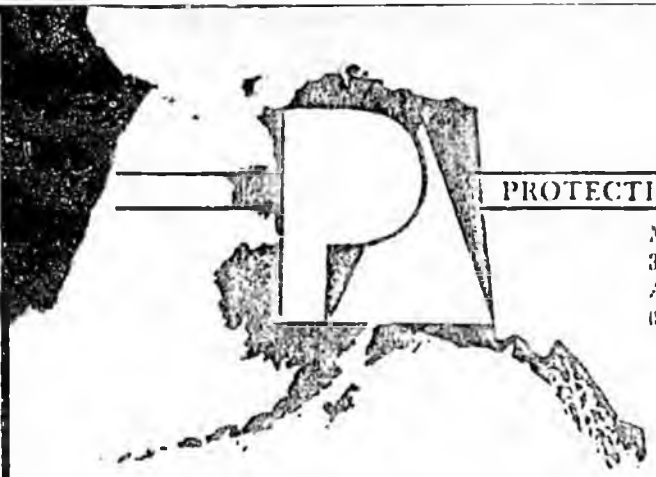
Asked her about levels of interpreter certification -

Standard for court interpreter is the highest level - Comprehensive Skills Certificate (CSC). They typically have two years of training to reach that level. CSC-L is CSC-Legal; they have special training in legal terminology, and are screened and tested by a board.

There are four CSC level interpreters in the state - three with legal experience. This would not be enough to cover needs if legislation is passed to allow deaf on juries.

CSC-L interpreters usually charge $28/hour with a 2 hour minimum

Interpreter for hearing will charge approximately $20/hour.



PROTECTION AND ADVOCACY FOR THE DEVELOPMENTALLY DISABLED

MAIN OFFICE
325 East 3rd, 2nd Floor
Anchorage, AK 99501
(907) 274-3658

SOUTHEAST
REGIONAL OFFICE
127 S. Franklin, Suite 2
Juneau, AK 99801
(907) 586-1627

NORTHERN
REGIONAL OFFICE
763 7th Ave.
Fairbanks, AK 99701
(907) 456-1070

March 1, 1985

Ms. Dorothy Truran, Director
Governor's Council for the
Handicapped & Gifted
600 University Avenue, Suite C
Fairbanks, Alaska 99701

RE: SB168: An Act Relating to the Rights of Deaf, Blind, and Disabled Persons.

Dear Dot:

This position paper is offered to the Governor's Council with the hope that the Council will support SB168. The bill has four conceptual parts. The first part addresses the rights of disabled persons to serve on state jury panels. The second part requires state and local governments to provide an interpreter whenever a deaf person seeks funds, services, goods, facilities, advantages, or privileges from that government. The third section amends the statute providing penalties for interfering with admittance to or enjoyment of public facilities by clarifying that disabled means physically disabled in that statute and adding deaf to that statute. The fourth section amends the Human Rights Commission statute. At present the Human Rights Commission statute prohibits discrimination in employment, credit and financing, public accommodations, and housing on the basis of race, religion, color, national origin, sex, age, marital status, changes in marital status, pregnancy, or parenthood. The bill adds deafness, blindness, and disability to this list of inappropriate discriminatory criteria.

(1) Jury Service. At present, deaf, blind and mobility impaired persons are not legally qualified to serve on state jury panels. This disqualification has nothing to do with whether the disabled person is actually capable of hearing the case and rendering a rational judgment based upon the facts presented. Rather, it appears to be based upon the archaic presumption that persons who are not in possession of their "natural faculties" are unable to reach a fair and impartial verdict. Nothing in the literature or experience supports this conclusion. The bill is an attempt to eradicate this unjustified denial of a basic civil right to disabled persons.

To date the Alaska Association for the Deaf has documented the denial of jury service to at least four deaf persons merely because they are deaf. At least one member of the Governor's Council would be disqualified from serving on a state jury because of his deafness. Another member of the Governor's Council had been denied the opportunity to serve on the state jury because of her disability even though this disability does not interfere with her powers of judgment.

Similar laws prohibiting discrimination against disabled jurors are in effect in a number of states including California, Colorado, Oklahoma, Washington, and Texas.

A recent law review article has addressed the issue of deaf persons serving on juries. Jury Selection: The Courts, The Constitution, and The Deaf, 11 Pacific Law Journal 967 (1980), effectively refutes all the arguments against deaf jurors. Its well reasoned analysis convincingly demonstrates that deaf people are perfectly capable of fairly considering a case and that the assistance of an interpreter would in no way interfere with the deliberative process or its secrecy. Furthermore, the article goes on to demonstrate that jury service is a constitutional right, the denial of which to persons on the basis of their disability is highly inappropriate. We have enclosed a copy of the law review article for your consideration.

Providing interpreters for deaf people to serve on juries should not be prohibitively expensive. Qualified interpreters are already serving in the Alaska Court System for purposes of testimony. They could just as readily interpret for purposes of a juror. There will be some expenses associated with rendering jury boxes accessible to the mobility impaired. However, this should be minimal and it does not justify the denial of the right to jury service for these persons. Finally, there is absolutely no justification for denying jury service to blind persons.

(2) Interpreters for deaf persons seeking access to governments. This section would require all state and local governmental units, including the University of Alaska, to provide an interpreter whenever a deaf person seeks access to funds, services, facilities, advantages, or privileges. The merits of this provision are apparent on its face. In order for deaf people to meaningfully participate in a society where the overwhelming majority of its civil servants are unable to communicate with the deaf, it is incumbent upon the government to provide a means by which the deaf can make use of the government which their taxes go to support. The deaf are unique vis-a-vis other non-English speaking peoples. In almost all non-English speaking communities, there is always someone who can interpret for a citizen who is attempting to communicate with the government. With the deaf, very few people are able to interpret. Therefore, the responsibility should shift to the governments to assure the right of access for deaf people.

It should be noted that the fiscal impact of this section should not be overwhelming. In Alaska deaf people are concentrated in the urban centers of Fairbanks, Juneau, and Anchorage. Interpreter services exist to some extent in all those communities. This section will merely require upgrading of those interpreter services.

(3) Penalty for denying rights. This amendment supplements and clarifies the section providing penalties for persons who deny or interfere with admittance to or enjoyment of a public facility. The amendment would make clear that it is inappropriate to deny admittance to a deaf person to public facilities. It also clarifies that this penalty provision is meant to only apply to physically disabled persons. This clarification is justified because the statutory chapter is entitled "Rights of Blind and Otherwise Physically Disabled Persons," and was, therefore, never intended to apply to mental disabilities.

(4) Human Rights Commission. The Alaska Human Rights Commission, which is under the Governor's office, is vested with the power to investigate and prescribe remedies to eliminate inappropriate discriminations against all Alaskan citizens. The Commission deals with complaints on a case by case basis. If the Commission finds the complaint to be justified, it has the power to fashion remedies which will prevent the discriminatory practice from continuing. At present, the Commission's mandate is limited to discrimination against Alaskan's on the basis of race, religion, color, origin, age, sex, marital status, changes of marital status, pregnancy or parenthood, or in the case of employment, physical handicap.

The bill would amend the human rights statute by adding deafness, blindness, and disability to the list of inappropriate discriminatory criteria. If a deaf, blind or disabled person is being discriminated against by any person, entity, or government, in the areas of civil rights, employment, housing, or financial practices, the Commission would have the power to address the situation.

There would be a two-fold benefit to adding deafness, blindness, and disability to the human rights statute. First, it would give all deaf, blind, disabled persons another forum through which to remedy the plethora of abuses which these persons have been subjected to. Second, by codifying the illegality of discriminating against deaf, blind, and disabled persons, we would be enhancing the dignity, self-perception, and status of these otherwise devalued persons. The effect would be felt not only within the disabled community, but also in the community at large, as society as a whole is forced to recognize that disabled persons are entitled to the same rights and privileges of all other persons.

The bill's definition of "Disability" closely tracks the Federal department of Health and Human Services Non-Discrimination on the Basis of Handicap regulations which were promulgated pursuant to Section 504 of the Rehabilitation Act of 1973. This is intended to tie into the large body of federal case law that has addressed the issue.

We anticipate that this bill will be well received and vigourously supported by the Governor's Council. It represents an affirmative step in the quest for equal rights for all handicapped persons, regardless of their disability. If the Governor's Council is interested in more information about the bill, please feel free to contact either of the undersigned with your questions and comments.

Sincerely,

Jonathon A. Katcher
Supervising Attorney
P.A.D.D.

Albert Berke
Director
Alaska Association of the Deaf

PROTECTION AND ADVOCACY FOR THE DEVELOPMENTALLY DISABLED

MAIN OFFICE
325 East 3rd, 2nd Floor
Anchorage, AK 99501
(907) 274-3658

SOUTHEAST
REGIONAL OFFICE
127 S. Franklin, Suite 2
Juneau, AK 99801
(907) 586-1627

NORTHERN
REGIONAL OFFICE
763 7th Ave.
Fairbanks, AK 99701
(907) 456-1070

April 19, 1985

Mr. Roger Lewis
Office of Sen. Patrick M. Rodey
Pouch V
Juneau, Alaska 99811

RE: SB 168/HB 172

Dear Roger:

As you may already know, on April 15th the House Judiciary Committee passed out an amended version of CS HB 172. They deleted the sections which would cost money (jury service; government discrimination against the disabled) but kept the pedestrian rights and the human rights which would have no fiscal impact. They also reinserted "emotional or mental illness" into the definition of physical or mental disability. As for the deleted fiscal impact sections, the committee agreed to submit a separate bill which would include those sections.

It appears that the ball is in the Senate's court and we hope there will be some movement soon. A teleconference of some sort remains highly desirable.

Finally, the enclosed copy of AS 47.30.865 should alleviate your concerns about the inclusion of "emotional or mental illness."

Please keep me posted.

Sincerely,

Jonathon A. Katcher
Supervising Attorney

JAK/jim

Alaska
Association of the
Deaf

4241 B Street, Suite 201
Anchorage, Alaska 99503
907-563-4713 (V/TTY)

April 5, 1985

Representative Max Gruenberg
Pouch V
Juneau, AK 99811

RE: HB172/SB168

Dear Max:

This letter is in response to your letter dated March 15, 1985.

Thank you for this opportunity to comment on these very important pieces of legislation. I am very pleased that the House HESS Committee chose to consolidate these bills in order to expedite their passage. Both bills would afford handicapped people legal protections that have been long awaited.

However, in the process of combining these two bills, certain elements of SB168 which are very important to the deaf community have been watered down or deleted. I am disappointed that this has occured and I hope that through my input you will be able to rectify the situation.

SB168 provided that whenever a deaf person seeks access to funds, services, goods, facilities, advantages or privileges from the state or local government, including the University of Alaska, that governmental entity must pay for and provide the deaf person with an interpreter. HB172 has eliminated this very important provision. You must try to understand what a terrible disadvantage we deaf people are at whenever we try to deal with the government. Without an interpreter any attempts on our part to receive the benefits of basic citizenship are completely frustrated. I feel it is the responsibility of the government to provide us with interpreters in order for us to have the same rights as all speaking and hearing persons. I recognize that this will end up costing the state some money. However, this expense does not justify denying deaf people access to their government. I hope you and the other members of the House will reconsider this deletion. We, in the deaf community, consider this section to be essential and we will be very disappointed if it does not become part of the law.

Both SB168 and HB172 deal with the Alaska Human Rights Commission. Both bills add the disabled to race, religion, etc. in the Human Rights Commission Statute. SB168 protects the "deaf, blind, and disabled". HB172 protects the "physically and mentally disabled". I am unhappy with the deletion of deafness and blindness from the specific wording of HB172. I feel it is very important that the deaf and the blind be specifically mentioned in the Human Rights Commission Statute. I believe that the law should make it absolutely certain that these protections apply to the deaf and blind. I do not want to leave it up to some lawyer or judge down the road to determine that the statute does not apply to the deaf or the blind. Therefore, I disagree with HB172's elimination of the

words deafness and blindness.

Finally, I am dissatisfied with the exclusion of the emotionally and mentally ill from the protection of the Human Rights Commission Statute as found in HB172. SB168 includes the emotionally and mentally ill as persons who are protected under the Human Rights Commission. I believe that these laws should apply to all disabled people, including the emotionally and mentally ill.

I was very disappointed that I was not given the opportunity to give input to your committee at the time that it was deliberating over these bills. As you know I have been very actively involved in the drafting of SB168. As a primary advocate for the deaf community, I feel that I had the right to present my position to the committee at the time it was considering the action and not subsequent to that time. Therefore, I would greatly appreciate being notified of any subsequent hearings or actions by your committee or any other House Committee as it may relate to these bills.

Thank you again for this opportunity to comment. Please feel free to contact me if you have any questions.

Sincerely,

Albert Berke,
Executive Secretary

AB:ss

Sensory Impairment Center

(907) 272-7223 3710 E. 20th Ave. • Anchorage, Alaska 99508

March 8, 1985

The Honorable Patrick M. Rodey
Alaska State Senate
Pouch V (MS3100)
Juneau, Alaska 99811

Re: Support for SB168 - "An Act relating to rights of persons with disabilities."; and proposed amendment.

Dear Senator Rodey:

On behalf of this Agency, I wish to lend our support to Senator Rodey's Bill concerning rights of persons with disabilities. As you know, our Agency is responsible for providing rehabilitation services for blind or deaf adults from throughout Alaska. Therefore, we have a keen interest in making sure that blind or deaf individuals, along with other people with disabilities, enjoy full civil rights protections.

I thought it would be helpful to provide some general information particularly about blind or deaf persons, since there was quite a discussion on an Anchorage T.V. newscast a few days ago concerning the right of these individuals to serve on juries. A statement was made that it would be extremely difficult and would present quite a problem for a blind person to serve on a jury, since it would not be possible for such an individual to "see" physical evidence. This is nonsense! No attorney in a trial situation simply holds up a piece of physical evidence, photograph, drawing, or other visual information and says, "Here, members of the jury, look at this." The attorney involved always describes the physical evidence in great detail. Therefore, a blind juror would learn about the evidence by listening to the verbal description. And, of course, there may also be situations where a piece of physical evidence will be passed among the members of the jury for closer examination.

Many states now have laws which permit blind individuals who are otherwise qualified to fulfill their civic responsibilities by serving on juries. Also, there are a

good number of blind attorneys and judges in this nation who perform quite competently in courtroom settings.

Several other states have laws which establish the right of deaf individuals to serve on juries through the use of interpreters. In the Anchorage T.V. story, a question arose concerning the cost to the State if interpreters had to be provided. Again, this issue should be kept in perspective. It is estimated that there are only 450 deaf adults throughout this entire State who use sign language. Therefore, it is clear that the number of deaf persons actually called to serve as jurors would be minimal.

In general, we are in support of SB168 in its entirety. However, in * Section 6. AS 18.80.220(a), subsection (1), (3) and (6), we see a potential problem. While these sections make it clear that it is illegal to discriminate against persons with disabilities in employment, advertising by an employer or employment agency, or advertising by a person, each section permits "different" treatment of persons with disabilities if such differential in treatment is based upon the "reasonable demands of the position" or "a bona fide occupational qualification."

This legislative intent is clear. For example, an employer may refuse to hire a blind person as a truck driver since driving actually requires sight. Or an employer may refuse to hire a totally deaf person as a switchboard operator since telephone work requires at least some degree of hearing.

Here is where confusion may arise: Many employers mistakenly believe that sight or hearing are required for every position which they have. Therefore, even though they are mistaken, they may honestly believe that visual or hearing requirements are based upon "bona fide occupational qualifications."

Therefore, to prevent possible future problems, we recommend that the following language be added to subsections (1), (3) and (6), or as a new subsection:

PROPOSED AMENDMENT

Where an employer, employment agency, or person believes that it is reasonable to treat a person with a disability differently from persons

without disabilities because of the reasonable demands of the position or due to a bona fide occupational qualification, the employer, employment agency, or person has the burden of proving that the differential in treatment was reasonable and not discriminatory.

I appreciate the opportunity to comment on this much-needed piece of civil rights legislation. I hope that you will consider the suggested amendment which I have proposed.

Respectfully,

James H. Omvig

James H. Omvig, Director
Sensory Impairment Center

JHO/db

cc: The Honorable William J. Sheffield
Mr. Mike Morgan, Director,
Division of Vocational Rehabilation

941 then file

APR 11 1985

BILL SHEFFIELD, GOVERNOR

☐ AGENCY HEADQUARTERS
431 W. 7th AVENUE, SUITE 105
ANCHORAGE, ALASKA 99501
(907) 276-7474

☐ NORTHERN REGION
675 SEVENTH AVENUE, STA H
FAIRBANKS, ALASKA 99701
(907) 452-1561

☐ SOUTHCENTRAL REGION
431 W. 7th AVENUE, SUITE 101
ANCHORAGE, ALASKA 99501
(907) 274-4692

☐ SOUTHEASTERN REGION
POUCH AH
314 GOLDSTEIN BUILDING
JUNEAU, ALASKA 99811
(907) 465-3560

HUMAN RIGHTS COMMISSION

April 11, 1985

The Honorable Bettye M. Fahrenkamp
Chair
Senate Health, Education & Social
Services Committee
Room 125 Capitol
Juneau, AK 99811

Dear Senator Fahrenkamp:

At their annual meeting in Juneau on March 1, 1985, the Human Rights Commissioners considered SB 168 "An Act relating to rights of deaf, blind, and disabled persons" and passed the following resolution:

> To support that part of the legislation which applies to our agency and the state law and express our concern that the portion which deals with jury duty be permissive but not mandatory.

The Commissioners are aware of the need for broader protection from the unfair discrimination suffered by the deaf, blind and disabled in Alaska. Although the Commission's current jurisdiction on the basis of physical handicap is limited to the employment section of our statute, the Commission has been active in the enforcement of this limited protection. Most recently, the Commissioners took a strong advocacy position in the Williams v Union Chemical decision after a public hearing on the matter, holding that an applicant capable of performing all the required duties of a job could not be denied employment on the grounds that his prior medical history made him an industry risk without evidence establishing a likelihood of injury.

With respect to SB 168, the Commission supports the proposed definition of disability found at Section 11 AS 18.80.300 because of its broader coverage affording greater protections than under our present definition, repealed at Section 12 AS 18.80.300(13). Furthermore, the harmonizing of state law with the federal protections for the disabled provides a consistency beneficial to both complainants and respondents who must comply with state and federal law.

The Commissioners' concern about Section 1 amending AS 09.20.210 reflects their hesitation to compel a blind, deaf or disabled

person to act as a juror. The Commission supports this section so long as it is interpreted as a permissive but not mandatory responsibility.

If you or the Committee desire further information about the Commission's position on this bill, please do not hesitate to call me.

Sincerely,

Janet L. Bradley

Executive Director

JLB/b

SB

169

BILL CONTACT/ACTION

DATE	CONTACT/ACTION
3/22	Roger - order F/N from Revenue
	Ziegler will testify.
3/26	Bill passed out

STATE OF ALASKA 1985 LEGISLATIVE SESSION

FISCAL NO

Revised

REQUEST
Bill/Resolution No: SB 169
Title: An Act limiting the exceptions of permanent fund dividends from orders for the collection of debts
Sponsor: Ziegler
Requestor: Senate Judiciary Committee

FISCAL DETAIL
Agency Affected: Revenue
Program Category Affected: General Government
BRU, Program of Subprogram(s) Affected: Permanent Fund Dividend - Enforcement
Date of Request: February 23, 1985

EXPENDITURES/REVENUES: (Thousands of Dollars)

		FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
	OPERATING						
100	PERSONAL SERVICES	-	-	-	-	-	-
200	TRAVEL	-	-	-	-	-	-
300	CONTRACTUAL	-	-	-	-	-	-
400	SUPPLIES	-	-	-	-	-	-
500	EQUIPMENT	-	-	-	-	-	-
600	LANDS & STRUCTURES	-	-	-	-	-	-
700	GRANTS, CLAIMS	-	-	-	-	-	-
800	MISCELLANEOUS	-	-	-	-	-	-
	TOTAL OPERATING	-	-0-	-0-	-0-	-0-	-0-
	CAPITAL	-	-	-	-	-	-
	REVENUE	-	-	-	-	-	-

FUNDING: (Thousands of Dollars)

	GENERAL FUND	-	-	-	-	-	-
	FEDERAL FUNDS	-	-	-	-	-	-
	OTHER	-	-	-	-	-	-
	TOTAL	-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

	FULL-TIME	-	-	-	-	-	-
	PART-TIME	-	-	-	-	-	-
	TEMPORARY	-	-	-	-	-	-

ANALYSIS: None necessary.

Prepared By: Thomas O. Williams /Thomas O. Williams
Phone: 465-2366
Division: Enforcement
Date: March 1, 1985

Approved by Commissioner: Thomas A. Sheehan
Date: 3/7/85
Agency: Revenue

Distribution (by Agency preparing fiscal note):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Original sponsor: Ziegler by request

IN THE SENATE BY THE JUDICIARY COMMITTEE

CS FOR SENATE BILL NO. 169 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act limiting the exemption of permanent fund dividends from orders for the collection of debt."

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

* Section 1. AS 43.23.065 is amended to read:

Sec. 43.23.065. EXEMPTION OF PERMANENT FUND DIVIDENDS. Fifty percent of the annual permanent fund dividend payable to an individual is exempt from levy, execution, garnishment, attachment, or any other remedy for the collection of debt. This exemption applies to an eligible individual's permanent fund dividend both before and after payment is made to the individual. An exemption is not available under this section for permanent fund dividends taken to satisfy (1) child support obligations required by court order or decision of the child support enforcement agency under AS 47.23.140 - 47.23.220; (2) a debt owed by an eligible individual to an agency of the state, unless the debt is contested and an appeal is pending, or the time limit for filing an appeal has not expired; or (3) court ordered restitution under AS 12.55.045 - 12.55.051 or 12.55.100. A child support obligation under (1) of this section has priority over a debt owed to an agency of the state or court ordered restitution, and a permanent fund dividend may not be taken to satisfy a debt under (2) of this section until any portion of the dividend necessary to satisfy a child support obligation and court ordered restitution has been taken.

AMENDMENT #1

SB169 - Exemption of permanent fund dividends

Page 1, line 24

After "state", insert "or a court ordered restitution,"

Page 1, line 26

After "obligation" insert "and a court ordered restitution"

RECORDS CERTIFICATION

I, the undersigned, an employee of the State of Alaska, do hereby certify that the microfilm images on this microform are accurate reproductions of the original records of the State of Alaska as accumulated during the regular course of business, and that it is the established policy and practice of this State to microfilm its records and to dispose of the original records after microfilm reproductions have been made.

James O. Smith
Signature of Camera Operator

11/7/89
Date

02-519 (REV 8/78)

SB

188

BILL CONTACT/ACTION

DATE	CONTACT/ACTION
5/7/85	1st hearing - held over
1/15	copy sent to Steve Gilbertson. City & Juneau
1/24	bill passed out

STATUTES RELATED TO SB 188

CHAPTER = 34.03
SECTION = 34.03.225
TITLE = 34
HEADINGS TITLE 34.
Property.
CHAPTER 03.
Uniform Residential Landlord and Tenant Act.
ARTICLE 6.
Landlord Remedies.
CITATION Sec. 34.03.225.
CATCH LINE
LIMITATIONS ON MOBILE HOME PARK OPERATOR'S RIGHT TO TERMINATE.
TEXT A mobile home park operator may evict a mobile home or a mobile home park dweller or tenant only for one of the following reasons:

(1) the mobile home dweller or tenant has defaulted in the payment of rent owed;

(2) the mobile home dweller or tenant has been convicted of violating a federal or state law or local ordinance, and that violation is continuing and is detrimental to the health, safety or welfare of other dwellers or tenants in the mobile home park;

(3) the mobile home dweller or tenant has violated a provision, enforceable under AS 34.03.130, of the rental agreement or lease signed by both parties and not prohibited by law including rent and the terms of agreement; and

(4) a change in the use of the land comprising the mobile home park, or the portion of it on which the mobile home to be evicted is located; however, all dwellers or tenants so affected by a change in land use shall be given at least 90 days notice, or longer if a longer notice period is provided in a valid lease.

HISTORY (Sec. 5 ch 138 SLA 1976; am sec. 1 ch 48 SLA 1982)

STATE OF ALASKA 1985 LEGISLATIVE SESSION

FISCAL NOTE

Revision Date:

REQUEST

Bill/Resolution No.: SB 188

Title: "An Act relating to eviction from a mobile home part;..."

Sponsor: Sen. Ray

Requestor: Senate Labor & Commerce

Date of Request: March 11, 1985

FISCAL DETAIL

Agency Affected: Department of Law

Program Category Affected: Public Protection

BRU, Program or Subprogram(s) Affected: Consumer Protection

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

This bill would prohibit a mobile home part operator from evicting a mobile home or a mobile home park dweller or tenant because of the age of the mobile home. The bill would not prohibit eviction for violation of a provision enforceable under AS 34.03.130 that requires that a mobile home be in a fit and habitable conditino. The bill does not call for state intervention or enforcement and, consequently, no fiscal impact on the Department of Law is expected.

Prepared By: Richard I. Pegues Richard I. Pegues, Director Phone: 465-3672

Division: Administrative Services Date: 3/12/85

Approved by Commissioner: Richard I. Pegues / FOR Norman C. Gorsuch Date: 3/12/85

Agency: Department of Law

Distribution (by Agency preparing fiscal note):

Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Fiscal Note (0)

Mobile Home Task Force
Summary of Findings

The Mobile Home Task Force was organized to address five major problem areas:

1. Mobile home parks in Juneau are prime targets for conversion to other uses such as apartments, condominiums, single family housing, and in some instances, commercial or industrial uses. The most recent example of such a conversion is Valley Court Mobile Home Park. In June of 1982, approximately 50 residents of Valley Court were given notices of eviction. This action coupled with the relative nonexistence of mobile home lots on which to relocate the units, gives evidence of the economic pressures which can result in dire housing problems for mobile home owners.

2. Due to outmoded mobile home park regulations and inadequate enforcement, several parks have fallen into decay resulting in potentially serious health and safety hazards.

3. Although manufactured housing (including mobile homes) has moved to the forefront across the nation as the most affordable alternative to conventional housing, the utilization of this housing option to address Juneau's severe housing shortage has been virtually nonexistent in recent years. Why does this condition prevail and what can be done about it?

4. Given the imminent displacement of many mobile home owners from existing parks in the coming years, residents are faced with an immediate requirement for land that they can purchase or lease for the placement of their mobile homes. A recent informal survey indicates that many mobile home owners would much prefer to purchase a lot to live on.

5. The financing of mobile home purchases is presently restricted to levels which make lot and home ownership impractical under present Alaska Housing Finance Corporation policy. Can local government be of assistance in this area to stimulate housing development in Juneau?

The Mobile Home Task Force believes that its recommendations potentially provide partial solutions to all of the stated problem areas. Our recommendations include a revised mobile home park ordinance to enhance the city's ability to ensure safer and more attractive conventional mobile home parks in Juneau. We recommend

Second Mortgage Loan Purchase Program

Alaska HOUSING FINANCE CORPORATION

In 1982, AHFC implemented its Second Mortgage Loan Purchase Program. The program can be divided into two categories:

1) Home Improvement Loan (HIL); and

2) Second Mortgages for the purchase of a residence

1. Home Improvement Loan Taxable Program

Maximum Loan Amount

The total-financing-to-value may not exceed 90% of the market value—as completed—and the sum of the first and the second may not exceed AHFC's loan maximums of $178,650 for a single-family dwelling and $207,750 for a duplex.

Eligible Improvements

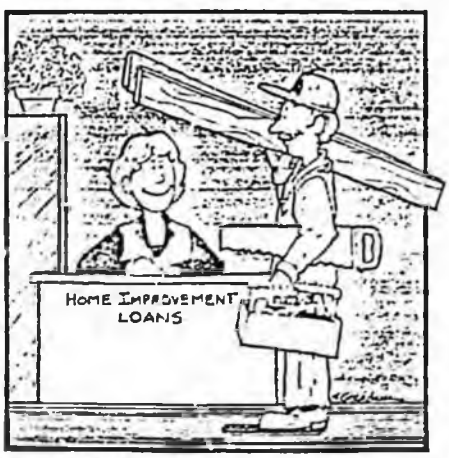
Those which improve the basic livability or energy efficiency of the dwelling, including completions or additions.

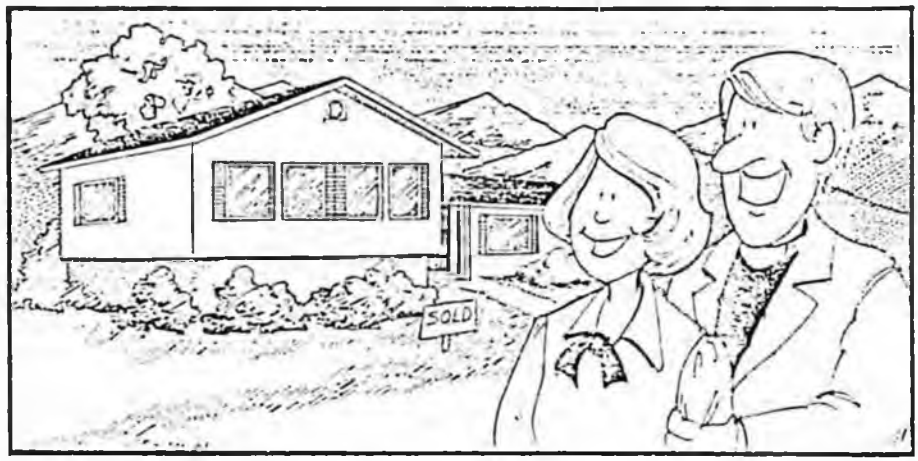
Eligible Property

Owner-occupied single-family dwellings, including condominiums, units in a PUD, duplexes and Type I mobile homes. Vacation or rental properties are NOT eligible.

Loan Terms

Up to $6,450 . . . . . 5 years
$ 6,500 - $12,450 . . . . . 10 years
$12,500 - and up . . . . . 15 years





2. Seconds for Purchase

Proceeds of a second mortgage must be used for the purchase of an owner-occupied single-family residence or duplex, where the dwelling is subject to an existing first mortgage.

Maximum Loan Amount

The total-financing-to-value may not exceed 90% of the market value or sales price—whichever is less—and the sum of the first when combined with the second may not exceed AHFC's current loan maximums of $178,650 for a single-family dwelling and $207,750 for a duplex.

Eligible Property

Owner-occupied single-family dwellings (including condominiums or PUDs) and duplexes. Mobile homes, vacation or rental properties are NOT eligible.

Loan Terms

Up to $6,450 . . . . . 5 years
$ 6,500 - $12,450 . . . . . 10 years
$12,500 - and up . . . . . 15 years

Interest Rates

As with AHFC's first mortgage program, the interest rate is governed by the legislature and may fluctuate depending on the cost the Corporation must pay to obtain its funds. Interest rates are SUBJECT TO CHANGE WITHOUT PRIOR NOTICE.

By Law, AHFC is allowed to loan up to $90,000 under the first mortgage program at a subsidized rate. For any portion above $90,000, the borrower is required to pay an interest rate equal to the cost of funds. The Seconds Program works in the same manner. However, please remember, if the existing first mortgage is a subsidized AHFC loan, the outstanding principal balance of the first mortgage must be subtracted from the $90,000 to determine the amount of the second that will be eligible for the subsidized rate. This formula applies to both categories of the Second Mortgage Loan Program.

235 East 8th Avenue, Third Floor
P.O. Box 101020, Anchorage

Printed August 1983

Mobile Home Program

Alaska HOUSING FINANCE CORPORATION

Offering an alternative to the high cost of stick built dwellings, mobile homes have played a significant role in providing housing in Alaska.

Features

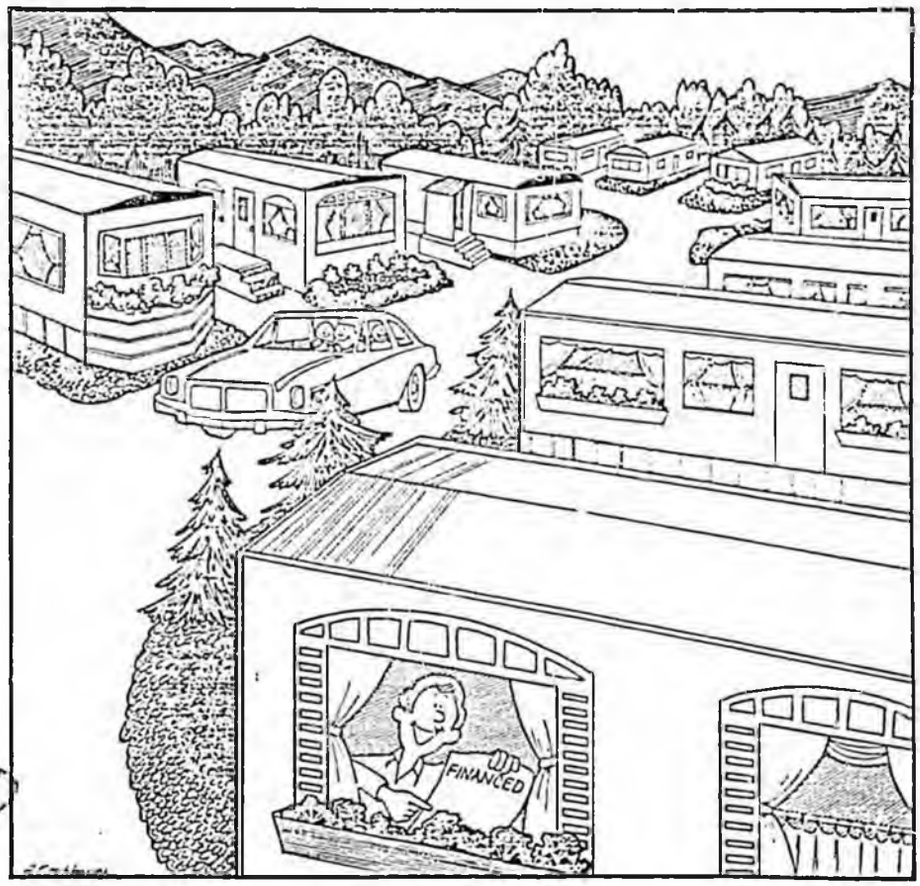
Maximum Loan Amount:
Type I - $178,650
Type II - $ 75,000
Minimum Down: 5%
Maximum Term:
Type I - ABE Structured Mortgage (See brochure "Buying a Home in the Future")
Type II - Lesser of 20 years or remaining economic life.

Type I Mobile Home Criteria

Type I mobile homes will be financed with the proceeds from bond sales and may be financed under our Taxable Program, Veterans Mortgage Program, Tax-Exempt Program, Home Ownership Assistance Program, and Pledged Account Program (brochures for these Programs are available through your lender or AHFC).

Based on our current Pool Insurers' requirements, to be eligible for financing as a Type I Mobile Home the following requirements must be met:

1. Units must have been constructed after 6/15/76.
2. Units must be set up on permanent foundation and situated on fee simple lot or accepted leasehold estate.
3. Units must contain a minimum of 700 square feet, exclusive of lean-tos, wanigans, etc.
4. Units must have a pitched roof (for every 12 inches, the rise must be 3 inches), and have a roof overhang of no less than 10 inches.
5. Units must have a minimum ceiling height of 7' 6".
6. Units must be taxed as real property.
7. Units must meet the Federal Mobile Home Construction and Safety Standards (Title VI, Housing and Community Development Act of 1974).



Type II Mobile Home Criteria

Type II mobile homes must contain a minimum of 600 square feet. Type II mobile homes are defined as all mobile homes not meeting the criteria set forth for a Type I unit. Type II mobile home units are also eligible for financing under the Home Ownership Assistance Program.

Type II mobile home loans may be for:

1. The purchase of a mobile home,
2. The purchase of a mobile home and lot,
3. The purchase of a mobile home and to pay off an existing lot currently owned by the borrower, and
4. The purchase of a lot on which to move the borrower's existing AHFC mobile home, if the relocation is due to a mobile home park closure. (Maximum loan amount - 75% of lot value as improved, determined by lesser of cost or appraised value.)

For Items 2-4, the cost of the lot shall include the purchase price or payoff on the lot plus the cost of providing permanent improvements (water, sewer, access, etc.) to the lot.

235 East 8th Avenue, Third Floor
P.O. Box 101020, Anchorage, Alaska 99510

Printed January, 1984

Other Criteria for Type II Mobile Homes

1. Personal property (appliance package) that may be included in the sale of the mobile home is limited to $1,500. No furniture may be included in the sale of the mobile home.

2. When the mobile home is located on fee simple land or an acceptable leasehold estate (and on a permanent foundation) improvements such as lean-tos, wanigans, storage, etc. may be part of the appraised value if they enhance the livability and marketability of the unit.

3. If the unit is in a mobile home park, the park must be an approved AHFC park.

4. If the mobile home is on fee simple land or an acceptable leasehold estate, the value of the mobile home and foundation shall not be less than 50% of the total appraised value.

Examples:

a) Mobile Home & Foundation $30,000
Land 25,000
Total Value $55,000

Since the mobile home and foundation is more than 50% of the total value, the maximum loan is 95% of $55,000 or $52,250

b) Mobile Home & Foundation $25,000
Land 35,000
Total Value $60,000

In this case, the mobile home and foundation is less than 50% of the total value so the maximum loan is based on 95% of 2 times the mobile home and foundation. $25,000 x 2 = $50,000 x 95% = $47,500

Interest Rates

The interest rates under this program follow those established under the Taxable Mortgage Program and are based on the rate for AHFC bonds plus the Corporation's operating costs and will vary from time to time. INTEREST RATES ARE SUBJECT TO CHANGE WITHOUT PRIOR NOTICE. Consult your lender for the current AHFC rate.

BILL SHEFFIELD, GOVERNOR

XX REPLY TO

— 1031 W 4th SUITE 110
ANCHORAGE ALASKA 99501
PHONE (907) 279-0428

— 1st NATIONAL CENTER
100 CUSHMAN SUITE 400
FAIRBANKS ALASKA 99701
PHONE (907) 456-8588

— S S FULLER BLDG
4th & HARRIS SUITE 214
POUCH K
JUNEAU ALASKA 99811
PHONE (907) 465-3692

— STATE COURTHOUSE ROOM 26
P O BOX 671
VALDEZ ALASKA 99686
PHONE (907) 835-2462

DEPARTMENT OF LAW
OFFICE OF ATTORNEY GENERAL
CONSUMER PROTECTION SECTION

March 12, 1985

Honorable Fred F. Zharcff
Chairman
Senate Labor and Commerce Committee
Alaska State Legislature
Pouch V (MS 3100)
Juneau, Alaska 99811

Re: SB 188

Dear Senator Zharoff:

This office has been asked for its comments on SB 188, relating to eviction from a mobile home park. The bill would prohibit mobile home park operators from evicting a tenant because of the age of the mobile home.

Based on the Consumer Protection Section's experience, such a bill would provide needed protection for mobile home park tenants. We have received several reports of instances where tenants were told that, due to the age of their mobile homes, they would have to remove their homes from the park when and if they decided to sell them. While this may already be unlawful under AS 34.03.040(c)(1), a legislative clarification on this point would be helpful.

One technical point I would make on SB 188 is as follows. AS 34.03.225, which the bill would amend, by its terms prohibits eviction for any reason other than the four specifically enumerated therein. The age of a mobile home is not among those reasons. My concern is that if an additional subsection were enacted, as under SB 188, setting out a particular prohibited ground for eviction, that might cast some doubt on the extent of the existing broad prohibition.

Now it is true that there is one potential "loophole" in the existing section, namely that under AS 34.03.225(3) a mobile home park operator might attempt to include in the rental agreement a provision requiring mobile homes to be under a certain age. To prevent this, while avoiding the possibilty of weakening the section by implication, the Legislature could directly prohibit such a provision in rental agreements.

The logical place for an amendment on this point would be in AS 34.30.040(c). A new paragraph (5) could be added, as

follows:

> (c) No rental agreement between a mobile home park operator and a mobile home park tenant may
>
> . . . .
>
> (5) provide for eviction or termination of the tenancy or require removal of the mobile home because of the age of the mobile home, nor may the mobile home park operator make a rule or regulation to the same effect; however, this paragraph does not prohibit eviction for violation of a provision enforceable under AS 34.03.130 that requires that a mobile home be in a fit and habitable condition.

I hope this comment proves helpful to your Committee's deliberations.

Sincerely,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By: Robert E. Mintz
Robert E. Mintz
Assistant Attorney General
Consumer Protection Section

REM/ssr
cc: Norman Gorsuch

RECORDS CERTIFICATION

I, the undersigned, an employee of the State of Alaska, do hereby certify that the microfilm images on this microform are accurate reproductions of the original records of the State of Alaska as accumulated during the regular course of business, and that it is the established policy and practice of this State to microfilm its records and to dispose of the original records after microfilm reproductions have been made.

James O. Smith
Signature of Camera Operator

11/7/89
Date

02-519 (REV 8/78)

SB

193

BILL SHEFFIELD
GOVERNOR

ch 193

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

The Honorable Don Bennett
President of the Senate
Alaska State Legislature
Pouch V
Juneau, AK 99811

Dear Senator Bennett:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill making several changes in the exercise of the power of eminent domain under AS 09.55.240 -- 09.55.460. This bill recognizes recent developments in the law and contains provisions that should streamline eminent domain procedures without prejudicing landowners' rights. The result will alleviate delays that public works projects can experience. The public is well served by the amendments because it will get the use of its public works projects sooner and at lower public expense.

Section 1 of the bill amends AS 09.55.270 by requiring the condemning authority, before the taking of real property by a "declaration of taking," to prepare a decisional document summarizing the decision. Section 4 amends AS 09.55.430 by requiring that the decisional document be part of the declaration of taking. These two amendments codify and implement the holding in Ship Creek Hydraulic Syndicate v. State, 685 P.2d 715 (Alaska 1984).

Section 2 amends AS 09.55.300(a) by clearly specifying the power of the superior court when considering the requirement that a taking be made in a manner compatible with the greatest public good and least private injury. The court is to make its analysis based upon a review of the decisional document required by sec. 1 and on appropriate evidence as set out in sec. 7 of the bill.

Section 3 amends AS 09.55.410 by clearly stating the proposition that, if any money on deposit is withdrawn by a party in interest, the withdrawal operates as a waiver of all issues, except the amount of just compensation. This amendment codifies existing practice. We believe that it is reasonable because it requires the property owner early

GOVERNOR'S LETTER OF TRANSMITTAL

on to make a choice between attempting to stop the project or only litigating the issue of compensation.

Section 5 amends AS 09.55.440(a) by raising the statutory interest allowed under the declaration-of-taking procedure to the lawful interest rate. Under AS 45.45.010, that interest rate is currently 10.5 percent. Under the existing language of AS 09.55.440(a), a property owner is entitled to interest at the rate of six percent on the amount finally awarded that is in excess of the initial deposit. This interest rate was found unconstitutional in City of Valdez v. 18.99 Acres, 686 P.2d 682 (Alaska 1984), where the court held that condemning authorities are required to pay lawful interest.

Section 6 provides a number of amendments to AS 09.55.450(a) that will streamline the procedure in the superior court. First, the court is required to schedule a hearing for the review of the taking within 30 days after the filing of any objections to the declaration of taking or as soon after that as possible. This particular amendment does not create a priority over other matters on the court's calendar, but does place a requirement upon the superior court to deal expeditiously with hearings on objections to the authority and necessity for the taking. When combined with the changed nature of that hearing under the amendments contained in sec. 7, the scheduling of a hearing on any objections to the declaration of taking should be greatly expedited.

Section 6 also contains amendments that clearly state that if a defendant does not make his objections in a timely fashion, he has waived his objections and defenses to the taking. This amendment parallels the existing law found in Civil Rule 72(e)(4). We believe that the amendment is necessary to avoid situations such as those that arose in Stewart v. State, Op. No. 2895 (Alaska, December 28, 1984).

In that case, the state filed its declaration of taking, and the property owners filed no objection to the taking. The project went out to bid and the contract was awarded. Six months after the action was filed and two months after the award of the contract, the property owners entered an objection to the taking and the superior court allowed the objections. Rather than litigate the propriety of the taking, the state dismissed its declaration of taking and redesigned its project. This resulted in higher construction costs. Section 6's amendment, absent extraordinary circumstances that the superior court may in the interest

of justice address, is not prejudicial to a defendant's rights; it places him in no worse position than any other civil litigant; i.e., objections or defenses that are not made are waived.

Section 7 contains amendments that are a departure from the existing law and practice. Existing AS 09.55.460 requires an analysis by the superior court to determine whether the taking was accomplished in a manner compatible with the greatest public good and least private injury. If the court finds that the taking was not made in that manner, the state is divested of the title it has acquired with its declaration of taking. The difficulty with the current statute is that no procedural standards are given for the analysis, and no burden of proof is assigned to the parties. The result, in practice, of this lack of clarity in the statute has been generally to assign to the defendant the burden of proof that the taking was not made in a manner compatible with the greatest public good and least private injury, and a "mini-trial" was necessary for the taking of the parties' evidence.

Court calendars are quite crowded and, when coupled with the "mini-trial" practice, the effect has been to delay the hearing until a significant block of the court's calendar can be set aside. One recent Supreme Court case, Ship Creek Hydraulic Syndicate v. State, cited above, produced a hearing in the trial court which lasted nearly five days, during which expert testimony was presented by both sides. While the trial court did ultimately confirm the taking, time that could have been devoted to the project was lost. It should also be noted that the requirement for a decisional document, which is set out in sec. 1, is a product of this case.

The language proposed in AS 09.55.460(c) assigns the burden to the defendant to prove by clear and convincing evidence that the decision to condemn was arbitrary, capricious, or an abuse of discretion. We believe that this language is a codification of the holdings in State v. 0.644 Acres, 613 P.2d 829 (Alaska 1980) and State v. 2.072 Acres, 652 P.2d 465 (Alaska 1982), and only represents a departure from existing statutory language in that the appropriate review standards are clearly and succinctly stated.

The language proposed in AS 09.55.450(d) is a departure from existing practice, but, when combined with the amendments regarding decisional documents, should streamline the procedure in the superior court without prejudicing

the property owners' rights. Under this language, the superior court will consider the decisional document, any supporting reports, studies, or statements relied upon in reaching the decision to condemn, and any affidavits the parties might submit, as well as depositions taken by the parties. There is no provision for the taking of evidence by the court except in situations in which the court allows the presentation of additional evidence. This proposed language provides for a review process by the superior court which is analogous to the function it serves when reviewing decisions of the district court and administrative agencies under AS 22.15.240 and Appellate Rule 609.

Under the cited statute and rule, the superior court reviews cases involving significant liberty and property interests that have been adjudicated by the district court and a variety of administrative agencies. These appeals are all upon the record without the taking of additional evidence, except as provided by statute and rule in extraordinary circumstances.

There are significant differences between the record in an appeal from the district court or an administrative agency and the decisional document envisioned in sec. 1 of this bill. The most important is that the aggrieved party will have presented his case before the matter is in the superior court. We believe that allowing the parties to submit affidavits and depositions in response to, or to support objections to, the taking is a reasonable substitute. We reach this conclusion because of the extensive nature of the background analysis that is performed in the course of developing a public works project. Typically, location and design studies and, in many instances, environmental impact studies are prepared. An additional component of the planning and design of a public works project is a public hearing process during which comments are solicited from the public. Furthermore, AS 35.30.010 requires approval by local planning and zoning commissions. An analogous approval is required under AS 09.55.275 for any replatting which is necessary to accommodate the project. By the time an eminent domain action is filed, the project is a well-known entity and well defined, and has been the subject of local political decisions and adjudication procedures under AS 35.30.010 and AS 09.55.275.

With this extensive administrative background, we believe that augmenting the evidence before the court with depositions and affidavits provides the superior court an adequate basis to review the appropriateness of the taking.

Under the amendments in this bill, the superior court has the discretion to allow the presentation of additional evidence as it does in its appellate jurisdiction.

I urge your favorable action on this measure, so that our eminent domain code accurately reflects the law, and so that the public's business is handled in an expeditious and fair manner for all concerned.

Sincerely,

Bill Sheffield
Governor

BILL SHEFFIELD, GOVERNOR

REPLY TO:

☐ 1031 W 4th AVENUE
SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 276-3550

☐ 1st NATIONAL CENTER
100 CUSHMAN ST.
SUITE 400
FAIRBANKS, ALASKA 99701
PHONE: (907) 452-1568

☒ POUCH K - STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

465-3603

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

MAR 2 6 1985

March 26, 1985

The Honorable John B. Coghill
Chairman, Senate Transportation Committee
Alaska State Senate
Pouch V
Juneau, AK 99811

Re: SB 193 relating to the power of eminent domain

Dear Senator Coghill:

During the Senate Transportation Committee meeting on March 20, 1985, inquiry was made regarding the approach of other jurisdictions on the issue of which party has the burden of proof that a particular taking is not necessary for a public purpose. My research indicates that it is routinely assigned to the property owner. In section 7 of SB 193, we proposed language codifying this legal principal which presently exists in Alaska law. The committee's amendment to the bill which deleted that language will not have much of an impact upon eminent domain practice in Alaska. However, if the committee further amends the bill by assigning to the condemning authority the burden to prove that its decision to condemn was not arbitrary, capricious, nor an abuse of discretion; the contrary is true. Statutory language of that sort would make Alaska unique among American jurisdictions, i.e. in effect the taking could be presumed invalid unless proven otherwise by the condemning authority.

The necessity for the taking of private property enjoys a presumption of validity for very sound public policy reasons. An executive agency undertakes a particular public works project by the direction of the legislature through the appropriation process. That public works project is brought to fruition by that executive agency under a grant of power conferred upon it by the legislature, which includes the grant of the power of eminent domain. Consequently, when, in the course of constructing a public works project, it becomes necessary to acquire interests in land necessary for its construction by the use of the power of eminent domain, the executive agency is fulfilling the will of the legislature, the elected representatives of the people. (It

03-C5LH

ATTORNEY GENERAL'S LETTER

is not fulfilling an agenda of its own.) It is for these reasons that the burden is assigned to the property owner to prove that the taking is not necessary for a public purpose. To assign the burden to the condemning authority is in our opinion contrary to sound public policy. Consequently, the administration is opposed to the amendment of SB 193 which would shift the burden of proof on the issue of necessity to the condemning authority.

If I may be of any further assistance in this matter, please contact me.

Sincerely yours,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By: William F. Cummings
William F. Cummings
Assistant Attorney General

WFC:prm

STATE OF ALASKA 1985 LEGISLATIVE SESSION

FISCAL NOTE

Revision Date:

REQUEST

Bill/~~Resolution No.~~: SB 193

Title:

Sponsor: Rules Committee

Requestor:

Date of Request:

FISCAL DETAIL

Agency Affected: Transportation & Public Faci

Program Category Affected: Capital Projects

BRU, Program or Subprogram(s) Affected: Right of Way & Land Acquisition

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

Although a dollar amount cannot be identified in this fiscal note, this bill should definitely provide a savings to the State. It will alleviate problems that have developed in regard to eminent domain procedures which have the potential to seriously delay badly needed public work projects. This bill should improve eminent domain procedures without prejudicing property owners' rights.

Prepared By: Milton H. Lentz, Chief, ~~R/W & Land~~ Acq. Phone: 465-2985

Division: Standards & Technical Services/RW Date: 2/13/85

Approved by Commissioner: Date: 2/14/85

Agency: Dept. of Transportation & Public Facilities

Distribution (by Agency preparing fiscal note):

Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

ZERO FISCAL NOTE & ANALYSIS

ANALYSIS OF FISCAL NOTE

"An Act relating to the power of eminent domain; and providing for an effective date"

This bill recognizes recent development in the law and contains provisions that should streamline eminent domain procedures without prejudicing property owner's rights.

First, this would require the court to schedule a hearing for the review of the taking within 30 days after the filing of any objections to the declaration of taking or as soon after that as possible. This particular amendment does not create a priority over other matters on the court's calendar, but does place a requirement upon the Superior Court to deal expeditiously with hearings on objections to the authority and necessity for the taking.

This bill would amend AS 09-55-410 by clearly stating that, if any money on deposit is withdrawn by a party in interest, the withdrawal operates as a waiver of all issues except the amount of just compensation. This would require the property owner early on to make a choice between attempting to stop the project or only litigating the issue of compensation. This bill would also raise the statutory interest allowed under the declaration of taking procedure to the lawful interest rate.

This bill would clearly state that if a defendant does not make his objections in a timely manner, he has waived his objection and defense to the taking.

It is concluded that legislation that leaves a property owner's substantive rights intact, but that changes the procedural aspects of the litigation to a more effective and timely manner so that capital projects are not delayed is in the best interest of the public.

Although a dollar amount cannot be identified, this bill should provide a savings to the State, since it will alleviate problems that have developed in regard to eminent domain procedure which have the potential to seriously delay badly needed public work project.

Alaska Court System
State of Alaska

OFFICE OF ADMINISTRATIVE DIRECTOR

303 K Street
Anchorage, Alaska 99501

March 22, 1985

Senator Coghill, Chair
Senate Transportation Committee
Pouch V
Juneau AK 99811

Dear Senator Coghill:

I am writing with regard to SB 193, an act relating to the power of eminent domain. I have discussed this measure with several of the presiding judges, who offer the following comments. First, the measure provides that a hearing for review of a taking must be held within 30 days after the filing, or as soon after that as is possible, to establish the validity of any objections (Section 6, pages 3-4). Calendaring of matters before the court is an inherently procedural task, properly within the purview of the courts. The Court System therefore opposes inclusion of language which appears to require placement on the calendar within a set time period. However, the courts are mindful of the concerns expressed in the governor's transmittal letter. Judge Serdahely in particular is exploring ways to expedite hearings before the superior court in Anchorage.

A second concern relates to section 7, paragraph (d), which limits live testimony at a hearing to object to a taking. Since supporting statements, reports and similar documents generally contain hearsay evidence, due process would be enhanced if these materials were sworn in a manner similar to affidavits.

Although this legislation represents a change in the way in which eminent domain proceedings would be handled, the other provisions of the bill involve substantive policy decisions appropriately addressed to the legislature.

Thank you for the opportunity to comment upon this legislation.

Sincerely,

Karla L. Forsythe

Karla L. Forsythe
General Counsel

cc: Arthur H. Snowden, II
Presiding Judges
William F. Cummings, Assistant Attorney General

COURT SYSTEM LETTER

the basic distinction arises between a question of fact and a question of law. Taylor v. Interior Enterprises, Inc., Sup. Ct. Op. No. 621 (File No. 1113), 471 P.2d 405 (1970).

Questions of fact may not be re-examined by court. — Where there is a trial by jury, questions of fact must be decided by the jury and may not be re-examined by the court. Taylor v. Interior Enterprises, Inc., Sup. Ct. Op. No. 621 (File No. 1113), 471 P.2d 405 (1970).

Criterion for determining sufficency of evidence for jury. — In deciding whether the evidence is sufficient to raise a question of fact to be presented to the jury, the court applies a criterion. In Alaska's courts the criterion is whether there is room for a difference of opinion among reasonable men as to the factual issue in controversy. If there is, the issue is submitted to the jury for its determination. If not, the court decides the issue without reference to the jury. Taylor v. Interior Enterprises, Inc., Sup. Ct. Op. No. 621 (File No. 1113), 471 P.2d 405 (1970).

Power of removing factual issues from jury. — The courts have exercised the power of removing from consideration by a jury factual issues in a case where the court decides there is insufficient evidence to raise a question of fact to be presented to the jury. Taylor v. Interior Enterprises, Inc., Sup. Ct. Op. No. 621 (File No. 1113), 471 P.2d 405 (1970).

Section does not preclude review of rulings on motions to set aside awards. — Nothing in this section precludes appellate review of the trial judges' rulings on motions to set aside awards. Fruit v. Schreiner, Sup. Ct. Op. No. 838 (File Nos. 1526, 1546), 502 P.2d 133 (1972).

Applicability of fair cross-section standard to civil jury selections. — See Malvo v. J.C. Penney Co., Sup. Ct. Op. No. 901 (File No. 1630), 512 P.2d 575 (1973).

Applied in State v. Kaatz, Sup. Ct. Op. No. 1536 (File No. 3080), 572 P.2d 775 (1977).

Quoted in Knudsen v. City of Anchorage, Sup. Ct. Op. No. 21 (File No. 58), 358 P.2d 375 (1960); Patrick v. Sedwick, Sup. Ct. Op. No. 206 (File No. 314), 391 P.2d 453 (1964); Pennington v. Snow, Sup. Ct. Op. No. 625 (File No. 1101), 471 P.2d 370 (1970); Martinez v. Bullock, Sup. Ct. Op. No. 1152 (File No. 2209), 535 P.2d 1200 (1975); Jeffries v. Glacier State Tel. Co., Sup. Ct. Op. No. 1985 (File No. 4298), 604 P.2d 4 (1979).

Cited in Lee v. State, Sup. Ct. Op. No. 749 (File No. 1395), 490 P.2d 1206 (1971).

Section 17. Imprisonment for Debt. There shall be no imprisonment for debt. This section does not prohibit civil arrest of absconding debtors.

The gist of the offense under AS 28.35.026 is failure to return an automobile with a conscious purpose to injure the owner and not mere failure to pay the rental price. Hence, the constitutional prohibition against imprisonment for debt has not been violated. Speidel v. State, Sup. Ct. Op. No. 584 (File No. 1014), 460 P.2d 77 (1969).

Section 18. Eminent Domain. Private property shall not be taken or damaged for public use without just compensation.

Cross reference. — As to compensation and damages awarded for property taken by eminent domain, see AS 09.55.330.

I. General Consideration.
II. Damage.
III. Taking.
IV. Just Compensation.

I. GENERAL CONSIDERATION.

Construction. — The supreme court has liberally construed this section in favor of the private property owner. Alsop v. State, Sup. Ct. Op. No. 1764 (File No. 3023), 586 P.2d 1236 (1978).

ALASKA CONSTITUTION ART. 1 § 18

Compensation for personal property. — Reading Alaska Const., art. I, § 18, and Alaska Const., art. I, § 1, in paria materia, and the generally recognized principle that the constitution and legislative enactments in implementation thereof are to be liberally construed, the supreme court found no clear legislative intent to have been manifested that personal property taken or damaged by public use should not be justly compensated. Stroh v. Alaska State Hous. Auth., Sup. Ct. Op. No. 496 (File No. 924), 459 P.2d 480 (1969).

There is no clear legislative intent manifested that personal property taken or damaged by public use should not be justly compensated. Stroh v. State Hous. Auth., Superior Court, 3rd Jud. Dist., No. 65-1222, 459 P.2d 484 (1969).

See note under catchline "Personal property used on land not considered in determining compensation" under analysis line IV, "Just Compensation."

Chattel as real estate. — The rule is that for a chattel to become a fixture and be considered as real estate, three prerequisites must unite: There must be an annexation to the realty of something appurtenant thereto; the chattel must have adaptability or application as affixed to the use for which the real estate is appropriated; and there must be an intention of the party to make the chattel a permanent accession to the freehold. Intention, the third of the three factors said to comprise the general test for determining whether an object has become a fixture, refers to the intent of the parties that the object being introduced onto the realty become a permanent accession thereto. Stroh v. State Hous. Auth., Superior Court, 3rd Jud. Dist., No. 65-1222, 459 P.2d 484 (1969).

Carpeting constituted personalty at the time of the taking, and party was entitled to recover the actual market value thereof at the time of the taking. Stroh v. Alaska State Hous. Auth., Sup. Ct. Op. No. 496 (File No. 924), 459 P.2d 480 (1969); Stroh v. State Hous. Auth., Superior Court, 3rd Jud. Dist., No. 65-1222, 459 P.2d 484 (1969).

Expectation of renewal of a lease is not a compensable interest. State, Dep't of Hwys. v. Salzwedel, Sup. Ct. Op. No. 1861 (File No. 3976), 596 P.2d 17 (1979).

Proceedings distinguished from ordinary civil actions. — This constitutional guarantee, together with the peculiar in rem nonadversary pleadings characteristic of condemnation proceedings, distinguish these proceedings from ordinary civil actions. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

Alaska's procedural rules pertaining to condemnation actions do not provide a burden of pleading which could be looked to as determinative of the companionate burden of persuasion. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

Procedural rules involving the concept of risk of failure to persuade are inapposite in a condemnation proceeding where the sole issue is determination of just compensation. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

The separate questions of order of proof and order of final arguments of counsel in condemnation proceedings should be left to the discretion of the trial judge. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

The burden of production facet of burden of proof, rather than the risk of non-persuasion aspect, is the more meaningful concept in the trial of a condemnation proceeding. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

Competent evidence of fair market value. — As to the issue of fair market value, both the condemning agency and the property may produce competent evidence of the fair market value of the condemned property. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

For additional notes concerning evidence, see notes under analysis line IV, "Just Compensation."

Role of expert witness in eminent domain proceedings. — See Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

Absent the production of evidence by either party, the triers of fact will determine fair market value solely from the other party's evidence. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

Testimony. — It is not necessary, in order to give credence to a witness' opinion

of fair market value, to also require him to show that the property and market value are such that the entire purchase price could be expected to be paid at the time of sale. State v. 7.026 Acres, more or less, Sup. Ct. Op. No. 601 (File No. 1106), 466 P.2d 364 (1970).

Sale 15 months after date of taking. — As to admission into evidence of a sale taking place 15 months after the date of the taking by the state, see Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

The focal point of the trier of fact's inquiry is the ascertainment of just compensation. Thus, regardless of whether the condemning agency or the property owner meets a given burden of persuasion, Alaska's constitutional mandate requires that the owner be awarded just compensation for the property he has lost. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

Jury confronted with conflicting opinions as to value. — In the usual condemnation case, the jury is confronted with conflicting opinions as to value. The jury is not faced with the necessity of finding a particular value or no value at all. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

Instructions on burden of proof, in the sense of allocating the risk of failure to persuade the jury, are inappropriate in condemnation actions. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

In a condemnation proceeding, the trial court did not err in refusing to instruct the jury on the subject of burden of proof, where the jury was informed that the exercise of the power of eminent domain is subject to the constitutional requirement of payment of just compensation, and was further instructed that their only concern was the determination of the just compensation to be awarded. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

Quoted in Stroh v. Alaska State Hous. Auth., Sup. Ct. Op. No. 496 (File No. 924), 459 P.2d 480 (1968).

II. DAMAGE.

Section expressly requires compensation for damage, while 5th amendment does not. — See State v. Hammer, Sup. Ct. Op. No. 1268 (File Nos. 2500, 2660), 550 P.2d 820 (1976).

Temporary loss of profits during relocation incurred because of the state's exercise of its eminent domain power in taking the property on which the business was conducted is a damaging of property within this section and must be compensated for. State v. Hammer, Sup. Ct. Op. No. 1268 (File Nos. 2500, 2660), 550 P.2d 820 (1976).

III. TAKING.

When taking occurs. — It is the general rule that a taking does not occur until: (1) Legal title vests in the state, (2) the state enters into actual possession, or (3) the state takes constructive possession either by causing damage to property or by depriving the owner of full beneficial use of his land. Stewart & Grindle, Inc. v. State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

Once an owner is deprived of the economic advantages of legal ownership, a taking has occurred. Grant v. State, Sup. Ct. Op. No. 1385 (File No. 2855), 560 P.2d 36 (1977).

Although the state is clearly not bound to abide by its construction plans and specifications, it is reasonable for parties negotiating for the sale of the land involved to assume that those plans will be implemented, and where the plans are not implemented, any further economic interference constitutes a second taking for which the state must pay just compensation. Grant v. State, Sup. Ct. Op. No. 1385 (File No. 2855), 560 P.2d 36 (1977).

Limiting access to vessels able to pass through a culvert six feet in diameter was in effect a taking of such access. Wernberg v. State, Sup. Ct. Op. No. 972 (File No. 1797), 519 P.2d 801 (1974).

Loss of access due to closure of intersection. — Where owners received compensation for the taking of their property for construction of a highway, a second taking occurred, separate from the first, when the state decided to redesign the highway, the second taking consisting of a loss of access due to closure of an intersection and due to the limitation of travel on the frontage road to one-way traffic, if the settlement or the receipt of the intersection award had been in reliance upon unrestricted access to be closed. Alsop v. State, Sup. Ct. Op. No. 1764 (File No. 3023), 586 P.2d 1236 (1978).

Where owners contended that a second taking of their property occurred when the state redesigned the highway for the construction of which their property had

been originally taken, closing off an intersection and limiting travel on the frontage road to one-way traffic, in order to recover damages, each of the owners must demonstrate that he or a predecessor in interest had a portion of his property taken for the original construction project, that he or his predecessor relied on construction of the intersection or the two-way frontage road, or both, in settling or receiving an award for their condemnation claims, and that his remaining property had decreased in value as a result of the highway modifications. Alsop v. State, Sup. Ct. Op. No. 1764 (File No. 3023), 586 P.2d 1236 (1978).

Nonabutting owners, whose property has not been taken, cannot claim damages because a more circuitous access route is imposed upon them. Alsop v. State, Sup. Ct. Op. No. 1764 (File No. 3023), 586 P.2d 1236 (1978).

Changing a frontage road from a two-way street to a one-way street is not by itself a taking. B & G Meats, Inc. v. State, Sup. Ct. Op. No. 1950 (File No. 3940), 601 P.2d 252 (1979).

A distinction must be made between loss of access and loss of traffic flow. The latter is not a part of the owner's interest in his property. Restrictions which merely result in a diversion of traffic away from the property are thus not compensable. B & G Meats, Inc. v. State, Sup. Ct. Op. No. 1950 (File No. 3940), 601 P.2d 252 (1979).

Principles which control when claim of taking caused by loss of access is raised. — See B & G Meats, Inc. v. State, Sup. Ct. Op. No. 1950 (File No. 3940), 601 P.2d 252 (1979).

Compensation required for taking littoral access right. — The state must justly compensate the property owner when it takes by inverse condemnation, a littoral access right. Grant v. State, Sup. Ct. Op. No. 1385 (File No. 2855), 560 P.2d 36 (1977).

Institution of condemnation proceedings constitutes a compensable appropriation of vacant and unimproved land, and the property owner is constitutionally entitled to interest dating from the institution of such proceedings. Stewart & Grindle, Inc. v. State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

Under the Alaska statutory scheme, an owner of unimproved or untenanted property is deprived of both investment potential and the possibility of future development the moment a condemnation action commences. Meanwhile, the owner remains liable for property taxes, mortgage payments, and any other expenses incidental to legal ownership. Stewart & Grindle, Inc. v. State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

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 v. Crosby, Sup. Ct. Op. No. 322 (File No. 584), 410 P.2d 724 (1966).

IV. JUST COMPENSATION.

Measure of just compensation. — Just compensation is measured by the value of the property taken. State v. 7.026 Acres, more or less, Sup. Ct. Op. No. 601 (File No. 1106), 466 P.2d 364 (1970).

Fair market value is an appropriate measure of the just compensation guaranteed by this section. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

"Fair market value". — Fair market value is the price in money that the property could be sold for on the open market under fair conditions between an owner willing to sell and a purchaser willing to buy, with reasonable time allowed to find a purchaser. State v. 7.026 Acres, more or less, Sup. Ct. Op. No. 601 (File No. 1106), 466 P.2d 364 (1970).

One criterion for determining value is what the property is worth on the market — its fair market value, and this is to be determined by a just consideration of all the uses for which the property is suitable. State v. 7.026 Acres, more or less, Sup. Ct. Op. No. 601 (File No. 1106), 466 P.2d 364 (1970); Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

The highest and most profitable use for which the property is adaptable is to be considered, to the extent that the prospect of demand for such use affects the market value while the property is privately held. State v. 7.026 Acres, more or less, Sup. Ct. Op. No. 601 (File No. 1106), 466 P.2d 364 (1970).

The essential difference between market price and market value lies in the premises of intelligence, knowledge and willingness, all of which are contemplated in market value but not in market price. Stated differently, at any given moment of time, market value

connotes what a property is actually worth and market price what it may be sold for. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

Use of property must be reasonably probable. — It must be shown that the use for which the property is claimed to be adaptable is reasonably probable. If this cannot be shown, evidence of prospective use must be excluded because it would allow mere conjecture and speculation to become a guide for ascertainment of value, and this is not a permissible method for the judicial ascertainment of truth. State v. 7.026 Acres, more or less, Sup. Ct. Op. No. 601 (File No. 1106), 466 P.2d 364 (1970).

"Best use" evidence. — See Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

In determining just compensation, usually measured by the "market value" of the property, the highest and most profitable use for which the land is adaptable may be considered to the extent that the prospective demand for such use affects the property's present market value. Thus, many courts, including Alaska's, have allowed evidence of a reasonably probable subdivision to be admitted to prove the adaptability of the land for subdivision use. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

Admissibility of subdivision plat. — Where the adaptability of the land for subdivision use is shown to be reasonably probable, and not too remote or speculative, then a subdivision plat is admissible as illustrating the potential and reasonably probable use. State v. 7.026 Acres, more or less, Sup. Ct. Op. No. 601 (File No. 1106), 466 P.2d 364 (1970).

A truly speculative or imagined use should not be considered. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

Evidence of use as subdivision. — The majority of courts allow evidence of a potential subdivision only for the limited purpose of showing the adaptability of the land for subdivision purposes. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

The courts are much more liberal in admitting evidence of a potential subdivision when some preliminary steps have been taken to develop the land. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

Where there is testimony that the highest and best use of the property is as an industrial subdivision, and evidence that other property in the immediate area was subdivided for industrial purposes, the proposed subdivision is not purely conjectual or speculative. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

If the land were adaptable for subdivision purposes, it would seem that the potential income to be derived from sales of the subdivided lots would be highly relevant to a determination of the "market value," especially to the extent that sophisticated investors who make decisions on the basis of income capitalization take part in market transactions. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

Capitalization of income, in contexts other than proposed subdivisions, has been recognized as an accepted method of valuation by a number of jurisdictions. Although capitalization of anticipated proceeds from a proposed subdivision necessarily has a speculative element, it still has a direct impact on the property's market value since it will influence investment decisions and thereby affect supply and demand. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

To the extent that the "just compensation" guarantee in this section comprises a notion of fair market value rather than merely the price the property will bring in an imperfect market, income capitalization must be considered particularly apposite. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

Even in a market where a parcel's price is unaffected by its income potential, income capitalization must be considered to have a bearing on "market value." The danger that market price will not closely reflect market value is enhanced when the property is not currently generating income. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

Income capitalization in general and the anticipated use or development method in particular are standard appraisal practices. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

An expert's testimony which capitalized the anticipated rentals from a proposed recreational subdivision to arrive at an estimate of fair market value was properly admitted. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

As to admission of expert testimony on market value based on the development costs and income capitalization of a potential subdivision, see Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

Rule as to special benefits. — The rule in Alaska is that special benefits to the remainder can only be used to offset severance damages to the remainder. In the event that special benefits exceed severance damages, the landowner is still entitled to receive the full market value of the portion actually taken. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

Just compensation is not conditioned upon receipt of commensurate value by the state. Stewart & Grindle, Inc. v. State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

Personal property used on land not considered in determining compensation. — The general rule is to the effect that personal property which is used on land taken by eminent domain cannot be considered in the determination of the compensation. State v. Ness, Sup. Ct. Op. No. 977 (File No. 1914), 516 P.2d 1212 (1973).

The majority rule excludes property tax assessments from evidence in condemnation cases on the rationale that such an assessment is res inter alios acta, notoriously unreliable as a criteria of true value or the opinion of persons not called as witnesses and subject to cross-examination. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

It is almost everywhere the law that the value placed upon a parcel of land for the purposes of taxation by the assessors of the town in which it is situated is no evidence of its value for other than tax purposes. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

AS 29.53.080 does not furnish the basis for the admissibility of tax assessments as evidence in condemnation proceedings. Given the limited purpose of the act, there is no indication that the legislature intended to make tax assessments prima facie evidence of value in condemnation proceedings. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

In view of the special purposes for which tax assessments are made, the fact that there is little likelihood that an owner would contest an under-assessment or an assessment which did not reflect the property's full value, the potential unreliability of such assessments due to the varied qualifications of assessors, and the fact that such assessments standing alone embody the opinions of persons not called as witnesses and not subject to cross-examination, the admission of property tax assessments as evidence of fair market value in condemnation actions is prohibited. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

Payment of interest may be necessary component of just compensation. — The payment of interest is, in appropriate circumstances, a necessary component of constitutionally guaranteed "just compensation." Stewart & Grindle, Inc. v. State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

Before interest can accrue, there must be a "taking." Stewart & Grindle, Inc. v. State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

Owner is entitled to interest from date of taking to date of payment. — This section necessitates that a property owner be compensated for delays incurred between the dates of the government's taking of property and making payment. If an award were paid immediately upon the taking of the land by the state, no damages to the property owner would ensue. But where, due to the necessity of legal proceedings to ascertain fair market value of property, delays ensue, the property owner is entitled to an adequate sum to reimburse him for the loss of use of the money during the period of such delay. To hold otherwise would constitute a taking of the property without just compensation. Therefore, it is well established that the owner of property is entitled to interest from the date of taking to the date of payment. Russian Orthodox Greek Catholic Church of North America v. Alaska State Hous. Auth., Sup. Ct. Op. No. 809 (File No. 1600), 498 P.2d 737 (1972).

Since compensation for delays required. — The 5th amendment to the United States Constitution and this section require that a property owner be compensated for delays incurred between the dates of the government's taking of property and making payment. Stewart & Grindle, Inc. v. State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

If an award were paid immediately upon the taking of the land by the state, no damages to the property owner would ensue. But where, due to the necessity of legal proceedings to ascertain fair market value of property, delays ensue, the property owner is entitled to an adequate sum to reimburse him for the loss of use of the money during the period of such delay. To hold otherwise would constitute a taking of the property without just compensation. Stewart & Grindle, Inc. v. State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

Interest from date owner loses economic advantages but not liabilities. — If as a matter of constitutional law the property owner is entitled to interest from the moment the state takes legal possession, he should, a fortiori, receive interest where he has been deprived of all the economic advantages of legal ownership but is relieved of none of the liabilities. Stewart & Grindle, Inc. v. State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

Although no statute so provides. — There is no statutory provision for payment of interest from the date a condemnation action is instituted where the property owner remains in possession, and it has long been recognized that unless interest is specifically authorized by legislative enactment, it may not ordinarily be assessed against the state in any action. Stewart & Grindle, Inc. v. State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

Compensation to include expenses necessarily incurred. — Civil R. 72(k)(4), when construed in the framework of the "just compensation" clauses of the United States and Alaska constitutions, entitles the property owner to be made whole for expenses necessarily incurred in connection with the condemnation of his property. Stewart & Grindle, Inc. v. State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

This section and the 5th amendment entitle the property owner to be made whole for expenses necessarily incurred in connection with the condemnation of his property. City of Anchorage v. Scavenius, Sup. Ct. Op. No. 1183 (File Nos. 2214, 2222), 539 P.2d 1169 (1975).

Without such a rule, the state forces a property owner to pay a greater portion of the costs of a public project than any other taxpayer must pay by afflicting him with unavoidable expenses of condemnation. Placing such a burden on the property owner is no more just than assessing a levy against him but no others. City of Anchorage v. Scavenius, Sup. Ct. Op. No. 1183 (File Nos. 2214, 2222), 539 P.2d 1169 (1975).

Construction of holding in Stewart & Grindle, Inc. v. State. — The holding in Stewart & Grindle, Inc. v. State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974), that Civil R. 72(k)(4) when construed in the framework of the "just compensation" clauses of the United States and Alaska constitutions entitles the property owner to be made whole for expenses necessarily incurred in connection with the condemnation of his property, does not mean that the state must become the guarantor of costs incurred in advancing every possible legal theory an owner may have in an eminent domain proceeding. State, Dep't of Hwys v. Salzwedel, Sup. Ct. Op. No. 1861 (File No. 3976), 596 P.2d 17 (1979).

Any rule which purports to shift the costs of the initial determination of the compensation award upon the owner would be unconstitutional. City of Anchorage v. Scavenius, Sup. Ct. Op. No. 1183 (File Nos. 2214, 2222), 539 P.2d 1169 (1975).

Appraisers' and attorney's fees held "necessarily" incurred. Stewart & Grindle, Inc. v. State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

Where the property to be taken has a readily ascertainable market value, or is worth too little to warrant a professional appraisal, an appraiser's fee could not be said to be "necessary," and the property owner would not be entitled to compensation for such an expense. Stewart & Grindle, Inc. v. State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

Where the property to be taken has a readily ascertainable market value, or is worth too little to warrant a professional appraisal, an appraiser's fee could not be said to be "necessary," and the property owner would not be entitled to compensation for such an expense. Stewart & Grindle, Inc. v. State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

Where the property has a readily ascertainable market value and the state has offered at least that amount, any attorney's fees subsequently incurred would not be necessary in order to obtain just compensation, and would accordingly be disallowed. Stewart & Grindle, Inc. v.

State, Sup. Ct. Op. No. 1052 (File Nos. 1941, 1982, 1986), 524 P.2d 1242 (1974).

No award of expenses in situations not specified in Civ. R. 72(k). — In the absence of an amendment, the supreme court is not justified in awarding costs and attorney's fees in situations not specified in Civ. R. 72(k), which specifies when costs and attorney's fees incurred by the property owner are to be assessed against the condemnor. City of Anchorage v. Scavenius, Sup. Ct. Op. No. 1183 (File Nos. 2214, 2222), 539 P.2d 1169 (1975).

Award of fees incurred in unsuccessfully seeking compensation for the expectancy of renewal of a lease was error since the expenses in developing this claim were not "necessarily incurred" within the meaning of Civ. R. 72(k)(4). State, Dep't of Hwys. v. Salzwedel, Sup. Ct. Op. No. 1861 (File No. 3976), 596 P.2d 17 (1979).

Where property owner unsuccessfully appeals master's award. — A condemnor is not entitled to an award of costs and attorney's fees when the property owner has unsuccessfully appealed a master's award. City of Anchorage v. Scavenius, Sup. Ct. Op. No. 1183 (File Nos. 2214, 2222), 539 P.2d 1169 (1975).

Just compensation within range of testimony precludes new trial. — The trial court did not commit an abuse of discretion in denying the state's motion for new trial, where the jury's determination of just compensation was within the range of the testimony. State v. 45,621 square feet of land, Sup. Ct. Op. No. 641 (File No. 1115), 475 P.2d 553 (1970).

Jury's award of $0.00 as just compensation to a property owner for the taking of an easement was not patently inadequate or violative of constitutional provisions pertaining to eminent domain. Scavenius v. City of Anchorage, Sup. Ct. Op. No. 1182 (File No. 2193), 539 P.2d 1161 (1975).

The taking of an easement does constitute an appropriation of the owner's property regardless of its minuscule effect. But where the property owner failed to object to instructions expressly permitting the entry of an award of no compensation and the difference between an award of $0.00 compensation and a nominal sum to which the property owner would have been entitled is de minimus, the failure to award compensation per se did not require reversal. Scavenius v. City of Anchorage, Sup. Ct. Op. No. 1182 (File No. 2193), 539 P.2d 1161 (1975).

Section 19. Right to Bear Arms. A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

Section 20. Quartering Soldiers. No member of the armed forces shall in time of peace be quartered in any house without the consent of the owner or occupant, or in time of war except as prescribed by law. The military shall be in strict subordination to the civil power.

Section 21. Construction. The enumeration of rights in this constitution shall not impair or deny others retained by the people.

Right of self-representation has been so retained by the people. — See McCracken v. State, Sup. Ct. Op. No. 986 (File No. 1791), 518 P.2d 85 (1974).

A prisoner has a right to represent himself in post-conviction relief proceedings. McCracken v. State, Sup. Ct. Op. No. 986 (File No. 1791), 518 P.2d 85 (1974).

The right to counsel should not be used to bar self-representation. McCracken v. State, Sup. Ct. Op. No. 986 (File No. 1791), 518 P.2d 85 (1974).

The right to self-representation is not absolute. McCracken v. State, Sup. Ct. Op. No. 986 (File No. 1791), 518 P.2d 85 (1974).

Qualifications on right of self-representation in post-conviction proceedings. — See McCracken v. State, Sup. Ct. Op. No. 986 (File No. 1791), 518 P.2d 85 (1974).

Criminal R. 39(b) construed in light of this section. — See McCracken v. State, Sup. Ct. Op. No. 986 (File No. 1791), 518 P.2d 85 (1974).

Rule 72. Eminent Domain.

(a) **Applicability of Other Rules.** The procedure for the condemnation of property under the power of eminent domain shall be governed by these rules, except as otherwise provided in this rule.

(b) **Joinder of Properties.** The plaintiff may join in the same action one or more separate pieces of property, whether in the same or different ownership and whether or not sought for the same use.

(c) **Complaint.**

(1) *Caption.* The complaint shall contain a caption as provided in Rule 10(a), except that the plaintiff shall name as defendants the property, designated generally by kind, quantity, and location, and at least one of the owners of some part of or interest in the property.

(2) *Contents.* The complaint shall contain a short and plain statement of the authority and necessity for the taking, the use for which the property is to be taken, a description of the property sufficient for its identification accompanied by a map or plat thereof, the interests to be acquired, and as to each separate piece of property a designation of the defendants who have been joined as owners thereof or of some interest therein. If an easement or right-of-way is sought to be condemned, the complaint and the attached map or plat must show the location, route and termini.

Upon the commencement of the action, the plaintiff need join as defendants only the persons having or claiming an interest in the property whose names are then known, but prior to any hearing involving the compensation to be paid for a piece of property, the plaintiff shall add as defendants all persons having or claiming an interest in that property whose names can be ascertained by a reasonably diligent search of the records, considering the character and value of the property involved and the interests to be acquired, and also those whose names have otherwise been learned. All others may be made defendants under the designation "Unknown Owners".

Process shall be served as provided in subdivision (d) of

this rule upon all defendants, whether named as defendants at the time of the commencement of the action or subsequently added, and the defendant may answer as provided in subdivision (e) of this rule. The court meanwhile may order such distribution of a deposit as the facts warrant.

(3) *Filing.* In addition to filing the complaint with the court, the plaintiff shall furnish to the clerk at least one copy thereof for the use of the defendants and additional copies at the request of the clerk or of a defendant.

(d) **Process.**

(1) *Notice—Delivery.* Upon the filing of the complaint the plaintiff shall forthwith deliver to the clerk joint or several notices directed to the defendants named or designated in the complaint. Additional notices directed to defendants subsequently added shall be so delivered. The delivery of the notice and its service have the same effect as the delivery and service of the summons under Rule 4.

(2) *Form.* Each notice shall state the court, the title of the action, the name of the defendant to whom it is directed, that the action is to condemn property, a description of his property sufficient for its identification, the interest to be taken, the authority and necessity for the taking, and the use for which the property is to be taken. The notice must show the location, route and termini of any easement or right-of-way sought to be condemned.

The notice shall also state that the defendant may serve upon the plaintiff's attorney an answer within twenty (20) days after service of the notice, that a failure to serve an answer constitutes a consent to the taking and to the authority of the court to proceed to hear the action and to fix the compensation, and that at a designated time and place the court will conduct a hearing to determine the authority and necessity for the taking.

The notice shall further state that the defendant, without filing an answer, may serve on plaintiff's attorney a notice of appearance designating the property in which he claims to be interested; that thereafter he will receive notice of all proceedings affecting it; that regardless of whether the defendant ap-

pears or answers, he may present evidence as to the amount of compensation to be paid for his property at the hearing or trial of the issue of just compensation; that regardless of whether he appears or answers he may share in the distribution of the award; that if neither an appearance nor an answer is filed the court will proceed to hear the action and to fix the compensation without further notice; and that if neither an appearance nor an answer is filed before ten (10) days after the jury's verdict is returned or the master's report is filed, judgment by default will be taken against the defendant for the relief demanded in the complaint.

(3) *Service of Notice.*

[a] *Personal Service.* Personal service of the notice shall be made in accordance with Civil Rule 4.

[b] *Unknown Owners.* Service of the notice upon unknown owners shall be made in accordance with Civil Rule 4(e).

(4) *Return—Amendment.* Proof of service of the notice shall be made, and amendment of the notice or proof of its service allowed, in the manner provided for the return and amendment of the summons under Rule 4(f) and (g).

(e) Appearance or Answer.

(1) *No Objection or Defense.* If a defendant has no objection or defense to the taking of his property, he may serve a notice of appearance designating the property in which he claims to be interested. Thereafter he shall receive notice of all proceedings affecting it.

(2) *Objection or Defense—Answer.* If a defendant has any objection or defense to the taking of his property, he shall serve his answer within twenty (20) days after the service of notice upon him. The answer shall identify the property in which he claims to have an interest, state the nature and extent of the interest claimed, and state all his objections and defenses to the taking of his property.

(3) *Declaration of Taking—Objection.* Any motion questioning the validity of a declaration of taking shall be served on or before the time provided in the notice for answering, or within twenty (20) days after the filing of the declaration of

taking, whichever is later. For good cause shown, the court may permit a later filing of the motion.

(4) *Waiver of Defenses and Objections.* A defendant waives all defenses and objections not presented as provided in this subdivision (e), but at the hearing or trial of the issue of just compensation, whether or not he has previously appeared or answered, and even though a default judgment may have been entered against him, he may present evidence as to the amount of compensation to be paid for his property, and he also may share in the distribution of the award if his claim

for compensation is filed before the award is ordered distributed by the court.

(5) *Other Pleading or Motion Precluded.* No other pleading or motion asserting any additional defense or objection shall be allowed.

(f) **Amendment of Pleadings.** Without leave of court, the plaintiff may amend the complaint at any time before the trial of the issue of compensation and as many times as desired, but no amendment shall be made which will result in a dismissal forbidden by subdivison (i) of this rule. The plaintiff need not serve a copy of an amendment, but shall serve notice of the filing, as provided in Rule 5(b), upon any party affected thereby who has appeared and, in the manner provided in subdivison (d) of this rule, upon any party affected thereby who has not appeared. The plaintiff shall furnish to the clerk of the court for the use of the defendants at least one copy of each amendment, and he shall furnish additional copies on the request of the clerk or of a defendant. Within the time allowed by subdivision (e) of this rule a defendant may serve his answer to the amended pleading, in the form and manner and with the same effect as there provided.

(g) **Substitution of Parties.** If a defendant dies or becomes incompetent or transfers his interest after his joinder, the court may order substitution of the proper party upon motion and notice of hearing. If the motion and notice of hearing are to be served upon a person not already a party, service shall be made as provided in subdivision (d) (3) of this rule.

(h) **Hearing and Trial.**

(1) *Procedure.* The hearing of the allegations and evidence of persons interested, whether before the court, jury, or a master, shall be conducted in the manner prescribed by these rules.

(2) *Hearing Before Master.* A master appointed by the court to ascertain the amount to be paid by the plaintiff to each owner or other person interested in the property shall report to the court pursuant to Rule 53(d) (1). If all parties object to the appointment of a master, they may have a trial by jury or, if the

jury is waived by all parties to the action, a trial without a jury, by filing a demand for it within the time allowed for answer or within the additional time which the court may set.

(3) *Notice of Report.* Upon the filing of a report by the master, the clerk shall forthwith mail notice of the filing to all parties who have appeared or answered.

(4) *Appeal and Trial De Novo.* The plaintiff may appeal within ten (10) days after being served with notice of the filing of the master's report. Any defendant who has appeared or answered before the filing of a master's report may appeal within fifteen (15) days after being served with notice of the filing of the master's report. Any other interested person desiring to appeal from a master's report must take his appeal within fifteen (15) days after the filing of such report.

(5) *Notice of Appeal.* A party or other interested person may appeal from the master's report by filing with the clerk a notice of appeal in duplicate, with sufficient additional copies for all parties who have appeared or answered. The notice of appeal shall contain the following:

[a] The title of the action.

[b] The names of the parties taking the appeal.

[c] The master's report or part thereof appealed from and the date of its filing.

[d] The name of the court to which the appeal is taken.

[e] A concise statement of the grounds of appeal.

Notification of the filing of the notice shall be given by the clerk by mailing copies thereof to all parties who have appeared or answered other than the party or parties taking the appeal, but his failure to do so does not affect the validity of the appeal. The notification to a party shall be given by mailing a copy of the notice of appeal to his attorney of record, or if the party is not represented by an attorney, then to the party at his last known address.

(i) **Dismissal of Action.**

(1) *As of Right.* If no hearing has begun to determine the compensation to be paid for a piece of property and the plaintiff has not acquired the title or a lesser interest in or taken possession, the plaintiff may dismiss the action as to that

property, without an order of the court, by filing a notice of dismissal setting forth a brief description of the property as to which the action is dismissed.

(2) *By Stipulation.* Before the entry of any judgment vesting the plaintiff with the title or a lesser interest in or possession of property, the action may be dismissed in whole or in part, without an order of the court, as to [illegible] property by filing a stipulation of dismissal by the plaintiff and the defendant affected thereby; and, if the parties so stipulate, the court may vacate any judgment that has been entered.

(3) *By Order of the Court.* At any time before compensation for a piece of property has been determined and paid and after motion and hearing, the court may dismiss the action as to that property, except that it shall not dismiss the action as to any part of the property of which the plaintiff has taken possession or in which the plaintiff has taken title or a lesser interest, but shall award just compensation for the possession, title or lesser interest so taken. The court at any time may drop a defendant unnecessarily or improperly joined.

(4) *Effect.* Except as otherwise provided in the notice, or stipulation of dismissal, or order of the court, any dismissal is without prejudice.

(j) **Deposit and Its Distribution.** The plaintiff shall deposit with the court any money required by law as a condition to the exercise of the power of eminent domain, and although not so required, may make such deposit. In such case the court and attorneys shall expedite the proceedings for the distribution of the money so deposited and for the ascertainment and payment of just compensation. If the compensation finally awarded to any defendant exceeds the amount which has been paid to him on distribution of the deposit, the court shall enter judgment against the plaintiff and in favor of that defendant for the deficiency. If the compensation finally awarded to any defendant is less than the amount which has been paid to him, the court shall enter judgment against him and in favor of the plaintiff for the over-payment.

(k) **Costs.** Costs and attorney's fees incurred by the defendant shall not be assessed against the plaintiff, unless:

(1) the taking of the property is denied; or

(2) the plaintiff appeals from the allowance of the master and the defendant does not appeal; or

(3) the award of the court was at least ten (10) percent larger than the amount deposited by the condemning authority or the allowance of the master from which an appeal was taken by the defendant; or

(4) the action was dismissed under the provisions of paragraph (i) of this rule; or

(5) allowance of costs and attorney's fees appears necessary to achieve a just and adequate compensation of the owner.

Attorney's fees allowed under this paragraph shall be commensurate with the time committed by the attorney to the case throughout the entire proceedings. (Amended by Supreme Court Order 414 effective August 1, 1980; and by Supreme Court Order 465 effective June 1, 1981)

CROSS REFERENCES: AS 09.55.240—AS 09.55.460; Civ. Form 148
(c) **CROSS REFERENCES:** AS 09.55.240—AS 09.55.270; Civ. Form 145
(d)(2) **CROSS REFERENCE:** Civ. Form 146
(d)(3) **CROSS REFERENCE:** Civ. Form 147
(e)(3) **CROSS REFERENCES:** AS 09.55.420—AS 09.55.460; Civ. Form 149
(e)(4) **CROSS REFERENCE:** AS 09.55.310
(h)(4) **CROSS REFERENCE:** AA 09.55.310

and the deposit of the estimated compensation. Russian Orthodox Greek Catholic Church of N. Am. v. Alaska State Hous. Auth., Sup. Ct. Op. No. 809 (File No. 1600), 498 P.2d 737 (1972).

It is the objection which calls for the hearing. A motion for hearing with supporting affidavits is not required. State, Dep't of Transp. & Pub. Facilities v. 0.644 Acres, Sup. Ct. Op. No. 2118 (File No. 4861), 613 P.2d 829 (1980).

As to showings necessary where owner contests validity of taking, see Arco Pipeline Co. v. 3.60 Acres, More or Less, Sup. Ct. Op. No. 1177 (File No. 2419), 539 P.2d 64 (1975).

For distinction between proceedings in condemnation under declaration of taking and those under complaint seeking condemnation and order for possession, see Arco Pipeline Co. v. 3.60 Acres, More or Less, Sup. Ct. Op. No. 1177 (File No. 2419), 539 P.2d 64 (1975).

Collateral references. — Condemnor's acquisition of, or right to, minerals under land taken in eminent domain. 36 ALR2d 1424.

Charging landowner with rent or use value of land where he remains in possession after condemnation. 20 ALR3d 1164.

Sec. 09.55.460. Effect of appeal. (a) No appeal or a bond or undertaking given operates to prevent or delay the vesting of title to real property or the right to possession of it.

(b) The plaintiff may not be divested of a title or possession acquired except where the court finds that the property was not taken by necessity for a public use or purpose in a manner compatible with the greatest public good and the least private injury. In the event of that finding, the court shall enter the judgment necessary to (1) compensate the persons entitled to it for the period during which the property was in the possession of the plaintiff, (2) recover for the plaintiff any award paid to any person, and (3) order the plaintiff to restore the property to the condition in which it existed at the time of the filing of the declaration of taking unless such restoration is impossible, in which case the court shall award damages to the proper persons as compensation for any diminution in the value of the property caused by the plaintiff's wrongful possession. (§ 13.23 ch 101 SLA 1962; am § 3 ch 149 SLA 1976)

Legislative history reports. — For report on ch. 149, SLA 1976 (HCSSB 546), see 1976 House Journal, p. 945.

NOTES TO DECISIONS

Presumption that taking is reasonably requisite to realization of public use. — Once an authorized public use for the taking is established by the condemnor, and statutory and procedural requirements are otherwise satisfied, that the particular taking is reasonably requisite to the realization of that use shall be presumed. Arco Pipeline Co. v. 3.60 Acres, More or Less, Sup. Ct. Op. No. 1177 (File No. 2419), 539 P.2d 64 (1975).

The question of necessity under a declaration of taking is not one for initial judicial consideration as in the case of other condemnation proceedings. Arco Pipeline Co. v. 3.60 Acres, More or Less, Sup. Ct. Op. No. 1177 (File No. 2419), 539 P.2d 64 (1975).

The concept of judicial review embodied in Alaska's general eminent domain stat-

AS 09.55.460

utes is inconsistent with, and inappropriate to, proceedings under a declaration of taking. Arco Pipeline Co. v. 3.60 Acres, More or Less, Sup. Ct. Op. No. 1177 (File No. 2419), 539 P.2d 64 (1975).

Absent clear showing of fraud, etc. — In proceedings in eminent domain by way of a declaration of taking under AS 09.55.420 — 09.55.450, the court is without authority, either by virtue of the express mandate of subsection (b) of this section or by implication from the legislative history and policy evidenced in AS 09.55.440, to review the question of the necessity of a particular taking absent a clear showing of fraud, bad faith, arbitrariness or an abuse of discretion in exercise of the power of condemnation by the condemning authority. Arco Pipeline Co. v. 3.60 Acres, More or Less, Sup. Ct. Op. No. 1177 (File No. 2419), 539 P.2d 64 (1975).

Notwithstanding such provisions as AS 09.55.270(2), judicial inquiry into such necessity or the condemnor's determinations with respect thereto is not appropriate unless and until the condemnee has presented clear and convincing evidence that the condemnor has acted in bad faith or so capriciously and arbitrarily as to indicate the absence of any reasonable determining principle. Arco Pipeline Co. v. 3.60 Acres, More or Less, Sup. Ct. Op. No. 1177 (File No. 2419), 539 P.2d 64 (1975).

Only specific allegations of fraud, bad faith or some gross abuse of discretion in locating the pipeline could raise issues sufficient to permit judicial review of the necessity of the taking. Arco Pipeline Co. v. 3.60 Acres, More or Less, Sup. Ct. Op. No. 1177 (File No. 2419), 539 P.2d 64 (1975).

Failure of condemnor to make showing was not abuse of discretion. — Where it is clear that the use intended is public and statutorily authorized, and condemnor has presented unrebutted evidence to the effect that the design and construction criteria for the pipeline are most feasibly satisfied by the route across the property of the owner, it cannot be said that condemnor is under any duty to initially submit evidence that it has considered such alternate routing; nor can the failure to make such showing under the circumstances justify a finding of arbitrariness or an abuse of discretion. Arco Pipeline Co. v. 3.60 Acres, More or Less, Sup. Ct. Op. No. 1177 (File No. 2419), 539 P.2d 64 (1975).

No implied waiver. — Subsection (b) of this section, which provides in part, that when the court finds that the property was not taken by necessity for a public use or purpose in a manner compatible with the greatest public good and least private injury; the court shall enter the judgment necessary to "recover for the plaintiff any award paid to any person," militates against a finding of implied waiver from the respondents' withdrawal of money deposited in the registry of the court by the state in conjunction with its filing of a declaration of taking against respondents' property. State, Dep't of Transp. & Pub. Facilities v. 0.644 Acres, Sup. Ct. Op. No. 2118 (File No. 4861), 613 P.2d 829 (1980).

Injury should be minimized. — This section, which mandates in subsection (b) that "private injury" be considered with reference to the particular properties involved, contemplates that the injury suffered by each individual should be minimized to the extent that it is reasonably possible to do so without impairing the integrity and function of the project and without adding unreasonable costs to the project. State, Dep't of Transp. & Pub. Facilities v. 0.644 Acres, Sup. Ct. Op. No. 2118 (File No. 4861), 613 P.2d 829 (1980).

State's failure to consider several important, relevant factors made it impossible to rationally determine whether intended taking was compatible with the greatest public good and the least private injury, and rendered its action arbitrary, thus taking of subject land could not be upheld. State, Dep't of Transp. & Pub. Facilities v. 2.072 Acres, More or Less, Sup. Ct. Op. No. 2575 (File No. 6159), 652 P.2d 465 (1982).

Collateral references. — Appeal relating to amount of condemnation award, 50 ALR2d 1386.

Reviewability, on appeal from final judgment in eminent domain proceeding, of interlocutory order, as affected by fact that order was separately appealable, 79 ALR2d 1400.

Running of interest on judgment where both parties appeal, 11 ALR4th 1099.

State v. Alaska Land Title Ass'n, Sup. Ct Op. No. 2681 (File Nos. 5407, 5408), P.2d (1983).

48 U.S.C. § 321d does not apply to patents issued under the Small Tract Act of 1938, 43 U.S.C. §§ 682a-682(e) (now repealed). State v. Alaska Land Title Ass'n, Sup. Ct. Op. No. 2681 (File Nos. 5407, 5408), P.2d (1983).

The Right-of-Way Act of 1966 does not apply to rights-of-way created by a public land order issued pursuant to an executive order under which the President of the United States delegated his statutory authority to the Secretary of the Interior authorizing withdrawal of public lands in Alaska for specified public purposes. State v. Alaska Land Title Ass'n, Sup. Ct. Op. No. 2681 (File Nos. 5407, 5408), P.2d (1983).

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

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

(2) the taking is necessary to the use;

(3) if already appropriated to a public use, the public use to which it is to be applied is a more necessary public use. (§ 13.04 ch 101 SLA 1962)

Cross references. — For contents of complaint, see Civ. R. 72(c).

NOTES TO DECISIONS

Editor's note. — All notes from Montana decisions appearing under this section are constructions of the Montana statute from which this section derives.

Judicial review of necessity. — Alaska is among the minority of jurisdictions which statutorily calls for judicial inquiry into the question of necessity in eminent domain proceedings. Arco Pipeline Co. v. 3.60 Acres, More or Less, Sup. Ct. Op. No. 1177 (File No. 2419), 539 P.2d 64 (1975).

Such review is inappropriate to proceedings under declaration of taking. — The concept of judicial review embodied in Alaska's general eminent domain statutes is inconsistent with, and inappropriate to, proceedings under a declaration of taking. Arco Pipeline Co. v. 3.60 Acres, More or Less, Sup. Ct. Op. No. 1177 (File No. 2419), 539 P.2d 64 (1975).

The question of necessity under a declaration of taking is not one for initial judicial consideration as in the case of other condemnation proceedings. Arco Pipeline Co. v. 3.60 Acres, More or Less, Sup. Ct. Op. No. 1177 (File No. 2419), 539 P.2d 64 (1975).

For distinction between proceedings in condemnation under a declaration of taking and those under a complaint seeking condemnation and an order for possession, see Arco Pipeline Co. v. 3.60 Acres, More or Less, Sup. Ct. Op. No. 1177 (File No. 2419), 539 P.2d 64 (1975).

Pleading must plainly show authority and necessity for taking. — The right of eminent domain can only be exercised in behalf of a public use authorized by law, and in the taking of property necessary to such public use the complaint or petition in such proceedings must show plainly and affirmatively the existence of the statutory authority for the public use, and the necessity of the property for such use. Miocene Ditch Co. v. Lyng, 138 F. 544 (9th Cir. 1905).

An inference is not sufficient in eminent domain proceedings. There must be a clear, positive statement that the property sought to be condemned is necessary for a public use authorized 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).

The complaint should allege both that the use to which the property is to be applied is a use authorized by law and that the taking is necessary to such use. City of Helena v. Harvey, 9 P. 903 (Mont. 1886).

Which 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

AS 09.55.270

necessary "before condemnation." Bridges v. Alaska Hous. Auth., Sup. Ct. Op. No. 1 (File No. 16), 349 P.2d 149 (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).

Taking for use authorized by law is not conclusive that taking is necessary. — By providing that the right to take property for public use is founded upon a use authorized by law and that the use for such purpose is necessary, the law itself recognizes the fact that a mere taking for a use authorized by law is not conclusive that the taking is necessary for such use. City of Helena v. Harvey, 9 P. 903 (Mont. 1886).

The rule of necessity must be determinative of the right to take in each instance. Northern Pac. Ry. v. McAdow, 121 P. 473 (Mont. 1912).

But absolute necessity is not required. — An absolute necessity is not a prerequisite to the exercise of the law of eminent domain. Butte A. & Pac. Ry. v. Montana U. Ry., 41 P. 232 (Mont. 1895).

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., Sup. Ct. Op. No. 1192 (File No. 2504), 540 P.2d 1056 (1975).

Question of necessity is one of fact. — In an action to condemn private property for a public use, the question of necessity is one of fact, to be determined as other questions of fact, in view of all the evidence in the case. State ex rel. Livingston v. District Court, 300 P. 916 (Mont. 1931).

And involves both public and private considerations. — The question of necessity in a given case involves a consideration of facts which relate to the public and also to the private citizen whose property may be injured. State ex rel. Livingston v. District Court, 300 P. 916 (Mont. 1931).

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., Sup. Ct. Op. No. 1192 (File No. 2504), 540 P.2d 1056 (1975).

Evidence should show that the land is reasonably required for the purpose of effecting the object of its condemnation. State ex rel. Livingston v. District Court, 300 P. 916 (Mont. 1931).

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., Sup. Ct. Op. No. 1192 (File No. 2504), 540 P.2d 1056 (1975).

Proof of unnecessary injury. — When an attempt is made to show that the location proposed is unnecessarily injurious, the proof should be clear and convincing; otherwise no location could ever be made. State ex rel. Livingston v. District Court, 300 P. 916 (Mont. 1931).

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., Sup. Ct. Op. No. 1192 (File No. 2504), 540 P.2d 1056 (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., Sup. Ct. Op. No. 1192 (File No. 2504), 540 P.2d 1056 (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., Sup. Ct. Op. No. 1192 (File No. 2504), 540 P.2d 1056 (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).

Convenience and enhanced profits are insufficient to permit appropriation. — That the appropriation of a particular piece of property would promote convenience of operation and enhance the profits of the business of a railroad company is not alone a sufficient reason for permitting it. Northern Pac. Ry. v. McAdow, 121 P. 473 (Mont. 1912).

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

Sec. 09.55.275. Replat approval. No agency of the state or municipality may acquire property located within a municipality exercising the powers conferred by AS 29.33.150 — 29.33.245 which 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)

Sec. 09.55.280. Entry upon land. In all cases where land is required for public use, the state, the public entity, or persons having the authority to condemn, or its agents in charge of the use may enter upon the land and make examination, surveys, and maps and locate the boundaries; but it shall be located in the manner which will be most compatible with the greatest public good and the least private injury, and subject to the provisions of AS 09.55.300. The entry shall constitute no cause of action in favor of the owners of the land except for injuries resulting from negligence, wantonness, or malice. (§ 13.05 ch 101 SLA 1962)