

MEMORANDUM

State of Alaska

Department of Law

TO: John Miller, P.E.
Chief, Right-of-Way
DOT/PF, Northern Region

DATE: July 16, 1993

FILE NO: 665-92-0158

TEL. NO.: 451-2811

FROM: Leone Hatch
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SUBJECT: Can city restrict
state's right to
eminent domain?

1. Question Presented.

You have requested our opinion concerning the effect of Fairbanks North Star Borough (FNSB) Ordinance 91-015.¹ This ordinance enacts FNSB 17.100.035, which requires that in certain zones "any right-of-way created or modified by the exercise of the power of eminent domain shall be located more than fifteen feet from any building." The landowner is given the right to waive the requirement. It also amends FNSB 17.100.090 requiring the platting board to consider "both the horizontal distance between the garage door and the property line and elevation between the garage and the road" in determining whether there is safe access or whether additional special conditions need be required for replat approval.

Specifically, you have asked:

1. To what extent can a municipality or borough burden and restrict the state's right to eminent domain?
2. Is the ordinance valid as it affects the state's right of eminent domain?

2. Short Answer.

A local authority may restrict or impinge the state's right to eminent domain to the extent that the state allows it to do so through constitutional or legislative pronouncement. Such restrictions, of course, must comport with other, relevant principles of law. A second class borough such as the Fairbanks North Star Borough may only exercise those powers specifically granted to it. AS 29.04.020. The legislature has passed a statute which requires the condemning authority to obtain municipal replat approval under most circumstances.² AS

¹ A copy is attached for reference.

² The governor may waive the requirement when the condemning

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09.55.275. The borough will use its replat authority to impose the new requirements.

Put simply, the question becomes, Does Ordinance 91-015 validly fit within the scope of permissible replatting activity as authorized by AS 09.55.275? We believe that the better view is that the ordinance is invalid.

There are several potential frailties in Ordinance 91-015. FNSB 17.100.035 (setbacks) is the more questionable of the two provisions in the ordinance. By limiting the effect of the setback to governmental condemnors and placing waiver authority in the hands of private parties, the ordinance may exceed the specific terms of the grant of authority to the borough in AS 09.55.275. FNSB 17.100.035 (setbacks) may also be flawed as an invalid exercise by the borough of the police power for an improper non-public or ultra vires purpose. Both FNSB 17.100.035 (setbacks) and the amendment to FNSB 17.100.090 (garages) may impose requirements which are not properly within the borough's purview at all.

3. Discussion.

The Extent of the State's Right to Eminent Domain

Two basic but distinct governmental powers (eminent domain and the police power) are implicated in the context of sovereignty.

The power of eminent domain is inherent in the sovereign. It is considered to be one of the basic attributes of sovereignty: the manifestation of ultimate dominion over the land. 1 Julius L. Sackman and Patrick J. Rohan. The Law of Eminent Domain • 1.13[4] (1992). The state's exercise of it may be restricted by constitutional limitation and regulated through legislative pronouncement. See Id. at • 1.14[2] & 1.3.

The power to control the use and habitation of land is an exercise of the police power. Id., • 1.42. Any exercise of the police power must be reasonably related to a legitimate **public** purpose. This requirement for a public purpose applies to the burdening of private property through the exercise of platting and zoning authority. Village of Euclid v. Ambler

agency demonstrates an "overriding state interest." AS 09.55.275.

Realty Co., 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926).
Seward Chapel, Inc. v. City of Seward, 655 P.2d 1293, 1297
(Alaska 1982). 1 Sackman and Rohan, supra, • 1.42[2]. The
police power is not a superior power to that of eminent domain
under normal circumstances. Id., • 1.141[6].

Both powers inure to the state as sovereign, but may be
delegated to local entities through constitutional or legislative
provision. In Alaska, local governments enjoy a variety of
powers depending on the specific type of local entity involved.

The Fairbanks North Star Borough is a second class
borough.³ Its specific powers and authority are created and
defined affirmatively by statute. AS 29.04.020. A second class
borough may not exercise a power not specifically granted. The
state has given second class boroughs the authority pursuant to
the police power to legislate in the areas of land use, AS
29.40.040, and platting, AS 29.40.070. The borough exercises its
land use and platting authority through the enactment of
ordinances. Ordinances are presumed to be valid and constitu-
tional. Municipality of Anchorage v. Anchorage Police
Department, 839 P.2d 1080, 1083 (Alaska 1992). However, an
ordinance is not valid if it falls outside of the grant of
authority provided by law or exceeds constitutional limitations.
Cochran v. City of Nome, 10 Alaska 425 (1944).

In general, the sovereign's authority to condemn may
not be impinged by local government. 1 Sackman and Rohan, supra,
• 1.141[6]. The sovereign may, however, expressly submit itself
to the local government's control. See 1A Id. • 3.2. Such is
the case in Alaska. AS 09.55.275. This statute requires a
condemning authority to obtain replat approval before proceeding
with a condemnation which causes a boundary change. In effect,
through this legislation the state subjected itself in a limited
manner to the borough's delegated police power in the area of
land use. This statute has not been interpreted by the court.
Research has not unearthed any direct authority on the questions
presented. No relevant legislative history has been located.
Relevant former AG opinions have been reviewed and are cited as
appropriate.

³ Municipalities and boroughs are political subdivisions of
the state, defined by state constitution and law. Alaska Const.
art. X; AS • 29.03.010.

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Scope of Plain Language of AS 09.55.275 (setbacks).

The setback ordinance only applies to governmental entities who by eminent domain create or modify a right-of-way (ROW) within 15 feet of a building without the consent of the immediate landowner. FNSB 17.100.035 (setbacks). It does not apply to private subdividers who dedicate a public way. Nor does it apply to utilities. It does not apply to a governmental entity which acquires land and alters or creates a ROW within 15 feet of a building without resorting to actual condemnation. If the owner of the land directly impacted does not object, the setback does not apply. This ordinance has a peculiarly narrow application.

AS 09.55.275 requires borough replat approval prior to condemnation as noted above. However, it also provides that the platting authority must "treat all applications for replat made by state or local governmental agencies in the same manner as replat petitions originated by private landowners." *Id.* If this requirement is interpreted as substantive, then FNSB 17.100.035 (setbacks) is invalid on its face because it distinguishes governmental condemners from other classes or parties seeking replat approval and thus violates AS 09.55.275. If this language is interpreted as procedural, in other words requiring only that the public and private application process be identical, the ability of the landowner to naysay only a governmental condemnor would also tend to invalidate the ordinance by allowing an additional step in the process when a governmental condemnor is involved.

Exercise of the Police Power.

An exercise of the police power under the state constitution at a minimum must demonstrate "a substantial relationship between the legitimate legislative goals and the means chosen to achieve those goals."⁴ Barber v. Municipality of Anchorage, 776 P.2d 1035, 1039 (Alaska 1989). The Barber court recited a three part test in reviewing an ordinance regulating sidewalk signs. The court stated:

The ordinance will be upheld as long as (1) the statutory purpose is legitimate and within the

⁴ When the exercise of governmental power impinges upon a fundamental right or impacts a suspect class, the standard of review becomes more rigorous.

police power of the state; (2) the means chosen substantially further the legislative purpose; and (3) the municipal interest in its chosen means outweighs [plaintiff's] interest

Barber, 776 P.2d at 1039. If the ordinance fails to meet this basic test, then it is invalid as violative of constitutional equal protection.

The application of FNSB 17.100.035 (setbacks) is so cramped and restricted as to call into question the public (as opposed to private) interest served. As noted above, it only applies to governmental condemnors, and its application may be waived by an individual private party. The landowner in essence has been given variance authority over the governmental condemnor, with no public standards or oversight to guide the exercise of that authority.⁵ Compliance with other setback ordinances are not determined by the landowner or influenced by the identity of the interested parties, but are managed through variance procedures controlled by local governmental authorities. The ordinance's practical effect is to allow an individual landowner to defeat some condemnations at will for any or no reason.⁶

The public benefit to be gained by setbacks is already served by neutral setback provisions in the zoning chapter of the ordinances. FNSB 18.54.040. The state has subjected itself to these provisions. AS 35.30.010; AS 35.30.020. See also FNSB 18.54.060 (zoning permits). As the application of this setback is left in private hands, and will likely be exercised for private rather than public benefit, it is difficult to imagine what **public** purpose under the police power this particular ordinance would substantially further.

The effort to single out governmental condemnors and

⁵ Viewed in this light, it could also constitute a conflict with AS 29.40.040, which sets out the standards for variances. Kenai Peninsula Borough v. Kenai Peninsula Board of Realtors, Inc., 652 P.2d 471, 473 (Alaska 1982).

⁶ The only alternatives left to the condemnor would be the redesign or abandonment of the project to the detriment of the public at large, or the condemnation and demolition of the structure in question at greater public expense than would be otherwise warranted.

leave compliance in the hands of the condemnee may reasonably be interpreted as an improper effort to afford a handful of private landowners additional rights in condemnation beyond that which is provided by state law and constitution to the detriment of the public fisc. The ordinance may be an attempt to benefit a few individuals rather than the general public. It may also constitute an exercise of the police power in an area (condemnation valuation) in which the borough has not been given statutory authority.

Neither purpose qualifies as a legitimate use of the police power by the borough. It is likely that a court would find that FNSB 17.100.035 (setbacks) is not substantially related to a legitimate public interest within the borough's power.

Improper Delegation to Private Party

One of the more troubling aspects of the setback ordinance is the enforcement discretion of the private landowner.⁷ If the setback is indeed intended to benefit the general public, a single landowner could negate all such benefits upon a standardless whim or through an improper motivation. See, e.g., Municipality of Anchorage v. Anchorage Police Department, 839 P.2d 1080, 1085 (Alaska 1992). Neither the landowner's neighbors nor other users of the neighborhood or ROW could complain. This raises questions as to the propriety of investing an individual with what is essentially a governmental power to grant a variance without constructing any due process protections for others concerned.

A review of other jurisdictions has revealed an inconsistent body of law discussing the propriety of delegating governmental authority to private entities. E.g., New Motor Vehicle Board of California v. Fox, 439 U.S. 96 (1978). Kenneth Culp Davis, Administrative Law • 3:12 (Delegation to Private Parties) (1989).⁸ The Alaskan courts have not spoken specifically to the question at hand, although it has been held that future amendments to the uniform building code (published by

⁷ By statute, a platting authority or planning commission may delegate its power to hear and decide replat petitions pursuant state law. AS 29.40.170. There is no similar statutory delegation authority for waivers and variances.

⁸ An in-depth discussion of delegation to private parties is beyond the scope of this opinion.

a private entity) may not be adopted prospectively due to concerns about public process and accountability. Northern Lights Motel v. Sweaney, 561 P.2d 1176, 1180 (Alaska 1977). The Alaskan court has also held that the delegation of power to a private arbitrator may be permissible, given that sufficient standards and opportunity for review are available. Anchorage Police Department, 839 P.2d at 1090.

Although the law is too complex and unsettled to predict with certainty how the Alaskan courts would rule on this particular delegation, it is quite possible that the ability of the single landowner to waive application of the setback requirement without resort to any general standard and without review would doom the ordinance as an unconstitutional delegation of power to a private party. Compare State Theater Co. v. Smith, 276 N.W.2d 259 (S.D. 1979) (zoning statute requiring consent of neighbors upheld).

State and Borough Authority

By constitutional provision the state shelters within it local governmental units with varying degrees of power and autonomy. The state constitution encourages local autonomy and expressly requires a liberal interpretation of powers granted to local authorities. Liberati v. Bristol Bay Borough, 584 P.2d 1115, 1122 (Alaska 1978). Alaska Const. art. X, • 1. As noted above, a second class borough such as the Fairbanks North Star Borough may legislate only in an areas in which it has been affirmatively granted authority. AS 29.04.020.⁹ See Alaska Const. art. X, • 3; See Libby v. City of Dillingham, 612 P.2d 33 (Alaska 1980). Even a second class borough, however, has the power necessarily implied to assert the powers it has been given. Libby, 612 P.2d 33; City of Homer v. Gangle, 650 P.2d 396, 401 n.8, 9 (Alaska 1982).

The resolution of the inevitable conflicts between different levels of government turns upon the extent of the grant of power to the local authority. Local authority has been deemed impliedly denied when the state has entered an area fully and universally and either the recognition of the local authority would interfere with a statewide policy or when the two

⁹ In contrast, the City of Fairbanks has home rule status and has any legislative power not denied by charter or statute. AS 29.04.010.

legislative efforts are in irreconcilable conflict.¹⁰ E.g., Jefferson v. Alaska, 527 P.2d 37 (Alaska 1974).¹¹ The borough's efforts to regulate the safety of highway access through a review of driveways and garage attributes may be outside of its authority due to both a lack of direct statutory empowerment and through the state's occupation of the area. Likewise, as briefly noted above, an effort to directly intervene in the valuation process in condemnation is beyond the borough's statutorily granted authority.

Even though the Plan and the borough ordinances address traffic safety considerations, the enabling state legislation does not specifically grant such authority to the borough beyond that which is necessarily implied in platting and zoning activities. The courts are split in other jurisdictions as to the ability of platting authorities to deny approval based on general safety concerns. Kenai Peninsula Borough v. Ryhere, 628 P.2d 557, 563 n.2 (Alaska 1981). See 1982 Inf. Op. Att'y Gen. (Dec. 14; 566-082-83. No Alaskan controlling authority was located on this precise point.

There is a statewide scheme of highway construction safety standards which apply to highways.¹² AS 19.10.160. See also AS 44.42.50; AS 19.30.161. There are very few circumstances in which these standards do not apply. AS 19.30.161. Driveways in particular require a state encroachment permit. AS 19.25.200. A permit will not be issued if the driveway, its use, or maintenance, will interfere with public safety. 17 AAC 10.020(d). All ingress and egress to highways, roads, service roads, and trails must comply with 17 AAC 10.020 and meet state driveway standards. 17 AAC 10.040. If a condemnation renders a

¹⁰ In Simpson v. Municipality of Anchorage, 635 P.2d 1197 (Alaska App. 1981), the Alaska Court of Appeals struck down a municipal ordinance relating to drunk driving on the grounds that it was inconsistent with the state's traffic safety scheme.

¹¹ Most of the cases discussing these issues arise from conflicts between the state and home rule, or first class entities which, unlike second class boroughs, may exercise those powers not specifically denied to them.

¹² "Highway" has a very broad definition, including ". . . road, street, trail, walk, bridge, tunnel, drainage structure or other similar or related structure or facility" AS 19.45.001(9).

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property ineligible for a state driveway permit, the resultant damage must be assessed and the owner compensated in accordance with state law. AS 09.55.310.

In any event, public safety interests will be served and the landowner provided with just compensation. FNSB 17.100.090 (garages) is addressed to exactly the same safety concerns controlled by state law and regulation. The court will not give effect to FNSB 17.100.090 if to do so will interfere with the state scheme.

Property acquisition through condemnation is strictly governed through state and federal law. As discussed above, on its face FNSB 17.100.035 (setbacks) gives a property owner with a ROW within 15 feet of a dwelling the ability to halt a condemnation and in essence force the state to either pay more money or acquire more property than state and federal law would otherwise allow. This may constitute a direct interference with a statewide statutory policy concerning condemnation valuation. The courts have ruled that this type of interference is impermissible, although the rulings have not been entirely consistent. E.g., City of Kodiak v. Jackson, 584 P.2d 1130 (Alaska 1978); Johnson v. City of Fairbanks, 583 P.2d 181 (Alaska 1978); Chugach Electric Association v. Municipality of Anchorage, 476 P.2d 115 (Alaska 1970); Simpson v. Municipality of Anchorage, 635 P.2d 1197 (Alaska App. 1981).

The Alaska Supreme Court has partially truncated the exercise of a valid municipal power when a valid state power also exists, to allow both the state and the local entity to coexist in one regulatory area. Libby v. Dillingham, 612 P.2d 33, 42 (Alaska 1980). While this interpretation lacks efficiency and solicits conflict, it does serve the constitutionally expressed goal of local autonomy. Alaska Const. art. X, • 1. See also Alaska Board of Fish and Game v. Thomas, 635 P.2d 1191 (Alaska 1981) (state law which exceeds federal requirements in aircraft labeling valid).

It is possible that a court could find a grant of concurrent authority to the borough, and hold that borough requirements will be valid unless they are in direct and irreconcilable conflict with state requirements. In this case, however, state authority is express, while if there is any grant of borough authority in the area of access safety standards or condemnation valuation, it is implied. In matters both of highway safety and condemnation valuation, uniformity is generally beneficial. While there is conflicting legal authority in the area of state versus local power, the existence of a

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pervasive statutory scheme which evinces a statewide policy has been held to preclude local attempts at regulation in the same field. Johnson v. City of Fairbanks, 583 P.2d 181 (Alaska 1978); Chugach Electric Association v. City of Anchorage, 476 P.2d 115 (Alaska 1970). Cf. Jefferson v. State, 527 P.2d 37 (Alaska 1974) (irreconcilable conflict or express prohibition required to invalidate a home rule borough's authority). Traffic control has already been recognized as one such area. Anchorage v. Richards, 654 P.2d 797 (Alaska App. 1982). We feel that the better view is that state law controls and the ordinance is invalid as stepping beyond the bounds of borough authority.

LH/jag
Enclosure
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