

The facts that we have been furnished are as follows:

Four-way controlled-access intersections have been designed for "C" Street and 44th Street, and for "C" Street and 75th Street. The proposed construction will result in the "land-locking" of two parcels at each of those intersections, with the result that the damages could equal 100 per cent unless other access becomes available. The only alternate access is across the private land of adjoining owners who, for purposes of this discussion, it must be assumed are unwilling to voluntarily furnish an easement for access purposes.

QUESTION NO. 1:

It is our opinion that a private landowner, whose access to his non-mineral bearing land has been eliminated by construction of a controlled access highway, cannot maintain an action in eminent domain to acquire a private way for access purposes across adjoining lands.

Our Constitution provides that proceedings in eminent domain may be undertaken, inter alia, for private ways of necessity to permit essential access for extraction or utilization of resources. (Alaska Constitution, Art. VIII, Sec. 18). In the instant case there are apparently no resources to be extracted or utilized and the constitutional provision is, therefore, inapplicable,

By statute, it is provided that the right of eminent domain may be exercised to acquire, inter alia, "private roads leading from highways to residences, mines or farms." (AS 09.55.240(a)(6)). The facts provided give no indication that the land in question is farm land or that there are residences located thereon, and state definitely that the land is non-mineral bearing land. Thus, there is no basis for application of the statute.

A state legislature may constitutionally delegate the power of eminent domain to individuals in a proper case. (26 Am. Jur.2d Eminent Domain § 20; 29A C.J.S. Eminent Domain § 27). Here, it could be argued that the constitutional and statutory provisions cited confer upon individuals the power to exercise the right of eminent domain. The Supreme Court of Alaska has never ruled on this particular question and such a construction would appear to be a reasonable one in the event that it ever does. However, even if it is assumed that there has been such a delegation of power to individuals, the power could be properly exercised only in those cases where the facts show that the land includes a residence or mine, etc. As we have seen, there is no factual basis that would authorize the exercise of the power by the individuals in the instant case.

Mr. David S. James
Anchorage, Alaska

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QUESTION NO. 2:

Even if it is assumed that the power to exercise the right of eminent domain exists in the instant case, we can find no authority whereby the State can compel him to do so in order to mitigate damages.

QUESTION NO. 3:

It has been held that a state may properly condemn land to furnish a means of access to and egress from parcels of private property cut off by a limited access highway. (See Mississippi State Highway Commission v. Morgan, 175 So.2d 606 (Miss.); Luke v. Massachusetts Turnpike Authority, 149 N.E.2d 225 (Mass.)).

In the Mississippi case, supra, the Court reasoned (at p. 609) that the acquisition of an easement or right of way for the benefit of parcels of land incidentally cut off from all or some means of access to an existing way and is a mere by-product of laying out the highway which is essential to the accomplishment of that purpose. On that theory the Court held that there was a "public use" and the required "public necessity."

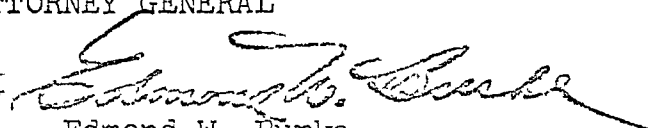
In the Luke case, supra, involving condemnation of an easement over private land to provide access for other land that would be landlocked by construction of an express highway, the Massachusetts court said (at pp. 228 - 229):

If the easement or the private way should be viewed in the abstract, no public purpose would appear. Such an approach, however, would be closing the eyes to reality. The laying out of the turnpike the length of the commonwealth and the acquisition of numerous sites essential to that object are attributes of one huge undertaking. Procuring an easement and creating a right of way for the benefit of parcels of land incidentally deprived of all or some means of access to an existing way are but a by-product of that undertaking.

By virtue of the foregoing it is our opinion that the State can provide, through eminent domain, access roads to landlocked property in order to mitigate damages, regardless of whether such land is mineral bearing, improved or otherwise.

Very truly yours,

D. A. BURR
ATTORNEY GENERAL

By 
Edmond W. Burke
Assistant Attorney General

DAB:EWB:lvh
cc: Dick Chitty, Dept. of Highways
Paul B. Jones, Dept. of Law