02-1C

#26.16

MEMORANDUM State of Alaska

TO: Shirl Davis
Assistant Review Appraiser
Anchorage

DATE: June 15, 1973

FILE NO: 23-2900

SUBJECT: Damages as a result of diversion of traffic

FROM: Dick Chitty
Right of Way Director
Juneau

Enclosed is a copy of Mr. Thomas P. Blanton's opinion on whether damages by reason of diversion of traffic are compensable. As you will note his opinion is definitely no.

cc: Douglas Foster
Anchorage District

Mike McCrackin
Interior District

Enclosures: As stated

DC/SHW/pc

	DIST. ENGR.	
	PRE-CONST. ENGR.	
	Design	
	Right-of-Way	
	Plan & Program	
	Materials Lab	
	ADMIN. OFFICER	
	Finance	
	Personnel	
	Supply & Serv.	
	CONST. ENGINEER	
	MAINT. ENGINEER	
	Maint. Supervisor	
	Equipment Manager	
	Return Main File	

INTERIOR DISTRICT
JUN 18 10 00 AM 1973
DEPT. OF HIGHWAYS

STATE OF ALASKA
DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
WILLIAM A. EGAN, GOVERNOR
POUCH K–STATE CAPITOL
JUNEAU 99801

To: Dick Chitty, Right of Way Director
Department of Highways

From: Thomas P. Blanton
Assistant Attorney General
Department of Law

Date: June 13, 1973

Re: Damages as a result of diversion of traffic.

You have requested an opinion from this office on the question of whether a property-owner is entitled to compensation for diversion of traffic.

With several exceptions, dealt with in this opinion, it is the general and well established rule that the owner of real property is not entitled to receive compensation for diversion of traffic. In diverting traffic from in front of an owner's property to a new route, there is no evasion of the rights of the owner, nor is there any legal injury to the land remaining. In this situation, access is not disturbed and the buildings and the land about it remain exactly as before the establishment of the new route except the travel past the land is diminished. Citing Nichols on Eminent Domain, sec. 14.244(4). The rationale for this established rule is that the state owes no duty to the owner in regard to sending the public past his door. Highways are built and maintained to meet public necessity and convenience in travel and not for the enhancement of property along the route. Benefits which come and go with the changing currents of public travel are not matters in which any individual has a vested right against a judgment of those public officials whose duty it is to build and maintain these highways. Citing, Supra.

There are recognized exceptions to this basic rule. As set forth in Nichols, distinctions must be drawn between a diversion of traffic and a destruction of access. A vacation of a street which destroys all access to abutting property, in one direction, or putting the property on a cul-de-sac, has been held to constitute an actionable injury.

In the case of State ex rel Merritt v. Linzell, Director of Highways, 168 Ohio 97, 126 N.E. 2nd. 53, (1955) the court indirectly modified the existing majority rule. The court first stated the rule that a land-owner abutting on a highway has no property right in the continuation or maintenance of the flow of traffic past his property, and the diversion

of traffic as a result of an improvement of the highway or the construction of an alternate route is not an impairment of property right to such owner for which damages may be awarded.

The court however, makes the distiction in the case of a partial taking of the land-owner's property. In this situation, the land-owner is entitled to compensation for the land taken and for the damages to the remainder. The court acknowledged that an ordinary, prudent businessman as a willing buyer, contemplating retail commercial use as a highest and best use of the premises, would give consideration to the decreased traffic flow resulting from the change in traffic flow caused from the highway re-routing. The court stated that it would therefore appear at first glance that evidence pertaining to loss of traffic flow would be admissible on the question of damages due the remainder. However, the court stated that other owners along the affected route who had no property taken would of course, not have a right to damages for loss of traffic flow and that the result would be inequitable.

The court then stated as follows:

> "We therefore conclude that the diminution in flow of traffic past a business property by action of the state in relocating a highway is not the taking of a property right and, hence, where some of the land of that business property is taken, it is not a proper element of damage to be considered in arriving at a fair market value of the residue after the taking . . . .
>
> However, traffic flow is, however, still pertinent to the case. In determining the fair market value of the premises prior to the taking, one element that would be pertinent to the determination would be the then existing traffic flow. This would be a positive factor tending to increase the value. Counterbalancing this would be the negative factor of risk assumed by a willing buyer that the state in the exercise of its lawful governmental power might relocate or redirect traffic to alternate through routes. The net result of weighing positive and negative factors would be a part of the valuation process."

Therefore, it was held, that evidence as to the traffic flow as it existed prior to the taking would be pertinent to this extent, and the court allowed the testimony as to such traffic flow to be admitted.

A long line of California Supreme Court opinions follows the majority rule without modification. In the most recent case of People, Department of Public Works vs. Romano, 94 Cal. Rptr. 839, (1971). The court said:

> "The diversion of traffic is not a proper element to be considered in computing damages inasmuch as the land-owner has no property rights in the continuation or maintenance of the flow of traffic past his property. The property-owner has no constitutional right to compensation simply because the streets upon which his property abutts are improved so as to affect the traffic flow on such streets. If loss of business or of value of property results, that is non-compensable. It is simply a risk a property-owner assumes when he lives in modern society and under modern traffic conditions."

The majority ruled that an owner is not entitled to receive any compensation for diversion of traffic holds firm in those cases where there was no actual taking of the owner's property. Any trend toward the rationale set forth in the Ohio case, State ex rel Merritt v. Linzell, seems to be in those cases where a partial taking is involved.

With direct reference to the subject property, parcel 78 of project F-062-4(25), we are faced with a situation of partial taking. If the construction project was a realignment, widening or improvement of the existing Steese Highway, the problem raised by the subject parcel would be more closely aligned with the "Ohio" exception to the majority rule. It should be noted however, that the property taken is considerably removed from the Steese Highway frontage. Clearly if the owner of the Steese Highway frontage and the owner of the frontage on the new highway being constructed were not one and the same person, the case would then clearly be in line with the California cases and there should be no recovery for diversion of traffic by the Steese Highway frontage owner. If the owner of the frontage on the new construction project owned a portion of the Steese Highway frontage and the remainder of the frontage was owned by a second party having no frontage on the new highway project, it would seem inequitable that the first owner could recover for damages to the remainder while the second owner having had none of his property actually taken would have no right to compensation.

In summary, until case law or statutes dictate to the contrary, we should adhere to the majority rule and exclude any consideration of damages to the remainder arising by reason of diversion of traffic.