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TO: **Trail Advisory Commission Members**
CC: **Mayor Karl Kassel**
FROM: **Wendy Doxey, Assistant Borough Attorney**
DATE: **February 9, 2016**
SUBJECT: **Trail Easement Questions, Continued**

This memorandum is in response to the Trail Advisory Commission's questions submitted to the Legal Department, received on December 21, 2015. This memorandum is a continuation of my earlier memorandum dated December 29, 2015, and should be read in conjunction therewith. The remaining questions posed by the Trail Advisory Commission center around the FNSB's involvement with trails. As such, a brief review of the FNSB's powers, generally, as well as an overview of the FNSB's Comprehensive Recreational Trail Plan is expected to provide helpful background and context.

I. FNSB Powers.

The FNSB is a second-class, general-law Borough,[1] meaning that the FNSB can exercise only those powers specifically granted by state law.[2] For the most part, the FNSB's powers are found in title 29, chapter 35 of the Alaska Statutes. Many of the FNSB's powers are restated in FNSB Code at title 1, chapter 02.

Relevant to the discussion here, the FNSB has parks and recreation powers,[3] the power "to expend money for a community purpose, facility, or service for the good of the municipality" so long as the FNSB has the underlying power for which the money is being expended,[4] and the FNSB has the power "to acquire, manage, control, use, and dispose of real... property...."[5] Of note, the FNSB does not have general road powers, but only has limited powers within road service areas.[6]

Thus, to the extent the Trails Advisory Commission has asked about the FNSB's ability to manage, maintain, or own trails, the FNSB will likely do so under its parks and recreation powers or under its powers to manage FNSB-owned property. With any trails project, it will be important to ensure that the FNSB is operating for parks

[1] Fairbanks North Star Borough Code 1.01.010.
[2] Alaska Statute 29.04.020.
[3] FNSBC 1.02.050(A)(5).
[4] AS 29.35.010(9); FNSBC 1.02.020(A)(9).
[5] AS 29.35.010(8); FNSBC 1.02.020(A)(8).
[6] AS 29.35.450.

and recreation purposes; the FNSB cannot cross into what could be construed as the exercise of road powers.[7]

II. The Comprehensive Recreational Trail Plan.

The Comprehensive Recreational Trail Plan[8] ("Trail Plan") is incorporated into the Borough's Regional Comprehensive Plan, which is the overarching guidance document for Borough development. Legally, then, the Borough's actions with respect to trails (except Borough trails across Borough land[9]) should be consistent with the Trail Plan. The Trail Plan states that the purpose of creating the plan was to "focus efforts of the Borough toward trails of community wide importance[.]"[10]

The Trail Plan states, as policy, "The Borough will focus the primary efforts of its recreational trail plan program toward trails which are of community wide importance, and which are identified as proposed components of the Fairbanks North Star Borough Recreational Trail System in the Comprehensive Recreational Trail Plan."[11] "In order to more clearly define where the efforts of the Borough trail program should be concentrated," the Trail Plan established a system of categorizing the various types of trails.[12] In addition, the Trail Plan sets forth the Borough's position on primary management responsibility, maintenance responsibility, funding, and rights-of-way for each category of trail.[13] The Trail Plan's Figure 1, "Summary of Trail Categories," is attached hereto for review and reference.

State and federal grant monies "should be prioritized toward trails intended for eventual public dedication as components of the Borough Trail System."[14] "[T]rails within the Borough Trail System should have some type of regular maintenance or safety inspections[,]" primarily through an "adopt-a-trail program."[15] Neighborhood trails that are not of community-wide importance can be added to the Borough Trail System but should receive only minimal efforts from the Borough.[16] In the case of RS 2477s, the Trail Plan indicates that "the Borough will encourage the

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[7] I expressly note this because, as indicated in the previous memorandum, Alaska has historically defined "highway" to include trails. AS 19.59.001(8). In addition, this must be kept in mind because RS 2477s are established for "any purpose consistent with public travel." *Dillingham Commercial Co. v. Dillingham*, 705 P.2d 410, 415 (Alaska 1985).

[8] FNSB Comprehensive Recreational Trail Plan, last updated on May 30, 2006.

[9] The Trail Plan states that it "deals primarily with trails not yet dedicated for public use" and that trails in the plan that "lie on dedicated public park land are included primarily to document presently available public trails." *See* Trail Plan at p. 1. Further, trails for which the Borough holds complete right-of-way "should be identified and managed as public recreational facilities." *Id.* at p. 10. From these statements, we can deduce that FNSB-owned trails across FNSB-owned land are not intended to be managed according to the guidelines in the Trail Plan.

[10] *Id.* at p. 2.

[11] *Id.* at p. 13.

[12] *Id.* at p.8-9.

[13] *Id.* at p. 9.

[14] *Id.* at p. 10.

[15] *Id.* at p. 10.

[16] *Id.* at p. 11.

establishment of cooperative agreements or right-of-way designations which provide for recreational use of the rights-of-way."[17]

The Trail Plan states that "[t]he Borough will provide trail maintenance only on a very limited basis when special equipment requirements make volunteer maintenance impractical or where clearly shown to be in public need."[18] Costs from Borough trail maintenance and operations are to be kept to a minimum.[19] Borough Trail System trails "shall be adequately signed and identified for the uses allowed."[20]

Interestingly, although often appearing to minimize Borough involvement in non-Borough-owned or held trails, the Trail Plan instructs, using mandatory language, that "[t]he Borough shall utilize its public right-of-way encroachment authority to protect the right-of-passage and physical integrity of all trails included in the Fairbanks North Star Borough Recreational Trail System."[21]

To answer the Trail Advisory Commission's specific question regarding the legal ramifications of a trail being listed or not listed on the Comprehensive Trail Plan, simply put, a listed trail is more likely to have priority of involvement, expenditures, and encroachment protection from the Borough.

III. Remaining Trail Advisory Commission Questions.

1. What would need to be done in order for the Borough to have the authority to manage trails?

The answer to this question and the degree of management authority varies greatly depending on the type of trail at issue.

The FNSB has full management authority over FNSB-owned trails across FNSB-owned land that is under the management of the Department of Parks and Recreation.[22] For these trails, the FNSB may exercise its parks and recreation powers to open, close, develop, and maintain its trails.

Arguably, trails that have been acquired by public prescriptive easement by Borough residents are held by the Borough in trust for the Borough public.[23] The Borough would have the authority to manage those trails for the public.

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[17] *Id.* at p. 16.
[18] *Id.* at p. 18.
[19] *Id.* at p. 18.
[20] *Id.* at p. 19 (although the Trail Plan does not indicate who should make expenditures to accomplish this stated policy).
[21] *Id.* at p. 20.
[22] This is as opposed to FNSB-owned land managed by the FNSB Division of Land Management, which is subject to FNSBC 25.10.070 regarding casual use of FNSB land.
[23] Cases declaring public prescriptive easements do not generally indicate what entity, if any, holds the public prescriptive easement. However, the Alaska Supreme Court has stated that a municipality holds rights-of-way such as roads in trust for the public. *State of Alaska v. Vernon Dale Simpson*, 397 P.2d 288, 291 (Alaska 1964). Similarly, then, a prescriptive easement declared to be held by the public would likely be found to be held in trust by the entity representing the public.

Without consideration of Trail Plan guidance, the Borough would have the authority to utilize or maintain a state trail in cooperation with the appropriate state agency. As previously discussed, RS 2477 trails are held by the state. Thus, maintenance or management of such trails must be done in cooperation with Alaska DNR.[24] Alternatively, the Borough is not limited from utilizing state trails in the same manner as other members of the public. For instance, state law allows access improvements, including "brushing or cutting a trail less than five feet wide using only hand-held tools[.]"[25]

On trails crossing private property without official legal designation as a public trail, the Borough's "authority" becomes more tenuous. The Borough could exercise the same rights and privileges as any member of the public to such trails.

2. What kind of public process could be set up to involve landowners and users in decisions concerning trail maintenance and improvement?

Generally, the Trails Advisory Commission is tasked with providing "a forum for citizen input into the trails assessments and needs for the borough[.]" Thus, the Trails Advisory Commission is an appropriate body to hear landowner and user concerns regarding existing trails or planned improvement. Currently, Commission meetings are published for public notice as required by law.

The Trails Advisory Commission could introduce an ordinance regarding or send a communication to the Assembly seeking modifications to the FNSB code regarding the Commission's authority. One way to increase relevant public participation could be to mail notice to the property owners whose property is affected by a trail that will be discussed before the Commission.[26]

3. Can the Borough accept a trail easement from the State of Alaska, a private landowner, or some other entity? If not, what would need to be done in order for this to happen? What are the pros and cons of the Borough holding the easement?

Yes, the Borough may acquire an easement from the state, a private landowner, or another entity. As discussed in the foregoing, a Borough-held easement gives the Borough more freedom and authority in the management of the trail.

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[24] AS 19.30.400; 11 AAC 51.100.
[25] 11 AAC 96.020(a)(2)(A).
[26] *See*, for example, FNSBC 18.54.010(C)(2).