BOOK 35 PAGE 518
Fairbanks Recording District

DEDICATION DEED

KNOW ALL MEN BY THESE PRESENTS: that the undersigned, LLOYD TOMLIN and A. JANELLE TOMLIN, do hereby grant to the public a right-of-way for a public road on, over and across the following described property situate in the Fairbanks Recording District, State of Alaska, to be known as Auburn Drive:

A strip of land thirty-three (33) feet wide along and contiguous to the East line, (the Section line between Section Thirty (30) and Section Twenty-nine (29), T. 1N., R. 1W.) of Lot 7, Sunrise Subdivision No. One (1), as shown on the plat recorded March 29, 1966 as Instrument No. 66-2313, Records of the Fairbanks Recording District, for its entire length.

And do hereby covenant that they are lawfully seized of the premises and have the authority to grant the right-of-way herein dedicated.

IN WITNESS WHEREOF, the undersigned have executed this instrument this 5th DAY OF March, 1972.

Lloyd Tomlin
LLOYD TOMLIN

A. Janelle Tomlin
A. JANELLE TOMLIN

STATE OF ALASKA)
) ss.
FOURTH DIVISION)

THIS IS TO CERTIFY that on this 7th day of March, 1972, before me, the undersigned, a Notary Public in and for the State of Alaska, duly commissioned and sworn, personally appeared LLOYD TOMLIN and A. JANELLE TOMLIN, to me known and known to me to be the identical individuals mentioned and they executed the within and foregoing deed, and they acknowledged to me that they signed and sealed the same freely and voluntarily for the uses and purposes therein specified.

WITNESS my hand and notarial seal on the day and year in this certificate first hereinabove written.

Notary Public in and for the State of Alaska.
MY COMMISSION EXPIRES: January 2, 1975

45-55

ALASKA TITLE GUARANTY CO
3.00
RECORDED
FAIRBANKS REC. DISTRICT
Mar 7 3 42 PM '72
REQUESTED BY
ADDRESS

Dedication

Dedication: The appropriation of land, or an easement, by the owner, for the use of the public, and accepted for such use by or on behalf of the public. Such dedication may be express where the appropriation is formally declared, or by implication arising by operation of law from the owner's conduct and the facts and circumstances of the case.

Common-Law Dedication: A common-law dedication is one made as above described, and may be either express or implied. An express common-law dedication is one where the intent is expressly manifested, such as by ordinary deeds, recorded plats not executed pursuant to statute or defectively certified so as not to constitute a statutory dedication.

Statutory Dedication: A statutory dedication is one made under and in conformity with the provisions of a statute regulating the subject, and is of course necessarily express.

In essence, a dedication is a two part operation. It requires an offer by the land owner to dedicate, and it also requires the acceptance by the public. Statutory dedication formalizes this process.

A statutory dedication is provided under A.S. 40.15.010 Approval, filing, and recording of subdivisions. This statute reads as follows: "Before the lots or tracts of any subdivision or dedication may be sold or offered for sale, the subdivision or dedication shall be submitted for approval to the authority having jurisdiction, as prescribed in this chapter." "The recorder may not accept a subdivision or dedication for filing and recording unless it shows this approval. If no platting authority exists as provided in AS 40.15.070 and 40.15.075, land may be sold without approval." AS 40.15.070 and AS 40.15.075 cite that the Department of Natural Resources is the platting authority outside of the organized boroughs for the change or vacation of existing plats.

Although DNR is cited as the platting authority in the unorganized borough, its authority is limited by statute to the review of replats which modify land boundaries as depicted on existing plats or the vacation of street dedications which have been previously created. They do not have the authority to review and approve subdivision plats therefore cannot accept dedications on behalf of the public. A 1/11/83 AGO opinion on the "Eagle River Urban relinquishment" and a 7/10/89 AGO opinion on "Dedicated easements in Rocky Lake subdivision" have discussed this type of a scenario and stated that where there is no platting authority to approve or disapprove the plat, common law principles apply in determining whether lands were dedicated to public use.

The fact that DNR does not have complete platting authority in the unorganized borough is not lost on DNR or the private surveying community. Currently, subdivisions and dedications may be made in the unorganized borough by deed or plat, are not required to be surveyed and monumented, and require no approval prior to recording. At this time, only DEC has authority to review and approve a subdivision plat with regard to waste water adequacy. Complete platting authority in the unorganized borough may be extended to DNR in the near future by virtue of proposed legislation. Senate Bill 81, entitled "An Act

establishing the Department of Natural Resources as the platting authority in certain areas of the state; relating to subdivisions and dedications; and providing for an effective date" was offered in 1991 but has not passed the legislature to date.

Often a common-law dedication is based upon an offer to dedicate an easement to the public by virtue of an express reservation in a property conveyance document or in an easement deed specifically prepared to dedicate an easement. It is also possible to make the offer of dedication with a deed and an attached plat as an exhibit.

(extracted from Record of Survey document)

located by actual construction of the railroad, and by surveys and USGS maps; therefore staking and posting was unnecessary either to establish the original 200 foot right-of-way, or to widen it later. The Omnibus Act Quitclaim Deed conveyance of unconstructed as well as constructed portions of roads in the state would otherwise have no meaning.

II. The 1941 Act Was a Dedication for Highway Purposes of the Entire Railroad Right-of-Way from Cordova through Chitina to the Kennecott Mine; the Dedication Was Effective Upon Relinquishment by the Railroad Without Additional Agency Action.

Whether the 1941 Act is to be interpreted as a dedication of the former railroad right-of-way is a matter of statutory interpretation, and does not depend on a finding of the common law elements of a dedication of private property to public uses. The language and purpose of the 1941 Act, and consistent later acts of two federal Departments clearly support the conclusion that the 1941 Act was a dedication of the former railroad right-of-way for highway purposes.

A. A Congressional Dedication of Public Lands Does Not Require the Common Law Elements of a Dedication of Private Property to Public Purposes.

The elements necessary to establish a common law dedication to public use by the owner of private property are not applicable to a congressional dedication of public lands. 3/ The

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3/ Congress undisputedly has the capacity to "withdraw," "appropriate," or "reserve" public lands of the United States for specific public uses. Congress may also "dedicate" public lands, and this word does not imply any limitation of Congress's power, or any additional requirements to perfect. The word "dedicate" has been used in these briefs because it is usually associated with setting aside land for roads or highways.

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common law elements of dedication -- a clearly expressed offer to dedicate, and acceptance by appropriate public authorities -- attempt to assure fairness to the two separate entities interested in the transaction: the owner of the private property said to be dedicated to public use, and the public recipient. The element of a clearly expressed offer to dedicate serves to protect the owner from overreaching by a public claim to more than the owner intended to dedicate. The element of an acceptance by public authorities serves to protect the public from being burdened by property of no value or usefulness. See, e.g., Note, Public Ownership of Land Through Dedication, 75 Harvard L. Rev. 1406 (1962); Parks, The Law of Dedication in Oregon, 20 Ore. L. Rev. 111 (1941).

But dedication of property owned by a government for a particular public use is a different sense of the word. 23 Am. Jur. 2d Dedication (1983) Sec. 2 at p. 6. See also, 26 C.J.S. Dedication, Sec. 6, p. 404 n. 55.15; Sec 34, p. 462 n. 48.5 (1956); Tigner, Dedication - a Survey, 15 Baylor L. Rev. 179 (1963) at 184-5, n. 38. No acceptance is necessary when a public body having capacity to do so makes a formal dedication. State of California v. U.S., 169 F.2d 914, 921 (9th Cir. 1948); Gewirtz v. City of Long Beach, 330 N.Y.S. 2nd 495, 506 (N.Y. Sup. Ct 1972); McKernon v. City of Reno, 357 P.2d 597, 601 (Nev. 1960); Singewald v. Girden, 127 A.2d 607, 616 (Del. 1956); Arcques v. City of Sausalito, 272 P.2d 58, 60 (Cal. Ct. App. 1954). When acting to dedicate public land, Congress has authority and responsibility to determine what uses of public lands will benefit both the public as landowner and

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the public as user. The dedication and its acceptance are in the same acts. Singewald, 127 A.2d at 616.

For this reason, the plaintiffs' search (Plaintiffs' Supplemental Brief at pp. 42-47) for two separate elements of offer and acceptance is simply inappropriate. The only pertinent question is whether the 1941 Act is properly interpreted as an expression of intent to appropriate or reserve the right-of-way as a future transportation route, or whether the 1941 Act merely directs the Secretary to determine later whether the right-of-way is needed for use as a highway, without specifying the form of such a determination or imposing any restrictions which would protect the right-of-way from passing out of the public domain before the Secretary made such a determination.

This is an issue of statutory construction, which is a matter within the special competency of the court. Tesoro Alaska Petroleum Co. v. Kenai Pipeline Co., 746 P.2d 896 (Alaska 1987) There the court said:

> the starting point should be the language of the statute itself construed in light of the purposes for which it was enacted. . . . The goal of statutory construction is to give effect to the legislature's intent, with due regard for the meaning the statutory language conveys to others.

Id. at 904-905.

B. The Language and Purpose of the 1941 Act Support the Conclusion that Congress Dedicated the Railroad Right-of-Way for Highway Purposes.

First, the plain language of the 1941 Act shows that Congress intended the former railroad corridor to be used for a

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2. The Law of Dedication.

Dedication is a mechanism for transfer of real property which need not comply with the Statute of Frauds. There are, however, well-defined requirements for a valid dedication.

"Dedication is the intentional appropriation of land by the owner to some public use." Seltenreich v. Town of Fairbanks, 103 F.Supp. 319, 323 (D.Ak. 1952), quoting 16 Am.Jur. § 2, at 348.[21]

In Alaska, there are two basic elements of common law dedication: an intent to dedicate on the part of the landowner, and an acceptance by the public. Swift v. Kniffen, 706 P.2d 296, 300-01 (Alaska), reh. denied, 1985; State v. Fairbanks Lodge No. 1392, Loyal Order of Moose, 633 P.2d 1378, 1380 (Alaska 1981); Seltenreich v. Town of Fairbanks, 103 F.Supp.

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after relinquishment, which would be a necessary precondition to the Secretary's exercise of his authority to withdraw the lands for a right-of-way."

Letter from Roger DuBrock to Asst. A.G. McGee, June 7, 1989, Exhibit "W," at 3-4.

[21]See also Nature Conservancy v. Machipongo Club, Inc., 419 F.Supp. 390, 396 (E.D.Va. 1976). "A common law dedication occurs `when the owner of an interest in land transfers to the public a privilege of use of such interest for a public purpose.' Hamerly v. Denton, 359 P.2d 121 [, 125] (Alaska 1961); see also State v. Fairbanks Lodge No. 1392, Loyal Order of Moose, 633 P.2d 1378 (Alaska 1981); Olson v. McRae, 389 P.2d 576 (Alaska 1964)." A grant of a private right-of-way is not a dedication. Seltenreich v. Town of Fairbanks, 103 F.Supp. 319, 323 (D.Ak. 1952).

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319, 323 (D.Ak. 1952), quoting McQuillin on Municipal Corporations, 3d ed., § 33.02, at 579-80.[22]

"It is a question of fact whether there has been a dedication." Hamerly v. Denton, 359 P.2d 121, 125 (Alaska 1961). The burden of proof to show dedication is on the party asserting it. Seltenreich v. Town of Fairbanks, 103 F.Supp. 319, 323 (D.Ak. 1952).[23]

The evidence to establish a dedication must be clear and convincing. Seltenreich v. Town of Fairbanks, 103 F.Supp. 319, 323 (D.Ak. 1952).[24]

First, the proponent of a dedication must show that the landowner intended to dedicate his property to the public,

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[22]"[D]edication involves not only an offer to dedicate, but an acceptance thereof, either express or implied, by a public authority having power to pass upon the matter." Anderson v. Town of Hemingway, 237 S.E.2d 489, 490 (S.Car. 1977); Swift v. Kniffen, 706 P.2d 296, 300-01 (Alaska), reh. denied, 1985; Nature Conservancy v. Machipongo Club, Inc., 419 F.Supp. 390, 396 (E.D.Va. 1976).

[23]Quoting McQuillin on Municipal Corporations, 3d ed., at 671-72, and quoting 16 Am.Jur. § 75, at 417; see also Hamerly v. Denton, 359 P.2d 121, 125 (Alaska 1961) ("It is a question of fact whether there has been a dedication. This fact will not be presumed against the owner of the land; the burden rests of the party relying on a dedication to establish it by proof that is clear and unequivocal." (at 125.) "Since we know that individual owners of property are not apt to transfer it to the community or subject it to public servitude without compensation, the burden of proof to establish dedication is upon the party claiming it." Anderson v. Town of Hemingway, 237 S.E.2d 489, 490 (S.Car. 1977) (citations omitted).

[24]Quoting McQuillin on Municipal Corporations, 3d ed., at 674; see also Hamerly v. Denton, 359 P.2d 121, 125 (Alaska 1961). "'Dedication being an exceptional and a peculiar mode of passing title to interest in land, the proof must usually be strict, cogent, and convincing and the acts proved must be inconsistent with any construction other than that of dedication.' Seaboard Air Line Ry. Co. v. Town of Fairfax, 80 S.C. 414, 430, 61 S.E. 950, 956 (1908)." Anderson v. Town of Hemingway, 237 S.E.2d 489, 490 (S.Car. 1977).

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and that he manifested that intent in such a way as to create, as a matter of law, an offer to dedicate. "The crux of the offer requirement is that the owner must somehow objectively manifest his intent to set aside property for the public use." Swift v. Kniffen, 706 P.2d 296, 300-01 (Alaska), reh. denied, 1985 (footnote omitted, emphasis in original).

"The existence of an intent to dedicate is a factual issue which the claimant must clearly prove." Swift v. Kniffen, 706 P.2d 296, 300 (Alaska), reh. denied, 1985. Intent to dedicate must be clearly and unequivocally manifested. Seltenreich v. Town of Fairbanks, 103 F.Supp. 319, 323 (D.Ak. 1952).[25] Recordation of a plat showing streets does not by itself dedicate the lands shown as streets on the plat. State v. Fairbanks Lodge No. 1392, Loyal Order of Moose, 633 P.2d 1378 (Alaska 1981).

An intent to dedicate on the part of the landowner only sets the stage for creation of a valid dedication. A

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[25]Quoting McQuillin on Municipal Corporations, 3d ed. § 33.36, at 669; see also Nature Conservancy v. Machipongo Club, Inc., 419 F.Supp. 390, 396 (E.D.Va. 1976). "Intention must be clearly and unequivocally manifested by acts that are decisive in character." Hamerly v. Denton, 359 P.2d 121, 125 (Alaska 1961); accord, Swift v. Kniffen, 706 P.2d 296, 300-01 (Alaska, reh. denied, 1985. "[S]uch intention must be manifested in a positive and unmistakable manner." Anderson v. Town of Hemingway, 237 S.E.2d 489, 490 (S.Car. 1977).
"A court can, however, find an intention to dedicate land based on objective facts in spite of testimony as to a subjective intent to the contrary. See e.g., Tinaglia v. Ittzes, 257 N.W.2d 724 (S.D. 1977); 6 R. Powell, The Law of Real Property § 935 at 368-69 (Rohan rev.ed. 1977)." State v. Fairbanks Lodge No. 1392, Loyal Order of Moose, 633 P.2d 1378, 1380 n. 3 (Alaska 1981).

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dedication, to be effective, must be accepted by or on behalf of the public.[26]

> Acceptance, in this context may occur through a formal official action or by public use consistent with the offer of dedication or by substantial reliance on the offer of dedication that would create an estoppel.

State v. Fairbanks Lodge No. 1392, Loyal Order of Moose, 633 P.2d 1378, 1380 (Alaska 1981) (citations omitted).

The issue of whether, in a particular case, there were acts constituting acceptance is a question of fact, but what constitutes acceptance under a particular state of facts is a question of law. Watson v. City of Albuquerque, 76 N.M. 566, 417 P.2d 54 (1966).

As with the proof of an offer to dedicate, the burden to prove acceptance is on the party asserting dedication. Watson v. City of Albuquerque, 76 N.M. 566, 417 P.2d 54 (1966). Proof of acceptance must be unequivocal, clear and satisfactory, and inconsistent with any other construction. Seltenreich v. Town of Fairbanks, 103 F.Supp. 319, 323 (D.Ak. 1952).[27]

Where an implied offer to dedicate is found to be accepted, the acceptance, too, is usually implied. "A landowner's implied dedication may be and usually is impliedly

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[26]"Common law dedication takes place when an offer to dedicate is accepted." State v. Fairbanks Lodge No. 1392, Loyal Order of Moose, 633 P.2d 1378, 1380 (Alaska 1981) (citations omitted); Seltenreich v. Town of Fairbanks, 103 F.Supp. 319, 323 (D.Ak. 1952), quoting McQuillin on Municipal Corporations, 3d ed., § 33.43, at 682-85.

[27]Quoting McQuillin on Municipal Corporations, 3d ed., § 33.54, at 727 and 728. See also, Watson v. City of Albuquerque, 76 N.M. 566, 417 P.2d 54 (1966).

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accepted by public use of the property in question. Acceptance may also be implied from acts of maintenance by public authorities." Bruce & Ely, Law of Easements and Licenses, ¶ 4.06[3], at 4-75 (footnotes omitted).

Irregular plowing or repair by city does not establish acceptance. Watson v. City of Albuquerque, 76 N.M. 566, 417 P.2d 54 (1966). Use of right-of-way for garbage collection does not establish acceptance. Watson v. City of Albuquerque, 76 N.M. 566, 417 P.2d 54 (1966). Giving permission to utility company to erect poles in the right-of-way does not establish acceptance. Watson v. City of Albuquerque, 76 N.M. 566, 417 P.2d 54 (1966). Failure to assess right-of-way for taxes does not establish acceptance. Watson v. City of Albuquerque, 76 N.M. 566, 417 P.2d 54 (1966).

3. The 1941 Statute Was Not an Offer to Dedicate the Chitina to Cordova Section of the Abandoned Railroad Bed.

The legislative history, including the Senate Report on the 1941 statute and the previous report of the Interstate Commerce Commission, illustrates that the federal government was concerned that abandonment of the railroad line would isolate the individual landowners near McCarthy and Kennecott. The effect of the 1922 statute would be to split the ownership of the former right-of-way lands between the federal government and the other landowners adjacent to the railroad. It is clear from the legislative history that the main intent of the 1941 statute

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MEMORANDUM State of Alaska

TO: James E. Sandberg
Chief, Right-of-Way
Department of Transportation
and Public Facilities

DATE: January 11, 1983

FILE NO: 166-426-83

TELEPHONE NO:

FROM: Donald W. McClintock
Assistant Attorney General
Department of Law-Anchorage
Transportation Section

SUBJECT: Proj. RS-0558(1)
Eagle River Urban
relinquishment

By memorandum of December 13, 1982, you have requested an opinion as to the ramifications of the vacation of excess right-of-way along the Glenn Highway passing through the Debora Subdivision. You have also inquired as to the most expeditious manner for the state to dispose of the excess right-of-way.

Questions Presented

1. What legal interests does the state possess in the dedicated right-of-way which it can vacate?

2. Should the department vacate its excess right-of-way, would title to the vacated area go to the abutting landowners or revert back to the original dedicator?

Short Answer

The dedication, if it exists, probably creates an easement. However, the same rights the public has to the right-of-way are shared in a private capacity by the abutting lot owners. Thus, the vacation of the public easement would not terminate their private rights; i.e., if the original dedicator reappeared to claim the excess right-of-way unencumbered by the public easement, he would still be estopped from denying private access to the abuttors.

A solution, then, would be to quit claim our interest, whatever that may be, and allow the abutters to perfect their title adversely, if need be, against the original dedicator.

Facts

The facts available are relatively few. We know that PLO 601 of August 10, 1949, withdrew from appropriation 300 feet along the Glenn Highway that by PLO 1613 of April 7, 1956, and S.O. 2665 of October 16, 1951, was established as an easement for highway purposes. It is not clear, however, when patent to Debora Subdivision was granted; it is assumed for the purposes of this discussion that the PLO 601 withdrawal was effective.

The plat you have shown me shows that on August 17, 1953, Ermine Hett recorded the plat of Debora Subdivision. The plat does not contain any language of intent to dedicate, nor was it ever approved or accepted for dedication. Other than the sketch showing lots, the Glenn Highway, Eleanora Street, and Juanita Street, the plat is bare with the exception of references to utility easements and two 25-foot road easements. As we have discussed, the dimensions platted for the Glenn Highway coincide with the PLO 601 easement -- 105 feet of each side of the center-line.

Analysis

Because so many of the questions raised herein turn on the facts, and our grasp of the relevant facts is impaired by the passage of time, this analysis is more of an outline of relevant law than any firm opinion.

Authority to vacate land is provided by AS 19.05.070:

> Vacating and disposing of land and rights in land. (a) The department may vacate land, or part of it, or rights in land acquired for highway purposes, by executing and filing a deed in the appropriate recording district. Upon filing, title to the vacated land or interest in land inures to the owners of the adjacent real property in the manner and proportion considered equitable by the commissioner and set out by him in the deed.
>
> (b) If the department determines that land or rights in land acquired by the department are no longer necessary for highway purposes the department may:
>
> (1) transfer the land or rights in land to the Department of Natural Resources for disposal, or
>
> (2) sell, contract or sell, lease, or exchange land or rights in land according to terms, standards and conditions established by the commissioner.

> (c) Proceeds received from disposal of land or rights in land as authorized by this section shall be credited to the funds from which the purchase of the land was made originally.

The initial question is what interest in land will the department vacate and convey to abutting landowners. The hornbook rule is that dedications accomplished by statute generally convey a fee simple to the public, whereas a common-law dedication conveys an easement with the fee left to the dedicator. 6A R. Powell, Law of Real Property, ¶ 926[3] at 84-101-102 (1982). Neither the Alaska Supreme Court nor our statutes have directly addressed this question.

At the time the Debora Subdivision plat was filed, ch. 115, SLA 1953 was in effect (see generally AS 40.15.040-.190). That Act provided for a statutory method of dedication while subdividing property. Although the Act did not specify the interest conveyed by a dedication, i.e., fee versus easement, it did provide that upon vacation the land inured to the abutting landowners of a vacated street, inferring that a fee had been dedicated. AS 40.15.140-.180, dealing with vacation of dedicated streets, was repealed by sec. 1, ch. 118, SLA 1972. That Act in turn enacted AS 29.33.240, which again gave title to vacated streets to abutting landowners in equal proportions in a platted subdivision.

The foregoing provides some support for the argument that the intent of the legislature was that a dedication of a street convey a fee interest; otherwise, its provision for conveyance of title to abutting landowners upon vacation would be problematic given that the fee encumbered by the easement would still be owned by the dedicator.

Unfortunately, this plat does not meet the requirements of AS 40.15 to effect a statutory dedication. The plat lacks the statutory magic words showing intent to dedicate, an offer to the appropriate governmental entity of the dedication, and its acceptance thereof. These deficiencies are fatal to a finding of a statutory dedication. State of Alaska v. Fairbanks Lodge No. 1392, Loyal Order of Moose, 633 P.2d 1378 (Alaska 1981).

Common-law dedication requires only an objectively manifested offer to dedicate and a valid acceptance by the public. Acceptance can be shown through formal official action or by public use consistent with the offer of dedication or by substantial reliance on the offer of dedication that would create an estoppel. Fairbanks Lodge, 633 P.2d at 1380.

An initial problem with finding the appropriate intent to dedicate is the coincidence that the Glenn Highway was platted to the same width as the PLO 601 easement. It is factually possible for Mr. Hett to claim he was only allowing for the PLO 601 easement and had no intent to dedicate the land.

However, an offer to dedicate can also be established by the filing of a subdivision plat followed by the selling of lots with reference thereto. The sale of lots with reference to the plat is sufficient to establish an offer to dedicate. R. Powell, supra, ¶ 926[2] at 84-90-92.

An acceptance by a governmental entity can be proved by conduct such as maintenance or improvement of the Glenn Highway. Thus, the history of improvement of the Glenn Highway could determine whether there was an acceptance of the public dedication. Any formal pronouncement by the state of its rights to the right-of-way could also establish an acceptance of the offer.

Where only part of a dedicated right-of-way is used and maintained, there is a split in jurisdictions whether the entire dedication is effective or only that portion which is used. Compare Corbin v. Cherokee Realty Co., 91 S.E.2d 542 (S.C. 1956); May v. Whitlow, 111 S.E.2d 804 (Va. 1960) with Stringer v. Willingham, 71 S.E.2d 258 (Ga. App. 1952); City of Eugene v. Garett, 169 P. 649 (Or. 1918). In light of my conclusion, I see no need to further explore this.

Assuming there was a dedication, it is a common-law dedication and the question becomes whether only an easement was conveyed. I cannot predict how the Alaska Supreme Court will determine the question. Very tenuous dicta in some Alaska cases suggest that it is an easement. Anderson v. Edwards, 625 P.2d 282, 284 n.1 (Alaska 1981) (AS 19.10.010 section line easements); Olson v. McRae, 389 P.2d 576 (Alaska 1964) (dedicated a right-of-way; a right-of-way has been held in Wessells v. State, 562 P.2d 1042, 1046 n.5 (Alaska 1977), to be an easement); Hamerly v. Denton, 359 P.2d 121 (Alaska 1961) ("privilege of use").

On the other hand, the court could decide that it is a question for the jury whether the intent behind the dedication was to convey a fee or an easement.

One positive point is that a vacation should not affect any private rights of access. A subdivision lot owner obtains a private easement to streets shown on the plat -- their rights are not affected by a vacation. Petition of Englehardt, 118 N.W.2d 242 (Mich. 1969); Highway Holding Co. v. Yara Engineering Corp., 123 A.2d 511 (N.J. 1956); R. Powell, supra, ¶ 926[2] at 84-91.

Conclusion

What the foregoing demonstrates is that the nature of the interest in the excess Glenn Highway right-of-way is subject to great uncertainty both due to insufficient facts and a lack of controlling Alaska law.

I suggest one possible practical solution for your consideration. The state should, under AS 19.05.070, vacate the excess land to the abutting landowners. The commissioners' deed must be a quitclaim deed as we can make no representations as to title. The grantees then may start their open and hostile use, which will allow them to perfect their title by adverse possession. The abutting landowners also must be advised about the questionable status of their title to the vacated right-of-way.

Another alternative, but more expensive, is a quiet title action. I will require a title search and a legal description plus the assistance of one of your staff to investigate facts to file the complaint should you choose this alternative.

You probably should require the abutting landowner to replat the subdivision. See AS 29.33.200-.240 for the procedures to be followed in a petition by the majority of the landowners affected by the replat. I also suggest that the land be vacated in equal proportions to the lots so that the vacation is in technical compliance with AS 29.33.240 in the event that we may be able to use that section for authority for the disposition of vacated rights-of-way.

Finally, you need to give public notice of the vacation. Alaska Constitution article VIII, section 10, requires public notice of any disposal of state lands or interest therein.

Please call so we can discuss this further.

DWM/sls/vrb

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

DENNIS WISE and POLAR EVANGELISM, INC., d/b/a GOLD NUGGET RANCH and TRAINING CENTER,

Plaintiffs,

vs.

ROBERT GAMBLE,

Defendant.

No. 4FA-78-1807

DENNIS WISE and POLAR EVANGELISM, INC., d/b/a GOLD NUGGET RANCH and TRAINING CENTER,

Plaintiffs,

vs.

ALEXANDER SZMYD,

Defendant.

No. 4FA-78-1338

ORDER ON MOTIONS

This matter comes before the Court upon three motions: (1) plaintiffs' Motion to Strike Defendants' Opposition to Plaintiffs' Motion for Summary Judgment, (2) defendants' Motion for Summary Judgment and (3) plaintiffs' Cross Motion for Summary Judgment. The Court has read the memoranda of the respective parties, the depositions insofar as they are referred to in the memoranda, and has heard the arguments of counsel.

The first motion under consideration is plaintiffs' Motion to Strike. Plaintiffs base this motion on their belief that opposition to their Cross Motion for Summary Judgment was filed late. Therefore, Mr. Aschenbrenner (of all people) argues it should be stricken. According to plaintiffs' calculations,

opposition was due on March 13, 1979, and according to the file opposition was in fact filed on March 13, 1979. Plaintiffs' Motion to Strike on its face is spurious, falacious and unfounded in either fact or law. Therefore plaintiffs' Motion to Strike be and the same hereby is DENIED and defendants are awarded attorneys' fees against plaintiffs in answering said motion in the sum of $150.00.

The second motion for the Court's consideration is defendants' Motion for Summary Judgment. Defendants advance several theses in support of their motion for summary judgment. First, they challenge the standing of plaintiff Polar Evangelism to bring this action. Defendants point out that Wise allegedly acquired the lease from the Division of Lands and that Polar Evangelism has no standing to seek an injunction except as an interested member of the public. Polar Evangelism has no property right in the ESRO site. Plaintiffs in their oppostion to this motion do not contradict defendants' assertion.

Defendants next argue that they legally may control access to the ESRO site inasmuch as access is by way of their private road which has neither been dedicated to the public by defendants nor which is located on public lands so as to justify an argument for declaring it a public road because of public use. In support of this argument defendants cite Hamerly v. Denton, 359 P.2d 121 (Alaska 1961), in which the court set forth tests for determining whether or not a road was a public highway. The court stated that a public highway could be established if the proponent of the public highway argument proved

> (1) that the alleged highway was located 'over public lands' , and
> (2) that the character of its use was such as to constitute acceptance by the public of the statutory grant. Hamerly at 123.

In the instant case, plaintiffs have presented no evidence to suggest that the alleged easement is "over public lands". Therefore,

plaintiffs cannot prevail on a public highway theory.

In Hamerly the court also recognized the possibility of a right-of-way established by dedication to the public. In discussing the requirements for finding that a landowner has dedicated land to the public, the court stated,

> Dedication is not an act or omission to assert a right; mere absence of objection is not sufficient. Passive permission by a landowner is not in itself evidence of intent to dedicate. Intention must be clearly and unequivocally manifested by acts that are decisive in character. (footnotes omitted) Hamerly at 125.

The burden of proving dedication rests on the party relying on dedication. Hamerly at 125. In Hamerly the court concluded that the landowner's indifference to infrequent and sporadic use of his property by hunters and sightseers did not constitute a clear and unequivocal manifestation of his intent to dedicate the land to public use. In the instant case, the only evidence which plaintiffs might rely on is the fact that defendants have permitted school buses and mail vehicles to pass over ESRO Road. However, defendants have closed the road to all traffic at least once a year. I would conclude that the yearly closing refutes any suggestion that defendants have clearly and unequivocally dedicated ESRO Road to public use. The passage of school buses and mail vehicles was not of benefit to the public. Rather, only defendants themselves benefitted from the use by these vehicles of ESRO Road. I see nothing in plaintiffs' presentation which suggests clear and unequivocal dedication of ESRO Road to the public by defendants.

Plaintiffs in their opposition argue that ESRO Road is a "de facto public road". They cite no authority for their contention that such a road is legally cognizable.

Plaintiffs place great reliance on the requirements of

4 AAC 27.010 which sets forth the requirements for the establishment of a school bus route. That section provides:

> ESTABLISHMENT OF REGULAR ROUTES.
> (a) A regular pupil transportation route may be established by a school district if
>
> (2) the entire route is over regularly maintained roads, having at least a gravel surface, which are under the supervision and all-weather maintenance of the Alaska Department of Highways, a public utility district, a municipality, a borough service area, or any other agency supported by public funds;
> . . .

Plaintiffs suggest that because ESRO Road is on a school bus route, it is a public road under the supervision of one of the enumerated agencies. It is undisputed that defendants receive no public funds for the maintenance of ESRO Road. However, plaintiffs contend that the passage of the buses in combination with the above quoted statute compels one to conclude that the road is public.

I am not convinced by plaintiffs' argument factually or legally. As plaintiffs note, there is no question of fact that maintenance of ESRO Road is conducted entirely by defendants without state assistance. Legally plaintiffs' approach does not withstand scrutiny. The Administrative Code sets forth requirements for the establishment of school bus routes. Presumably a person could object to a particular route because the roads did not conform to 4 AAC 27.010. However, nothing in the Administrative Code or in statutes cited by plaintiffs supports the theory that once a school bus travels on a particular road, the road conclusively is deemed public. In addition, it might be argued that "supervision" by one of the agencies simply means that the agencies may require private owners to keep their roads up to a particular standard or else lose the bus route. Nothing supports plaintiffs' thesis that that sort of supervision converts a private road to a public road.

Finally, plaintiffs accuse defendants of accepting public benefits, i.e., the school bus service, while "trying to avoid the burdens common to a public road." (Opposition at p. 5) That accusation is not followed by any citation of law to support what I assume is their conclusion that this "cavalier attitude" mandates a finding that ESRO Road is a public road.

Defendants next argue that ESRO Road is private and that plaintiffs have failed to demonstrate any recognized easement to their benefit. It is agreed that Hazel Hall has an easement by implication over Gamble's land arising from the transfer to her of land from defendant Gamble. Since then, Hall conveyed to Polar Evangelism a "Temporary Limited Easement". Defendants' argument at this point is a little unclear. They point out that in the conveyance from Gamble to Hall, Gamble retained an easement over Hall's land which easement was made subject to the easement granted to the European Space Research Organization (which easement terminated upon the termination of the ESRO lease). It seems clear that the termination of the ESRO lease simply meant that the easement retained by Gamble over Hall's land would no longer be burdened by the ESRO easement. It did not limit Hall's use of the land.

The critical issue is Hall's implied easement over Gamble's land and the extent of her authority to encumber or convey that easement. The scope of an implied easement is to be determined by the nature of the prior use and the intent of the parties. Powell on Real Property, Vol. 3 §416 at pp. 34-203 - 34-205 (1977). In this case questions of fact appear to exist as to the scope of Hall's easement over Gamble's property. Determination of those questions is required before a legal determination can be made of the validity of any purported easement conveyed by Hall to plaintiffs over Gamble's property.

It is worth noting that there is no possibility of finding an implied easement appurtenant to the ESRO property itself over Gamble's property inasmuch as the two pieces of land were never transferred from one owner to the present owners. Therefore, the common ownership requirement of establishing an implied easement over Gamble's property to the ESRO property is lacking. The only easement over Gamble's property to the ESRO property (except for Hall's implied easement) was the express easement in the lease. That easement terminated with the termination of the lease.

Even if plaintiffs establish an easement over Gamble's property, plaintiffs have presented no argument to support the conclusion that they have an easement beyond Gamble's property over Szmyd's property. Because there was no prior common ownership of the ESRO land by Szmyd, no argument for an easement by necessity or implication can be made.

Defendants' final point is their contention that plaintiffs have no right of eminent domain. Plaintiffs rely on AS 09.55.240(a)(6) for their authority to acquire an interest in ESRO Road by power of eminent domain. That section provides:

> Uses for which authorized; rights-of-way.
> (a) The right of eminent domain may be exercised for the following public uses:
>
> (6) private roads leading from highways to residences, mines, or farms;

As defendants point out, the fallacy in plaintiffs' argument is their failure to establish any legal support for their authority to exercise the power of eminent domain. AS 09.55.240(a)(6) merely sets forth the uses authorized. No provision in the Alaska Statutes permits a private party to exercise the power of eminent domain even for an arguably public purpose. AS 09.55.420 which covers declarations of taking contemplates state action by the state or municipality. No provision exists for private declarations of taking. It is common knowledge that the term "eminent domain" taken from

Black's Law Dictionary supports that general understanding, defining it as follows:

> The right of eminent domain is the right of the state, through its regular organization, to reassert, either temporarily or permanently, its dominion over any portion of the soil of the state on account of public exigency and for the public good.

For the foregoing reasons defendants Motion for Summary Judgment is GRANTED except insofar as it relates to the question of whether or not Hall has an implied easement over Gamble's land and the extent of her authority to encumber or convey that easement.

The third motion for consideration is the plaintiffs' Cross Motion for Summary Judgment. With this motion plaintiffs seek summary judgment declaring that ESRO Road is a public road. They base their motion on the application by defendant Gamble in July, 1968, for a waiver of the requirement that he submit a plat in connection with his subdivision of his property. Gamble made that application pursuant to the provisions of AS 29.33.170(b) (titled AS 40.15.110 in 1968) which permits such a waiver provided that no dedication of a street is required because each parcel has adequate access to a public highway. AS 29.33.170 provides:

> (a) The platting authority shall, in individual cases, waive the preparation submission for approval, and recording of a plat upon satisfactory evidence that
>
> > (1) each tract or parcel of land will have adequate access to a public highway or street;
> >
> > (2) each parcel created is five acres in size or larger and that the land is divided into four fewer parcels;
> >
> > (3) the conveyance is not made for the purpose of, or in connection with, a present or projected subdivision development;

> (4) no dedication of a street, alley, thoroughfare or other public area is involved or required.
>
> (b) In other cases the platting authority may waive the preparation, submission for approval, and recording of a plat, if the transaction involved does not fall within the general intent of AS 29.33.150 - 29.33.240 of this chapter and AS 40.15 if it is not made for the purpose of, or in connection with, a present or projected subdivision development and no dedication for a street, alley, thoroughfare, park or other public area is involved or required. (emphasis added by plaintiffs)

The waiver to Gamble was granted by the Borough Planning Authority. Plaintiffs argue that the request and granting of the waiver constitute a declaration that ESRO Road is a public road. Plaintiffs cite no authority for their proposition. Plaintiffs are again flitting merrily through the garden of euphemisms proclaiming them law. They simply argue that the Planning Authority was acting in a quasi-judicial capacity and that its findings are binding on interested parties.

The problem with plaintiffs' theory is that the statute does not require that the subdivision itself be served by a public road. It simply requires that each parcel have access to a public road. It does not specify what sort of access is involved. Presumably a private road is sufficient access. Because of this flaw in plaintiffs' reasoning, the findings of the Planning Authority cannot be considered to have any binding authority in this action. Therefore, plaintiffs' Motion for Summary Judgment be DENIED.

DATED at Fairbanks, Alaska, this 17 day of May, 1979.

Gerald J. Van Hoomissen
Superior Court Judge

MEMORANDUM

State of Alaska

Department of Law

Gary Gustafson
Director
Division of Land & Water Management
Department of Natural Resources

DATE: July 10, 1989

FILE NO.: 661-89-0111

TEL. NO.: 276-3550

SUBJECT: Dedicated easements in Rocky Lake subdivision

Lance B. Nelson
Michael J. Frank
Assistant Attorneys General
Natural Resources-Anchorage

By memorandum to our office dated August 30, 1988, you asked several questions with respect to the state's management authority over public easements in the Rocky Lake subdivision. Before answering your questions, a brief statement of the facts and relevant law may be helpful.

Rocky Lake is located near Big Lake in the Matanuska-Susitna Borough. The Division of Lands prepared a subdivision plat, called the "Rocky Lake Alaska Subdivision," for certain Rocky Lake uplands, which plat was approved by the Division Director on June 27, 1958. The Department of Natural Resources ("DNR") then offered 55-year land leases for a number of lots on Rocky Lake, on three different occasions: September 3, 1959; August 11, 1962; and October 26, 1967. These lease offerings were made under sec. 1, art. V, ch. 169, SLA 1959, as amended and later codified at AS 38.05.070. On December 2, 1963, before the third lease offering, the Division of Lands filed the "Rocky Lake Alaska Subdivision" plat with the Palmer Recording District. 1/ The subdivision plat shows three 60-foot roadways along the exterior boundaries of the subdivision and two 50-foot roadways within the subdivision.

When the plat was approved in 1958 by the Director of the Division of Lands, there was no platting authority in the Rocky Lake area. The state's current platting authority statutes originated in the 1953 Territorial Laws of Alaska, ch. 115.

1/ The DNR Plat File number was 63-31; it was filed with the recording district office under file number 63-3107. At that time the recording district offices were run as part of the court system. Today, of course, the Recorder's Office is part of the Division of Management of the Department of Natural Resources.

Section 1, ch. I, of ch. 115 required that "[e]ach subdivision or dedication, before any of its lots or tracts may be sold or offered for sale, shall first be submitted for approval to the authority having jurisdiction thereof, as herein prescribed ...." This statute was subsequently codified at AS 40.15.010. Platting authority was granted to cities and to school districts organized outside of cities. See sec. 1, ch. II, ch. 115, SLA 1953, later codified at AS 40.15.070. What would occur for lands located outside of the boundaries of a school district or city was not dealt with in the 1953 act, but that was corrected in 1955 when the territorial Legislature amended sec. 1 ch. I, ch. 115, SLA 1953 to indicate that where "no platting board or authority has in fact been appointed as provided in Chapter II of this Act lands may be sold without the approval as in this Act required." Sec. 1, ch. 95, SLA 1955. Thus, beginning in 1955 for lands located outside the platting authority boundaries of school districts and cities, the common law applied for determination of the dedication of streets, etc. 2/

In the context of Rocky Lake, there was no recognized platting authority in the area when the plat was approved by the Director of the Division of Lands in 1958. Nor was there one in the area when the division filed the subdivision plat on December 2, 1963. The Matanuska-Susitna Borough was not incorporated until January 1, 1964. See generally ch. 52, SLA 1963. As there was no platting authority to approve or disapprove the plat,

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2/ Pursuant to AS 01.10.010, "[s]o much of the common law not inconsistent with ... any law passed by the legislature of the State of Alaska is the rule of decision in this state." Under the common law, for a dedication of land to the public use to be complete, there must first be an offer of land by the grantor to the public and acceptance by the public. 6A R. Powell, The Law of Real Property ¶ 926[1] at 84-84 (1988). See also State v. Fairbanks Lodge No. 1392, 633 P.2d 1378, 1380 (Alaska 1981) (acceptance at common law can occur through official action, through public use, or by substantial reliance on the offer of dedication which would create an estoppel). Other courts have held that in the case of dedication by a plat, or by a sale by reference to a plat, no acceptance by a public authority is required to make the dedication effective, there having been a reliance interest created in the grantees such that it would be unfair to allow the grantor to back out of the dedication. See, e.g., Wenderoth v. City of Fort Smith, 510 S.W.2d 296, 297 (Ark. 1974); Banks v. Wilhoite, 508 S.W.2d 580, 582 (Ky. App. 1974).

common law principles applied in determining whether lands were dedicated to public use. Because the Rocky Lake uplands subdivider was the state, the common law "acceptance" of the "offer" of dedication of the roadways shown on the plat as dedicated 3/ to the public can be presumed to have occurred with the filing of the state-created plat by the Division of Lands. Of course, at least as long as the state remained the owner of all the lands involved, the act of filing the plat was mainly a land management exercise. Notwithstanding the plat, the Division of Lands retained management authority over all the lands. In other words, the division's filing of a plat did not in and of itself create any private rights.

As to whether private rights were created in the Rocky Lake Alaska Subdivision platted easements upon the state's sale of Rocky Lake subdivision lots, the required result seems to be clear:

> [T]here is considerable confusion in the decisions due to a failure to distinguish clearly between the effect of such a sale as between the grantor and the public. Strictly speaking, there can be no dedication to a private person, and, hence, it is improper to speak of the sale as a dedication as between the grantor and grantee, although often that is done. As between the grantor and grantee the situation is simply this: The grantor is estopped, as against the grantee, to deny the existence of such public places or to revoke his act of setting them aside for public use, and this is too well settled to require citation of authority, and it is doubtful if the rule has ever been denied so far as the rights between the grantor and the grantee are concerned. [Footnote

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3/ We note that AS 38.05.070(b), under which many of the lots were leased before being sold, required DNR to preserve "reasonable and traditional access to state land and water." Also, 11 AAC 54.280 (eff. July 1, 1960, Register 1; amended August 15, 1964, Register 18), AS 38.05.020, and AS 38.05.045 gave the Director the same authority in the context of land sales. Sample lease and sale documents for Rocky Lake which your office has provided us repeatedly refer to the "platted easements," and separate reservations for them are stated in the conveyance documents.

> omitted.] Furthermore, the rights of the grantee against the grantor do not depend upon whether the offer to dedicate, by such platting and sale, is accepted by the municipality. [Footnote omitted.]
>
> On the other hand, as between the grantor and the public, there is a conflict in the cases as to whether the sale is an acceptance of the offer to dedicate.

11 E. McQuillin, The Law of Municipal Corporations § 33.24, at 683 (3d ed. 1983) (emphasis supplied). See also State v. Fairbanks Lodge No 1392, 633 P.2d 1378, 1380 (Alaska 1981).

Thus, even if the courts were to hold that the state had not yet, under common law principles of dedication, dedicated to public use the easements shown on the Rocky Lake Alaska Subdivision plat 4/, as between the state as grantor of the subdivision lots and its private grantees as purchasers of the lots, it would seem likely that the courts would hold that the state was estopped to deny the grantees' right to use of the platted easements for ingress and egress.

This brings us to the reason for your questions. Since their initial leasing, many of the lots have been sold. In 1988, many of the current lot owners in the Rocky Lake subdivision petitioned the Matanuska-Susitna Borough Platting Board for vacation of one of the easements shown on the Rocky Lake Alaska Subdivision plat. The borough has for many years been authorized under AS 40.15 to be the local platting authority. At least one of the current landowners in the subdivision, whose lot does not abut the lake front, opposed vacation of the easement, apparently because it provides convenient access for this landowner to the lakeshore. The Platting Board approved the vacation, but subject to later Borough Assembly approval and a number of other stipulations, one of which included "[r]ecordation of vacation resolution signed by all parties holding ownership of a beneficial interest simultaneously with the final plat." Matanuska-Susitna Borough Assembly Memorandum 88-224 dated June 7, 1988, at 1.

4/ We believe such a court ruling would be highly unlikely given the many documents indicating state officials' belief in the existence of the easements, and public and private reliance on the easements which has developed over the years.

On June 21, 1988, the Matanuska-Borough Assembly rejected a motion to approve the Platting Board action vacating the easement. The Assembly apparently did so on the advice of a borough attorney who thought that, since the plat was filed in 1963 before the creation of the borough, the borough had no platting authority over any of the platted easements, and the easements remained under state management. Since then the landowner who opposed vacation asked DNR for authority to clear the controverted easement of brush to make vehicular access to the lakeshore easier.

You therefore asked whether the state has retained any "management authority" over the easements, and if so, what are the outer boundaries of that authority. The answer lies in AS 40.15.200:

> All subdivisions of land made by the state, its agencies, instrumentalities and political subdivisions are subject to the provisions of this chapter and AS 29.40.070 -- 29.40.160, or home rule ordinances or regulations governing subdivisions, and shall comply with ordinances and other local regulations adopted under this chapter and AS 29.40.070 -- 29.40.160 or former AS 29.33.150 -- 29.33.240, or under home rule authority, in the same manner and to the same extent as subdivisions made by other landowners.

The borough's platting authority powers are laid out in AS 29.40. AS 29.40.120 -- 29.40.160 grant the borough decision-making authority over the alteration and vacation of platted easements without regard to whom may have been the dedicator, or when the dedication may have occurred. It is only in areas where there is no platting authority that DNR retains platting powers. See AS 40.15.075. Thus, in our view the Matanuska-Susitna Borough ordinarily has authority to alter or vacate a platted easement which was initially dedicated to public use by the state under the common law. 5/

5/ In disposing of lands the state often reserves to itself in the conveyancing documents easements and other interests in the land as between it and its grantees. These reserved easements must be distinguished from dedicated platted easements. A platting authority does not ordinarily have the power to "vacate"
(Footnote Continued)

Perhaps the borough attorney was concerned about the retroactive application of the statutes granting the borough platting authority. However, the shift of plat management power from one governmental entity to another, or the imposition of a statutory platting regulatory scheme on easements which were initially dedicated to public use through the operation of common law principles, does not raise any problems with AS 01.10.090, which ordinarily bars the retrospective operation of statutes. See Matanuska Maid, Inc. v. State, 620 P.2d 182, 187 (Alaska 1980) (procedural changes that do not affect substantial rights are not immune from retrospective application); State v. Alaska Pulp America, 674 P.2d 268, 273 (Alaska 1983) ("modes of procedure" immune). A shift of easement-management rights from one governmental agency to another does not necessarily affect the substantial rights of any private party, and it does not mean that valid existing rights of private landowners can be affected without due process of law. Thus, the reasons for the rule against the retrospective application of statutes simply do not apply.

Should the borough vacate an easement in the Rocky Lake subdivision, the question arises what property rights will inure to the ownership of abutting landowners. The hornbook rule is that a statutory dedication conveys the whole estate of the dedicated lands to the public, whereas a common law dedication conveys only an easement, with the remaining portion of the estate's "bundle of sticks" of property rights left in the ownership of the dedicator. 6A R. Powell, The Law of Real Property ¶ 926[3], at 84-101-02 (1988). Although the territorial and later state platting statutes codified at AS 40.15 did not specify the interest conveyed by a dedication, i.e., whole estate versus easement, it did provide that upon vacation of the easement the land inured to the abutting landowners, clearly implying that the whole estate had been dedicated. AS 40.15.140 -- 40.15.180, dealing with vacation of dedicated streets, was repealed by sec. 1, ch. 118, SLA 1972. At the same time the latter Act enacted AS 29.33.240 (currently codified at AS 29.40.160), which again gave title to vacated streets to abutting landowners. Thus, it is very probable that the state and territorial legislatures intended that a statutory dedication of a street, accomplished under AS 40.15, conveyed the whole estate of the dedicator, and not just an easement. Otherwise, the

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(Footnote Continued)
a reserved easement as between a grantor and grantee, absent their consent.

relevant statutes' provision for conveyance of title to abutting landowners upon vacation would be problematic given that the estate encumbered by the easement would still be owned by the dedicator.

However, since the state's dedication of the easements in the Rocky Lake subdivision will probably be construed as having occurred under the common law, it is unclear how the courts would construe the easement dedication or its vacation. In the usual common law case the issue would be resolved by attempting to determine the intent of the grantor in making the dedication and evaluating subsequent reliance interests. This is not so easy to do, however, when the grantor is state government dedicating public lands to public use, and there are no state statutes or regulations defining the government's intent. In our judgment, nonetheless, we predict that the courts would probably decide that, with respect to streets dedicated under the common law in state subdivision plats, vacation of the easements will result in the fee estate inuring to the ownership of the abutting landowners 6/, just as it would under a statutory dedication. F. Clark, Law of Surveying and Boundaries §§ 603, 617-19, 628, 647 (4th ed. 1976).

The view that title to the vacated street would attach to the abutting land is supported by the statutory rules for construing real estate descriptions. AS 09.25.040 states, in pertinent part:

> The following are the rules for construing the descriptive part of a conveyance of real property when the construction is doubtful and there are no other sufficient circumstances to determine it.
>
> (4) When a road ... is the boundary, the rights of the grantor to the middle of the road ... are included in the conveyance, except where the road ... is held under another title.

6/ The ownership would not include interests in land reserved to the state by law, such as mineral interests reserved under AS 38.05.125.

This statutory rule of construction indicates the fee interest may be deemed conveyed to the owners of abutting land in the first place, subject to the dedicated access rights.

Given this conclusion -- which is admittedly only a prediction of what a court might conclude -- your remaining question dealing with the boundaries of any residual DNR power to manage the Rocky Lake Subdivision easements are all answered thus: since the Matanuska-Susitna Borough is now the "manager," DNR retains no residual management authority over the dedicated easement at issue. The state continues to hold, however, whatever easement interests (i.e., reserved easements) it may have under contracts of sale or deeds with particular grantees, which may or may not be affected by the platting power of the borough depending on the language of the conveyancing documents.

If you have any further questions, please let us know.

LBN:MJF/jmo

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MEMORANDUM

State of Alaska
Department of Law

TO: John Bennett
ROW Engineering Supervisor
Northern Region, Fairbanks

DATE: December 15, 1997

FILE NO: 665-98-0061

DEC 17 1997

TEL. NO.: 451-2828

FROM: Pamela A. Hartnell PAH
Assistant Attorney General
AGO, Fairbanks

SUBJECT: Project TEA-0002(75)
McGrath Road Bike Path
"Green Strips"

CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

FACTS

The Department of Transportation and Public Facilities (the Department) is currently working on two projects where the proposed right of way limits will overlap or incorporate dedications created by the platting process. The McGrath Road bike path project might require a portion of the bike path or relocated utilities to be placed in the "Green Strip" adjoining McGrath Road. The Airport Way Frontage Roads will require use of an area labeled "Public Parking and Access" according to the plats.

You have requested advice concerning whether these dedications can be converted to or used as a part of the projects' right of way and who are the owners.

QUESTIONS PRESENTED AND SUMMARY OF ADVICE

McGrath Road

The McGrath Road bike path project may require a portion of the bike path or relocated utilities to be placed in the "Green Strip" area as identified on the plat for McGrath Estates - Portion 2. A label in the "Green Strip" refers to plat note 4 which reads "Clearing of natural vegetation not permitted with 50' of McGrath Road R/W, except for existing power and communication lines."

Question: Would the Department be subject to the clearing restriction if a portion of a lot covered by it was acquired? If so, how can the restriction be removed?

Answer: Yes. The Department would be subject to the clearing restriction if a portion of a restricted lot was acquired. The restriction can be removed by condemning in fee and indicating that we are also condemning any restrictive covenants.

LEGAL ANALYSIS

The "Green Strip" as indicated on the McGrath Estates- Portion 2 plat is a part of the individual lots along McGrath Road. Note 4 restricts the manner in which the 50' Green Strip can be cleared. The Restrictive Covenants from McGrath Estates Subdivision, Book 40, page 279 to 281, includes Number 14, "Clearing: Trees or brush on property shall be to the extent possible, hand cleared to preserve the natural environment; no bulldozers or other heavy equipment shall be used to clear trees and brush except for building site, view and driveway." Because restrictive covenants run with the land, the Department will have to condemn for title.

During negotiations with the landowners you may negotiate a price that is equal to fair market value without the restriction on the property. However, the lot owners do not have legal authority to remove the restrictive covenant in their conveyances to the State. Therefore the Memoranda of Agreement with the landowners would have to include a provision under "Other Conditions" that the Department paid fair market value for the fee without the restrictive covenant and that the owners will not oppose our suit to condemn for title. A letter could be enclosed with the summons for the condemnation complaint indicating that we are filing for title and to remove the restrictive covenant. We could then move for summary judgment.

If negotiations are not successful, the Department can pursue the normal condemnation procedures. We will condemn the fee including removal of the restrictive covenant.

Airport Way Frontage Road

This project will require the use of an area labeled "Public Parking and Access." These areas are separate from the subdivision lots and dedicated roadways.

Question: Do the adjoining lots have an ownership interest in these areas? If so, are adjoining lot owners due compensation if the areas are converted in whole or part to frontage road right of way under the Department's jurisdiction? If not, does the Department have to undertake any action to convert or incorporate the area into the project right of way?

Answer: No, the adjoining lot owners have no ownership interest in the Public Parking and Access Areas. Therefore, they are not due compensation if the areas are incorporated into the project.

Because the areas have been dedicated to the use of the general public, the Department may incorporate them into the project without any further action.

LEGAL ANALYSIS

The adjoining lot owners do not have an ownership interest in the Public Parking and Access Areas because they were publicly dedicated by the 88/6/57 plat of Riverside Park Subdivision (Instr. No. 174.026) and the 6/11/59 plat, Block 5 Addition to Riverside Park Subdivision (Instr. No. 189.794). Both plats have the following Certificate of Ownership and Dedication: "*I hereby certify that I am the owner of the property shown and described hereon and that I hereby adopt this plan of subdivision with my free consent, and I hereby dedicate all streets, and access alleys, the areas indicated as public parking and access, and other open spaces to the use of the general public forever.*"

The area publicly dedicated for parking and access is an incidental use by the adjoining lot owners. The Department is using the public access areas for their intended purpose. This in not a case where the Department is converting a private road to a public road. Rather it is using a public access area to enhance public access. Therefore, the landowners have no compensable interest in the areas in question.

The Borough does not have an interest in the public access areas either. This situation is similar to the Seavy Subdivision Green Areas letter dated July 20, 1989. You may want to call the Borough to confirm my conclusion that it has no interest in the areas.

CONCLUSIONS AND RECOMMENDATIONS

McGrath Road

I recommend that the Department negotiate for the required property and condemn for title. If the landowners agree to the value of the land without the restrictive covenants and also agree not to oppose condemnation for title, then the condemnations will move more quickly. However, we will have to condemn for title and to remove the restrictive covenants in either case.

Airport Way Frontage Road

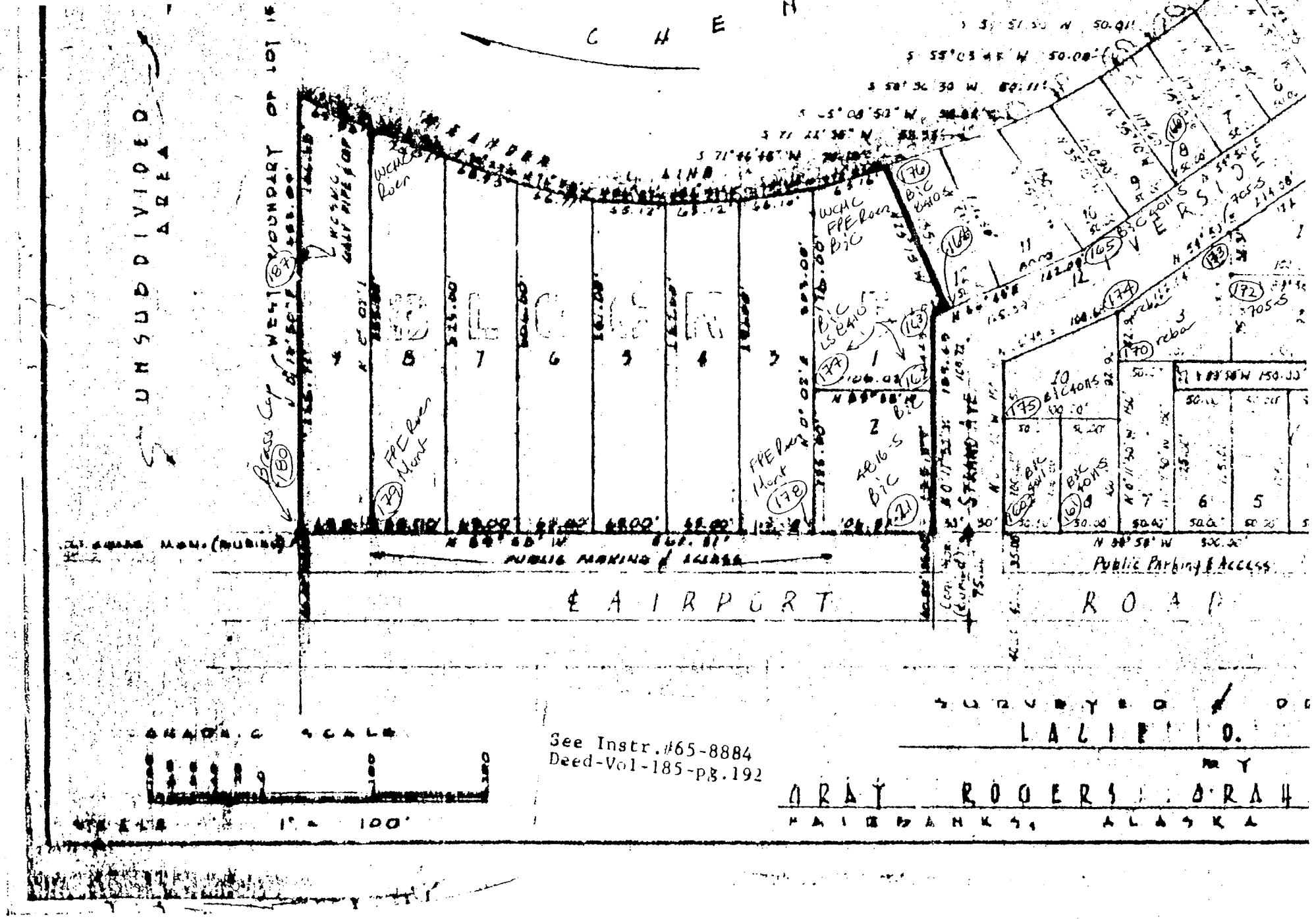
I recommend that the Department use the publicly dedicated Public Parking and Access areas for its project. There is no need to compensate adjoining lot owners or the Borough since they do not have an ownership interest in the areas.

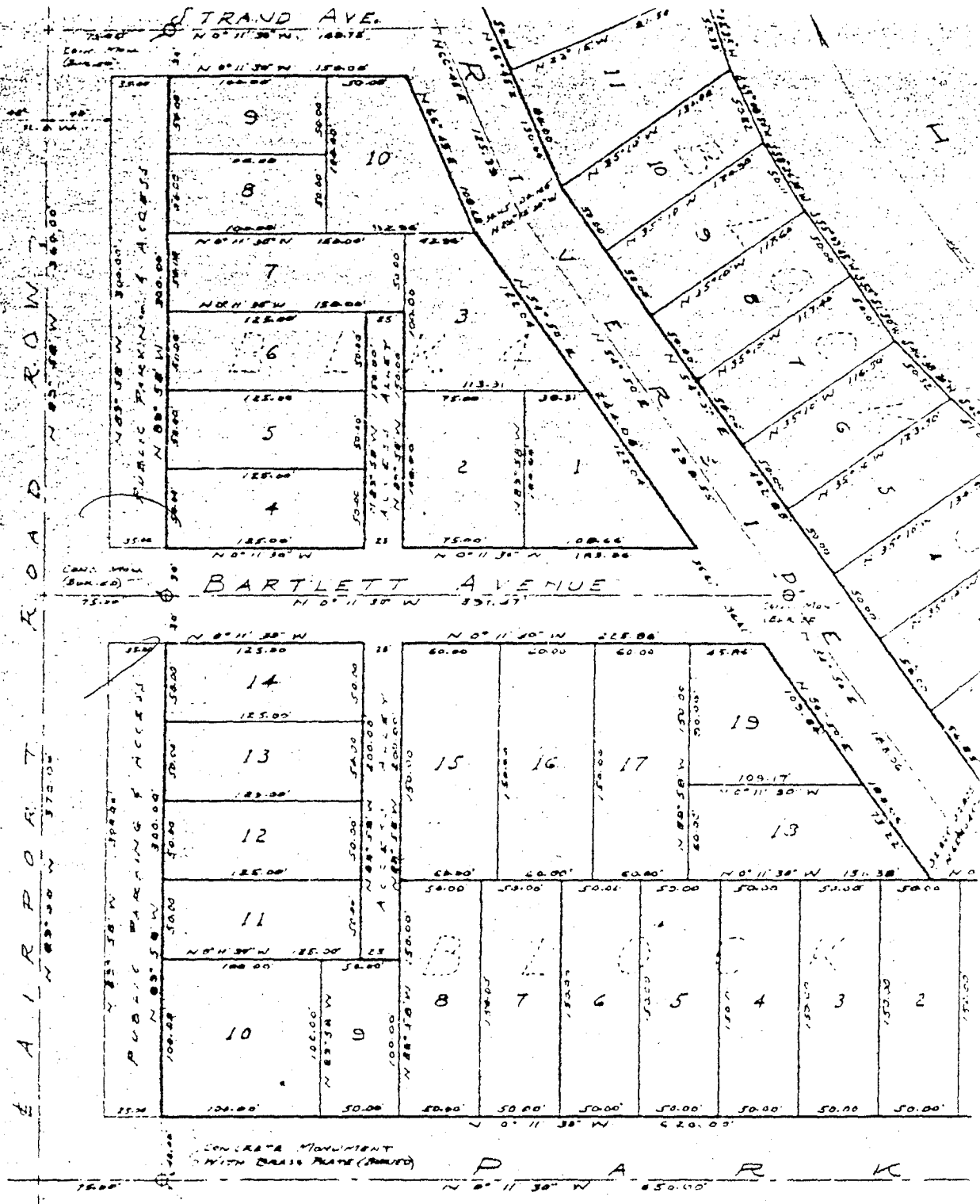
If you have any questions about this advice, please do not hesitate to contact me.

PAH/arp

Attachments

I:\HARTNELP\BENNETT.M01

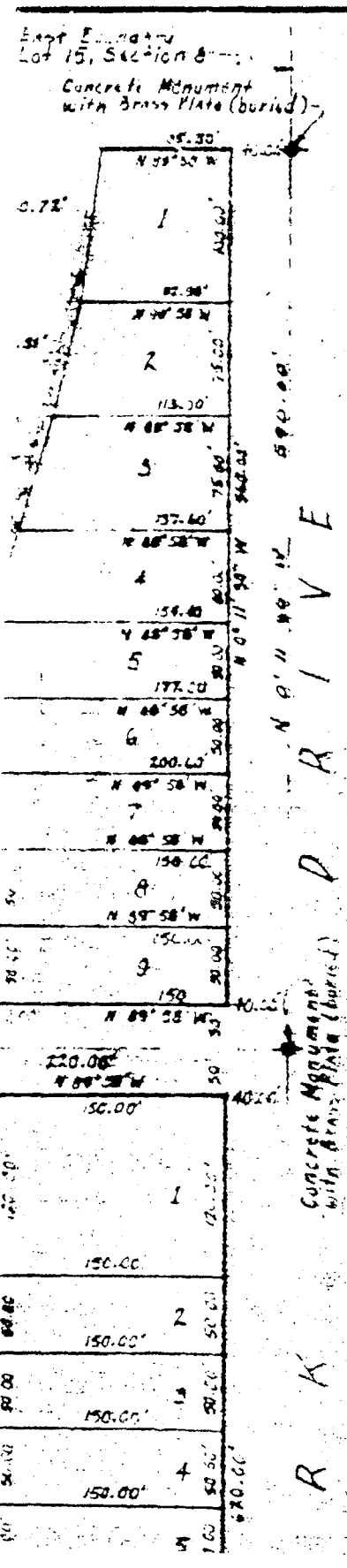

UNSUBDIVIDED AREA
BLOCK
8
7
6
5
4
3
2
1
AIRPORT ROAD
Public Parking & Access
See Instr. #65-8884
Deed-Vol-185-Pg. 192
1" = 100'
GRAY ROGERS & GRAY
FAIRBANKS, ALASKA



Riverside Park Subdi

See Instr. #65-8884
Deed-Vol.-185-pg.192-19

Block 5 Addition to
Riverside Park



CERTIFICATE OF OWNERSHIP AND DEDICATION

I HEREBY CERTIFY THAT I AM THE OWNER OF THE PROPERTY SHOWN AND DESCRIBED HEREON AND THAT I HEREBY ADOPT THIS PLAN OF SUBDIVISION WITH MY FREE CONSENT, AND I HEREBY DEDICATE ALL STREETS AND ALLEYS, THE AREAS INDICATED AS PUBLIC SQUARES AND ALLEYS, AND OTHER OPEN SPACES TO THE USE OF THE GENERAL PUBLIC FOREVER.

DATE 10 June 1958

WITNESSED BY:

Witness — Lucie A. Hagood, Owner

UNITED STATES OF AMERICA)
TERRITORY OF ALASKA) S.S.

ON THIS 10th DAY OF JUNE, 1958, BEFORE ME, THE UNDERSIGNED NOTARY, PERSONALLY APPEARED LUCIE A. HAGOOD JONES KNOWN TO ME AND TO BE THE PERSON DESCRIBED IN AND WHO EXECUTED THE ABOVE CERTIFICATE AND ACKNOWLEDGED TO ME THAT SHE EXECUTED THE ABOVE CERTIFICATE, AND THE ACKNOWLEDGED TO ME THAT SHE SIGNED AND SEALED THE SAME FREELY AND VOLUNTARILY AND FOR THE PURPOSES THEREIN CONTAINED.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND AND AFFIXED MY OFFICIAL SEAL, ON THE DAY AND YEAR INDICATED ON THE ABOVE CERTIFICATE.

NOTARY PUBLIC IN AND FOR THE TERRITORY OF ALASKA, RESIDING AT FAIRBANKS, ALASKA.
MY COMMISSION EXPIRES: June 23 1962

CERTIFICATE OF APPROVAL

I HEREBY CERTIFY THAT THE SUBDIVISION PLAT SHOWN HEREON HAS BEEN FOUND TO COMPLY WITH THE SUBDIVISION REGULATIONS OF THE FAIRBANKS AREA PLATTING AUTHORITY, AND THAT SAID PLAT HAS BEEN APPROVED BY THE BOARD BY THE PLAT RESOLUTION NO. 22 DATED JULY 10, 1958, AND THAT THE PLAT SHOWN HEREON HAS BEEN ACCEPTED FOR RECORDATION IN THE OFFICE OF THE UNITED STATES COMMISSIONER, EX-OFFICIO RECORDER, FAIRBANKS.

DATE, August 14th 1958

Chairman Secretary Fairbanks Area Platting Authority

Riverside Park

I D E P A R K

I V I S I O N

: ¼ LOT 15, SECTION 8,
W½ FAIRBANKS MERIDIAN

CERTIFICATE OF OWNERSHIP AND DEDICATION

I HEREBY CERTIFY THAT I AM THE OWNER OF THE PROPERTY SHOWN AND DESCRIBED HEREON AND THAT I HEREBY ADOPT THIS PLAN OF SUBDIVISION WITH MY FREE CONSENT, AND I HEREBY DEDICATE ALL STREETS AND ACCESS ALLEYS, THE AREAS INDICATED AS PUBLIC PARKING AND ACCESS, AND OTHER OPEN SPACES TO THE USE OF THE GENERAL PUBLIC FOREVER.

DATE: July 13, 1957

WITNESSED BY:

[signature] WITNESS

[signature] OWNER

UNITED STATES OF AMERICA } ss.
TERRITORY OF ALASKA

ON THIS 13 DAY OF JULY, 1957, BEFORE ME, THE UNDERSIGNED NOTARY, PERSONALLY APPEARED DALE D. HAGEN, KNOWN TO ME (OR PROVED) TO BE THE PERSON DESCRIBED IN AND WHO EXECUTED THE ABOVE CERTIFICATE, AND HE ACKNOWLEDGED TO ME THAT HE EXECUTED THE SAME FREELY AND VOLUNTARILY AND FOR THE PURPOSES THEREIN CONTAINED.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND AND AFFIXED MY OFFICIAL SEAL ON THE DAY AND YEAR INDICATED ON THE ABOVE CERTIFICATE.

LeRee C. Arend
NOTARY PUBLIC IN AND FOR THE TERRITORY OF ALASKA
MY COMMISSION EXPIRES 3-28-59

CERTIFICATE OF APPROVAL

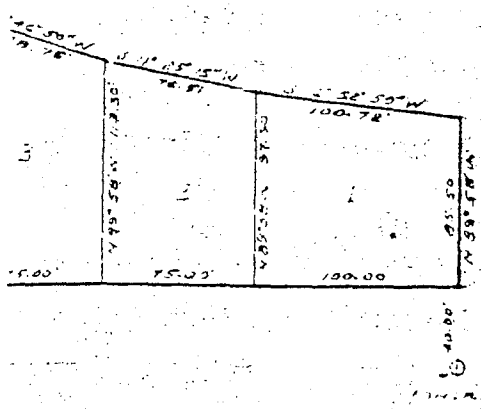
I HEREBY CERTIFY THAT THE SUBDIVISION PLAT SHOWN HEREON HAS BEEN FOUND TO COMPLY WITH THE SUBDIVISION REGULATIONS OF THE CITY OF FAIRBANKS, ALASKA, PLATTING AUTHORITY, AND THAT THE PLAT HAS BEEN APPROVED BY THE BOARD BY PLAT RESOLUTION NO. 57-7 DATED JULY 10, 1957, AND THAT THE PLAT SHOWN HEREON HAS BEEN APPROVED FOR RECORDING IN THE OFFICE OF THE UNITED STATES COMMISSIONER, EX OFFICIO RECORDER, FAIRBANKS.

DATED July 11, 1957

William W. Mackell
CHAIRMAN, PLATTING BOARD
CITY OF FAIRBANKS, ALASKA

ATTEST: Edgar L. Phillips
CITY CLERK

7/12/57

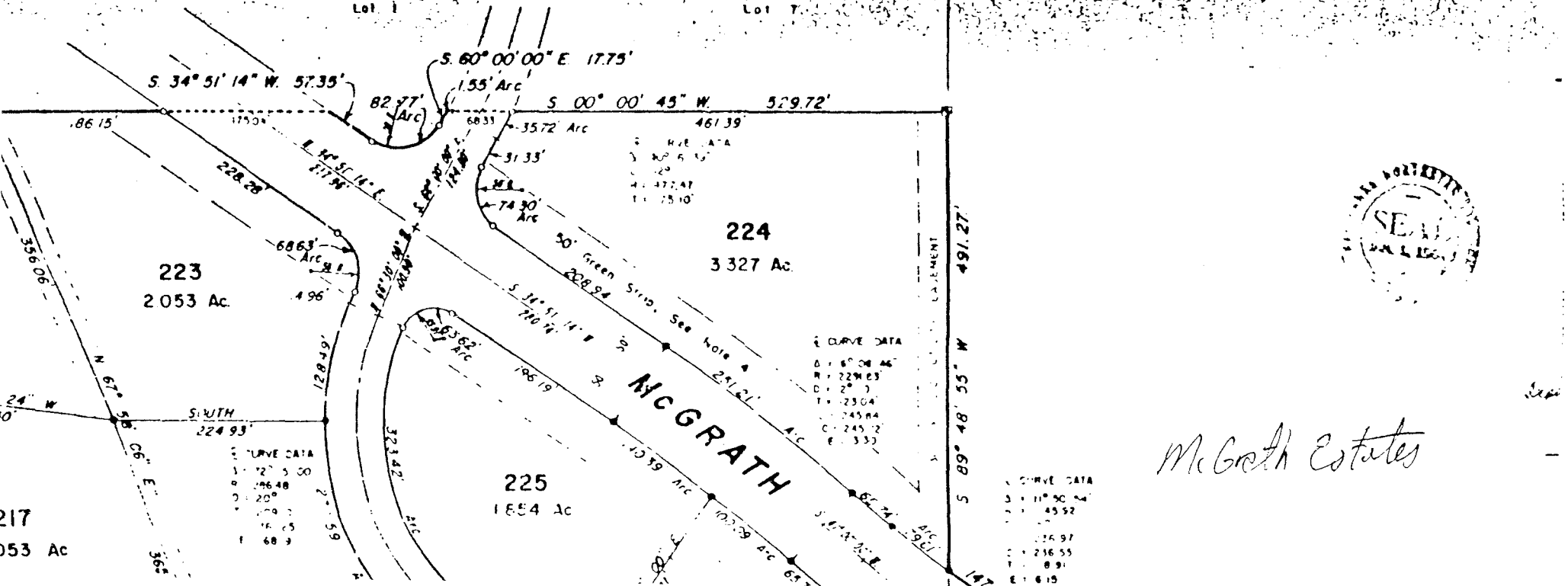


⊙ CONCRETE MONUMENT WITH BRASS PLATE (FOUND)

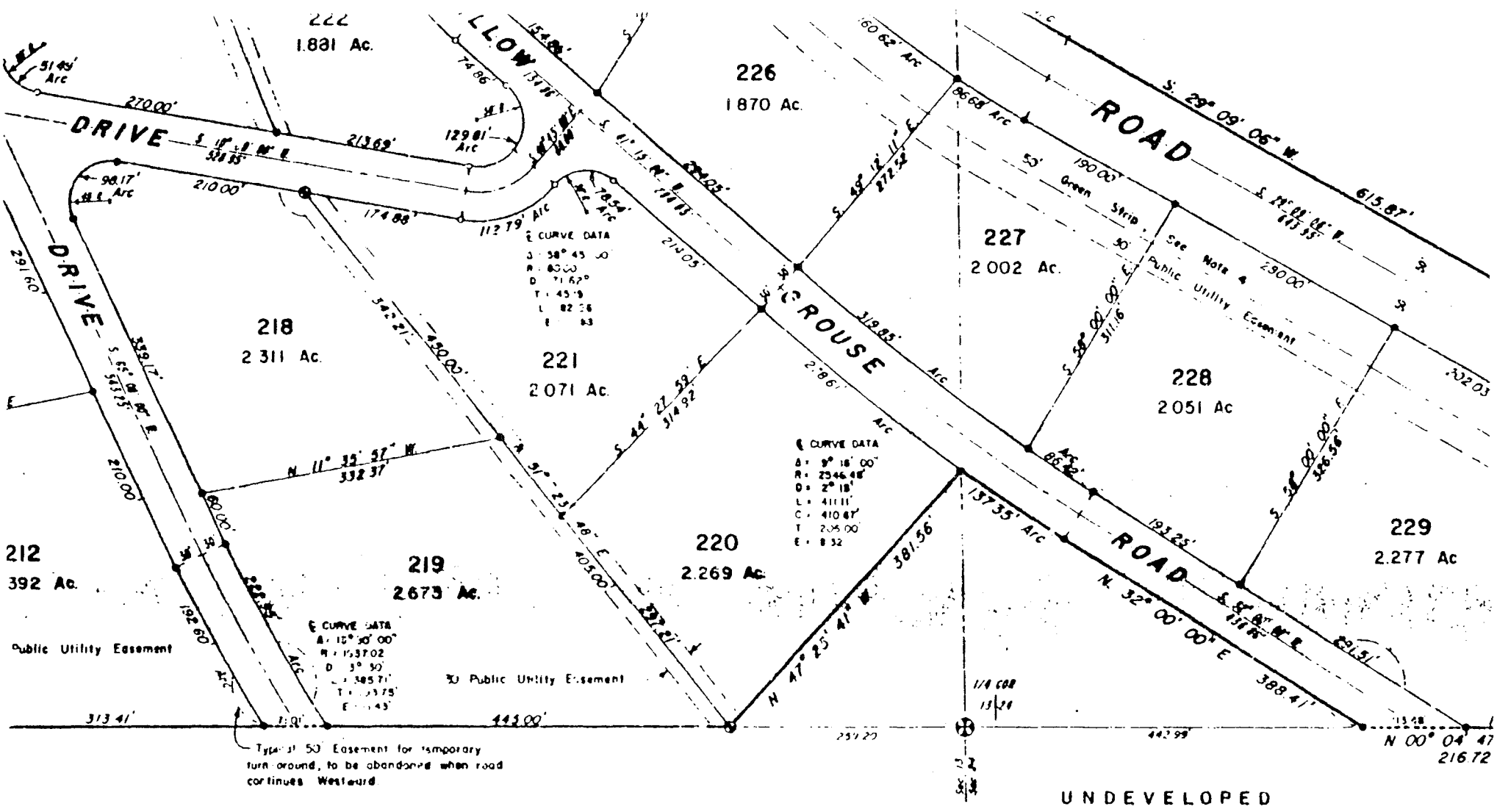
FAIR BENCHMARK LOT 15, SECTION 8 T2

NOTES

1. This area overlain by Fairbanks Soil Series as per U.S.D.A., S.C.S. publ. no. 25 (1969).
2. This area not flooded in August 1967.
3. Utility Easements to also be used for non-motorized recreational trails.
4. Clearing of natural vegetation not permitted within 50' of McGrath Road R/W, except for existing power and communication lines.
5. No lots shall have direct access to McGrath Road.
6. All of the lots within this subdivision are subject to PROTECTIVE COVENANTS, as recorded at the Fairbanks District Recording Office as instrument no. 71-07948.
7. In addition to the specific easements shown hereon it is hereby created an easement of 10' width on each side of each and every side and back lot line for the construction & maintenance of underground utilities and surface drainage facilities.



McGrath Estates



ITES - PORTION '2'

'3 and the N 1/2 NW 1/4 NE 1/4 Sec. 24,
, F.M.

McGrath Estates

l Lot Acres

BOOK 40 PAGE 279

RESTRICTIVE COVENANTS FOR MCGRATH ESTATES SUBDIVISION

PART A. PREAMBLE

DATE: June 7, 1976

OWNERS: McGrath Estates Investment Group, a limited partnership. General Patners: William K. Simon, Ed Martin and Damon Thomas, Fairbanks, Alaska.

The restrictive covenants hereinafter set forth are to apply to the McGrath Estates Subdivision, located in the SE 1/4 of Section 13, N1N, R2W, Fairbanks Meridian, Alaska.

The purpose of these covenants is to establish minimum standards for each individual property owner and / or builder, in order to insure and perpetuate to the owners of the property, both severally and collectively, the beauty and integrity of the McGrath Estates Subdivision.

PART B. COVENANTS

1. PROTECTIVE COVENANTS FOR MCGRATH ESTATES SUBDIVISION: We, the undersigned owners of land situated in the McGrath Estates Subdivision, according to the written plat, for and in covsideration of the mutual advantages which will accrue to us by virtue thereof, do by these presents adopt and agree to be bound by the following protective covenants for said subdivision.

2. LAND USE AND BUILDING TYPE: No lot shall be used except for residential purposes. No building shall be erected, altered, placed or permitted to remain on any lot other than one (1) or two (2) family dwelling not to exceed three (3) stories in height nor forty-five (45) feet in total height above the natural ground level of the building location and a private garage for not more than four (4) cars.

3. DWELLING COST, QUALITY AND SIZE: No dwelling shall be permitted on any lot at a cost of less than $55,000 based upon cost levels prevailing on the date these covenants are recorded. The ground floor area of the main structure, exclusive of one-story open porches and garages, shall not be less than 1,200 square feet for a one-story dwelling, nor less than 900 square feet for a dwelling of more than one story.

4. TEMPORARY STRUCTURE: No structure of a temporary character including house trailers, tents, shacks, garages or barns or other buildings shall be used on any lot at any time as a residence. A basement will not be used as a temporary residence .

5. TIME LIMIT FOR CONSTRUCTION: The exterior of the building constructed on said premises must be fully completed within two (2) years from the date of the commencement of its construction which will be considered commenced upon with the start of excavation for footings or foundation.

6. NUISANCE: No noxious or offensive activity shall be carried on upon any lot, nor shall anything be done thereon which may be or may become an annoyance or nuisance to the neighborhood.

7. PARKING AND STORAGE: No lot shall be used for the storage of any commercial vehicles, machinery, surplus equipment or scrap of any kind. Only items directly connected with use of the land for strictly residential purposes may be kept on any lot. No overnight parking shall be permitted on any subdivision street.

8. STORAGE TANKS: All storage tanks for oil, gas and deisel oil will be stored in underground tanks installed in accordance with the regulations of the State of Alaska Fire Marshall.

9. SIGNS: No sign of any kind shall be displayed to the public view on any lot except one sign of not more than five (5) square feet advertising the property for sale or rent, or a sign by a builder to advertise the property during the construction and sales period.

10. LIVESTOCK AND POULTRY: No poultry or other animals including dogs, cats and livestock shall be permitted on any lot or part therof for commercial purposes nor shall any pet or animal be allowed to constitute a nuisance.

11. GARBAGE AND REFUSE DISPOSAL: No lot shall be used or maintained as a dumping ground for rubbish. Trash, garbage or other waste shall not be kept except in sanitary containers. All incinerators or other equipment for the storage or disposal of such material shall be kept in a clean and sanitary condition, in accordance with the regulations of the State of Alaska Department of Health.

12. OIL AND MINING OPERATIONS: No oil drilling, oil development operations, oil refining, quarrying or mining operations of any kind shall be permitted upon or in any lot, nor shall oil wells, tanks, tunnels, mineral excavations or shafts be permitted upon or in any lot.

13. DRAINAGE DITCHES AND CULVERTS: No obstruction shall be placed in drainage ditches adjoining any lot. Metal culverts of a diameter of not less than 12 inches and 30 feet in length, or as required by the Division of Highways shall be placed under driveways leading from roads or streets onto said lot, to avoid obstruction of said ditch.

14. CLEARING: Trees or brush on property shall be to the extent possible, hand cleared to preserve the natural enviorment; no bulldozers or other heavy equipment shall be used to clear trees and brush except for building site, view and driveway.

16. EASEMENT: Easements for installation and maintenance of utilities and drainage facilities are reserved as shown on the recorded plat. Within these easements, no structure, trash, vehicles, plantings or other material shall be placed or permitted to remain which may damage or interfere with the installation and maintenance of utilities or which may change the direction of flow of drainage channels in the easements, or which may obstruct or retard the flow of water through drainage channels in the easements.

17. TERMS: These covenants are to run with the land and shall be binding on all parties and all persons claiming under them for a period of twenty-five years from the date these covenants are recorded, after which said covenants shall be automatically extended for a successive period of twenty-five years unless an instrument signed by a majority of owners has been recorded, agreeing to change such covenants in whole or in part.

18. ENFORCEMENT: Enforcement of these covenants shall be by proceedings at law or in equity against any person, or person, violating or attempting to viloate any covenant, either to restrain such violation or to recover damages.

19. SEVERABILITY: Invalidation of any of these covenants by judgement or court order shall in no way effect any of the other covenants, which shall remain in full force and effect.

76-07942
900
RECORDED - FILED
FAIRBANKS REC. DIST.
JUN 7 3 56 PM '76
REQUESTED BY TTICO
ADDRESS

William K. Simon — General Partner

Ed Martin — General Partner

Damon Thomas — General Partner

UNITED STATES OF AMERICA)
) SS
STATE OF ALASKA)

THIS IS TO CERTIFY that on this the 7th day of June, 1976, before me, the undersigned, a Notary Public in and for the State of Alaska, duly commissioned and sworn personally appeared William K. Simon, Ed Martin and Damon Thomas to me known and known to be the General Partners of the McGrath Estates Investment Group, a limited partnership, and they acknowledged to me that they signed and sealed the within and foregoing covenants as their free and voluntary act and deed of this limited partnership, and that they were duly authorized to do so by the Limited Partnership Agreement.

WITNESS my hand and notarial seal the day and year in this certificate first herein written

Notary Public for the State of Alaska
My Commission Expires: 1-30-79

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 LH
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

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.

I:\HATCHL\GREENSTR.MCG

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

MEMORANDUM

State of Alaska

Department of Transportation & Public Facilities

TO: Malcolm Pearson
Design
Northern Region

DATE: March 26, 1997

FILE NO:

TELEPHONE NO: 451-5426

FROM: John F. Bennett, PLS
ROW Engineering Supervisor
Northern Region

SUBJECT: Project TEA-0002(75)
McGrath Rd Bike Path
"Green Strips"

Attached is an enlarged portion of the McGrath Estates Portion 2 subdivision which shows the "Green Strip" adjoining McGrath road.

Our last experience with "Green Strips" was on the Laurance Road - Nelson Road project back in 1989. Our area of acquisition included a portion of a "green area" noted on the plat of Seavy Subdivision. The area in question, however, was specifically segregated from the adjoining lots. The Certificate of Ownership and Dedication included language that dedicated "parks and open spaces" to the public or private use (as noted). The green areas were not noted as public or private but they were clearly areas separate from the street dedications and the private lots.

We originally decided that the FNSB was the owner and that we needed to acquire a portion of the green area from them. FNSB responded in writing that they considered the green area to be a part of the road right of way and that we could incorporate it into our project without any conveyance from them.

This, however, is not the situation at McGrath Estates. The "green strip" noted on the plat is clearly within the lots adjoining McGrath road. Note number 4 states *"Clearing of natural vegetation not permitted within 50' of McGrath Road R/W, except for existing power and communication lines."* My interpretation of this note is that the green strip is not a public area or recreation area subject to the 4F provisions, but more like a restrictive covenant which prevents the individual lot owners from clearing the 50' strip. The next question, which should be answered by the AGO, is whether DOT&PF would be restricted from clearing the strip if we acquired it to expand the McGrath road right of way.

Note No. 7 which discusses additional easements along side and back lot lines is also subject to interpretation. It appears to only apply to side and back lines where no easement is shown on the plat. As the McGrath road side of the lots are subject to a 30' PUE and note No. 4 suggests that there may be power or communications lines in the 50' green strip, I don't believe the additional easements referenced in note 7 apply to the McGrath road boundary of the lots.