39.18

John F. Bennett

From: "Jim Cantor" <Jim_Cantor@law.state.ak.us>
To: <johnf_bennett@dot.state.ak.us>
Sent: Thursday, July 17, 2003 3:56 PM
Subject: Re: State v. Stephan

Dave Heier raised this too, but in the context of what we pay to acquire and easement. It certainly makes you wonder if 90% is the appropriate percentage. I have sent you the superior court decision. If, when you review it, you believe there are issues worth appealing, please call me. Thanks. Jim

CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

James. E. Cantor
Assistant Attorney General
Supervising Attorney
Transportation Section
Phone: 907-269-5160
Fax: 907-279-5832
Email: jim_cantor@law.state.ak.us

>>> "John F. Bennett" <johnf_bennett@dot.state.ak.us> 07/17/03 03:11PM >>>
Jim, if the Superior Ct. issued a decision on this that you can send my way, I would appreciate that. The issue of not being able to charge rent brought to mind our regulation requiring payment of 90% Fair Market Value as a condition to dispose of a highway easement interest. 17 AAC 10.105 (b) Given the court's decision, do you believe that this regulation is at risk of also being rejected. JohnB

----- Original Message -----

From: Jim Cantor
To: johnf_bennett@dot.state.ak.us ; rob_murphy@dot.state.ak.us
Sent: Thursday, July 17, 2003 1:34 PM
Subject: Re: State v. Stephan

CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

James. E. Cantor
Assistant Attorney General
Supervising Attorney
Transportation Section
Phone: 907-269-5160
Fax: 907-279-5832
Email: jim_cantor@law.state.ak.us

>>> Jim Cantor 07/17/03 11:07AM >>>
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Yesterday, we received a decision in the Stephan case. The result was mixed. Stephan must obtain a permit to place encroachments in the right of way, but the state cannot charge rent.

Stephan owns land along the Old Seward Highway in Anchorage. He leases the land to United Rentals. United Rentals uses land within the right of way for advertising and other purposes. United Rentals and Stephan refused to remove the advertising from the right of way and refused to apply for an encroachment permit to authorize the other uses.

DOTPF sued Stephan and United Rentals to compel them to remove the advertising from the right of way and to compel them to either remove the other uses or obtain a permit authorizing those uses.

Stephan and United Rentals contested DOTPF's authority to prohibit advertising in the right of way and DOTPF's authority to require encroachment permits.

Stephan and United Rentals filed a counterclaim (essentially a lawsuit against the state) challenging the constitutionality of a regulation DOTPF promulgated in 2000 requiring the payment of "economic rent" for use of right of way to place encroachments. Stephan and United Rentals alleged they owned the land under the right of way, and that it would be a constitutional taking to make them pay to use that land.

The superior court ruled: (1) the state has the authority to prohibit outdoor advertising within the right of way; (2) the state has the authority to require encroachment permits "to ensure that the land be maintained in a fashion that does not make use of the land for highway purposes impossible or impractical"; (3) it would be unconstitutional to require a landowner to pay economic rent to use its own land, even when that land is within a highway easement.

Highways are underlain by private land in some locations and are owned in fee by the government in other locations. The Stephan/United Rentals parcel involved a land withdrawal in 1949 by the federal government through Public Land Order 601, a homestead entry, and a conversion of the land withdrawal to an easement in 1958 through Public Land Order 1613. The case presented better facts (from DOTPF's perspective) than other similar encroachment cases because (1) there was an argument that due to the terms of the land withdrawal the land underlying the highway still belonged to the federal government, not to Stephan, and (2) there was an argument that under the terms of Public Land Order 1613, the state had exclusive possession of the easement regardless of who owned the fee - and that with exclusive possession would come the right to charge rent. With regard to the first argument, the federal government changed its postion mid-way through the litigation and disclaimed any interest in the land underlying the highway, leaving Stephan as the sole claimant. The court rejected the second argument, finding that PLO 1613 does "not include any language stating that the easements are to be used exclusively by the State or that the State has the authority to condition the granting of a permit on payment of economic rent. Indeed," the court continued, "a close reading of all of the language in PLO 1613 makes clear that the purpose of providing the state with permit authority is not to grant it use rights equivalent to or exceeding those of the land's owner, but instead to allow it to prohibit any uses that are inconsistent with future highway use."

The court found the state may only charge a reasonable fee to offset administrative costs of processing permit applications, not economic rent.

The effect of the court's ruling is to render 17 AAC 10.013 (Establishing Economic Rent) unconstitutional as it applies to landowners who own land under a right of way. The regulation would not be unconstitutional when applied to right of way owned entirely by the state - the state can still charge rent for its own land, although it will have to amend its regulation to specify when it applies and when it does not. I have been told that DOTPF promulgated 17 AAC 10.013 with the intention of having a single rule apply to all right of way. A single rule would have prevented right of way agents from having to research title history underlying each parcel of highway right of way, and

would have avoided the appearance of inequality when one neighbor had to pay rent for placing something near highway pavement while, simply due to a quirk in 50 year old acquisition processes, another neighbor did not have to pay rent for doing essentially the same thing.

I believe the superior court decision comports with the law of property, and do not recommend an appeal.