IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

STATE OF ALASKA,

Plaintiff,

v.

JAMES L. WHISENHANT; ELIZABETH J. WHISENHANT; the heirs of T.N. GORE, JR.; the heirs of ROGER A. BOYD; CAROL D. BOYD; GOLDEN VALLEY ELECTRIC ASSOCIATION, INC.; COLLEGE UTILITIES CORPORATION; MUNICIPAL UTILITIES SYSTEM; FAIRBANKS NORTH STAR BOROUGH; 7,034 square feet, more or less, and also all other persons or parties unknown claiming right, title, estate, lien, or interest in the real estate described in the complaint in this action,

Defendants.

Case No. 4FA-90-2148 Civil

MEMORANDUM DECISION

James and Elizabeth Whisenhant ("Whisenhants") move to set aside the declaration of taking in this condemnation action. The Department of Transportation ("DOT") cross moves for an order vesting title in the State.

Facts

The Whisenhants live on a street commonly referred to as Wolf Run, which is in the University to Peger section of the Johansen Expressway Project. The Whisenhant property contains a house, an unattached garage and a guest cabin. After the portion of land is taken as part of the condemnation, the unattached garage sitting on the remainder will be in violation of the

Fairbanks North Star Borough's ("Borough") twenty foot setback requirement.

DOT offered to move the unattached garage, so that it would comply with the Borough's setback requirement. The Whisenhants rejected DOT's offer, because, in their opinion, it would move their garage too close to their guest cabin. DOT responded that it was also willing to move the guest cabin. The Whisenhants rejected this offer as well.

On May 9, 1990, the Platting Board granted preliminary replat approval for the University to Peger section of the Johansen Expressway Project. The Platting Board attached conditions to the preliminary approval. One of the conditions required DOT to submit a final plat for approval.

The Borough requires approval of variances before a final plat can be submitted. DOT has offered to apply for a setback variance for the Whisenhant property. However, Borough regulations require the owner of the property to a sign the variance application. The Whisenhants refuse to sign a variance application.

The Whisenhants appealed the Platting Board's preliminary replat approval to the Planning Commission. On June 19, 1990, the Planning Commission upheld the decision of the Platting Board. The Whisenhants did not appeal this administrative determination.

DOT subsequently revised its "take" of the Whisenhant property in order to reduce the need for a variance. The change

DOT proposed actually reduced the size of the take. The Borough informed DOT that the revised take did not require an additional preliminary replat approval for the revised taking.

Valuation of Whisenhants' Remaining Property

The Whisenhants argue that their remaining property has little or no value, because its rural character will be lost when the expressway is built. Because their remaining property is valueless, they conclude that the State must condemn the entire parcel. The Whisenhants further argue that DOT is obligated to buy their entire property under AS 19.05.100.

DOT has discretion in determining whether to buy all or part of a property under AS 19.05.100. AS 19.05.100 is titled "Acquisition of Excess Land" and it provides:

> When a part of a parcel of land is taken and the remainder is in a shape or condition that is of little value to its owner, or give rise to claims or litigation concerning severance or other damage, the department may acquire the whole parcel[.] (emphasis added)

Here, the Whisenhants argue that the remaining property has little value to them, because the property's rural character has been destroyed. When property is taken for a public use, the owner is entitled to the fair market value of the property condemned. State v. Lewis, 785 P.2d 24, 26 (Alaska 1990).

> Fair market value of condemned property is the amount which a fully informed seller would receive from a fully informed buyer in a normal, open market sale.

Martens v. State, 554 P.2d 407, 409 (Alaska 1976); appeal after remand 623 P.2d 331 (1981).

The phrase "fair market value" implies an objective standard. Under an objective standard, an inhabitable house, garage, and guest house has significant value. Moreover, even if the property had little value, the term "may" is discretionary. Therefore, the Court concludes AS 19.05.100 does not require DOT to buy the Whisenhants' entire property.

Adequacy of the Decisional Document

The Whisenhants argue that the decisional document is incomplete, because DOT failed to consider their request that the State buy their entire property. The State responds that DOT considered and rejected the Whisenhants' request. This conclusion is borne out by the text of the decisional document.

The Alaska Supreme Court has instructed that where "serious objections are raised in relation to action the agency proposes, the decisional document should respond to them." Ship Creek Hydraulic Syndicate v. State, Department of Transportation and Public Facilities, 685 P.2d 715, 717 (Alaska 1984).

> Striking the ultimate balance is, of course, a decision to be made by the condemnor. A court should not substitute its judgment for that of the condemnor, but it may set aside the condemnor's decision if it is 'arbitrary, capricious, and abuse of discretion or otherwise not in accordance with law.'

State v. 0.644 Acres, More or Less, 613 P.2d 829, 833 (Alaska 1980) [other citations omitted].

Here, the Whisenhants requested that DOT purchase their entire property. The decisional document stated:

With respect to the landowner's "buy out"

> proposal, the state's personnel explained that administrative settlement procedures require requests for additional compensation to be supported by appropriate evidence. The landowners have not provided supporting evidence to justify the state in condemning their entire property.

The decisional document noted the Whisenhants' request and explained why the request was rejected.[1/] Thus, DOT's decisional document responded, albeit unsatisfactorily, to the Whisenhants' requests and concerns.

The Whisenhants also argue that Mr. Sisk, the DOT official who signed the decisional document, did not consider taking the entire Whisenhant property, because he was told that the State had no authority to do so. The following exchange is from his deposition:

> Q And you were aware that as an alternative to a particular acquisition [the Whisenhants] requested a total take?
>
> A I was told that was the case, yes.
>
> Q Okay. What balancing did you do in reaching your decision of that?
>
> A I carefully checked to see if there was a way that we could honor his request and I was assured that we couldn't, short of condemnation.
>
> Q And did you consider condemning the whole parcel?

[1/] DOT's additional reliance upon the February 1, 1991 Fox affidavit is problematic. Consideration of the decisional document permits the Court to separate the original justifications from post-hoc rationalizations. The latter are of dubious worth. Ship Creek Hydraulic Syndicate v. State, Department of Transportation and Public Facilities, 685 P.2d 715, 720 (Alaska 1984).

A We can only condemn what we have to have.

Q And why is that?

A I only know that it's in the -- that that's the regulations and the interpretations of those that we have to live by, and I understand that it's to keep us out of the real estate business.

Q Okay. So, would it be fair to say that you didn't consider the taking of the whole parcel because you didn't need the whole parcel for the project?

A Yes.

Q Okay. So, I can assume that there was no analysis done of taking the whole parcel and the state disposing of the remainder?

A At this stage that would be inappropriate for us. That's something that would be done for--in a compensation under condemnation. (emphasis added)

The deposition testimony is not inconsistent with the decisional document. Sisk appears to be referring to "taking" and "condemnation" in their narrow technical sense. In the condemnation of private land for public purposes DOT can only condemn or take what it needs. As part of the condemnation process, under AS 19.05.100, DOT may thereafter acquire excess land, land not needed for a public purpose, if the remaining portion of the property has little or no value to the owner.

Here, Sisk correctly stated that it would be inappropriate to consider taking the entire property, because it was not needed for a public purposes. Likewise, in this context, Sisk was correct that an analysis of taking the original parcel and the State acquiring the remainder would be done in "a compensation

under condemnation."

Sisk's deposition is not in conflict with the decisional document.[2] Therefore, the Court concludes that DOT properly considered buying the entire Whisenhant property.[3]

Duty to Mitigate Damages in Condemnation Proceedings

The Whisenhants next argue that DOT failed to comply with the Fairbanks North Star Borough replat approval process by failing to seek a variance. In this regard, the Whisenhants conclude that they can withhold their signatures from the variance application and, by so doing, stop the highway project.

AS 09.55.275 provides:

> No agency of the state or municipality may acquire property located within a municipality exercising the powers conferred by AS 29.33.180 - 29.35.260(c) that results in a boundary change unless the agency or munici-

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[2]The Whisenhants argue that the decisional document must include a monetary analysis. However, they cite no authority for this proposition. Moreover, they do not dispute that DOT procedures required them to submit information justifying the buy out.

[3]The Whisenhants also belatedly argue in their supplemental memorandum that "the state has never addressed the problem of what happens if the state does not finish the road and file the final plat." They refer to AS 29.40.180, which makes it illegal to sell land in a subdivision before the plat of the subdivision has been recorded.

However, the burden is on the land owner to prove objections by clear and convincing evidence. State v. 0.644 Acres, 613 P.2d 829, 832 (Alaska 1980). Here, the Whisenhants fail to provide any evidence that such an event is a realistic possibility. Moreover, while failure to file the plat might give rise to a claim for severance damages, it is not a proper ground to set aside a declaration of taking.

> pality first obtains from the municipal platting authority preliminary approval of a replat[.]

The parties agree that the variance application cannot be processed by the Borough without the Whisenhants' signature.[4] The Whisenhants refuse to sign a variance application or otherwise cooperate in the replat process. The Whisenhants intend to use the DOT's need for a replat approval to either stop the road project or force DOT to buy their entire parcel. The State argues that the Whisenhants cannot complain about the consequences of their refusal to act, because they must act to avoid loss or damage.

A wronged party must use reasonable efforts to avoid the consequences of injury done by another. University of Alaska v. Chauvin, 521 P.2d 1234, 1239 (Alaska 1974). Although the question has not been addressed in Alaska, other states have recognized the duty to mitigate damages in the context of condemnation actions.

The Minnesota Supreme Court has held the rule of avoidable consequences is applicable to the owner in a condemnation

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[4] The Borough procedures require that:

> Every [variance] application will require the property owner's signature prior to acceptance by the Planning Department.

(FNSB PB Policy #90-2, p. 1, numbered para. 3)

proceeding. State v. Pahl, 95 N.W.2d 85, 91 (Minn. 1959).[5] Similarly, the California Supreme Court recognized the duty to mitigate in the context of eminent domain proceedings after a detailed review of the law of other jurisdictions in Albers v. County of Los Angeles, 309 P.2d 129, 140-42 (Cal. 1965).[6] This Court discerns no valid reason that the duty to mitigate damages should be inapplicable to condemnation actions.

> However, this duty does not extend to subjecting oneself to undue risk or expense. What is a reasonable effort is a question of fact as is undue risk or expense[.]
>
> The burden of proving that the plaintiff has unreasonably failed to minimize damages falls upon the defendant.

West v. Whitney-Fidalgo Seafoods, Inc., 628 P.2d 10, 18 (Alaska 1981). [citations omitted].

Here, the Whisenhants refuse to sign the variance application so as to force DOT to buy their entire property. Without the final plat approval, the Johansen Expressway Project may be substantially delayed and federal funding lost. The record con-

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[5]/The Pahl court noted "the extent of the duty imposed by the rule depends on the facts of each case." State v. Pahl, 95 N.W.2d 85, 91 (Minn. 1959). In Pahl the landowner was excused from applying for a variance, because the variance required was not minor and the city council had indicated by resolution that the setback provision would be enforced. Id. Moreover, essential parts of the landowner's building were subject to condemnation.

[6]/The only case refusing to apply the duty to mitigate in the context of a condemnation action is Wilson v. Fleming, 31 N.W.2d 393, 398-399 (Iowa 1948). The Iowa Supreme Court held there is no duty to mitigate, unless the action sounds in tort. Id.

tains no evidence that requiring the Whisenhants to sign the variance application or allow DOT to move their garage and guest house entails undue risk of loss or expense. Under these circumstances, the Whisenhants have a duty to mitigate their damages. They cannot be heard to complain of DOT's failure to obtain the variance. If they fail to either sign the variance application or allow DOT to move their garage and guest house, they might compel DOT to remove or destroy the garage and compensate them for this additional loss. They may not, however, use the failure to obtain the variance under these circumstances to stop the project or otherwise prevent the relief sought by the state in this action.7/

Preliminary Replat Procedure

The Whisenhants argue that the Borough's Platting Board

7/The Whisenhants argue that AS 29.40.040(b) prevents the state from seeking a variance for their property. AS 29.40.040(b) provides:

> A variance from a land use regulation adopted under this section may not be granted if
>
> (1) special conditions that require the variance are caused by the person seeking the variance; [or]
>
> (3) the variance is sought solely to relieve pecuniary hardship or inconvenience.

First, AS 29.40.040(b)(1) is inapplicable, because the Whisenhants, as the property owners, are required to apply for the permit, while DOT's construction of the roadway created the need for the variance. Second, AS 29.40.040(b)(3) is inapplicable, because the variance would be sought to further the important public interest in highways.

adopted special procedures in violation of AS 09.55.275 and treats DOT projects differently than other projects.[8/] The State responds that the Whisenhants should have raised this issue in their appeal to the Planning Commission and should have either appealed further to the Borough Assembly or pursued an administrative appeal to superior court. The Court agrees.

Here, the Borough's "streamlined" procedure states:

> [The] Planning Commission or appeal board will make the final decision.

(Streamlined Procedure, p. 2, para. 6). The Whisenhants appealed the Platting Board's decision to the Planning Commission, which made the final decision. They did not appeal to the superior Court under Appellate Rule 602. Had they done so, the borough would have been able to advance its interests and defend its actions in the adversary process of the appeal and the Whisenhants could have obtained a judicial determination as to the propriety of the procedure.

Res judicata generally bars litigation of an issue which has already been decided or could have been decided in a prior proceeding. This is the case here.

Res judicata is applicable to administrative

[8/] AS 09.55.275 requires state and local agencies to obtain preliminary approval of a replat before effecting a taking. AS 09.55.275 provides:

> [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 land owners.

> adjudicative decisions but that the doctrine is often applied there with less rigidity. A case by case analysis is used to see if the application is fair.

Commercial Fisheries Entry Commission v. Byayuk, 684 P.2d 114, 122 (Alaska 1984).[9]

All issues that the Whisenhants could have raised, but did not raise before the Planning Commission or in an appeal from the Planning Comission, are now barred by res judicata with one exception. The Whisenhants had no notice of the Borough's decision that a revised taking did not require a preliminary replat approval. Thus, the Whisenhants may litigate that issue.[10]

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[9] In Commercial Fisheries Entry Commission v. Byayuk, the Alaska Supreme Court held that res judicata did not bar consideration of an administrative appeal based on a statutory issue not raised before the administrative agency in part because the appellant lacked notice of the issue. 684 P.2d 114, 122 (Alaska 1984). However, the present case is distinguishable. The Whisenhants did not properly file an administrative appeal and they were fully informed of all issues except the Borough's decision regarding DOT's revised taking.

[10] DOT argues that the Whisenhants by failing to appeal the Borough's adverse administrative decision are collaterally estopped from relitigating the same issues before this Court. Collateral estoppel requires that

> the issue decided in the prior adjudication was precisely the same as that presented in the action in question[.]

Briggs v. State, Dept. of Public Safety, 732 P.2d 1078, 1081 (Alaska 1987).

However, the Whisenhants did not raise the argument that the Borough's Platting Board adopted special procedures in violation of AS 9.55.275 and treats DOT differently than other projects. Thus, the doctrine of collateral estoppel is inapplicable.

It is not for this Court in this setting to determine matters that could properly have been heard as an appeal from the Platting Board in a process, the outcome of which is final.

Attachment of Conditions to the Preliminary Replat Approval

The Whisenhants argue that a "conditional" preliminary replat approval does not meet the requirements of AS 09.55.275, which requires preliminary approval of a replat before a taking can occur:

> No agency of the state . . . may acquire property located within a municipality[,] which results in a boundary change unless the agency . . . first obtains from the municipal authority preliminary approval of a replat[.] Final approval of the replat shall be similarly obtained.

Here, the Planning Commission upheld the Platting Board's decision, which stated:

> The Board granted preliminary approval of your request with the following conditions[:]
>
> 4. A final plat shall be submitted for approval and recording in the Fairbanks Recording District to allow retracement of the ROW and affected platted property boundaries[.]

The Commission interpreted the Board's action as preliminary approval of the replat. The Supreme Court has spoken of the deference to be given to an agency's interpretation of governing regulations.

> Although an administrative agency's interpretation of its own regulations is entitled to great weight, the ultimate resolution of a regulation's meaning is a question for the courts. The appropriate standard of review for questions of law is the 'substitution of judgment test,' providing that the formulation

> of fundamental policy concerning particularized expertise of administrative personnel is not involved.

Borkowski v. Snowden, 665 P.2d 22, 27 (Alaska 1983). [citations omitted].

Here, the Platting Board choose to label its decision a "preliminary approval." AS 09.55.275 does not expressly distinguish between preliminary and "conditional" preliminary approvals. The term "preliminary" is broad enough to include an approval subject to certain conditions. The preliminary approval given to DOT was adequate for purposes of AS 09.55.275.

Revision of DOT's Original Taking

The Whisenhants argue that DOT's revised taking of part of the Whisenhant property was not submitted to the Platting Board for preliminary replat approval as required by AS 09.55.275 and Borough Ordinance 17.80.040(A). Borough Ordinance 17.80.040(A) provides:

> The final plat shall conform substantially to the preliminary layout approved by the Platting Board. (emphasis added).

Since the agency interpreted AS 09.55.275 and Borough Ordinance 17.80.040(A), the Court must apply the substitution of judgment standard. Borkowski v. Snowden, 665 P.2d at 27. Rex Nutter, Director of the Borough Department of Community Planning decided that AS 09.55.275 and FNSB Code 17.80.040(A) did not require an additional preliminary replat approval for the revised taking. The change DOT proposed actually reduced the size of the take. The language "substantially conform" indicates the Borough

expects some changes between the preliminary plat and the final plat. AS 09.55.275 and Borough Ordinance 17.80.040(A) do not require an additional preliminary replat approval based on the change proposed by DOT.

Subdivision Requirements

The Whisenhants also argue that DOT must comply with AS 40.15.200. AS 40.15.200 refers to "subdivisions." AS 40.15.290(2)(A) states that the term subdivision:

> means the division of a tract or parcel of land into two or more lots, sites, or other divisions for the purpose, whether immediate or future, of sale or building development, and includes resubdivision and, when appropriate to the context, relates to the process of subdividing or to the land or areas subdivided. (emphasis added)

Here, the construction of an expressway cannot be reasonably construed to include the division of a parcel for the purpose of sale or building development. As such, AS 40.15.200 is inapplicable.

Conclusion

Based upon the foregoing, title should be vested in the State. Accordingly, plaintiff's motion is GRANTED. Defendant's motion is DENIED.

DATED at Fairbanks, Alaska, this 4 day of June, 1991.

RICHARD D. SAVELL
Superior Court Judge

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