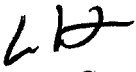


## MEMORANDUM

State of Alaska  
Department of Law

TO: John F. Bennett, PLS, SR/WA Chief, Right-of-Way DOT&PF, Northern Region	DATE: June 6, 2003
	FILE NO: 665-03-0187
	TEL. NO.: 451-2811
FROM: Leone Hatch  Assistant Attorney General	SUBJECT: McCarthy West Subdivision

**CONFIDENTIAL ATTORNEY/CLIENT COMMUNICATION**

You have asked whether the McCarthy Road right-of-way is 200 feet wide within the McCarthy West Subdivision, as provided by the dedication in the subdivision plat (Plat 77-7). In 1977 when the subdivision was platted, there was no standard procedural mechanism in place for the State's formal acceptance of the dedication in the plat. However, the State has consistently acted to maintain and control a 200 foot wide right-of-way. The Department (DOT/PF) recorded in 2000 a Record of Survey<sup>1</sup> (ROS) using the 200 foot wide dedication.

At least one of the subdivision landowners disputes the 200 foot wide dedication, and asserts that the 1993 IBLA decision in *Billum*<sup>2</sup> restricts the State to a 100 foot wide right-of-way. Although there have been conflicts between the Department and this landowner, the landowner has always acceded to the Department's directives with respect to its assertion of a 200 foot wide right-of-way within the subdivision.

**Short Answer**

Under applicable State law relating to dedications, and assuming the facts as presented, the McCarthy Road is subject to a 200 foot wide right-of-way through the McCarthy West subdivision, as depicted by Plat 77-7 and accepted by the 2000 ROS.

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<sup>1</sup> /Plat 2000-12, Chitina Recording District.

<sup>2</sup> /*State of Alaska, DOT&PF (Billum)*, 127 IBLA 137 (1993).

### **Prior Advice**

The width of the McCarthy Road ROW has been discussed or implicated in two published Attorney General Opinions<sup>3</sup>, as well as a published IBLA decision.<sup>4</sup> A historical discussion of the McCarthy Road may be reviewed in these documents. In sum, it is the opinion of this office (and the IBLA) that absent additional factors, the width of the right-of-way for the McCarthy Road is generally 100 feet, as set by PLO 601 and DO 2665. However, because of additional factors as discussed below, the width of the right-of-way is 200 feet in the McCarthy West Subdivision.

### **The Law of Dedication**

Generally, a dedication consists of an offer and an acceptance. The offer to dedicate may be withdrawn before acceptance.<sup>5</sup> Dedications may either be by statute or by common law. Alaska's statute addressing dedications is limited to dedications in plats that are subject to governmental approval.<sup>6</sup> No political authority was available to approve the right-of-way dedication in the 1977 plat of the McCarthy West Subdivision.<sup>7</sup> If there is no applicable statute, or the conduct of the parties falls short of the terms of the statute, there may nevertheless be an enforceable common law (non-statutory) dedication.

In Alaska, the intent to offer to dedicate must be clear and unequivocal, and must be proven by the party attempting to assert the dedication.<sup>8</sup> Plat 77-7 is a clear and specific offer to dedicate. The language on the plat is exactly what it

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<sup>3</sup> /*Right of Way Width for the McCarthy Road*, 2002 WL 31973274 (Alaska Op. Atty. Gen.); *Right of Way of Copper River Highway*, 1989 Alaska Op. Atty. Gen. (Inf.) 9.

<sup>4</sup> /*State of Alaska, DOT&PF (Billum)*, 127 IBLA 137 (1993).

<sup>5</sup> /*Swift v. Kniffen*, 706 P.2d 296, 301 (Alaska 1985).

<sup>6</sup> /AS 40.15.030.

<sup>7</sup> /This subdivision was not within an organized borough. Department of Natural Resources approval of dedications on plats outside organized Boroughs was not required prior to 1980. See, 11 AAC 53.230.

<sup>8</sup> /*0.958 Acres, more or less v. State*, 762 P.2d 96, 102 (Alaska 1989) (Parrish); *Dillingham Commercial Co., Inc. v. City of Dillingham*, 705 P.2d 410, 416 (Alaska 1985); *Chugach v. Calais*, 410 P.2d 508, 509 (Alaska 1966); *Olson v. McRae*, 389 P.2d 576, 577 (Alaska 1964). See also, *State v. Cronin*, 587 P.2d 395, 399 (Montana 1978).

should be to effect a dedication in Alaska, and the right-of-way is clearly depicted. The offer to dedicate meets both statutory and common law standards.

The Alaska Supreme Court has held that the inclusion of a dedicated street in a right of way map is a formal acceptance of a dedication.<sup>9</sup> Under this holding, the Department's ROS, completed and recorded in 2000 pursuant to AS 34.65.030, is an acceptance of the offer to dedicate the right-of-way in Plat 77-7. This ROS was prepared and filed as a normal part of the Department's activities in developing and maintaining the McCarthy Road corridor, and depicts the dedication in Plat 77-7 for the McCarthy West Subdivision.

Therefore, assuming that the offer to dedicate in Plat 77-7 was not effectively withdrawn prior to the recordation of the ROS, the 2000 ROS constituted a formal acceptance of the dedication of the 200 foot wide right-of-way for the McCarthy Road. However, the dedication may well have been informally (and legally) accepted at an earlier date.

The Alaska Supreme Court has confirmed the traditional rule that an acceptance of an offer to dedicate may be through formal official action, public use consistent with the offer to dedicate, or through an act of reliance sufficient to cause an estoppel.<sup>10</sup>

The State of Alaska has primary responsibility for the management of the state highway system.<sup>11</sup> Action taken by a highway authority to build and/or maintain public facilities ordinarily can constitute acceptance of a dedication in a plat.<sup>12</sup> Prior to the 2000 ROS, the Department consistently acted to control and develop the 200 foot wide right-of-way through the McCarthy Road subdivision, including the construction in 1997 of a pedestrian bridge and an area for public parking.<sup>13</sup> Further, public user is a time honored Alaskan tradition for the

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<sup>9</sup> /*Safeway v. Alaska*, 34 P.3d 336, 339-40 (Alaska 2001).

<sup>10</sup> /*State v. Fairbanks Lodge No. 1392*, 633 P.2d 1378, 1380 (Alaska 1981) (*Moose Lodge*).

<sup>11</sup> /AS 19.05.010; AS 19.05.125.

<sup>12</sup> /*Western Aggregates, Inc. v. County of Yuba*, 130 Cal.Rptr.2d 436 (Cal.App. 3 Dist., 2002); *Safeway*, 34 P.3d at 340, n. 13.

<sup>13</sup> /If the McCarthy Road right-of-way were 100 feet wide, the bridge and parking area would not be within the right-of-way.

acceptance of an offer to dedicate.<sup>14</sup> There has clearly been long-term public use of the McCarthy Road.

Plat 77-7 was recorded by Lester and Alvin Syren. The lots in the subdivision abutting the McCarthy Road right-of-way were subsequently conveyed by Lester and Alvin Syren to other parties. In a 1983 decision the Alaska Supreme Court noted:

The law is clear that an owner who conveys land by reference to a plat, whether or not the plat was filed by himself, is generally estopped to deny the validity of a dedication shown on the plat, as against his grantee whose land is affected by the dedication or against the public when it relies on the plat or otherwise asserts an interest in the purported dedications.<sup>15</sup>

This language, with the conveyance of some subdivision lots, strongly suggest that a Court would find that the dedication in Plat 77-7 was effective even prior to the 2000 ROS. However some caution is called for in reliance on the sale of lots as these transfers as they may not have been arm's length transactions, and without a title search it is difficult to confirm whether a current owner has conveyed relevant property with reference to this plat.

Although the 2000 ROS and the conveyance of the subdivision lots each strongly indicate that McCarthy Road has a 200 foot wide right-of-way through the McCarthy West Subdivision, the subdivision lot owners may yet raise arguments in an attempt to refute the dedication. These arguments would likely concern mistake, withdrawal of the dedication prior to acceptance, and inadequate acceptance by the Department.

Mistake:

When the plat was recorded, the State asserted a 200 foot wide right-of-way along the McCarthy Road based on the old Copper River Railroad right-of-way.<sup>16</sup>

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<sup>14</sup> /*Hamerly v. Denton*, 359 P.2d 121, 124 (Alaska 1961).

<sup>15</sup> /*Creary v. Kenai Peninsula Borough*, 671 P.2d 1286, 1288 (Alaska 1983)[footnote omitted]. *See also*, *Ogar v. City of Haines*, 51 P.3d 333, 336 (Alaska 2002); *State v. Simpson*, 397 P.2d 288, 291 (Alaska 1964) (the failure of the government to assert rights where the dedicated but as yet unused street was being occupied by a landowner cannot serve as a basis of equitable estoppel in favor of the landowner).

<sup>16</sup> /*See infra*, notes 3 and 4.

When the plat was drawn up, there is little doubt that the drafter also thought this to be true. At least one landowner has suggested that this error is cause for rescission.

Generally, dedications once accepted are not subject to rescission based on mistake.<sup>17</sup> Absent bad faith or negligence on the part of the public official, a person who relies on the faulty interpretation of the official is not entitled to damages.<sup>18</sup> It appears from the *Billum* decision that the State's assertion of a 200 foot wide right-of-way for the McCarthy Road was not the result of negligence, and that no bad faith was involved. Therefore, it is unlikely that a Court would reduce the dedication on the basis of mistake once the offer to dedicate had been accepted.

#### Withdrawal:

Two Alaska decisions discuss the withdrawal of an offer to dedicate, *Parrish and Swift*.<sup>19</sup> The landowners in *Swift* submitted to the appropriate authority a preliminary plat showing the dedication at issue. Upon the plat's rejection, the landowners published a withdrawal of the offer to dedicate in a newspaper. The *Swift* Court held that this published withdrawal was a sufficient repudiation, ending the time period in which the offer could be accepted. In *Parrish*, the Court noted that while the landowners had attempted to avoid the dedication, they had taken no clear steps to withdraw the offer to dedicate, as had

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<sup>17</sup> /*Hohnbaum v. City of Woodburn*, 563 P.2d 173 (Or.App. 1977) (Educated landowners were not entitled to rescission based on their claim that they did not understand the legal significance of their dedication); *Wood v. City of El Dorado*, 375 S.W.2d 363 (Ark. 1964) (Original owners and dedicators of subdivision plat could not, some 18 years later after many lots had been purchased in reliance on plat and deed of dedication, vacate plat to overcome unilateral mistake in location of dedicated streets); *Davis v. Kahkwa Park Realty Co.*, 145 A. 815 (Pa. 1929) (Owner of subdivided land making plan showing park reservation, cannot reclaim such reservation, as against city exempting it from taxation, because of copyist's mistake); *Burbach v. Schweinler*, 14 N.W. 449 (Wis. 1882) (An obvious mistake of the recorder in drawing a line-across one end of an alley, which is otherwise plainly marked, upon the plat of a village, cannot affect the dedication of such alley to the public).

<sup>18</sup> /"As we held in [an earlier case] 'it is well established that a state is not estopped to assert a result dictated by its rules, even if a state officer has made a contrary representation from the terms of the rules ... and caused reliance on such representation.'" *State, Dept. of Commerce and Economic Development, Div. of Ins. v. Schnell* 8 P.3d 351, 358 (Alaska 2000) (footnote omitted, brackets added), quoting Application of Stephenson, 511 P.2d 136, 143 (Alaska 1973).

<sup>19</sup> /*Parrish*, 762 P.2d at 102; *Swift*, 706 P.2d at 301.

the *Swift* landowners. Therefore, there was no withdrawal of the dedication in *Parrish*, and the dedication remained effective.

There is little guidance as to what would constitute an effective withdrawal of the offer to dedicate short of publication or recordation. An amended plat would surely have revoked the offer of dedication in Plat 77-7, provided it preceded acceptance and was recorded. On the other hand, mere verbal or written notice of withdrawal to the Department by a successor in interest to the dedicator has not been addressed by the Court but it is not likely that such a narrow attempt at withdrawal after the recordation of a plat would be sufficient to destroy an offer to dedicate.

Reliance and the breadth of the public user:

If the Department were to rely upon the theory that acceptance of the offer to dedicate occurred through the Department's reliance on the offer to dedicate through construction and maintenance or through the public user consistent with the offer to dedicate, then there may be factual questions relating to the extent of the user or of the reliance.<sup>20</sup>

While the Department assumed and relied upon a 200 foot ROW, it may not have made that assumption based on the dedication, but rather on the now abandoned premise that the Copper River Railroad's right-of-way was 200 feet. This is a technicality that could threaten an estoppel.<sup>21</sup>

The public use demonstrated to be consistent with the plat, and the reliance necessary for estoppel, may need to include use of the 50 feet on either side of the 100 foot right-of-way that the State acquired from the Copper River Railroad which the State holds irrespective of the plat. This is a factual as well as a legal issue.

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<sup>20</sup> /*Moose Lodge*, 633 P.2d 1378. Although *dicta* in *Moose Lodge* calls into question whether the State's construction of a road within the area described by an offer of dedication constitutes substantial reliance, later decisions of the Alaska Supreme Court indicate that such would constitute substantial reliance. See, *Safeway*, 34 P.3d at 340, n. 13; *Fitzgerald v. Puddicombe*, 918 P.2d 1017, 1019 (Alaska 1996). See also, *Western Aggregates, Inc.*, 130 Cal.Rptr.2d 436 (public repair and depiction of the public road on official maps ... are both traditional signs of acceptance of a dedication).

<sup>21</sup> /*Moose Lodge*, 633 P.2d 1378.

## **Conclusion**

There is a clear offer to dedicate in Plat 77-7, and a clear formal acceptance in the 2000 ROS. To defeat the dedication undeniably established by these two acts, a landowner will have to prove an adequate withdrawal of the offer prior to the recordation of the ROS. Public construction in the right-of-way and public user of the right-of-way would likely be held to establish common law acceptance of the dedication.

The McCarthy Road enjoys a 200 foot wide right-of-way, established by dedication, through the McCarthy West Subdivision.