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DATE: April 13, 2000

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TOTAL PAGES: 17

From: SUSAN URIG  
Transportation Section, Attorney General's Office  
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**NAME:** JIM SHARP

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**FAX NO.:** 248-9456

**CASE:** MOA v. EQUILON ENTERPRISES

**COMMENTS:** Please read this recent Superior Court decision and call me. Dennis Wheeler, an Anchorage Assistant Municipal Attorney, has requested state input.

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MUNICIPALITY OF ANCHORAGE  
MUNICIPAL ATTORNEY'S OFFICE  
FAX TRANSMITTAL FORM

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**Date:** April 12, 2000

**To:** Jim Kantor

**Company:**

**Fax # 279-5832**

**From:** Dennis Wheeler

**No. of Pages: 16**  
**Including Cover Sheet**

**In Re:** MOA v. Equilon & v. Black Angus

**Comments:**

**If you do not receive all pages call: Kathie**

**Our Phone Number: (907) 343-4545**

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From: "Susan Urig" <Susan\_Urig@law.state.ak.us>

12:07

Subject: Judge Hensley decision

To: <Jim\_sharp@dot.state.ak.us>, <kasandra\_rice@dot.state.ak.us>, <John\_Athens@law.state.ak.us>

CC: <Jim\_Cantor@law.state.ak.us>

I faxed all of you J. Hensley's recent decision in a Municipality of Anchorage condemnation. I have spoken with Jim Sharp and Dennis Wheeler, the Assistant Muni Attorney working on this with outside counsel Ron Baird.

Dennis is not asking anything of the state at this point except to consider possibly joining in the appeal sometime in the future. Dennis was unclear at this point whether the Muni would pursue a petition for review to the supreme court now or wait until receiving final judgment in the condemnation case. He will keep me posted.

CONFIDENTIAL ATTORNEY/CLIENT COMMUNICATION

Susan L. Urig

(907) 269-5167; fax 279-5832

Susan\_Urig@law.state.ak.us

1 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
2 THIRD JUDICIAL DISTRICT

3 MUNICIPALITY OF ANCHORAGE, )  
4 Plaintiff, )

5 vs. )

6 EQUILON ENTERPRISES LLC, a )  
7 Delaware limited liability company, )  
8 NORMAN PRESTON, SHIRLEY PRESTON, )  
9 LISA K. SUZUKI, and CHUGACH )  
10 ELECTRIC ASSOCIATION, INC., and a )  
11 portion of Lot Seven "A" (7-A), )  
12 Block Twenty-Six "D" (26-D), )  
13 according to the Planning and )  
14 Zoning Commission Resolution )  
15 No. 146 filed as Plat 66-61, )  
16 filed as Plat 66-61, filed in the )  
17 Anchorage Recording District, )  
18 Third Judicial District, )  
19 State of Alaska. )

20 Defendants. )

21 MUNICIPALITY OF ANCHORAGE, )  
22 Plaintiff, )

23 vs. )

24 DONG JOON LIM f/k/a DONG J. YIM, )  
25 individually and d/b/a BLACK ANGUS )  
26 INN; LIM; LAND TITLE COMPANY OF )  
27 ALASKA, INC., NORTHRIM BANK, )  
28 JACK K. WON, Lot Twelve (12), )  
29 Block Twenty-eight "D" (28-D) of )  
30 THIRD ADDITION to the TOWNSITE of )  
31 ANCHORAGE, according to the Plat )  
32 C-76, filed in the Anchorage )  
33 Recording District, State of Alaska )  
34 and Lot Seven "A" (7-A) Block )  
35 Twenty-Eight "C" (28-C) of )  
36 THIRD ADDITION to the TOWNSITE of )  
37 ANCHORAGE, according to Plat 93-106 )  
38 filed in the Anchorage Recording )  
39 District, Third Judicial District, )  
40 State of Alaska, )

41 Defendants. )

42 Case No. 3AN-99-11817 and  
43 Case No. 3AN-99-12542 Civil consolidate

44 ACCURATE TRANSCRIPT REPORTING

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TRANSCRIPT OF PROCEEDINGS .

BEFORE THE HONORABLE DAN A. HENSLEY  
Superior Court Judge

Anchorage, Alaska  
March 15, 2000  
8:30 o'clock a.m.

APPEARANCES:

FOR THE PLAINTIFF:

MR. RONALD L. BAIRD  
Attorney at Law  
Box 100440  
Anchorage, Alaska

MR. DENNIS A. WHEELER  
Assistant Municipal Attorney  
632 West Sixth Avenue  
Anchorage, Alaska

FOR THE DEFENDANT:

MR. RICHARD A. WEINIG  
Attorney at Law  
800 East Dimond Boulevard  
Anchorage, Alaska

PROCEEDINGS1  
2 42-1228

3 0316

4 THE COURT: Thank you for your quality briefing and  
5 the arguments yesterday. They helped me understand this case  
6 a great deal. Because I want to give you a prompt ruling, I'm  
7 going to give you an oral ruling because I didn't have time to  
8 write it. Because I'm going to read it to you, please bear  
9 with me.

10 This is the condemnation action. The municipality  
11 filed a declaration of taking to expand the existing road  
12 right-of-way at 15th Street -- on 15th Street near Ingra.  
13 Expansion of the right-of-way will require destruction of a  
14 portion of the Black Angus Hotel, and that's in the case  
15 involving landowner, Mr. Lim, Don Joon Lim, case number 12542,  
16 and will require removal of the gas pumping island at the  
17 service station on the corner of 15th and Ingra. That's in  
18 case number 11817 involving landowner Equilon. The cases were  
19 consolidated for the purpose of hearing and deciding the issue  
20 of whether the declaration of taking is valid.

21 Alaska statute 09.55.275 provides that when  
22 condemnation results in a, quote, boundary change, and quote,  
23 the condemning authority must obtain preliminary replat  
24 approval prior to filing the action. And the parties dispute  
25 whether this condemnation results in a boundary change. No

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1 preliminary replat approval was obtained. The city argues,  
2 that that's not required, and the landowners disagree.

3 The heart of the disagreement lies in what the term  
4 boundary change means. The city argues that boundary change  
5 for purposes of the statute occurs only when the city condemns  
6 by fee simple a portion of a surveyed lot, thus changing the  
7 lot lines. The city asserts correctly that a right-of-way  
8 taking is an easement, not a fee taking. And any dispute  
9 about that is put to rest by AS 09.55.250, which limits fee  
10 simple takings by condemnation to a short list, and road  
11 right-of-ways aren't included on that short list.

12 The landowners argue that resolution of the issue  
13 doesn't turn on the nature of the estate taken. Landowner  
14 makes two arguments. One, that rights-of-ways have boundaries  
15 also, and indeed, there are numerous ordinances and statutes  
16 which refer to boundaries of rights-of-way.

17 The landowners also makes a functional argument that  
18 we should define boundary based on a landowner's functional  
19 ability to use the land. And the term boundary has indeed  
20 been used in some context to describe a landowner's ability to  
21 functionally use his land, and the Gates versus Tennekee (ph)  
22 Springs case is a good example of that use of the term.

23 And in this case, of course, if the definition of  
24 boundary is functional, I ~ in other words, taking a  
25 significant interest that the property owner cannot use, then

1 clearly the boundary change here -- clearly the taking here  
2 would result in a functional boundary change.

3 In my mind, boundary can mean any of these things,  
4 depending on the different people and different contexts. So  
5 I need to look for help in defining what boundary change means  
6 in the context of this statute. And I looked for help. The  
7 statute doesn't define boundary change. The Alaska Supreme  
8 Court hasn't defined the -- hasn't applied the statute or  
9 interpreted the word boundary change in context of the  
10 statute. As far as I can tell, there are no similar statutes  
11 on the books in any other state in the union. So we don't  
12 have any decisions from any other state courts defining or  
13 implementing this kind of statute, and there's no legislative  
14 history that I could locate or apparently that the lawyers who  
15 worked very hard in the case could locate either.

16 When the statute was passed, as a sessional, I did  
17 have a companion section, section 1, relating to state public  
18 works compliance with local planning and zoning laws. And  
19 that statute is helpful to understand the purpose of the  
20 statute, as I will explain in a moment.

21 The first thing that any judge is supposed to do in  
22 interpreting a statute is look at the text. And the text for  
23 the statute says that a replat is required, that a replat  
24 which is required in the event of a boundary change, quote,  
25 must show clearly the location of the proposed public streets,



1 easements, rights-of-way, and other taking of private  
2 property, end quote. And the text to me strongly suggests  
3 that the purpose of the replat requirement is so that the  
4 platting board can consider the change in encumbrance on the  
5 property, and that the new plat can show the new, quote,  
6 taking of private property, end quote, which would include  
7 rights-of-ways.

8 The next step in interpreting the statute is to look  
9 at the purpose of the statute to see if it's consistent with  
10 what at least appears to be the intent of the text.

11 One purpose of platting -- I think when we look at  
12 purpose, we have to look at the purposes of platting in the  
13 first place. And one, the original purpose, the development  
14 of the concept of platting was to define lot line boundaries  
15 to prevent ownership disputes. The platting system replaced  
16 the old system of describing land by reference to natural  
17 markers; trees, boulders, rocks, metes and bounds, courses.  
18 And if that is the sole purpose of platting, then there may be  
19 -- then the intent of the statute to require replatting may  
20 indeed be -- would indeed be that replatting was required only  
21 when there were changes in the lot line.

22 Interesting to me, the city's brief explaining the  
23 historical purpose of platting is almost a verbatim recitation  
24 of section 873 of Thompson -- of the treatise by Thompson on  
25 the law of real property which discussed the historical --

1 discusses the historical purposes of platting. But that same  
2 section of Thompson on real property tells us that over the  
3 years platting has evolved to serve other purposes as well,  
4 purposes other than simply making lot boundaries clear so that  
5 property can be transferred easily. Those other purposes  
6 include, one, notice to public and purchasers, not only of the  
7 lot lines, but of the location of encumbrances and indeed the  
8 city's own platting ordinances require platting of rights-of-  
9 way.

10 The second modern purpose of platting, as Mr. Baird  
11 acknowledged in his oral argument, is basically a land use  
12 planning function. Platting authorities don't approve plats  
13 unless they are consistent with land use planning, laws and  
14 regulations. The platting authority serves as a screening  
15 body to make sure that new developments of land comply with  
16 local land use planning laws.

17 If we consider those purposes of platting, then it  
18 might be said that one of the purposes of requiring replat  
19 under the statute in dispute here is to ensure that land  
20 acquisition by condemnation is consistent with local land use  
21 planning laws.

22 That analysis is consistent with what I won't call the  
23 legislative history of the statute, but I'll call the  
24 legislative context of the statute. The statute in dispute  
25 here, section 2 of chapter 96 of the 1975 session laws,

1 section 1 of that statute, which clearly relates to section 2  
2 explains the purpose of the session law quite clearly. And  
3 section 1 says the purpose is to ensure that land acquisitions  
4 by condemning agencies, quote, comply with all local planning  
5 and zoning ordinances and local regulations in the same manner  
6 and to the same extent as other landowners.

7 Now, Mr. Baird on behalf of the city, argued that it  
8 was -- would be a radical notion that the state or other  
9 condemning agencies would be forced to get plats approved  
10 before they could condemn -- make acquisitions. But in my  
11 mind, that's exactly what the totality of the 1975 session law  
12 intended. And in my mind it's not a radical notion to force  
13 acquiring agencies to exercise condemnation authority in a  
14 manner consistent with local zoning -- land use planning laws.

15 So for that reason I find that the interpretation of  
16 boundary change most consistent with the text of the statute  
17 and most consistent with the purpose of platting in general is  
18 that a boundary change is any change of a boundary lot line,  
19 easement, right-of-way, or other acquisition, in order to  
20 provide that a platting board can review and make preliminary  
21 approval of an acquisition as being consistent with local land  
22 use planning laws.

23 The next question, since no preliminary replat was  
24 done, is what is the appropriate remedy in this case. Should  
25 this rule be applied retrospectively or prospectively? Under

1 Plumley (ph) versus Hale (ph), prospective application which  
2 the city is asking for in this case is the exception to the  
3 rule. And the following elements apply to determine whether I  
4 should apply that exception.

5 First of all, is the holding today one of first  
6 impression? Does it overrule private law? Clearly, the  
7 answer to that is yes. As far as I can tell, the only court  
8 to decide this issue was Alaska Superior Court, Judge Katz  
9 (ph). No other state has ever interpreted a similar statute.  
10 The Alaska Supreme Court hasn't interpreted the statute. So  
11 clearly, the ruling today overrules what little prior law  
12 there was.

13 Second, was the city justified in relying on that  
14 prior holding? That decision was not appealed. That decision  
15 is not an unreasonable interpretation. Even though I disagree  
16 with the conclusions reached by the judge 15 years ago, the  
17 issues apparently were presented to the judge than the issues  
18 presented today.

19 And as I said a moment ago, there isn't any other law  
20 on the books as far as I can tell that would have suggested to  
21 the city that that holding was inappropriate. So I find that  
22 the city was justified in relying on Judge Katz' (ph) holding.

23 Would the city suffer undue hardship from a  
24 retroactive application? This is a significant road  
25 improvement project. It's an expensive road improvement

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1 project. The timing according to the pleadings is very  
2 important. Completion now rather than later is very important  
3 to the city in terms of funding. Equally importantly in this  
4 case, no objection had been filed to the landowners to the  
5 public necessity of taking the property. No claim by the  
6 landowners here that violation of the statute caused them any  
7 particular harm or showing that the end result had replatting  
8 been done prior to declaration of taking rather than after  
9 would be any different. So I find undue hardship if I were to  
10 apply this ruling today retroactively.

11 And finally, can I accomplish the purpose of the  
12 statute which would require replatting by making a prospective  
13 application; and yes, I can. I find that if I order the city  
14 to make an application for preliminary replat in a short  
15 period of time, that I can accomplish the purpose of the  
16 statute without causing undue harm to any of the parties. I'm  
17 really hesitant to apply any ruling that I make, including  
18 interpretation of a statute prospectively only, especially in  
19 the cases of public agencies, because it may send a message  
20 that an agency can violate law with impunity.

21 But the remedy asked for by the landowners here is far  
22 more drastic than the nature of the violation of the law,  
23 especially considering that there's no reason that the city  
24 should have anticipated the change in the law. So for those  
25 reasons I'm going to apply the ruling today prospectively only

1 and not to the parties in this case.

2 As to the landowner's request for injunction,  
3 regardless of the statutory basis for injunction, injunction  
4 is still a discretionary remedy, and for the same reasons that  
5 I'm going to apply the statute, the ruling today  
6 prospectively, I'm not going to grant an injunction.

7 Finally, the undisputed evidence in the record  
8 establishes that the city is entitled to immediate possession,  
9 so I'm going to grant the city that relief as well. I think  
10 there is an order, a very brief order in the file.

11 MR. BAIRD: There should be one in both files, Your  
12 Honor.

13 MR. WEINIG: Your Honor, before you sign the order,  
14 could I ask one question of clarification?

15 THE COURT: Yes, sir.

16 MR. WEINIG: Did Your Honor find that the  
17 municipality's actions violated AMC 21.15.123, the right-of-  
18 way plat acquisition ordinance?

19 THE COURT: No, I didn't address that.

20 MR. WEINIG: Is it Your Honor's intention to address  
21 that, because I believe it is essential to the determination  
22 of the appropriate remedy.

23 THE COURT: I'll address that for you. I believe that  
24 statute only applies to subdivisions. That ordinance only  
25 applies to subdivisions; subdivisions as designed as dividing

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1 a piece of property into two. Now, I suspect that ordinance  
2 was drafted based on the city's understanding that replatting  
3 was only required when there was a subdivision. But  
4 regardless, that's what the ordinance says, and I don't  
5 believe it applies here.

6 MR. WEINIG: Further clarific -- and I'm not arguing;  
7 it's clarification for purposes of the record. That  
8 isn't.....

9 THE COURT: Even if I find a violation, I'm not going  
10 to grant an injunction for the same reasons, that even if  
11 there were a violation, I wouldn't grant an injunction for the  
12 same reason as stated.

13 MR. WEINIG: Again, I'm not trying to argue with you,  
14 I'm clarifying for purposes of the record, that is it Your  
15 Honor's ruling that AMC 21.15.123, the right-of-way  
16 acquisition plat ordinance applies only to takings in fee  
17 simple?

18 THE COURT: I don't believe I have to address that to  
19 get where I got today, so I'm not going to.

20 MR. WEINIG: Last question for purposes of  
21 clarification of the record; does Your Honor deem AMC 123 --  
22 AMC 21.15.123, the right-of-way plat acquisition ordinance to  
23 be relevant to Your Honor's determination?

24 THE COURT: To the extent that I'm going to address  
25 that ordinance, I think I said all I'm going to say.....

1 MR. WEINIG: Thank you.

2 THE COURT: .....for today.

3 MR. BAIRD: Also, by the way of clarification, the  
4 court said that it would be establishing a deadline for the  
5 municipality. I don't think you set one.

6 THE COURT: I didn't. Thirty days.....

7 MR. BAIRD: (Indiscernible - simultaneous speech).

8 THE COURT: .....to apply for preliminary replat  
9 approval, which is what the statute -- to apply for  
10 preliminary replat approval.

11 MR. BAIRD: To apply, okay. I didn't know if you were  
12 intending to have approval in 30 days.

13 THE COURT: Of application. We'll go off record.

14 THE CLERK: Off record.

15 (Off record)

16 THE COURT: .....signed the order submitted in the  
17 Equilon case. It's amazing that the orders were probably  
18 submitted in both cases, and the order in the Equilon case was  
19 filed right on the top of the file. And I don't know where  
20 the order in the other case is, but I've noted on the order in  
21 the Equilon case that it applies to Case Number 99-12542 as  
22 well, and you can obtain a copy of the order if you like.  
23 Actually, I'd like to give you a copy of the order before you  
24 leave so I don't have to mail it to you. And if you want a  
25 transcript for whatever immediate purposes you need it for,

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1 we'll help you get that.

2 MR. WEINIG: Thanks.

3 THE COURT: Any other questions?

4 MR. BAIRD: No, Your Honor.

5 MR. WEINIG: No. Thanks for your help.

6 THE CLERK: Please rise. The court is in recess.

7 (Off record)

8 1018

9 END OF REQUESTED PORTION

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C E R T I F I C A T E

SUPERIOR COURT )  
STATE OF ALASKA ) ss.

I, Shirley Cohen, Notary Public in and for the State of Alaska, and Reporter for Accurate Transcript Reporting, do hereby certify:

THAT the foregoing pages are a true and accurate transcript of the Court's Decision in Case Number Case No. 3AN-99-11817 and Case No. 3AN-99-12542 Civil Consolidated; Municipality of Anchorage versus Equilon Enterprises, et al; and Municipality of Anchorage versus Dong Joon Lim, et al, transcribed by me from a copy of the electronic sound recording to the best of my knowledge and ability.

THAT there may be indiscernible(s) throughout the transcript due to the poor quality of the recording.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal this 16th day of March 2000.

*Shirley L. Cohen*  
SHIRLEY L. COHEN  
Notary Public in and for Alaska  
My Commission Expires: 01/17/01

