Exhibit J
of
PZC Case 2011-104 Issue Response

Municipal Department of Law opinion:
"Title 21 – Down Zoning and Takings Analysis Overview of Alaska Jurisprudence"
(Dept. of Law Matter No. 05-0117, May 27, 2005)

Note: This information addresses the legal "takings" issue which was raised in work sessions.

MUNICIPALITY OF ANCHORAGE

OFFICE OF THE MUNICIPAL ATTORNEY

MEMORANDUM

DATE: May 27, 2005

TO: **Tom Davis, Senior Planner, Planning Department**

THRU: **Tom Nelson, Director, Planning Department** TN

THRU: Frederick H. Boness, Municipal Attorney FHB

THRU: Rhonda Fehlen Westover, Deputy Municipal Attorney

FROM: **Dean T. Gates, Assistant Municipal Attorney**

SUBJECT: **TITLE 21-DOWN ZONING & TAKINGS ANALYSIS – OVERVIEW OF ALASKA JURISPRUDENCE**
DEPT. OF LAW MATTER NO. 05-0117

QUESTION: You have requested we address the following question:

Provide a local analysis of Alaska case law and the probable outcome of litigation claiming a taking as a result of amending the zoning district regulations or amending the zoning map with the effect of down-zoning numerous properties.

BRIEF ANSWER: Subject to the following Background and Discussion, our brief answer is as follows:

Takings doctrine in Alaska necessitates several steps. Alaska courts first address whether a *per se* taking has occurred, by actual physical invasion of land or by regulatory action that has deprived the landowner of all economically viable use of the land. If there is no *per se* taking, such as conditions imposed for issuance of a permit or where a general zoning regulation is concerned, a case-specific analysis is necessary to determine whether there is a compensable taking. The four *Sandberg* factors are applied in this case-specific analysis: (1) the character of the governmental action; (2) its economic impact; (3) its interference with reasonable investment-backed expectations; and (4) the legitimacy of the interest advanced by the regulation or land-use decision. In general, when a regulatory action applies generally to benefit the public and the burdens on specific properties are allocated fairly, if its character and legitimacy factors are within valid exercise of police powers, the action probably does not result in compensable takings of affected properties.

BACKGROUND:

The Planning Department requests a report on (1) the parameters, according to Alaska state law (in the context of national trends as reported by Clarion), for revisions to zoning regulations, zoning maps and related comprehensive plan maps before the property owner no longer has "reasonable use" of the property; and (2) if the reduction of any "economic expectations" is a factor unique in Alaska state law.

A good local example of the takings issue is that our land use analyses and the comprehensive plan have established the need to reserve industrially zoned lands for industrial development opportunities. This leads to amending the zoning ordinance to restrict retail commercial development on industrially zoned lands, probably reducing the market value of some properties. *See* AMC 21.40.210. The draft Title 21 rewrite offers other examples of potential reductions of allowed uses, creation of nonconformities, and several amortization schedules.

DISCUSSION:

Takings jurisprudence has a long history commencing with the Fifth Amendment of the Bill of Rights, which reads in relevant part: ". . . nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. V. The Alaska Constitution is similar in its constitutional prohibition, which provides that "[p]rivate property shall not be taken or damaged for public use without just compensation." Alaska Const. Art. I, § 18.[1] It has long

[1] For an overview of the unique body of Alaska constitutional law exclusive of the federal constitution, including the takings doctrine, *see* Van Flein, Thomas V., *The Baker Doctrine and the New Federalism: Developing Independent*

been a general rule in Alaska that a taking does not occur until: (1) Legal title vests in the state (or government entity), (2) the state enters into actual possession, or (3) the state takes constructive possession either by causing damage to property or by depriving the owner of full beneficial use of his land. *Stewart & Grindle, Inc. v. State*, 524 P.2d 1242, 1246 (Alaska 1974). It is irrelevant whether the taking was intentional or whether the government benefited from it. *Bakke v. State,* 744 P.2d 655, 657 (Alaska 1987). The Alaska Constitution affords broader protection to the property owner than the federal Constitution, therefore United States Supreme Court precedents establish only the minimum standards of protection in an inverse condemnation claim in Alaska. *Balough v. Fairbanks North Star Borough,* 995 P.2d 245, 265 (Alaska 1995).

Whether there is a '*per se* takings,' is the first inquiry when analyzing a takings claim. There are two recognized classes of *per se* takings: (1) cases of physical invasion and (2) cases where a regulation denies a landowner of all economically feasible use of the property. *R & Y, Inc. v. Municipality of Anchorage*, 34 P.3d 289, 296 (Alaska 2001). Where the former category is concerned, it is usually clear whether a physical invasion has occurred and the dispute concerns compensation. Zoning regulations do not involve physical invasions. In the latter category, similar to the seminal federal case *Penn Central*,[2] the Alaska Supreme Court has held that once an owner is deprived of the economic advantages of legal ownership, a taking has occurred. *Grant v. State*, 560 P.2d 36, 39 (Alaska 1977). The Alaska Supreme Court has defined "economic advantages incident to ownership" of unimproved property to mean "the potential for appreciation and opportunity for development." *Homeward Bound, Inc. v. Anchorage Sch. Dist.*, 791 P.2d 610, 614 n.6 (Alaska 1990). For a zoning regulation to be a *per se* takings, it must remove all potential for appreciation and opportunity to develop a property.

When a case does not fall into either of the *per se* takings categories, courts must engage in a case-specific inquiry to determine whether a governmental action effects a "regulatory taking." The factors Alaska courts consider are: (1) the character of the governmental action; (2) its economic impact; (3) its interference with reasonable investment-backed expectations; and (4) the legitimacy of the interest advanced by the regulation or land-use decision. *Anchorage v. Sandberg*, 861 P.2d 554 (Alaska 1993). These are known as the *Sandberg* factors.

Constitutional Principles Under the Alaska Constitution, 21 Alaska L. Rev. 227 (December 2004). Two significant differences between the state and federal takings doctrines are (1) the prohibition on damaging private property without compensation in the Alaska Constitution (*State v. Hammer*, 550 P.2d 820 (Alaska 1976)) and (2) the Alaska Supreme Court's holding that Article I, section 18 is to be construed liberally in favor of the property owner. *Alsop v. State*, 586 P.2d 1236 (Alaska 1978); *Ehrlander v. State, DOT & Pub. Facilities*, 797 P.2d 629 (Alaska 1990).

[2] The seminal case of *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 98 S. Ct. 2646, 57 L.Ed.2d 631 (1978) determined that some regulations may go too far for purposes of the Fifth Amendment when they deny all economically viable uses of property, and a court must engage in ad hoc, factual inquiries to determine if a regulation does so.

In the regulatory takings arena, Alaska has largely followed the federal doctrine. With some modification, Alaska has adopted the test set forth in *Agins v. City of Tiburon*,[3] which weighs factors similar to *Sandberg,* and considers whether the government regulatory scheme is fair because the claimant landowner "has been compensated by the public program 'adjusting the benefits and burdens of economic life to promote the common good.' " *R&Y, Inc.,* 34 P.3d at 299, *quoting Agins v. City of Tiburon,* 447 U.S. 255, 257-59, 100 S. Ct. 2138, 65 L.Ed.2d 106 (1980). Thus, some minor economic losses may be compensable when the burden of the regulation is unfairly allocated to a few specific properties. To determine which losses are compensable requires courts to engage in a case-specific analysis "guided by the *Sandberg* factors and the underlying economic principle of equitable distribution of public burden and benefit." *R&Y, Inc.,* 34 P.3d at 300.

While not expressly adopting it, the Alaska Supreme Court referred in dicta to the conclusion in federal courts that the allocation of economic burdens and benefits under a regulatory scheme is fair when "the disputed regulation: (1) applies broadly to many landowners; (2) directly benefits those that it burdens; and (3) permits burdened landowners to engage in viable alternative economic uses of their land." *Id.* at 299-300. When legislative acts such as amendment to a land use map or the Code listing of permissible uses in a zoning district are passed for purposes of the social good and to assure "careful and orderly development," it is presumptively not a regulatory taking. *Id.* at 298 (citations omitted). Such is a valid use of the police power for the protection of the public welfare, and to ensure landowners' uses of their property are not injurious to the community. *Id.* at 297. In *R&Y, Inc.*, while some factors weighed in favor of the landowner, the economic loss to the landowner caused by the 20-foot wetlands setback requirements were so minor-1.2% to 2% of the total value of the parcels-there was no compensable taking because the minor economic loss was fairly balanced with the public benefits of the regulation also enjoyed by the landowners.

Other Alaska court decisions involving a regulatory takings analysis are instructive. For example, in *Zerbetz* a municipality's designation of certain property as "conservation wetlands" did not deprive the owner of the "economic advantages of ownership" and hence, was not a taking because the owner was not deprived of the potential for appreciation in value or the opportunity to develop the property. *Zerbetz v. Municipality of Anchorage*, 856 P.2d 777, 782-783 (Alaska 1993). The Anchorage Coastal Management Plan, adopted pursuant to the federal Clean Water Act, does not prevent development of property, but merely requires a developer to submit water flow data, soil samples, and vegetative and habitat information, and many subdivision plans for similarly classified conservation wetlands had been approved. *Id.*

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[3] 447 U.S. 255, 100 S. Ct. 2138, 65 L.Ed.2d 106 (1980) (stating that a determination that governmental action is a takings is a conclusion that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest).

General plans that do not definitely impose regulations or conditions on properties are not takings, although market prices may be affected by such policy statements. A municipal assembly's designation of property as a potential school site is not a taking for which the property owner could recover just compensation, where the assembly's mere designation was not a concrete indication that the municipality intended to condemn the property. *Homeward Bound, Inc. v. Anchorage Sch. Dist.*, 791 P.2d 610 (Alaska 1990). An inverse condemnation action states a claim where a land use planning classification deprives a property owner of the economic advantages of ownership of the property. *Id.* at 632-633. However, the balancing of the *Sandberg* factors is required for adjudication. The *Homeward Bound* court relied on California cases that conclude when a government expresses intent to condemn property, the condemnee must be afforded the opportunity to show (1) the public authority acted improperly either by unreasonably delaying eminent domain proceedings following the announcement to condemn, or by other unreasonable conduct prior to condemnation; and (2) as a result of such action the property suffered a diminution in market value. *Id.* at 614. However, the court made clear that the adoption of a general plan does not equal the expression of intent to condemn property, even when a general plan map showed streets extending through private property. *Id.* Because the final decision for a school site rested with the school board, the mere designation by the assembly of Homeward Bound's property as a potential school site did not evince the required intent to condemn.

In *Balough v. Fairbanks North Star Borough*, 995 P.2d 245 (Alaska 2000), the landowner operated a junkyard in the General Use (GU-1) zoning district, although there were some issues with compliance. Upon a rezoning application submitted by some neighboring landowners, the assembly approved rezoning the area a Rural Residential (RR) zoning district. While Balough had the right to operate the junkyard as a nonconforming use, that right was denied because her junkyard was not in compliance with the junkyard ordinances at the time of rezoning, and therefore not a lawful use. Balough's arguments for a taking were rejected by the court because she argued for a *per se* taking, and the Sandberg factors favored the Borough. The Court found that (1) the rezoning action was a legitimate government action, consistent with the borough's comprehensive zoning plan; (2) the economic impact was solely on Balough's fence building efforts, but such fence was required anyways for operation of the junkyard; and (3) the investment backed expectations argued by Balough were operation of the junkyard, but the evidence showed she did not assert the intent to operate a junkyard for profit when she purchased the property, and storing junked cars was always a temporary undertaking. *Balough,* 995 P.2d at 266. Finally, although the decision to deny her grandfather rights terminated her right to use her property as a junkyard, she still had economically feasible use of her property for a number of other allowed uses and purposes. *Id.*

A regulatory taking analysis is implicated when the government makes an adjudicative decision to impose conditions on a landowner's application for a building permit for a specific

individual parcel, as opposed to a legislative determination of general application. *Spinell Homes, Inc. v. Municipality of Anchorage*, 78 P.3d 692 (Alaska 2003). Additionally, the individualized condition must require the property owner to dedicate a portion of the parcel in question to the public in order to invoke the federal *Nollan/Dolan*[4] regulatory taking analysis. *Id.* In *Spinell Homes,* the municipality did not completely deprive developer of all economic value of its land where houses had been constructed and sold to third parties, and developer did not produce evidence showing the value of its land was altered by the municipal actions requiring landscaping, setbacks, and dedications disputed by the developer.

The kind of property investment at issue may also be determinative as to whether there is a takings. For example, expectation of renewal of a lease is not a compensable interest. *State, Dep't of Hwys. v. Salzwedel*, 596 P.2d 17 (Alaska 1979). The courts will not speculate the outcome of a plat application, where the developer has not actually submitted subdivision plans but argues the marketability is affected and opportunity to develop is diminished because some agencies have expressed desire to keep the area undeveloped. *Zerbetz,* 856 P.2d at 783. In short, a landowner must show actual effects of a regulation that deprive him of a vested economic interest.

CONCLUSION:

Takings analysis in Alaska considers first whether there is a *per se* takings: actual physical invasion or deprivation of all economically feasible uses of property. If there is no *per se* takings, the *Sandberg* factors are applied and weighed with due regard to the guiding principle that the allocation of the public burdens and benefits should be fair and not be unreasonably borne by a few landowners. Because the scenario presented in Planning's request-reduction in some property values and creation of nonconformities-indicates economic feasible uses will remain with properties affected by changes to the zoning map, there is probably no *per se* taking as a result of adopting land use maps that indicate possible future changes to zoning designations unfavorable to landowners' investment return potential. If there are questions regarding specific properties or actual rezonings, please contact the Legal department.

[4] The U.S. Supreme Court's regulatory takings analysis as applied to exactions or conditions imposed on development plans are set forth in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L.Ed.2d 677 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L.Ed.2d 304 (1994).