38.3

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

STATE OF ALASKA,

Plaintiff,

vs.

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; 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.

To: John Bennett
From: Paul Lyle, AAG
I thought you may want to review this pleading to refresh your recollection in regard to complaints being "subdivisions". I have a call into Clyde S.

Project No. FM-0668(3)/63099
Parcel Nos. 7 and P-7
No. 4FA-90-2148 Civil

STATE'S REPLY TO WHISENHANTS' SUPPLEMENTAL MEMORANDUM

The issue before this court is whether the state has authority to take a portion of the Whisenhants' property. In order to determine that issue the court must decide whether the state complied with AS 09.55.275, which requires preliminary replat approval prior to condemnation when state projects result in boundary changes on privately owned parcels. The Whisenhants concede that the state has authority to take their entire parcel. They have not challenged the necessity for the Geist Road Extension project.

In support of their argument that the state has not complied with AS 09.55.275, the Whisenhants rely upon portions of AS 29 and AS 40. These statutes add nothing to the Whisenhant's arguments.

AS 40.15.200 does not apply to the state.

The Whisenhants rely primarily upon AS 40.15.200 which states:

> All subdivisions of land made by the state, its agencies, instrumentalities and political subdivisions are subject to the provisions of this chapter and AS 29.40.070 -- 29.40.160, or home rule ordinances or regulations governing subdivisions, and shall comply with ordinances and other local regulations adopted under this chapter and AS 29.40.070 -- 29.40.160 or former AS 29.33.150 -- 29.33.240, or under home rule authority, in the same manner and to the same extent as subdivisions made by other landowners.

AS 40.15.200 does not apply to the state's right-of-way activities. Although the Whisenhants argue that the definition of the term "subdivision" makes AS 40.15.200 applicable to the state, the full text of that definition reveals otherwise. 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.)

When the state prepares right-of-way plans, it is not dividing lots for the purpose of selling them or developing buildings upon them. Therefore, DOT&PF is not a "subdivider" of

property when it condemns for highway projects and does not have to comply with AS 40.15.200 or the subdivision statutes found in AS 29 prior to exercising its power to condemn.

By relying upon AS 40.15.200, the Whisenhants seek to impose upon the state a requirement to comply with all subdivision statutes and regulations prior to filing a condemnation. However, DOT&PF is not required to obtain preliminary replat approval because its actions constitute a "subdivision" of property under the terms of AS 40.15.200. Rather, the Department is required to obtain preliminary replat approval by AS 09.55.275.

Under AS 09.55.275 the only prerequisite to exercising the power of eminent domain is obtaining preliminary replat approval. AS 09.55.275 does not require the state to comply with subdivision requirements or obtain final plat approval prior to filing a condemnation. Condemnation is authorized once preliminary replat approval is obtained. The state has already demonstrated its compliance with AS 09.55.275.

AS 40.15.200 does not make AS 29.40.040 and AS 29.40.180 applicable to the state.

If the court finds that AS 40.15.200 applies to condemnations for highway projects, its terms do nothing to support the Whisenhant's arguments. The Whisenhants argue that AS 29.40.040 and AS 29.40.180 preclude the borough from granting them a variance and preclude them from selling their property before the final replat is recorded.

However, AS 40.15.200 makes only certain provisions of AS 29 applicable to the state when it subdivides property. AS 40.15.200 provides, in relevant part:

> All subdivisions of land made by the state . . . are subject to the provisions of this chapter and AS 29.40.070--29.40.160, . . . and shall comply with ordinances and other local regulations adopted under this chapter and AS 29.40.070 -- 29.40.160 . . . .

(Emphasis added.) If the state is a "subdivider" under AS 40.15.200, then the provisions of AS 29.40.040 and AS 29.40.180 and the regulations and ordinances adopted under them do not apply: AS 29.40.040 and AS 29.40.180 fall outside of the provisions of AS 29 made applicable to the state through AS 40.15.200. Therefore, the proscriptions against granting variances and selling land do not apply when the state subdivides. 1/

AS 29.40.040 and AS 29.40.180 are not applicable to this case by their own terms.

If the court finds AS 29.40.040 and AS 29.40.180 are generally applicable to this case, the Whisenhants' objection to the taking must still be denied.

AS 29.40.040(b)(1) states that a variance may not be granted if the special conditions requiring the variance "are caused by the person seeking the variance." (Emphasis added.)

1/ The only exception to this is when the Department of Natural Resources subdivides undeveloped state land for the purpose of disposal under AS 38.05 or AS 38.08. See AS 29.40.200(a). A condemnation of land by DOT&PF does not fall within the terms of AS 29.40.200(a).

The conditions requiring a variance in this case are not caused by the Whisenhants. They arise out of the state's taking. Therefore, by its very terms, AS 29.40.040(b)(1) does not preclude granting a variance in this case.

AS 29.40.040(b)(3) states that a variance may not be granted when it is "sought solely to relieve pecuniary hardship or inconvenience." (Emphasis added.) Pecuniary hardship or inconvenience to the landowner is not the "sole" reason for the variance request in this case. The borough's position memorandum on Mr. Whisenhant's appeal of the preliminary replat approval stated:

> The Platting Board recognizes that highway projects cannot meet all the requirements of 17.70. Title 17 was written for subdivision development, and FNSB Policy #90-2 was adopted by the platting Board to accommodate DOT highway projects.

State's Opposition and Cross-Motion, Exhibit A, p.3. 2/ The borough's streamlined procedure recognizes that a state highway project creates an "unusual situation" with regard to the borough's normal platting process. Exhibit A, p.18. The borough procedure then goes on to set out standards for granting variances for properties affected by highway projects.

The borough procedure provides a means by which affected landowners may comply with zoning regulations while permitting highway projects to go forward in an expeditious manner. The variance request is not based solely on the

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2/ The portions of Exhibit A cited are attached.

Whisenhants' pecuniary hardship or inconvenience. The variance is necessary because of the strong interest the public has in development of a needed road improvement, the fact that the landowner took no action requiring a variance, and the hardship suffered by the landowner. Therefore, AS 29.40.040(b)(3) does not preclude granting the variance in this case.

Moreover, although not specifically set forth in AS 29.40.040(b)(3), the underlying assumption of AS 29.40.040(b) is that a variance is sought to avoid pecuniary hardship or inconvenience caused by the landowner's actions. As was stated above, the need for the variance in this case arises out of the state's project, not the Whisenhants' actions.

The Whisenhants argue that AS 29.40.180 prohibits them from selling their property until the final replat is recorded. The Whisenhants' interpretation of this statute is strained at best. AS 29.40.180 states:

> The owner of land located in a subdivision may not transfer, sell, offer to sell, or enter into a contract to sell land in a subdivision before a plat of the subdivision has been prepared, approved, filed, and recorded in accordance with this chapter.

The Whisenhants want to read the term "replat" into the statute. However, AS 29.40.180 does not address replats of subdivisions. A plat of the Whisenhants' subdivision has been recorded for decades. Under the Whisenhants' interpretation, no lot owner could sell his property while a subsequent replat of any portion of the subdivision was pending whether or not his lot was

affected by the replat. The court should reject statutory interpretations that create absurd results.

In addition, according to Rex Nutter, the borough gives full recognition to judicial decrees affecting real property. If a court issues an order partitioning property, the borough gives immediate effect to the order for both ownership and conveyance purposes, even though the property has not been formally subdivided under borough ordinances. See Second Affidavit of Rex Nutter accompanying this Reply. The order sought by the state in its Cross-Motion for Vesting of Title and Possession will operate as a decree granting title and possession to the state in a portion of the Whisenhants' property. Therefore, the Whisenhants will be free to convey the remainder parcel under standing borough policy.

AS 29.40.180 is improperly raised as an objection and is late.

Assuming, without conceding, that AS 29.40.180 precludes the Whisenhants from selling their property until the final replat is recorded, this fact would not form the basis of a valid objection to the authority and necessity for this project. Rather, the temporary inability to sell may form the basis for a claim of severance damages to the remainder parcel. If the claim is proven, the landowner would be entitled to compensation for the severance damages. Issues related to compensation for damages to the remainder are improperly raised

as objections. They must await resolution in the compensation portion of the case. AS 09.55.310(a)(2).

The Whisenhants did not raise an objection related to their alleged inability to sell their remainder parcel under AS 29.40.180 at the time they filed their answer and objections on January 22, 1991. The objection is raised for the first time in their supplemental memorandum. The objection is late and is therefore waived. Civil Rule 72(e)(4).

Failure to Mitigate Damages

The Whisenhants argue that FNSB Ord. 17.80.040 requires their signatures on the final replat. They cite this ordinance as proof that the conditions of the preliminary replat approval will never be met. This condition will remain unfulfilled only if the Whisenhants fail to mitigate their damages. The Whisenhants can not be heard to complain about the consequences of their own inaction.

Speculative objections related to the project's completion should be denied.

Finally, the Whisenhants allege the state never addressed the "problem" of the project not being completed or the final replat not being recorded. The burden is on the landowner to prove objections by clear and convincing evidence. State v. 0.644 Acres (Cooper), 613 P.2d 829, 832 (Alaska 1980). There is no evidence suggesting that DOT&PF will fail to complete this construction project or record the final replat.

The Whisenhants' objections should be denied. Title and possession to Parcels 7 and P-7 should be confirmed in the state.

DATED: _____.

CHARLES E. COLE
ATTORNEY GENERAL

By: _____
Paul R. Lyle
Assistant Attorney General

This is to certify that on the ___ day of May, 1991 a copy of the foregoing is being mailed to the following attorneys or parties of record:

Lance C. Parrish, 536 Fourth Avenue, Fairbanks, AK 99701

_____
Judith A. Hogenson Date