

JUN 04 1998

MEMORANDUM

State of Alaska
Department of Law

TO: John Bennett
Right Of Way
DOT, Fairbanks

DATE: June 3, 1998

FILE NO.: 665-98-0081

CC: Dan Baum

TEL. NO.: 451-5426

FROM: Leone Hatch **LA**
Assistant Attorney General
AGO, Fairbanks

SUBJECT: McGrath Road Bike Path "Green Strips"

CONFIDENTIAL ATTORNEY CLIENT COMMUNICATION

This memo is intended as an addenda to Pam Hartnell's memo of December 15, 1997 concerning the acquisition of property that is burdened by restrictive covenants. Ms. Hartnell correctly stated that restrictive covenants usually cannot be extinguished on a acquired parcel without judicial action. What may not have been clear from the earlier memo is that restrictive covenants are often viewed as creating a compensable interest in the "benefited estate or estates."

There are two views on the subject of whether restrictive covenants create a compensable interest. Nichols 2:5.07[4]. The Alaskan Courts have not picked a position yet.

The majority view is that a subdivision restrictive covenant creates a property interest in the benefitted lot owners, typically the other lot owners in the subdivision. Under this view, the subject property owner is entitled to compensation for the loss of the parcel, valued as burdened by the restrictive covenant. The benefitted property owners are entitled to compensation for any damage to the value of their lots by virtue of the loss of the covenant on the subject parcel. States with this approach view the restrictive covenant as creating property rights, in the nature of equitable easements within the subdivision.

The minority view tends to treat the restrictive covenants as contractual provisions which do not create compensable property interests, or otherwise suggest that the burdensome nature of acquiring rights from multiple dominant estates would impermissibly interfere with the government's right of eminent domain.

There is some question in predicting which way this state's courts will go. In *BBP Corp v. Carroll*, 760 P.2d 519 (Ak 1988) our court did not require all landowners in the subdivision to be joined in a proceeding to determine whether a covenant was abandoned, in essence because it was more cumbersome than useful to join all the parties even though the Court conceded that they would all be affected. This suggests that Alaska may be open to the minority position. On the other

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hand, *BBP* did not address this particular issue and the decision suggested that it did not bind the non-joined landowners. Alaska tends to be restrictive of governmental powers and tender of private property rights. It is likely that Alaska would join the majority if presented with an appropriate case.

I suggest that the burdened parcels be appraised "as restricted" and the appraiser analyze the nature of any benefit to the other lots in the subdivision, if this has not already been done. If there is no compensable interest to some or all of the other lots in the subdivision, the State can, in good faith, proceed to condemn for title without naming all of the other record holders of title in the subdivision.¹ If anyone disagrees, they can file for inverse condemnation.

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¹ \if there is a homeowner's association, it could be named to receive any nominal, generalized compensation that the appraiser deems appropriate.