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✓ Deputy Commissioner	
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Interior M & O Director	
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S. Central Director	
✓ Harold Cameron R/W	
RETURN	

BILL SHEFFIELD, GOVERNOR

1031 W. FOURTH AVENUE
SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 276-3550

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL

April 8, 1983

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Dept. of Trans. & PF
Insp. Counsel, R.E. Division

Mark K. Johnson, Staff Counsel
House Finance Committee
Alaska State Legislature
House of Representatives
Pouch V
Juneau, Alaska 99811

Dear Mr. Johnson:

Thank you for your letter of March 19, 1983 requesting information about eminent domain problems experienced by DOT/PF and recommendations for possible changes in the Alaska Statutes to alleviate those problems.

Alaska's condemnation laws are contained in AS 09.55.240.460, and comprise the procedure by which state and local governmental agencies may condemn private or public property for a public purpose. As a general proposition, private property may be taken for a public purpose if the property is reasonably necessary for that purpose and the condemning agency has been legislatively authorized to take property for that purpose. The procedural statutes have provided certain safeguards so that the landowner whose property is being taken may challenge the taking. It is in these challenges that most of the problems have occurred.

Prior to 1976 the landowner could challenge the taking on three bases; that the condemning agency lacked the statutory authority to take the property (rare); that the taking was not for a public purpose (rare); or that the taking was not necessary for the purpose for which it was made (most frequent). These challenges were made at the initial stages of the condemnation and resolved at an authority and necessity (A&N) hearing. At the A&N hearing the landowner bore the burden of showing, by clear and convincing evidence, that the taking was faulty in one of the three areas set out above. If the taking was made using a declaration of taking (by procedures set out in AS 09.55.420-460) a presumption of necessity attached to the taking and could only be overturned by a showing that the condemning agency had acted in an arbitrary or capricious manner in the taking. These statutes were extensively discussed and upheld in Arco v.

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Stewart, 539 P.2d 64 (Ak 1975) and Fairbanks v. Metro, 540 P.2d 1056 (Ak 1975).

Following the Arco and Metro decisions the legislature modified the declaration of taking statutes by adding subsection (7) to AS 09.55.430 and by adding to subsection (b) to AS 09.55.460. These new provisions provided that the declaration state the taking was made "in a manner which is most compatible with the greatest public good and the least private injury," and that if the court found the project was not so located, the property would be returned to the original landowner. These are called the G&L factors.

These amendments have been the subject of two supreme court opinions. In State v. Cooper, 613 P.2d 829 (Alaska 1980) the department made a taking of property adjacent to the Homer airport in order to provide an access road and upgrade apron parking. The evidence was that it did not consider the impact of a fence along the access road on the operation of Cooper's heliport. The court found that the project was not located in compliance with the statutory requirements and the state's title was overturned.

In State v. Hodges, 652 P.2d 465 (Alaska 1982) the department made a taking of a strip of property from Hodges in order to widen and straighten the Funny River Road near Soldotna. The trial court found that the taking was not necessary for the project and the Supreme Court upheld, stating that because the department had not supplied the trial court with specific estimates of the cost of a number of alternatives, the trial court was without sufficient information to determine if the taking was reasonable.

These challenges based upon the greatest public good and least private injury (G&L) equation have resulted in a substantial amount of uncertainty in the project planning and bidding process. The department cannot condemn property until after the negotiations to acquire the property have been fruitless. Condemnation normally occurs just prior to the planned construction. If the landowner is successful in his challenge then the project must be delayed, modified, or abandoned. If abandoned, all prior efforts including land acquisition are wasted expenses of time and money. The department is further plagued by the problem that if it does not study every conceivable alternative the taking may be set aside and the project stopped. In this regard, I invite your attention to Justice Rabinowitz's dissent in the Hodges case.

Justice Rabinowitz made these points:

1. Too high a burden has been placed upon the state to establish the validity of a condemnation.
2. A condemnation can be attacked by simply pointing out some alternative which the state may not have examined in detail without any burden on the condemnee to present evidence that such alternative is feasible.
3. The state will be required to make elaborate studies of all possible alternatives, good, bad or indifferent which will only add to the cost and delay of projects.

The delay impact on projects is quite real.

A G&L attack can be a great tool by litigants who wish to stop a project. Since each landowner can raise a separate challenge, actual takings may be delayed by successive challenges until the construction season is past. Even if the challenges are meritless, this poses a risk as scheduling an immediate hearing is difficult. On federally funded projects, filing and condemnation cannot proceed until negotiations are concluded--thus actions will be filed at different times.

In the Cooper case the department deleted a part of the airport apron expansion and the whole of the access road. In Hodges the project was shelved although it now appears that subsequent negotiations with Mr. Hodges will allow its reinstatement. Other condemnation actions in the Central Region of DOT/PF have had the G&L issue raised but have not resulted in appellate court decisions, discussion of a few of these will illustrate the growing problem.

Probably the greatest current financial impact is an A&N protest on Phase I of the A-C Couplet. The May 18, 1983, hearing already will delay the beginning of construction. If the A&N objection is upheld, the $24 million project will be delayed, at least in part, a full construction season. The protest has also delayed the filing of condemnation action in other parcels in fear we will take the land and then not be able to use it if the project must be redesigned.

On the West Hill Road project near Homer, the Cason parcel was deleted which required that a portion of the project be re-engineered. On the Kodiak-Near Island Bridge project, the issue was raised on the only two parcels taken by condemnation and in one instance the taking was modified; in the other the landowner has been using the possible delay of the project to his advantage in dealing with the City of Kodiak on adjoining property.

On the Bragaw Street project in Anchorage a taking was deleted to avoid a G&L problem as it was determined less expensive and time-consuming than the hearing process would have been, even though the state likely would have prevailed. In that case, even though the taking was deleted, the landowner is attempting to stop the project and was successful in convincing the trial court to hear the G&L question even though he waited 6 weeks after the time to protest had expired and the State had issued a contract in the interim.

In the $10 million land acquisition for the state office complex in Anchorage, a lessee has filed a G&L challenge. The landowner has not challenged the taking and it appears the tenant's action would be resolved if he were paid more money.

The state did prevail on a G&L challenge on the Minnesota Drive Extension project in Anchorage. However, that project, partially funded by federal funds was extensively studied with environmental and design studies and hearings on all the alternatives. This level of study is not currently done on state-funded projects and to require it to meet G&L challenges will add significantly to the cost of those projects.

The foregoing list of cases is not exhaustive of the cases in which the G&L issue has been raised. However, it is illustrative of the increasing frequency with which it is being raised either in an attempt to stop the take, to stop the project as a whole by delay or otherwise, or to gain some other advantage such as compensation beyond fair market value in exchange for not delaying the project. I believe it can reasonably be anticipated that the issue and the resulting challenges to projects will occur at a greater rate in the future.

It is our recommendation that the G&L statutes which were added by the 1976 amendment should be repealed. Time should be taken to study an alternative to fill the same functions. One possible alternative is that an analysis or study be made a required part of the planning function. In this manner the G&L would be a tool much like an environmental impact statement (EIS) to determine the need for the project and the consequences (good & bad) on abutting landowners. If the statutes are modified, the G&L substitute should state that once a G&L report is published, abutting property owners are the only persons authorized to challenge its findings, and that challenges must occur within 30 days of receipt of the G&L study or be waived. Third any such challenge should be made to the Commissioner of DOT/PF or the head of the condemning entity who may then accept the challenge and reopen the G&L report, amend the report to include the comments, hold a hearing to determine the basis of the challenge,

or reject the challenge to the report. The landowner would then be required to file an administrative appeal in the Superior Court in the judicial district where the property is located to determine if there is a reasonable basis for the agency decision.

Fourth G&L should be defined by statute to state specifically what factors should be considered by DOT/PF in determining G&L. The definition should be detailed and should avoid terms like socio- economic, cultural, personal, or any other amorphous term.

It is our hope that by providing this alternative the true intent of G&L statutes can be fairly met and landowners given an opportunity to challenge the G&L determination if they are not satisfied with the G&L report. More importantly, this alternative would allow projects to proceed in a predictable manner permitting the legislature, the condemning authority, and the public to know that once a project has been approved for construction, and funding, the project will, in fact, be built.

There are other areas of the eminent domain code which should be clarified which cannot be addressed in this letter. It is my hope that those areas could be addressed at a later date in order that Alaska could have a modern, comprehensive code which would allow condemnation actions to be resolved in a simple and expeditious manner.

The power of condemnation is an inherent power of government. The only constitutional restraint is the obligation to pay just compensation which has historically been defined as fair market value. Too often the present status of the condemnation statutes in Alaska are used to obtain more than just compensation. In other words "if the public wants the project, here is my price." And too often this price is way beyond any reasonable relationship to fair market value.

If you should have any questions, please call me.

Sincerely,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By: Ross A. Kopperud
Ross A. Kopperud
Assistant Attorney General

cc: John Scribner