43607

MEMORANDUM State of Alaska

TO: Jack T. Bodine, Chief
Right-of-Way
Department of Transportation
& Public Facilities-Douglas

DATE: September 24, 1980

FILE NO. A66-120-81

TELEPHONE NO:

FROM: Richard P. Kerns
Assistant Attorney General
Chief, Transportation Section
Department of Law-Anchorage

SUBJECT: Project No. S-0572(1)
Wasilla - Palmer and
Project No. SOS-1(020)
Bogard Road
Request for Legal Opinion

By memorandum dated September 4, 1980 you transmitted a memorandum dated August 26, 1980 by S. S. Davis and Milton Lentz asking several questions with regard to partial takings from lots which would leave the remainders of such size that they would not comply with the minimum size requirements established by Mat-Su Borough ordinances.

After discussion with Messrs. Davis and Lentz it was determined that several of the questions could be disposed of by answer to the single question, Does partial taking of a lot by eminent domain remove the remainder from the operation of the zoning ordinances which require a minimum lot size of 40,000 square feet?

The answer is "no".

The question presented does not appear to be one of first impression in other jurisdictions. For example, in Schuh v. State, 241 N.E.2d 362 (Indiana 1968) the State of Indiana acquired a five-foot strip from a parcel of land for widening a highway. This widening caused one of the owners' buildings to be closer to a highway than allowed by local zoning ordinances. The state representatives were under the mistaken impression that the building would not be in violation. However, when the owner applied for a building permit to construct a new residence on the remainder, the authorities refused to issue the permit until the non-conforming building was torn down. The Indiana court held that the owner was entitled to have the remainder valued on the premise that the building was in non-conformance with the zoning ordinance.

To the same effect is the case of Celwyn Company v. Board of Assessors of Nassau Co., 318 N.Y.S.2d 870 (New York, 1971) wherein the New York court stated:

> The fact that a parcel of land is put into a non-conforming situation as a result of a partial taking in eminent domain may be considered in estimating damages sustained as a result of that taking.

The same rule was, in effect, applied in Smith v. Zoning Bd. of Appeals, Etc., 387 A.2d 542 (Connecticut, 1978). That is, a partial taking which renders the remainder a non-conforming property is a factor to be taken into consideration in valuing the remainder. The factual background in that case involved a slight taking sufficient to render the remainder a technical non-conforming property. By a specific statute of the State of Connecticut, the State sought, without the consent or knowledge of the owners, a variance. The owners argued, according to the opinion "... that the granting of a variance without their consent violates their constitutional right of just compensation by forcing them to assume the financial risk of structural alteration or sale of the property subject to a variance." The Connecticut court disagreed pointing out that "the state referee could properly consider the variance as a factor affecting the market value of the plaintiffs' (owners') remaining land."

It is my opinion that the same rule would be applied by the Alaska court in the case of the lots in question. The fact that the remainders would not comply with the requirements of the Mat-Su Borough ordinances would be a factor in estimating the market value of the remaining property.

Another question has been raised with respect to Mat-Su Borough Ordinance 16.68.010 and .020. These, and the related ordinances, provide, in essence, that it is a misdemeanor to sell land of less than 40 acres until an approved subdivision plat has been appraised and recorded. In my opinion, these ordinances have no application to the situation at hand. Here the State is exercising its inherent power to acquire land for a public purpose. As far as the owner is concerned, this is an involuntary transaction. It is not, in the sense that these ordinances as framed, a voluntary subdivision of property for the purpose of transfer or sale in the commercial market. To construe these ordinances otherwise would be in effect to strip the State of its inherent power to condemn property. Such a result simply cannot be. The power to condemn is a power basic to the existence of the State.

It is stated in 1 Nichols §1.141[3]:

> The power of eminent domain is inalienable, and being an essential attribute of sovereignty cannot be even partially bargained away. Without it, the state cannot be a state. The power is an enduring and indestructible as the state itself.

There are basically two major restraints on this power which are contained in the Constitution. These are:

> Art. I §7. No person shall be deprived of ***property, without due process of law; and
>
> Art. I §18. Private property shall not be taken or damaged for public use without just compensation.

In short, when the State acquires property, it must pay for it and give the owner an opportunity to be heard and put on evidence as to value. The procedures established by the legislature for accomplishing these constitutional restraints must be followed.

The legislature has by statute indicated under what circumstances the DOT/PF may acquire property by eminent domain. Having given the department such power, it would be contrary to principles of statutory construction to interpret another statute that such power does not exist.

RPK/sls