2011 WL 5103230 (Alaska) (Appellate Brief)
Supreme Court of Alaska.

David MCCARREY and Donna McCarrey, Appellants, v. Ronald KAYLOR and Jean K. Kaylor, Appellees.

No. S14114.
April 27, 2011.

Trial Court No. 3AN-10-7799 CIV
Appeal from the Superior Court Third Judicial District At Anchorage, Alaska Honorable John Suddock

Brief of Appellant

Brent R. Cole, AK State Bar No. 8606074, Law Offices of Marston & Cole, P.C., 821 N Street, Suite 208, Anchorage, AK 99501, 907-277-8001, Counsel for Appellants.

*i TABLE OF CONTENTS

*ii TABLE OF AUTHORITIES

Cases

*iv CONSTITUTIONAL PROVISIONS, STATUTES, ETC., RELIED UPON

Alaska Rules of Evidence

Rule 201. Judicial Notice of Fact.

(a) Scope of Rule. This rule governs only judicial notice of facts. Judicial notice of a fact as used in this rule means a court's on-the-record declaration of the existence of a fact normally decided by the trier of fact, without requiring proof of that fact.

(b) General Rule. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within this state or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When Discretionary. A court may take judicial notice as specified in subdivision (b), whether requested or not.

(d) When Mandatory. Upon request of a party, the court shall take judicial notice of each matter specified in subdivision (b) if the requesting party furnishes sufficient information and has given each party notice adequate to enable the party to meet the request.

Anchorage Municipal Code - 21.80.330 - Design standards - Lot frontage and access.

A. Except when platted under section 21.15.030.J or section 21.15.134, all lots shall have frontage on a publicly dedicated street.

B. The front lot line of a residential lot shall not abut a street designated for collector or greater capacity on the official streets and highways plan, and shall not face a lot zoned or used for commercial or industrial purposes, except that an exemption shall be granted in rural areas where access is limited to such streets or roads.

C. Subdivisions shall be designed to minimize lots with access to residential major streets carrying over 1,000 average daily trips.

D. The total width of driveway entrances to a lot from a street shall not exceed two-fifths of the frontage of that lot on that street, or one-third of the frontage if the platting authority finds that conditions warrant it, unless the subdivider provides for snow storage in a mariner approved by the platting authority.

*v E. The frontage of a lot on a cul-de-sac bulb shall be at least 30 feet, except that the frontage on a cul-de-sac bulb of a lot with a side yard abated under section 21.45.120.G shall be at least 18 feet. This subsection does not apply to flag lots.

F. All street rights-of-way shall include an open area, which may contain sidewalks, for snow storage. The open area shall extend seven feet outward from the back of the curb.

*1 I. JURISDICTION

Appellants David and Donna McCarrey, on December 13, 2010, timely appealed to the Alaska Supreme Court from the Permanent Restraining Order distributed on November 11, 2010 and Judgment distributed on November 15, 2010 entered by the Honorable John Suddock, Superior Court Judge. [Exc. 127] This Court has jurisdiction to hear this appeal pursuant to AS 22.05.010.

*2 II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The following issues are presented to the Court for review:

1. Whether Appellants' due process rights were violated by lack of adequate notice and an opportunity to be heard and to present evidence on the public right-of-way issue;

2. Whether the superior court erred in ordering a permanent injunction enjoining Appellants from installing a gated fence, running east to west, along the northern boundary of their property;

3. Whether the superior court erred in determining that Appellants' property is subject to a public right-of-way;

4. Whether the superior court erred in determining that Appellees' property benefits from the right-of-way;

5. Whether the superior court erred in determining that Appellees are entitled to an absolute, unconditional and unfettered right to access the southern boundary of their property from the entire 165 foot length of the right-of-way located on Appellants' property; and

6. Whether the superior court's permanent injunction is too broad.

*3 III. STATEMENT OF THE CASE

A. Statement of the facts.

In 2009, appellants David and Donna McCarrey ("the McCarreys") became the owners of real property legally described as Lot Fourteen (14), Section Twenty-Seven (S27), Township Twelve North (T12N), Range Three West (R3W), Seward Meridian, according to the official Bureau of Land Management Survey thereof, being located in the Anchorage Recording District, Third Judicial District, State of Alaska. ("the McCarrey property"). [Exc. 3; Tr. 35] An original United States land patent ("Patent") for the McCarrey property, granted pursuant to the Small Tract Act of 1938, reserved a right-of-way, not to exceed 50 feet in width, along the north boundary of the McCarrey property for roadway and public utilities purposes ("the right-of-way"). [Exc. 1, 3; Tr. 35-37] Currently, an unimproved, dirt road exists within the boundaries of the right-of-way, named East 136th Avenue, beginning on Elmore Road and running east along the northern fifty feet (50') of Lots 13-20 to Davis Street. [Exc. 48, 2; Tr. 64-65; 79] In 1980, the right-of-way road only extended west from Davis Road to lot 15. [Tr. 59; 77; Exc. 2] Thus, as of 1980, the right-of-way road extended across two lots, 13 and 14, and it ended at lot 15. *Id.* According to public tax records, no homes were built on Small Tract Act lots 13-16 until 1980 when a home was *4 constructed on lot 13. [Attachment C] [1] There is no evidence in the record establishing that a right-of-way road existed prior to 1980. [Tr. 20-107]

Sometime after 2000, the right-of-way road was extended west to Elmore Road by lot owners 18, 19, and 20. [Tr. 77; 79-81] The extension came about as a result of a feud between these lot owners. [2] [Tr. 79-81] The right-of-way road provides the only access to the Small Tract Act Lots 13-20, including the McCarrey property. [Exc. 48]

The right-of-way road, East 136th Avenue, is an unimproved dirt road that is not maintained by the Municipality of Anchorage and does not meet the current Anchorage Municipal Code for a street. [Exc. 48, 65; Tr. 79] No municipal action was ever taken to create East 136th Avenue and the municipality has made no improvements to East 136th Avenue *5 other than the placement of road signs at Elmore Road and Davis Street sometime between 2000 and 2005. [Tr. 77; 79; 97] The Municipality of Anchorage Grid Map dated October 9, 2009 shows the 50' Patent Roadway Reserve US Patent 1220903 across the McCarrey property and marks East 136th Avenue as a private road. [Exc. 2] The right-of-way, as depicted on the Grid Map, runs to the interior of the small tract lot lines (lots 13-20) and does not burden adjacent property (lots 1-8), such as the Kaylor property. [Exc. 2; Tr. 81]

Appellees Ronald and Jean Kaylor ("the Kaylors") are the owners of real property located at 4500 East 135th Avenue, legally described as Lot Seven (7), Block Two (2), Olson Heights Subdivision, Plat No. 79-68, Anchorage Recording District, Third Judicial District, State of Alaska ("the Kaylor property"). [Exc. 17-18; Tr. 65] The Kaylors have a driveway on the northern boundary of their property that provides access to and from East 135th Avenue, a legally dedicated public roadway. [Tr. 68; Exc. 2, 48; Appendix D] The right-of-way road, East 136th Avenue, does not encroach upon the Kaylor property. [Exc. 48; Tr. 81] Despite their driveway which accesses East 135th Avenue, the Kaylors also access the southern boundary of their property from that portion of the right-of-way, East 136th Avenue, located within the northern fifty feet (50') of the McCarrey property. [Tr. 68, 81], the Kaylors have parked a boat, two motorhomes and other vehicles on the southern boundary of their property. [Exc. 19-20]

*6 B. Procedural History

In a letter dated May 21, 2010, the McCarreys, through their attorney, informed the Kaylors of their intention to install a six foot residential grade chain link fence along the northern boundary of their property. [Exc. 27] The letter states, in part:

This fence will contain a gate which can allow access on to the southern portion of your property. However, the use of this gate will be at the sole discretion of Mr. and Mrs. McCarrey. If you need to use this gate, you can provide 72 hour notice to Mr. and Mrs. McCarrey and they will try to accommodate any reasonable requests. Mr. and Mrs. McCarrey retain the right to refuse use of the gate at any time and for any reason.

Our understanding is that vehicles either owned by you or tenants of yours have been consistently parked on their property. This practice cannot continue... We also understand that a boat apparently owned by you, is encroaching up the McCarrey's property. This will have to be moved so that the fence can be installed...

Id.

On May 27, 2010, the Kaylors filed a Complaint alleging that their use of the right-of-way for a period in excess of fifteen years granted them an easement across the McCarrey property by prescription and that the proposed fence would unreasonably impair their use of the prescriptive easement. [Exc. 5] The Kaylors sought an immediate temporary restraining order prohibiting the installation of the proposed fence to be followed by a permanent injunction. [Exc. 5] The Kaylors also filed a Motion for Temporary Restraining Order [Exc. 12] and Memorandum in Support on May 27, 2010. [Exc. 14]

The McCarreys filed an Answer on June 8, 2010 [R. 8] and Opposition to Motion for Temporary Restraining Order on June 9, 2010. [Exc. 35] A preliminary ***7** injunction hearing was scheduled to be held before the Honorable John Suddock, Superior Court Judge, on June 10, 2010. [Tr. 4] At that time, however, the parties had tentatively agreed to a settlement which included a landscaping proposal and a parking limitation in lieu of a fence. [Tr. 4-7] The parties also tentatively agreed that the Kaylors' boat would be moved so that it would sit solely on Kaylor property. [Tr. 6]

The parties were ultimately unable to agree on a landscaping plan and settlement negotiations failed. [Tr. 13-16.] At a June 29, 2010 status conference, the court scheduled a preliminary injunction hearing for August 5, 2010. [Tr. 12, 17] On August 3, 2010, just two days prior to the hearing, the Kaylors filed a Memorandum Regarding Hearing for Permanent Injunction. [Exc. 85] In that Memorandum, the Kaylors argued, for the first time, that East 136th Avenue is a legally designated public road. [Exc. 86-89]

The preliminary injunction hearing was held on August 5, 2010 before the Honorable John Suddock, superior court judge [Tr. 19-20] At the hearing, the Kaylors sought a permanent injunction enjoining the McCarreys from installing a fence on the north side of the McCarrey property, running east to west and adjacent to East 136th Avenue. [Tr. 23-24] The Kaylors contended that the fence would interfere with access to their property from East 136th Avenue. [Tr. 24]

After the hearing, the superior court orally issued findings of fact and conclusions of law. [Tr. 101-106] The court granted the Kaylors' request for an injunction preventing the McCarreys from limiting the Kaylors' access to the Kaylor ***8** property by a gated fence. [Tr. 106] In reaching its decision, the superior court found that, setting aside the issue of a prescriptive easement, the facts were undisputed. [Tr. 97] The court determined that there were two legal issues: (1) whether the right-of-way benefited only the McCarrey property and not the Kaylor property; and (2) if the right-of-way does benefit the Kaylor property, is the right-of-way “subject to a rule of reason where so long as the McCarreys provide reasonable access that suffices.” [Tr. 98] The superior court concluded as follows:

I find as a matter of law what you have there is a 1961 devolution of property from the United States to a series of landowners that retained along the north side of lots 13 to 20, including lot 14 which is the McCarrey property, a 50 foot right-of-way for a road. By history there's been on the stretch that runs between - from Davis Street past McCarrey/Kaylor lots, there's been a road there for a long time and then more recently with the upgrade in the - it must be an extension of Elmore Road in the early 2000s, the East 136th is presented - is punched all the way through, running east/west from Elmore all the way to Davis. It's recognized on municipal plats as a roadway, they term it 136th Avenue, it's in logical sequence with 135th and 137th. It's signed by the municipality at both ends. It's open to public access. Any present in the courtroom or any present in Anchorage or tourist or an Afghani could legally drive from Elmore to Davis, it's a road. It's a road consistent with the 1961 deed conveying the McCarrey property from the United States to somebody else.

I'm asked to interpret it, to interpret and read in a limiting provision based on the insight or the argument that because it is in - because it is the form not of a right-of-way that straddles the property line, 25 say on either side, but rather solely encroaches upon here the McCarrey lot and not the Kaylor lot, I'm asked to read into that an implied limitation that it's there for only to benefit the McCarrey property. Well, it's there to benefit the world, it's a road, an Afghani can use the road.

In terms of the linguistic and analytical technique the court used to parse statutes, contracts, other writings, deeds, there's nothing in the ***9** wording of the - of the right-of-way grant that suggests that the McCarreys can turn off of the 136th Avenue at point A, B, C, ad infinitum, of their property, but that a different condition applies on the north side of the right-of-way.

The wording is this patent is subject to a right-of-way. A right-of-way in common parlance is an area in which a group of people or a political entity can do some specified thing. It's delimited as 50 feet in length and its purpose is both for public utility purposes and for a roadway to be located along the north boundary of the land. A road is a road, a road doesn't come attached with a fence on one side and no fence on the other. And so I can't read into this from the mere fact which it seems to me to be quite random or fortuitous, that the easement structure or right-of-way structure that some federal functionary in 1961 happened to select was - instead of straddling, let's just encroach across the north side of each of a block of lots. And so I'm unable to construe the patent right-of-way in the form that Mr. Cole and his client want me to do, I think that's an unreasonable reading of the right-of-way,

But I don't believe that I - that a court can hold that the McCarreys, as the owner of the underlying estate, can put conditions on the use of the Kaylor property without going through the municipality or taking advantage of some established procedure, I don't think a court can order - that courts really don't operate as planning and zoning or the determiner of where a driveway should or should not be, I think that's a municipal function. And so I'm going to find that as a matter of law the Kaylors are entitled to an injunction preventing the McCarreys from limiting their access to their property by a gated fence.

[Tr. 101-106]

Following the hearing, the Kaylors filed a Motion for Entry of Written Permanent Injunction on August 27, 2010 [Exc. 96] which the McCarreys opposed on September 24, 2010. [Exc. 115] The superior court granted the Kaylors' motion for a permanent injunction by Order signed on November 11, 2010 and distributed on November 12, 2010. [Exc. 127] The Permanent Restraining Order provides in part: ***10** Plaintiffs, Ronald Kaylor and Jean K. Kaylor, (“Kaylors”), in the above entitled action filed a complaint requesting an injunction against defendants, David MCarrey and Donna McCarrey (“McCarreys”) requiring the McCarreys to refrain from placing a fence or in any other manner restricting the use of a public right of way on the north 50 feet of the McCarreys property, Lot 14 . which has been set aside for a roadway and public utilities, said right-of-way being designated by the Municipality of Anchorage as East 136th Avenue.

At a hearing on the matter, the court found that as a matter of law, the Kaylors are entitled to an injunction permanently preventing the McCarreys from limiting their access to their property by a gated fence. The court, by its judgment duly given and orally entered on August 5, 2010, ordered, adjudged, and decreed that a permanent injunction be issued.

[Exc. 129] Judgment was entered on November 11, 2010 granting injunctive relief and awarding the Kaylors attorney's fees and costs in the sum of $3,212.82. [Exc. 127] The Judgment was distributed to the parties on November 15, 2010. [Exc. 127] The McCarreys filed a timely Notice of Appeal on December 13, 2010. [Exc. 132]

*11 IV. STANDARD OF REVIEW

The superior court's determination that the Small Tract Act right-of-way is a legally designated public road, and therefore, the Kaylors have an absolute and unfettered right to use the right-of-way to access the southern boundary of their property, regardless of necessity, was based on factual findings about property use and legal conclusions about whether the Small Tract Act right-of-way constituted a legally designated public road, whether the Small Tract Act right-of-way benefited the public, including the Kaylors, and whether the installation of a gated fence would unreasonably interfere with the Kaylors' use of the right-of-way. The Alaska Supreme Court reviews the trial court's factual findings under the clearly erroneous standard. *Price v. Eastham,* 75 P.3d 1051, 1055 (Alaska 2003). The Court will reverse if it has a definite and firm conviction that a mistake has been made. *Id.*

*12 V. ARGUMENT

The superior court erred in granting a permanent injunction enjoining the McCarreys from installing a gated fence along the northern boundary of their property. Accordingly, the superior court's Order granting the Kaylors' motion for a permanent injunction should be reversed and the Judgment granting injunctive relief and awarding the Kaylors attorney's fees and costs should be vacated.

The superior court erred in granting a permanent injunction because it failed to give the McCarreys adequate notice and an opportunity to be heard and to present evidence on the public right-of-way issue and, therefore, the McCarreys' due process rights were violated. In addition, the superior court erred in granting injunctive relief since the court made several incorrect conclusions of law: (1) the superior court erred in determining that the McCarreys' property is subject to a public right-of-way since there is no evidence in the record that the public right-of-way designation was accepted by actual use prior to 1976; (2) the superior court erred in determining that the Kaylors are beneficiaries of the right-of-way; and (3) even assuming, arguendo, that the right-of-way benefits the Kaylor property, the superior court's injunction is too broad and imposes greater restrictions than necessary on the McCarreys' use of their property.

*13 A. Because the McCarreys did not have Adequate Notice that a Public-Right-of-Way was at issue, Their Due Process Rights Were Violated.

The Alaska Constitution provides that "'[n]o person shall be deprived of life, liberty, or property, without due process of law.'" *Price v. Eastham,* 75 P.3d 1051, 1056 (Alaska 2003) (quoting Alaska Const. art. I, § 7). The Alaska Supreme Court has

held repeatedly that "[p]rocedural due process under the Alaska Constitution requires notice and opportunity for hearing appropriate to the nature of the case." Parties must have notice of the subject of proceedings that concern them "so that they will have a reasonable opportunity to be heard." "A hearing is required in order to give the parties an opportunity to present the quantum of evidence needed [for the court] to make an informed and principled determination."

Id. at 1056 (citations omitted).

In *Price v. Eastham,* plaintiff filed suit against Price claiming that it had perfected a prescriptive easement over Price's property. *Id.* at 1054. Price filed an answer, disputing the claim of entitlement to a prescriptive easement. Id. The case went to trial before Superior Court Judge Brown. Id. Judge Brown concluded that the trail at issue was an RS 2477 right-of-way and declined to decide whether a public or private easement was created. *Id.* The Alaska Supreme Court held that because Price did not have notice that an RS 2477 right-of-way was at issue, his due process rights were violated. *Id.* at 1056. Price did not have notice and an opportunity to be heard and to present evidence on the RS 2477 issue. *Id.* Accordingly, the Alaska Supreme Court reversed the superior court's finding of an RS 2477 right-of-way on Price's land.

***14** Similar to *Price v. Eastham,* the Kaylors filed a Complaint alleging that their use of the right-of-way for a period in excess of fifteen years granted them an easement across the McCarrey property by prescription and that the proposed gated fence would unreasonably impair their use of the prescriptive easement. [Exc. 5] The Kaylors sought an immediate temporary restraining order prohibiting the installation of the proposed fence to be followed by a permanent injunction. *Id.* The Kaylors did not allege in their Complaint that the McCarrey property was subject to a public right-of-way nor did they allege that the right-of-way is a legally designated public road. *Id.*

At the preliminary injunction hearing, the superior court declined to hear evidence or decide whether a prescriptive easement was created; instead, the superior court simply concluded that since a road presently exists, the road is named 136th Avenue, and the road is signed at Davis and Elmore, the road must be a legally designated public road. [Tr. 102] The court then concluded that the road is "there to benefit the world" and, therefore, the Kaylors are entitled to unlimited access to the southern boundary of their property from the road. [Tr. 102-104] The court found as a matter of law that "the Kaylors are entitled to an injunction preventing the McCarreys from limiting their access to their property by a gated fence." [Tr. 106] The superior court explained, "I make this ruling because at this moment in time, it's 11:15, because we could have gotten to the same place with a motion for summary judgment, I think, by one or the other of you, but one or the other of you didn't make it. And it's in the ***15** nature of a mercy killing because you both have two expensive surrogates..." [Tr. 106]

While the parties may not have disputed that a road currently exists, that the road is named 136th Avenue, and that the road is currently signed at Elmore and Davis, the McCarreys disputed that their property is subject to a public right-of-way, and they disputed that East 136th Avenue is a legally designated public road. [Tr. 94-97] However, like the defendant in *Price,* the McCarreys were given inadequate notice that a public right-of-way, rather than a prescriptive easement, was at issue and the McCarreys had inadequate opportunity to argue the law or present additional evidence to support their position. [Tr. 94-97]

Because the McCarreys' due process rights were violated, the permanent injunction order should be reversed and the judgment vacated.

B. The Superior Court Erred in Determining that the McCarrey Property is Subject to a Public Right-of-Way Under the Small Tract Act.

The superior court erred in determining that the McCarrey property is subject to a public right-of-way. The superior court mistakenly concluded that the right-of-way, named East 136th Avenue, is a legally designated public road. To prove the existence of a Small Tract Act right-of-way, the Kaylors were required to establish actual use of the right-of-way as a road prior to 1976. This they failed to do. There is no evidence in the record demonstrating that the right-of-way reserved on the McCarrey property was actually used as a road prior to 1976, the date on which the public right-of-way dedication terminated.

***16** The McCarreys purchased their property in 2009 subject to the "reservations and exceptions as contained in United States Patent and/or in Acts authorizing the issuance thereof." [Exc. 3] The original land patent, patent number 1220903, for the McCarrey property was issued by the United

States pursuant to the June 1, 1938 Small Tract Act, 52 Stat. 609 (repealed October 1976), and "is subject to a right-of-way not exceeding 50 feet in width, for roadway and public utilities purposes, to be located along the north boundary of said land." [Exc. 1] The Small Tract Act of June 1, 1938, 52 Stat. 609, 43 U.S.C. § 682a (1938)*repealed by* Pub.L. No. 94-579, Title VII, §702 (October 21, 1976) was made applicable to Alaska by the Act of July 14, 1945, 59 Stat. 467. *State v. Green,* 586 P.2d 595, 600 n.15(Alaska 1978); *State, Dep't of Highways v. Crosby,* 410 P.2d 724, 727 (Alaska 1966).

The Small Tract Act provided that "the secretary of the Interior, in his discretion, is authorized to sell or lease to any person or organization... a tract of not exceeding five acres... under such rules and regulations as he may prescribe *State, Dep't of Highways v. Crosby,* 410 P.2d at 727 (quoting Act of June 1, 1938, 52 Stat. 609, 43 U.S.C. § 682a (1964)). The Small Tract Act did not establish or reserve rights-of way along the boundaries of leases or patents. United States Department of Interior Instruction Memorandum No. 91-196 dated February 25, 1991 ("Memorandum"). [Attachment A] However, administrative regulations under the Small Tract Act stated, "unless otherwise provided in the classification order, the leased land will be subject to a right-of-way of not to exceed 33 feet in width along the ***17** boundaries of the tract for street and road purposes and for public utilities." *Green,* 586 P.2d at 601 (quoting 43 C.F.R. § 257.16(c)(1954)). The regulations later changed the right-of-way width to 50 feet. Memorandum at 1 [Attachment A]. This was the only reservation for a right-of-way that the Secretary, by regulation, prescribed as to small tracts. *State, Dep't. of Highways v. Crosby,* 410 P.2d at 727.

The rights-of-way first appeared in the small tract lease form around 1945 and were intended to provide a corridor for access and utilities to small tracts. Memorandum at 1; *Green,* 586 P.2d at 601 (the regulation's "apparent objective was to provide rights-of-way for 'access streets or roads' and for public utilities... this language and the parallel language of the lease suggest the Secretary's concern with reserving access for other lots within the boundaries of the small tract lease area.")

Because of the confusion regarding reserved rights-of-way on Small Tract Act patents, the United States Department of Interior, Bureau of Land Management, issued Instruction Memorandum No. 91-196 on February 25, 1991 ("Memorandum"). The Memorandum states that it "is an attempt to consolidate previously issued guidance and to provide policy and procedure when Small Tract Act rights-of-ways are encountered." [Attachment A] In Green, the Alaska Supreme Court considered a Department of Interior Memorandum of Opinion, noting that "an administrative agency's interpretation of its own regulation is normally given effect unless plainly erroneous or inconsistent with the regulation." *Green,* 586 P.2d at 602 n.21 (citations omitted). The Court also noted that although an administrative agency's interpretation ***18** of a statute is not binding upon courts, where the statute is ambiguous, some weight may be given to administrative decisions interpreting it. *Id. See also Boyd v. State,* 210 P.3d 1229, 1232 (Alaska 2009) (when interpreting a regulation, courts normally give effect to an administrative agency's interpretation of its own regulation).

The Department of Interior Memorandum explains that:

> The intent of the Small Tract Act easements was to provide access and utility accessibility to the affected tracts. No apparent "public" purpose or governmental use was contemplated except to carry out the purposes of the Small Tract Act to provide for intensive utilization of the public lands.

Memorandum at p. 3 [Attachment A at 3] The Memorandum also explains that any right-of-way dedication not accepted by actual use prior to 1976 terminated. The Memorandum states, in part:

It is generally accepted that small tract rights-of-way are common law dedications to the public to provide ingress and egress to the lessees or patentees and to provide access for utility services.

Confusion arises as to when the rights-of-way attach to the land, the status of the rights-of-way following termination of a lease or a classification order, and the uses which are allowed within the rights-of-way under the authority of the Small Tract Act. * * *

From 1949 until the Small Tract Act was repealed in 1976, a right-of-way along the borders of each tract was available for public use as provided in the terms on the lease form, the classification order, or through the regulation requirements. The right-of-way remained available as long as the lands were classified for small tract use. These rights-of-way were determined to be common law dedications and had the effect of a public easement. However, until *acceptance by use* of the easement made the dedication complete, the United States could revoke or modify the offer to dedicate in whole or in part. Said another way, unless the common law rights-of-way were actually used for a road or ***19** public utilities to serve a small tract, the dedication disappeared with the termination of the classification. To the extent that the common law dedications were accepted through use by appropriate parties prior to the revocation of the classification, those rights are protected by the provisions of 43 U.S.C. 1701(a) and 43 U.S.C. 1769.

Memorandum at 1-2 [Attachment A at 1-2] (emphasis in original). By way of illustration, the Memorandum explains that in the example set forth at Illustration 1, because the right to construct within the small tract easement terminated upon termination of the small tract classification, authorization for the new road where it crosses small tract lot 10 must be secured from the private landowner. Memorandum at 3 and Illustration 1. [Attachment A at 3 and 5]

The Department of Interior's interpretation of the small tract public right-of-way dedication is consistent with Alaska law. 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). Acceptance 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. *Id.*

In *Spittler v. Routsis,* 2010 WL 2717701 (Nev. Dist. Ct. April 21, 2010) [Attachment B], the court, citing to the Memorandum, held that Spittler had no easement across the small tract property of the defendants since (1) the rights-of-way on the defendants' properties were not actually used for a road and thus, the dedication for that purpose disappeared when the classification terminated which occurred no later than 1976, when the law was repealed; and (2) the rights-of-way are to serve a ***20** small tract, not to serve parcels outside the tract, like Spittler's. *Id.* at 2, 8. [Attachment B at 2, 8]

In Spittler, defendants' land was originally classified by the United States for disposal under the Small Tract Act in five acre blocks. *Id.* at 2. The defendants' land was originally patented from the United States to their predecessors and the patents were “subject to a right-of-way not exceeding 33 feet in width, for roadway and public utilities purposes, to be located along the boundaries of said land.” *Id.* The court stated that “these rights of way are located along the interior boundaries of the parcel to allow access to the various owners of that five acre parcel; they do not benefit other, non-Small Tract land.” *Id.* Spittler's land was not patented pursuant to the Small Tract Act. *Id.* The court concluded:

14. “When small tract classifications are terminated, the common law right-of-way dedication disappears to the extent that it was not accepted by actual use.” *See,* Memo, par.I(a). The 33-foot rights-of-way along the boundaries of the defendants' parcels were not “accepted by actual use” as a road prior to repeal of the Act, and therefore, there is no claim to an easement by Spittler.

15. The example illustration included with the Memo confirms that roads actually used are the ones that survive repeal of the Act. Notably, the illustration deals with parcels, that are within the tract, because only parcels within the tract are intended to be benefited by the rights-of-way. *See,* Memo, P.2, par. I(a) and attached diagram.

16. “After termination of the classification, additional rights-of-way uses may be made within the borders of the existing rights-of-way for roads and utilities that serve the small tract patents without additional authorization from the United States.” *See,* Memo, p.2 par. I(b). The uses made of the rights-of-way are those that benefit the small tract patents, not outsiders.

***21** 17. As to those parcels that had rights-of-way that were not accepted by actual use as a road, “the right to construct within the small tract easement terminated upon termination of the small tract classification. Authorization for the new road where it crosses lot 10 must be secured from the private landowner.” *See,*Memo, p.3, par 2 (top). Because the 33-foot rights-of-way on the boundaries of the defendants' properties were never used as roads, and because Spittler was not within the small tract, Spittler was required to obtain permission from Routsis and Purdon to built [sic] his road. He never obtained it.

18. “The intent of the Small Tract Act easement was to provide access and utility accessibility to the affected tracts. No apparent ‘public’ purpose or government use was contemplated except to carry out the purposes of the Small Tract Act to provide for intensive utilization of public lands... Roads or utilities that cross public lands outside the tract borders (regardless whether the rights-of-way serve the small tracts) or other facilities constructed within the rights-of-way borders that do not serve the small tracts require a separate rights-of-way authorization.” See, Memo, p.3, par. 1-2. As the memo demonstrates, in repeated fashion, the rights-of-way were for the use of the affected tracts, not for properties outside the tract, and for any uses that did not serve the small tracts, a separate authority was required.

19. There is no reported decision supporting the claim that a property owner outside the small tract has a right-of-way (easement) to a road over parcels within the small tract.

Id. at 8-9. [Attachment B at 8-9] The court also concluded that the maps admitted into evidence did not grant easements; rather, they merely referenced the pre-existing federal grants and did not expand the scope of the grants. *Id.* at 9. The court stated, “the easements depicted on these maps run to the interior of the lot lines only; in other words, they benefit and burden the original Small Tract Land referenced in the Notes (now the Purdon and Routsis property) and do not burden or benefit the now-Spittler property.” *Id.* at 3. [Attachment B, at 3]

***22** The *Spittler* court noted that since the Small Tract Act was repealed in 1976, no government or private party has ever been granted a right-of-way over land not used as a road prior to 1976. *Spittler v. Routsis,* 2010 WL 2717701 at 9. For example, in *Bernal v. Loeks,* 997 P.2d 1192 (Ariz. App. 2000), Bernal and his neighbors the Loekses and McCuskers all owned parcels of land that had originally been acquired from the federal government by land patents pursuant to the Small Tract Act. *Id.* at 1192. Each of the patents were “subject to a right-of-way not exceeding 33 feet in width, for roadway and public utilities purposes, to be located along” three of the lot's boundaries. *Id.* at 1192-1193. Although the right-of-way had been used as a road, the road in dispute had not yet been dedicated and established by inal County as a public roadway. *Id.* at 1193. Bernal brought an action seeking to enjoin the Loekses and the McCuskers from blocking his access to the right-of-way which prevented him from acquiring access to the western portion of his property. Id. The trial court held that there is no private right to enforce the easements reserved by the federal patents. *Id.* The appellate court reversed, holding that the right-of-way could be enforced by Bernal for access purposes, even though a roadway had not been publicly built and maintained along the affected boundary. *Id.* at 1194-95.

Thus, at issue in *Bernal* was not whether the access road had been in use prior to 1976, but whether a small tract property owner could enforce the right-of-way even though the access road had not been publicly built and maintained. Further, unlike the Kaylors, Bernal was not merely an adjacent property owner, but a member within the ***23** small tract. *See also Keener v. State,* 889 P.2d 1063, 1065 (Alaska 1995) (action to prevent the upgrade of Davis Road built in 1951); *State v. Alaska*

Land Title Ass'n, 667 P.2d 714, 718 (Alaska 1983) (dispute involving the widening of Rabbit Creek Road built prior to 1976); 823 *Square Feet, More or Less v. State,* 660 P.2d 443, 445 (Alaska 1983) (dispute involving the boundaries of Tudor Road built in May 1950); *Anderson v. State, Dept. of Highways,* 584 P.2d 537, 538 (Alaska 1978) (dispute involving the widening of Muldoon Road which was built prior to 1976); *State, Dept. of Highways v. Green,* 586 P.2d 595, 598 (Alaska 1978) (dispute regarding the widening of Tudor Road built in May 1950); *Neal v. Brown,* 191 P.3d 1030, 1036 (Ariz. App. 2008) (small tract property owners did not have right to use land patent right-of-way since an existing alternate roadway provided full access to and use of their properties); *City of Phoenix v. Kennedy,*675 P.2d 293, 294 (Ariz. App. 1983) (dispute involving the passing of an ordinance to improve an existing street); *Mountain States Telephone and Telegraph Co.,* 711 P.2d 653 (Ariz. App. 1985) (dispute involving installation of cable by public utility in 1976).

Thus, when a small tract classification is terminated, the common-law public right-of-way dedication disappears if it was not accepted by actual use.[3] ***24** Memorandum at 2; *Spittler v. Routsis,* 2010 WL 2717701 at 2, 8. The small tract classification terminated no later than October 1976, when the Small Tract Act was repealed. *Id.* In the instant case, there is no evidence in the record that the public right-of-way dedication was ever accepted by actual use as a road prior to the repeal of the Act in 1976.[4] Indeed, the evidence in the record points to the conclusion that the right-of-way was *not* actually used as a road prior to 1976.

The only testimony offered at the hearing was that based on aerial photographs taken in 1980, the right-of-way road only extended west from Davis Road to lot 15, crossing lot 13 and 14. [Tr. 59] Other evidence, which was not before the superior court but which is a matter of public record, shows that no homes were built on the lots at issue prior to 1976. [Attachment C] Pursuant to Alaska R. Evid. 201, this Court may take judicial notice of this fact since it is not subject to reasonable dispute. ***25** *Varilek v, City of Houston,* 104 P.3d 849, 852 (Alaska 2004). According to public tax records, a home was built on lot 13 in 1980, a home was built on lot 14, the now McCarrey property, in 2003, a home was built on lot 15 in 1992 and a home was built on lot 16 in 1987. [Attachment C] Thus, it is unlikely that a road existed at all prior to 1976 since no homes were located on small tract lots 13-15 until 1980. In other words, until homes were built in 1980, there was no need to access the lots, and, thus, it is reasonable to infer that no access road existed within the right-of-way until 1980. Significantly, there is no evidence in the record that the road existed prior to 1976.

Because the public right-of-way dedication was not accepted prior to 1976, the dedication disappeared. A public right to construct and use a road within the small tract right-of-way terminated in 1976. Memorandum at 2; *Spittler,* 2010 WL 2717701 at 2, 8. Thus, construction of the road that now exists within the boundaries of the right-of-way, named East 136th Avenue, required authorization from the private landowners. As the evidence in the record shows, the road was privately constructed. [Tr. 77; 79-81] The road was not built nor ever improved or maintained by the Municipality of Anchorage. [Tr. 77, 79, 97; Exc. 48] The Municipality of Anchorage Grid Map dated October 9, 2009 marks East 136th Avenue as a *private* road.[5] [Exc. 2] The public has no right to use the road.[6]

***26** Accordingly, the superior court erred in determining that the McCarrey property is subject to a public right-of-way. East 136th Avenue is not a legally designated public road since the dedication was not accepted by actual use prior to 1976. Rather, it is a private road built within the boundaries of lots 13-20 with permission of the private landowners in order to provide access to those lots.

Because East 136th Avenue is a private road located entirely within the boundaries of lots 13-20, the Kaylors have no right to use the road to access the southern boundary of their property. Accordingly, the superior court erred in granting a permanent injunction enjoining the McCarreys from installing a gated fence along the northern boundary of their property or in any manner restricting use of the right-of-way.

C. The Superior Court Erred in Determining that the Small Tract Act Right-of-Way Benefits the Kaylors.

The superior court erred in determining that the right-of-way benefits the Kaylors, adjacent property owners not within the land-locked small tract area. In *Green,* the Alaska Supreme Court stated that the objective of the Small Tract Act right-of-way was to reserve access for other lots within the boundaries of the small tract lease area. *State v. Green,* 586 P.2d at 600. The *Green* Court distinguished between rights-of-way for a "local road" and "rights-of-way for street or utilities serving interior lots." *Id.* at 601 n.20. Here, the right-of-way at issue was reserved to serve interior lots located within the boundaries of the small tract.

***27** Similarly, the Department of Interior Instruction Memorandum provides that "the intent of the Small Tract Act easements was to provide access and utility accessibility *to the affected tracts.* No apparent 'public' purpose or governmental use was contemplated except to carry out the purposes of the Small Tract Act to provide for intensive utilization of the public lands." [Attachment A] (emphasis added)] The Memorandum states that "it is generally accepted that small tract rights-of-way are common law dedications to the public *to provide ingress and egress to the lessees or patentees* and to provide access for utility services." [Attachment A] (emphasis added). In *Spittler v. Routsis,* 2010 WL 2717701 (Nev. Dist. Cit. April 21, 2010)[Attachment B], discussed *supra,* the court held, in part, that Spittler had no easement across the small tract property of the defendants because the rights-of-way are to serve a small tract, not to serve parcels outside the tract. *Id.* at 2; 8. Citing to the Interpretive Memorandum, the court explained that "the rights-of-way were for the use of the affected tracts, not for properties outside the tract, and for any uses that did not serve the small tracts, a separate authority was required." *Id.* at 9. The court concluded that because Spittler's property was not one of the patentees in the tract, his property was not one that was intended to be benefited from the Small Tract Act. *Id.* at 8.

Here, the Kaylors' property is not within the small tract area and their property was not one that was intended to be benefited from the Small Tract Act. [Attachments D, E] Unlike the lots within the small tract area, lots 13-20, the Kaylor property is not ***28** land-locked. As early as 1979, East 135th Avenue existed as a legally dedicated public road and provides full access to the Kaylor property. [Tr. 68; Attachment D][7] The Kaylors have a driveway on the northern boundary of their property that provides access to and from East 135th Avenue. *Id.* The purpose of the Small Tract Act right-of-way was to provide access to patentees in the tract, not to serve parcels outside the tract area.

Accordingly, the superior court erred in concluding that the Kaylors are beneficiaries of the Small Tract Act right-of-way. Because the right-of-way does not benefit the Kaylors, the superior court erred in granting a permanent injunction enjoining the McCarreys from installing a gated fence along the northern boundary of their property or in any manner restricting use of the right-of-way.

D. Assuming, Arguendo, that the Kaylors Are Beneficiaries of the Right-of-Way, the Superior Court's Injunction Was Too Broad.

An "'njunction should always be so worded as not to impose on the defendant any greater restriction than is necessary to protect the plaintiff from the injury of which he complains."' *Kohl v. Legoullon,* 936 P.2d 514, 519 (Alaska 1997) (quoting Henry L. McClintock, *Principles of Equity,* at 392 (1948)). The superior court's permanent ***29** injunction which enjoins the McCarreys from installing a gated fence and prevents them from "any other manner restricting the use of a public right of way on the north 50 feet of the McCarreys' property" is too broad. [Exc.129] The proposed gated fence or a fence with an opening for driveway access would not impede travel down East 136th Avenue, it would not prevent the Kaylors from accessing their property - since they have access from 135th Avenue - nor would it unreasonably impede the Kaylors' access to the southern portion of their property from 136th Avenue.

Even where property owners *within* a small tract have sought to enforce a right-of-way reserved for roadway purposes under land patents issued by the United States pursuant to the Small Tract Act, the Arizona Court of Appeals has held that the property owners do not have an absolute right to enforce the right-of-way; rather, they may do so only when such use is consistent with the purposes of the Act. *Neal v. Brown,* 191 P.3d 1030, 1031 (Ariz. App. 2008). In that case, Brown owned property on the north side of Skinner Drive. *Id.* at 1032. The original land patent for Brown's property was issued pursuant to the Small Tract Act and was "subject to a right-of-way not exceeding 33-feet in width, for roadway and public utilities purposes, to be located along the east and south boundaries of said land." *Id.* at 1032. Skinner Drive was constructed along the southern portion of Brown's property, and the Neighbors used Skinner Drive for years to access their properties. *Id.* Brown cleared and graded a 25-foot road south of her southern boundary line. *Id.* This road was located entirely within a similar 33-foot easement in a parcel located immediately to the south of the *30 Brown property. *Id.* Brown constructed a fence running east to west along the southern boundary of her property, enclosing some or all of the area designated as a right-of-way. The roadway, which retained the name Skinner Drive, provided ample access for vehicle travel to all properties along the roadway, including those of the Neighbors. *Id.*

The Neighbors filed a complaint against Brown for quiet title and an injunction, alleging that they were the owners and beneficiaries of an easement over Brown's property created by the land patents and that Brown's construction of a fence deprived them of their right to use the easement. *Id.* The Neighbors sought an order directing Brown to remove the fence and permanently enjoining her from interfering with their right to use the easement. *Id.*

The appellate court reversed the trial court's grant of summary judgment to the Neighbors and remanded with directions to enter judgment in favor of Brown. *Id.* at 1031. In reaching its decision, the court reasoned that the easement rights conveyed by the federal land patents pursuant to the Small Tract Act are not unconditional private rights of ingress and egress. *Id.* at 1035. Rather, they are circumscribed by their purposes, which are "'to provide street and utility access and to alleviate the burden on local governments to acquire easements to install roads and utilities." *Id.* The court stated that "the clear intent of the reserved right-of-way was to ensure adequate roadway access; it was not to create a right in nearby parcel owners to traverse a neighbor's property regardless of actual need." *Id.* The court concluded:

> *31 As far as the Neighbors are concerned, they have no right to unobstructed passage over the 66-feet width of the combined easements when the existing roadway (regardless of its precise location within the easement area) provides them full and convenient access to their properties... With Brown's fence in place, both Brown and the Neighbors have access to and can make full use of their respective properties. To require Brown to remove her fence to allow travel over her property would prevent her from making full use of her property but provide no benefit to the Neighbors' property that is not already available using Skinner Drive.

Id. at 1035-1036.

The purpose of the Small Tract Act right-of-way was to provide access to patentees in the tract - lots 13-20. The McCarreys, as the owners of the servient estate, are entitled to make any use of the right-of-way that does not unreasonably interfere with this purpose. *Williams v. Fagnani,* 228 P.3d 71, 74 (Alaska 2010). The proposed gated fence, running east to west along the northern boundary of the McCarrey property and adjacent to the right-of-way, would not interfere in any way with access to lots 13-20. The owners of lots 13-20 would be able to make full use of their property. In addition, the fence would not obstruct travel on East 136th Avenue. This is demonstrated by the fences already installed along East 136th Avenue. The Kaylors have no right to traverse the

McCarrey property to access the southern boundary of their property, particularly since they have full access to their property from135th Avenue. [Tr. 68]

Even assuming, arguendo, that the Kaylors are entitled to a roadway right-of-way over the McCarrey property, the Kaylors are only entitled to use the McCarrey property "in a manner that is reasonably necessary for the convenient enjoyment of the *32 servitude." *Labrenz v. Burnett,* 218 P.3d 993, 1000 (Alaska 2009). Moreover, the Kaylors are not entitled to interfere unreasonably with the McCarreys' enjoyment of the own property. *Id.* The proposed gated fence is not an unreasonable burden where the Kaylors have full access to their property from 135th Avenue. [Tr. 68] Further, the Kaylors have no right to unobstructed passage over the full 165 foot width of the McCarrey property to access the southern boundary of their property. Such a use of the McCarrey property is not reasonably necessary in order for the Kaylors to access their property. Assuming, arguendo, that the Kaylors are entitled to access their property from the right-of-way, they should at least be required to identify a "driveway" for ingress and egress. The McCarreys should be allowed to fence that portion of the northern boundary of their property that is not used by the Kaylors as a driveway.

As the language of the permanent injunction now stands, the Kaylors will receive greater access to their property than is even allowed by applicable Anchorage municipal ordinance.[8] AMC 21.80.330.D sets forth driveway requirements within the Municipality of Anchorage. The language of the permanent injunction essentially allows the Kaylors unfettered access along the entire southern border of their property *33 line. In seeking an injunction, the Kaylors argued that it was necessary to drive their vehicles on and off the southern portion of their property. [Exc. 15]. After the temporary restraining order hearing and the court's decision, they submitted a proposed order allowing such activity. With minimal changes, the trial judge accepted the language proposed by the Kaylors. [Exc. 129] The Permanent Restraining Order completely ignores the requirements under Anchorage Municipal Code 21.80.330.D and grants the Kaylors unfettered access along the entire border of their property line. [Exc. 130]

The present language of the Permanent Restraining Order is overbroad and greater than necessary to protect the Kaylors. [Exc. 129-131]

> Therefore, in consideration of that order, David and Donna McCarrey... are strictly commanded to refrain and desist absolutely from limiting the access, including, but not limited to, ingress and egress from their lot below, of the plaintiffs, their successors and assigns, guests, and invitees or the public at large, or in interfering in any way with the use of the, [sic] known as East 136th Avenue which comprises the north 50 feet of the defendants' property...

[Exc. 130] While it is extremely unclear what this limiting language allows or forbids, arguably, the court's order effectively precludes the McCarreys from planting flowers, shrubs, or trees on their boundary line or making any improvements on the northern 50 feet of their property. It will prevent them from parking their vehicles, building sheds, or otherwise making improvements on their property, despite the fact that they purchased in fee simple this lot and paid property taxes on this portion of the property. *34 The effect of the Permanent Restraining Order is to cede the disputed portion of the McCarreys' property to the public good without restriction.

Even assuming, arguendo, that the right-of-way benefits the Kaylor property, the superior court erred in concluding that the Kaylors have an absolute, unconditional, and unfettered right to use the right-of-way to access the southern boundary of their property. Further, the superior court's injunction is too broad and imposes restrictions greater than those necessary to protect the Kaylors from the injury of which they complain. Enjoining the McCarreys from installing any fencing along the northern boundary of their property to allow unfettered travel over their property prevents the McCarreys from

making full use of their property but provides no benefit to the Kaylor property that is not already available using 135th Avenue.

Accordingly, the superior court erred in granting a permanent injunction enjoining the McCarreys from installing a gated fence along the northern boundary of their property or in any manner restricting use of the right-of-way.

*35 VI. CONCLUSION

The superior court erred in ordering a permanent injunction. The superior court's Order dated November 11, 2010 granting the Kaylors' motion for a permanent injunction should be reversed and the Judgment granting injunctive relief and awarding the Kaylors attorney's fees and costs should be vacated.

DATED this *21st* day of April, 2011, at Anchorage, Alaska.

Appendix not available.

Footnotes

1 According to public tax records, a home was built on lot 13 in 1980, a home was built on lot 14, the now McCarrey property, in 2003, a home was built on lot 15 in 1992 and a home was built on lot 16 in 1987. [Attachment A] With regard to property located in the Olson Heights Subdivision located adjacent to the right-of-way road, a home was built on lots 6 and 7 in 1981 and a home was built on lot 8 in 1979. [Attachment A] As demonstrated by the Olson Heights Subdivision Plat comprising lots 1 through 8 of blocks 1 and 2 and recorded in 1979, lots 6-8 have been accessible from East 135th Avenue since at least 1979. [Attachment D]

2 Prior to 2000, lots 17-20 accessed their property using an easement on the southern boundary of their properties which they had granted to each other. [Tr. 79-81] A dispute arose over the use of this easement, and therefore, the lot owners extended the right-of-way road on the northern boundary of their properties to Elmore Road to provide access to their property. [Tr. 79-81]

3 Other federal right-of-way grants were self-executing and terminated if not accepted by actual use prior to a specific date. For example, under 43 U.S.C. § 932, Revised State (RS) 2477, the federal government granted rights-of-way, providing: "'[T] right of way for the construction of highways over public lands, not reserved for public uses; is hereby granted.' *Price v. Eastham,* 75 P.3d 1051, 1055 (Alaska 2003). The grant was self-executing, meaning that an RS 2477 right-of-way automatically came into existence "'if a public highway was established across public land in accordance with the law of Alaska." *Id.* RS 2477 specified that it provided for the construction of highways over federal public lands, not reserved for public uses. *Id.* In Price, a valid RS 2477 claim could only have been made before December 29, 1959, when the State of Alaska filed a land selection application with the Bureau of Land Management for lands encompassing the land at issue. *Id.* at 1055-56. In Price, the Court was required to determine whether the RS 2477 right-of-way existed prior to 1959. *Id.* at 1056. To effect the grant of a right-of-way, either the public or the appropriate state authorities must take positive action. *Id.* at 1055. Specifically, the public must use the land a such a period of time and under such conditions as to prove that the grant has been accepted,' or appropriate public authorities of the state must act in a way that clearly manifests their intention to accept the grant." *Id.* To determine whether sufficient public use exists to establish an RS 2477 right-of-way, courts generally consider evidence of use and evidence of the route's definite character. *Id.* at 1056.

4 There is also no evidence in the record of acceptance of the public right-of-way dedication by formal official action.

5 Giving a private way a name does not make it a public road or thoroughfare. 39 Am. Jur. 2d Highways, Streets, and Bridges § 3 (2010).

6 Whether a road is "public" or "private" is determined by the extent of the right to use it. 39 Am.Jur.2d Highways, Streets, and Bridges § 3 (2010).

7 The Statutory Warranty Deed and the recorded plat of the Olson Heights Subdivision which comprises Blocks 1 and 2, Lots 1-8, are matters of public record and are not subject to reasonable dispute. Accordingly, the Court may take judicial notice of the fact that 135th Avenue is a legally designated road and the fact that the Kaylor property is not within the small tract

area. Alaska R. Evid. 201; *Varilek v. City of Houston,* 104 P.3d at 852. Plat 79-68 was filed in 1979 and includes a dedication and acceptance of dedication by the Municipality of Anchorage. [Attachment D]

8 The total width of driveway entrances from a street shall not exceed two-fifths of the frontage of that lot on that street, or one-third of the frontage if the platting authority finds that conditions warrant it, unless the subdivider provides for snow storage in a manner approved by the platting authority.

Anchorage Municipal Code 21.80.330.D.

End of Document