MEMORANDUM

State of Alaska

Department of Law

To: Ed Collazzi
Regional Land Manager
Department of Natural Resources

Date: August 27, 2004

Tel. No.: 465-3600

From: Stephen M. White
Senior Assistant Attorney General
Natural Resources – Juneau

Re: Ownership of land & resources in dedicated rights of way

Your predecessor asked whether the state owns the timber and has title to the land that underlies a dedicated right of way. The right of way was dedicated to public use. It is located in a private subdivision that is not located in a municipality that has the power of land use regulation or has platting authority.

In particular, your predecessor asked if a person who would construct a road over the right of way needs to be issued a permit by the Department of Natural Resources ("DNR"). Other staff asked if the state has any role in a private-party dispute about cutting trees in the right of way. Finally, staff asked if the state has any role in managing the use and development of the right of way in order to assure that public use and access is not restricted.

Answer: The state does not acquire ownership of the land or natural resources that underlie a right of way that is dedicated to public use in this type of subdivision. Persons who own the land that is adjacent to the right of way own the land and resources to the mid-line of the right of way. If the right of way lies over a property boundary that bisects the right of way, owners of the underlying lots own the land and resources within their respective property boundaries, including those within the right of way. A person who would build a road, install utilities, or make other public improvements within the right of way does not need to apply for or hold a permit issued by DNR.

Although the state does not own the land or resources under a dedicated right of way, it has a trust responsibility toward them. The state may not use the land or resources in a way that would obstruct or interfere with public use. Further, the state may prevent others from doing the same. If a dispute arises about the land and resources, one that does not pertain to public use of the right of way, the state would have no legal interest to protect in the dispute.

Discussion:

There are several ways to dedicate a right of way. The right of way in this case is dedicated by a statute, AS 40.15.030. That statute provides, "When an area is subdivided and a plat of the subdivision is approved, filed, and recorded, all streets, alleys, thoroughfares, parks and other public areas shown on the plat are considered to be dedicated to public use."

It is important to note that all statutory requirements must be met before a right of way can qualify as one that is dedicated by statute. The statute cited above requires that a subdivision plat show public areas and that it be approved, filed and recorded. There are other statutory and regulatory requirements that apply to plats. [1]

Because of the location of this subdivision, DNR would review, approve, and record the plat.[2] If a plat fails to substantially satisfy the statutory and regulatory requirements, cited above, the rights of way shown in it would fail to qualify as ones dedicated by statute. In that event, we would need to determine if they qualify as common law dedications, and if so, what type of interest the state then holds.[3] For purposes of this discussion, however, we will assume that the rights of way qualify as ones that are dedicated by statute.

Statutory dedications for public use are usually interpreted to give to the governing body - in this case, the state - some form of interest in the underlying land and resources. The language in the dedicating statute and in associated laws determines the type of interest passing to the governing body.[4]

The interest could amount to absolute ownership and control, for a potentially infinite duration. This type of interest is called a "fee simple absolute." With this interest, the governing body continues to retain ownership and all rights regarding the land even if the purpose for the dedication is no longer being served.

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[1] AS 40.15.310 and .320 set out standards for plats reviewed under the department's platting authority, that is, for plats depicting land that lies outside of a municipality that has the power of land use regulation and that may exercise platting authority. Under AS 40.15.330, your department has adopted regulations that establish standards for plats reviewed under its platting authority. *See* 11 AAC 53.600-.740.

[2] The Department of Natural Resources is the platting authority for land that is not situated in a municipality that has the power of land use regulation and that may exercise platting authority. AS 40.15.070.

[3] Usually, a common law right of way for public use creates an easement. An easement establishes only a right for the public to use the right of way. There is no transfer of ownership in the land underlying an easement. The person receiving the easement may use natural resources associated with the easement only to the extent necessary to achieve the purposes for it.

[4] 23 *Am JR 2d* Dedication, sec. 55; *U. S. v. Illinois Central R. Co*, 154 U.S. 225, 237 (1894).

Generally, statutory dedications have been interpreted to give the governing body an interest called "fee simple absolute."[5] This is particularly true when the dedicating statute uses the words "in fee simple." For example, the Supreme Court of Alabama interpreted a statute providing that a dedication to the public "shall be held to be a conveyance *in fee simple* of such portion of the premises platted as are marked or noted on such plat or map as donated or granted to the public, and in the premises intended for any street, alleyway, common or other public use, as shown in such plat or map, shall be held in trust for the uses and purposes intended or set forth in such plat or map."[6] The court ruled that the term "in fee simple" caused absolute, indefinite ownership, rather than a lesser interest, to pass to the governing body.

The Mississippi Supreme Court came to the same conclusion. Even though the pertinent Mississippi statute contained no terms like those above, the court declared that title to a dedicated right of way passed to the municipality. It based its conclusion on the mere fact that the dedication was one that was established by statute.[7] This is contrary, however, to most decisions, which examine the specific language of a dedicating statute to determine its effect.

A second type of interest in the dedicated land is more limited than a fee simple absolute. Called a "limited defeasible fee interest" or a "base fee," this type of interest only enables the governing body to use the surface and subsurface of the land as is reasonably necessary to accomplish the purposes for the dedication. It may be a conditional interest, that is, one where the governing body's interest disappears when a certain event occurs.

Limited fee interests have arisen in a variety of circumstances. A Wyoming court ruled that such an interest was created by a statute that provided, "The acknowledgement and recording of such plat is equivalent to a deed in fee simple of such portion of the premises platted as is on such plat set apart for streets, or other public use, or is thereon dedicated to charitable, religious or educational purposes."[8] Despite the phrase that is

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[5] Law of Real Property, sec. 926[3].
[6] Section 35-2-51 Ala. Code 1975 cited in *City of Orange Beach v. Benjamin*, 821 So.2d 193, 195 (Ala. 2001), emphasis added.
[7] *Nettleton Church of Christ v. Conwill*, 707 So. 2d. 1075 (Miss. 1997). The Mississippi statute provided "In all cases where a map or plat of the subdivision is submitted to the governing authorities of a municipality, and is by them approved, all streets, roads, alleys, and other public ways set forth and shown on said map or plat shall be thereby dedicated to the public use, and shall not be used otherwise unless and until said map or plat is vacated in the manner provided by law, notwithstanding that said streets, roads, alleys or other public ways have not been actually opened for the use of the public." Miss. Code Annot. Section 21-19-63 cited in *Nettleton* , 707 So.2d at 1076-77.
[8] *Payne v. City of Laramie*, 398 P.2d 557, 558 (Wyo., 1965).

often associated with the transfer of complete title to real estate - the phrase "in fee simple" - the court ruled that statute should be interpreted in the context of how it had been enacted.

Wyoming had taken the statute almost verbatim from its neighboring state, Iowa. Thus, the court deferred to interpretations of the statute, made by Iowa courts, in existence at the time of the Wyoming enactment. Because the Iowa decisions held that the statute did not grant complete title in the real estate to the municipality (that is, title in "fee simple absolute") but instead, a lesser fee (a "determinable fee"), the Wyoming court ruled that its statute carried the same construction. It ruled that the governing - a Wyoming city - received, at best, title in trust for the public, one that granted the city the right to hold, use, occupy, and enjoy the land for public use as a street. Once the public right was extinguished, the city no longer held any title or interest in the land.[9]

The Supreme Court of Utah came to a similar conclusion. It affirmed an earlier decision that held that the following statute dedicated only the surface right to use streets, alleyways, and so forth: "Such maps and plats when made, acknowledged, filed and recorded with the county recorder shall be a dedication of all such avenues, streets, lanes, alleys, commons or other public places or blocks, and sufficient to vest the fee of such parcels of land as are therein expressed, named or intended for public uses for the inhabitants of such town and for the public for the uses therein named, or intended."[10] The court in the earlier decision had acknowledged the word "fee," which is often used to indicate ownership. That court, however, ruled that what followed that word meant that the fee to the land did not pass, but only the fee to the surface, and then only for public use for the intended purposes.[11]

With a limited fee interest, the governing body does not acquire absolute and infinite ownership rights to natural resources, including timber, that are associated with the real estate. The governing body may use the resources only to the extent that is necessary to accomplish the public purpose for the dedication. [12]

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[9] *Id.* at 559-562.
[10] Ch. 50, Laws of Utah, set out in *Mallory v. Taggart*, 470 P.2d 254, 255 (Utah, 1970).
[11] *Sowadski v. Salt Lake County*, 104 P. 111, 116 (Utah 1909), quoted in *Mallory v. Taggart*, 470 P.2d at 255-56.
[12] *Id. See also City of Evanston v. Robinson*, 702 P.2d 1283, 1287 (Wyo. 1985); *Village of Kalkaska v. Shell Oil Co.*, 446 N.W.2d 91 (Mich. 1989). In *City of Evanston*, the Wyoming court ruled that a statutory dedication of land for municipal streets did not give the city absolute ownership of subsurface oil, gas, and minerals to an infinite depth beneath the streets. Instead, the city gained only the surface of the dedicated lands and so much of their subsurface as was necessary for street construction and municipal services.

Whether the governing body acquires an absolute or a limited interest, the governing body acts as a trustee. That is, the governing body holds the property in trust for the public use that is intended by the dedication.[13]

A third type of interest that the governing body could hold in the dedicated land is an "easement." In an easement, the governing body receives no title to the land. The public gains the right to use the surface of the land and the resources on it, but only to the extent necessary to serve the purposes of the easement.[14] In those ways, an easement is similar to a limited fee, discussed above. When an easement no longer serves the intended purpose of the dedication (that is, when it has been "abandoned" or "vacated"), any interest held by the governing body return to the owner of the land. They do not remain with the governing body.

A minority of courts holds that a statutory dedication creates only an easement. For example, the Supreme Court of Montana ruled that an easement for public use was created by a plat that recited "The land included in all streets, avenues, alleys...shown on this plat are hereby granted and dedicated to the use of public forever." [15] At the time, a Montana statute provided "By taking or accepting land for a highway the public acquire only the right of way and the incidents necessary to enjoying and maintaining the same.... [16]

A New York appellate court also ruled that a public easement, not fee simple title, was created in the governing body.[17] The court had reviewed statutes that were in effect at the time as well as other public documents. It cited two principles that are important to keep in mind when making our analysis. First, it said that interpreting a statute or other act of a governing body that deals with acquiring land for a highway, the preferred construction is one that will leave the ownership in private hands.[18] Secondly, it said, "the law will not, by construction, effect...a grant of a greater interest or estate than was essential to the public use for which the grant was sought."[19]

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[13] *See* generally Thompson on Real Property (R.Thomas), sec. 60.03(a)(3)(I) (1994); *City of Quincy v. Sturhahn*, 165 N.E. 2d 271, 277-78 (Ill. 1960).

[14] In *Anderson v. Edwards*, 625 P.2d 282 (AK 1981), the Alaska Supreme Court examined the use of a right of way that had been reserved by the state when it conveyed adjacent parcels of land. A statute dedicated the right of way to public use as a highway. The court ruled that when an easement is ambiguous about the extent of the use that it allows, the person granted the easement may only make reasonable use of the land and its resources. There, the grantee was entitled to clear away only such trees as were reasonable and necessary for construction of the road. *Id.*at 286.

[15] *Bailey v. Rivali County*, 653 P.2d 139, 141 (Mont. 1982).

[16] *Id.* at 142, citing Sec. 1342, Revised Codes of Montana 1907.

[17] *Bashaw v. Clark*, 267 A.D.2d 681 (N.Y. Appellate, 1999).

[18] *Id.* at 684.

[19] *Id.*

We have published two opinions dealing with the type of interest created by a statutory dedication for public use. In 1980, we opined that when a dedication occurs within a municipality, "the public area is owned by the public with title in the local municipality."[20] In the unorganized borough, we concluded that because DNR is the platting authority for changes in plats, when those occur, DNR "holds the dedicated lands and manages them for the public for the use for which they were dedicated." [21]

Following the 1980 opinion, the laws were amended to make DNR the platting authority for the initial filing of a plat in the unorganized borough. By extending the rationale of that opinion to cover the statutory change, the state would also have the same rights and duties toward lands dedicated to public use by the initial filing of a plat in the unorganized borough. That opinion would have concluded that the state, through DNR, holds the lands and manages them for the dedicated public use.

In a 1989 opinion, we were examining a dedication of roadways in a subdivision of land owned by the state.[22] The land was located in the unorganized borough, and the platting of the subdivision preceded the law giving DNR platting authority in that area. In the opinion, we referred to the general rule, one holding that a statutory dedication conveys the entire interest in the dedicated lands to the public. We stated that a statute supports that conclusion. The statute addresses the situation where a public area or street is no longer being put to use (i.e. has been "vacated"). In that instance, the statute provides that title to the real estate attaches to bordering or abutting properties. We opined that the statute would not be consistent with a dedication that only established an easement.

Guided by these decisions, we turn to pertinent Alaska statutes. The operative statute, set out above, states only that "public areas shown on the plat are considered to be dedicated to public use." [23] A statute that applies to plats that were recorded or filed before 1953 has nearly identical language - "all streets, alleys, or public thoroughfares shown on these plats are considered to be dedicated to public use." [24] Notably absent in those statutes is any reference to the passage of title. In particular, neither statute includes "in fee simple," or "shall be held in the corporate name" - terms that were considered to be significant or determinative by the courts above.

[20] 1980 Inf. Op. Att'y Gen. (Apr. 22; A66-428-80), p.
[21] *Id.*, p. 2.
[22] 1989 Inf. Op. Att'y Gen. (July 10; 661-89-0111), p.
[23] AS 40.15.030.
[24] AS 40.15.050.

Another pertinent statute provides that when the public use ceases, title to the dedicated areas passes to the owners of the abutting lands.[25] That provision would conflict with an interpretation that the state receives absolute, infinite ownership of those areas and their resources.

Thus, contrary to the conclusions in our earlier opinion, we now believe that the statutory dedication here does not grant to the state fee simple absolute interest of the dedicated areas and their resources. Our new interpretation is consistent with the above statutes but also with the principle expressed by the New York court - that the preferred construction of a statute dealing with dedicated lands for public use is one that will leave ownership in private hands.

On the other end of the range of legal interests - easements - we note that regulations applying to certain dedicated lands support an interpretation that what the state receives is an easement. The regulations set out exceptions to the usual requirement for developers and land owners to apply for and receive a permit from DNR before undertaking certain activities.[26] The exceptions allow for those persons to build roads, install utilities, and making similar improvements in the dedicated land without having a DNR permit. In those regulations, the exceptions apply to a public area that is dedicated and accepted by DNR and is a "public right of way or easement." Thus, when dedicated lands involve improvements like roadbuilding and installing utilities, the interest acquired by the state is called an easement or a right of way. As noted earlier, however, such an interpretation - that the interest is merely an easement - is contrary to the majority of court decisions that look at statutory dedications, and it conflicts with our earlier advice on this question.

The middle-ground type of interest that could be held by the state- a limited or "defeasible fee" - is favored by courts when statutes provide that the governing body's interest ceases when a certain event occurs. Here, the statutory section, discussed above, provides that title passes to owners of abutting property when the public purpose is vacated. Although we cannot say with certainty, it is likely that an Alaska court would conclude that the state holds this type of interest in the dedicated lands.

Regardless of the type of interest held by the state, the important question here is what duties and privileges are associated with the dedication. Here, we believe that the statutory language and court decisions support an interpretation that the state holds the dedicated areas as a trustee for the purpose identified, "public use." The trust imposed on

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[25] AS 29.40.140(a). The provisions of this section apply to dedicated lands, like those in question here, that lie outside of a municipality. AS 40.15.305(f).
[26] 11 AAC 53.640.

the state delineates the duties and privileges it has in both the dedicated areas and in the natural resources, including timber, that are located on or under the surface. In this regard, we believe that the state may use the dedicated areas and resources if they are necessary to serve a "public use," such as constructing roads allowing access to subdivision lots. More importantly, by accepting the dedication, the state has an obligation to prevent private parties, like the developer of the subdivision, from using the land and resources in a way that would obstruct or interfere with public use. For example, the state could seek an injunction against the construction of a permanent structure that would tend to block public access to the right of way.

It follows that the state would have no interest in a private dispute concerning excessive use or removal of resources from the right of way. For example, if an adjoining landowner objected to how much timber was being cut in the right of way by a neighbor, the state would have no role in that dispute. The owner of the underlying land owns the timber, and as long as the cutting does not prevent the present or future public use of the right of way, the state has no legitimate interest to protect in the dispute.

Please contact our department if you need further advice on this matter.

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