Fairbanks North Star Borough Department of Law
809 Pioneer Road • PO Box 71267 • Fairbanks, AK 99707 (907) 459-1318 FAX 459-1155

TO: **Trail Advisory Commission Members**
CC: **Mayor Karl Kassel**
FROM: **Wendy Doxey, Assistant Borough Attorney**
DATE: **December 29, 2015**
SUBJECT: **Trail Easement Questions**

This memorandum is in response to the Trail Advisory Commission's questions submitted to the Legal Department, received on December 21, 2015. The intent of this memorandum is not to give the Trail Advisory Commission members every detail of easement and trail law and this memorandum will not answer every question posed,[1] but is intended to give the best overview possible at this time. In reviewing this memorandum, it is essential that the reader understands that easement issues are heavily fact-dependent. As such, attempts to generalize may not be satisfying and the factual circumstances of a particular issue or trail could be determinative.

I. Easements, generally.

Generally speaking, an easement is a legal right to enter and use the property of another.[2] A common example of an easement is an access easement, such as a driveway over owner B's property to access owner A's property, which is otherwise without access. In that situation, the land benefitted by the easement (A's property) is the "dominant estate" and the land burdened by the easement (B's property) is the "servient estate." There are many different kinds of easements including rights-of-way (including RS 2477 rights-of-way), access easements, prescriptive easements, floating easements, conservation easements, and section line easements.

Easements are often created to address a specific situation. Thus, an easement may set forth all of the parameters relevant to that easement including the reason the easement was created, the width and length, and allowed or restricted uses. Easements sometimes also address maintenance. Where the easement language is specific and definite, the express terms of the grant or reservation are controlling.[3] If the terms of an easement are not fixed by the easement grant, the scope of the easement will be defined by what is reasonably necessary for the easement's intended purpose.[4] The servient estate owner may not interfere with

[1] Due to current time constraints, I will reserve answering questions 6 through 8 for another time.
[2] *Hansen v. Davis*, 220 P.3d 911, 912 n. 1 (Alaska 2009).
[3] *Andersen v. Edwards*, 625 P.2d 282, 286 (Alaska 1981).
[4] *Id.*

authorized uses of the easement holder.[5] "The first step in determining whether the holder of an easement is entitled to make a particular use challenged by the owner of the servient estate is to determine whether the use falls within the purposes for which the servitude was created."[6]

II. Right-of-way versus easement designations.

"A 'right-of-way' is generally considered to be a class of easement."[7] "Easement" is defined by Black's Law Dictionary as "An interest in land owned by another person, consisting in the right to use or control the land... for a specific limited purpose (such as to cross it for access to a public road)."[8] "Right-of-way" is defined as "A person's legal right, established by usage or by contract, to pass through grounds or property owned by another... the right to build and operate... a highway on land belonging to another, or the land so used..."[9] Construing together the definition of "right-of-way" and the Alaska Court's previous interpretation that a right-of-way is a species of easement, the Alaska Supreme Court has indicated that an easement specifying that it is a "right-of-way" is an easement that grants the right to use the land for passage.[10]

It would be appropriate to refer to a trail easement as a right-of-way easement if that easement was intended to only grant the right of passage over the servient estate. For a considered and well-drafted easement, the "right-of-way" designation would be used in addition to other language indicating the purpose and scope of the easement. For instance, the easement might indicate that it is for travel along, over, and across the servient estate and it might indicate what type of travel is allowed (such as non-motorized use). This type of language would likely be construed to not allow a trail user, for instance, to stop and pick berries along the route because the easement is only for passage.

III. User and landowner rights on an easement; scope of easements.

The specific rights of the user and landowner will vary with the specific easement at issue; rights can vary due to the terms of the easement and possibly due to the type of easement at issue. Generally, neither the easement holder nor the servient estate owner may interfere with each other's reasonable use.[11] As discussed above, if the easement terms are sufficiently specific, those terms will govern the rights of the easement holder and the servient estate owner. If the terms are not sufficiently specific, the scope of the easement is defined by what is reasonably necessary for the intended use of the easement.

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[5] *Hansen*, 220 P.3d at 912 n. 1.
[6] *Labrenz v. Burnett*, 218 P.3d 993, 1000 n. 16 (Alaska 2009) (quoting the Restatement (Third) of Prop.: Servitudes, § 4.10 cmt. d (2000)).
[7] *Dias v. State*, 240 P.3d 272, 274 (Alaska 2010).
[8] *Id.* at 527.
[9] Black's Law Dictionary 1326 (Bryan A. Garner ed.,7th Ed., West 1999).
[10] *Id.* at 275.
[11] *See generally, Labrenz*, 218 P.3d 993 (stating that Labrenz, the holder of a driveway easement over the Burnetts' land, was entitled to use a driveway easement as reasonably necessary for the convenient enjoyment of the easement, including erosion control, and also holding that Labrenz could not interfere with the Burnetts' use of the easement area "in any manner and for any purpose that does not unreasonably interfere with the rights of the easement holder.")

The type of easement may also affect what rights a trail user or a servient estate owner may have, particularly where the easement was not created by a grant or dedication but came to exist by some other legal mechanism. As such, a brief discussion of the law surrounding RS 2477 rights-of-way, section line easements, and public prescriptive easements may be helpful.

A. RS 2477 rights-of-way and section line easements.

An RS 2477 right-of-way is a type easement. RS 2477 rights-of-way were established when the federal government made an "offer" through federal code (43 USC § 932, which later became Revised Statute 2477) to allow then-existing rights-of-way across then-unreserved public lands to remain as public rights of way after the land was passed into private ownership. To have a valid RS 2477 right-of-way, there must have been acceptance of the federal government's offer, which could be done by the state through statute or by public use that was sufficient to evidence intent to keep that right-of-way public.

That a right-of-way is legally an RS 2477 right-of-way is often not facially apparent; the RS 2477 right-of-way grant was self-executing and the legal rights of that easement came into existence automatically upon the elements of RS 2477 being met.[12] Some Alaska RS 2477 rights-of-way have been researched and identified by the Alaska Department of Natural Resources (DNR); these can be found listed in AS 19.30.400. In addition to those identified by DNR, Alaska courts have authority declare the legal status of an RS 2477 right-of-way.[13]

"Section line easements" are the product of statutory acceptance of the RS 2477 offer. Section line easements can be state or federal and the width of the easement depends on the time that the easement came into being.[14]

The RS 2477 offer was for rights-of-way for the construction of highways.[15] It is important to note that Alaska has historically defined "highway" to include trails.[16] The scope of an RS 2477 grant is "for any purpose consistent with public travel"[17] and an RS 2477 could be 100 feet in width.[18] However, even though a 100-foot wide right-of-way may be reserved, it is likely that development of only the amount of land necessary for use as a public highway will be upheld by the courts.[19]

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[12] *Fitzgerald v. Puddicombe*, 918 P.2d 1017, 1019 (Alaska 1996).
[13] *Puddicombe v. Fitzgerald*, 1999 WL 33958803, memorandum opinion and judgment (Alaska August 25, 1999).
[14] A summary of section line easements, their width, and timelines can be found in the Alaska Department of Transportation and Public Facilities publication *Highway Rights-of-Way in Alaska* (Jan. 1, 2013), beginning at page 48, which can be found at: www.alaskapls.org/standards2013/Highways-2013.pdf
[15] 43 USC § 932, repealed by Pub. L. No. 94-579, Title VII, § 706(a), 90 Stat. 2793 (1976).
[16] AS 19.59.001(8); *Fitzgerald v. Puddicombe*, 918 P.2d at 1020.
[17] *Dillingham Commercial Co. v. Dillingham*, 705 P.2d 410, 415 (Alaska 1985).
[18] AS 19.10.015.
[19] *Anderson*, 625 P.2d at 286-87.

All RS 2477 grants accepted by the state or territory of Alaska or by public users within the state are held by the state.[20]

B. Prescriptive easements.

A prescriptive easement can be acquired in a manner similar to obtaining another person's property by adverse possession.[21] In the context of trails, the public can obtain a prescriptive easement through continuous use that meets certain legal criteria for a 10 year period of time.[22]

A public prescriptive easement is a right of use of that easement held by the public at large.[23] However, the public is limited to using the easement only for those types of uses that led to the easement's establishment.[24] "The scope of a prescriptive easement is defined narrowly to include only the use that created the easement and closely related ancillary uses."[25] A judicial examination of the scope of a public prescriptive easement will focus on "what a landowner in the position of the owner of the servient estate should reasonably have expected to lose by failing to interrupt the adverse use before the prescriptive period had run." [26] Although the use of the easement may evolve, "new uses cannot substantially increase the burden on the servient estate or change the nature and character of the easement's original use."[27]

Thus, the scope of a public prescriptive easement – and the rights of the users and servient landowner – will depend on the historical use of the easement. Beyond "the public at large," I am not aware of any law delineating what entity holds a public prescriptive easement. Prior to a 2003 revision in AS 09.45.052, there was no legal requirement that a prescriptive easement vest in any entity.[28]

IV. Liability.

There are several Alaska statutes that address tort liability on trails. The terms of each statute addresses the scope of the tort liability protection. AS 09.65.200 provides a landowner with immunity from a tort claim for injury to a person who entered on the unimproved portion of land, including a trail, for recreational purposes.[29] As a landowner, the FNSB is also shielded from tort claims brought by

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[20] AS 19.30.400(a).
[21] *Interior Trails Preservation Coalition v. Swope*, 115 P.3d 527, 529 (Alaska 2005).
[22] *Id.*
[23] *Id.* at 530.
[24] *Price v. Eastham*, 254 P.3d 1121, 1126 (Alaska 2011).
[25] *Id.* (internal quotation omitted).
[26] *Id.*
[27] *Id.*
[28] *Id.* at 1131.
[29] My summaries of these statutes are somewhat simplified. AS 09.65.200 states:

(a) An owner of unimproved land is not liable in tort, except for an act or omission that constitutes gross negligence or reckless or intentional misconduct, for damages for the injury to or death of a person who enters onto or remains on the unimproved portion of land if (1) the injury or death resulted from a natural condition of the unimproved portion of the land or the person entered onto the land for recreation; and (2) the person had no responsibility to compensate the owner for the person's use or occupancy of the land.

(b) This section does not enhance or diminish rights granted under former 43 U.S.C. 932 (R.S.

a person using unimproved FNSB land for recreation. In addition, if a landowner allows recreational use of their land without charge under a recorded AS 34.17.100 public recreational use easement, the landowner is specifically shielded from owing specific legal duties to the users and the land is shielded from adverse possession or prescriptive easement claims.[30,31] Owners with land subject to a conservation easement have similar protections.[32] These protections do not apply to injury or damage caused to a user by the landowner's intentional, reckless, or grossly negligent conduct.[33] There is also a statute indicating that a person who participates in a recreational activity (including hiking, horseback riding, hunting, skiing, and ATV use) assumes the inherent risks involved in that recreational activity.[34]

The State and the FNSB are shielded from liability for damage or injury caused by a person's use of an RS 2477 right-of-way.[35]

As to damage caused by the easement holder to the property owner, the Restatement (Third) of Property, Servitudes, has stated the general rule as follows:

> [T]he holder of an easement is not entitled to cause unreasonable damage to the servient estate. Because the holder of an easement is generally entitled to enter the servient estate to make improvements and construct improvements, a certain amount of damage or inconvenience to the servient estate may be within the contemplation of the parties. However, under the rule stated in this section, the servitude owner is not entitled to cause any greater damage than that contemplated by the parties, or reasonably necessary to accomplish the purposes of the servitude.[36]

The Restatement gives the following illustrative example: "O, the owner of Blackacre, granted Able, the owner of Whiteacre, an easement to construct and maintain a roadway across Blackacre. Able constructed the road in such a way that it caused severe flooding to a part of Blackacre. In the absence of other facts or circumstances, the damage caused to Blackacre by the flooding is unreasonable and not authorized by the easement."[37]

2477).

(c) In this section, "unimproved land" includes land that contains

(1) a trail;

(2) an abandoned aircraft landing area; or

(3) a road built to provide access for natural resource extraction, but which is no longer maintained or used.

[30] AS 09.65.202.

[31] To the extent that the Trails Advisory Commission has asked if there is a functional difference between public recreational use easements recorded during the platting process and those recorded as provided by AS 34.17.100, this is the only difference that this author is aware of: AS 09.65.202 provides specific protections to a landowner recording an easement under AS 34.17.100.

[32] AS 34.17.055.

[33] AS 09.65.200(a); AS 09.65.202(c)(2); AS 34.17.055(a).

[34] AS 09.65.290.

[35] AS 19.30.420.

[36] Restatement (Third) of Prop.: Servitudes, § 4.13 cmt. g (2000).

[37] *Id.*

As to property damage between a private property owner and a trail user, each could potentially be liable to the other depending on the circumstances of the damage under the basic principles of civil law.

V. Maintenance.

As discussed above, easements are governed either by the specific terms of the easement or by the reasonably necessary standard. Maintenance would be governed by these same guidelines. Two case summaries are presented to aid in illustrating how these standards are applied:

In the *Price v. Eastham* series of cases (in which the case was appealed to the Alaska Supreme Court three different times), the court found that a public prescriptive trail easement existed for snowmachine use. The Alaska Supreme Court upheld the superior court's determination that snowmachiners could maintain and mark the trail to accommodate the reasonable use and enjoyment of the easement.[38] That included activities such as removing deadfall and willows prior to freeze up, placing signs along the trail identifying the boundaries of the trail, and the court found that there was no prohibition on grooming so long as such did not damage the servient estate.[39] However, in response to the servient estate owner's concerns that trail maintenance and/or grooming would result in excessive speeds on the trail, the Alaska Supreme Court remanded to the superior court with instructions to set a speed limit for the trail, which was suggested could be posted on the trail.[40]

In *Labrenz v. Burnett*, Labrenz held an easement that allowed him to construct a driveway over the Burnett property in order to access the Labrenz property. A portion of both properties abutted a steep hill and erosion to the constructed driveway due to runoff was a cited concern of Labrenz. Purportedly to address the erosion concerns and protect his driveway, Labrenz installed "light-colored landscaping rock" and "decorative shrubs."[41] Even acknowledging the erosion concerns, the superior court found that the primary purpose of the rocks and shrubs were decorative in nature and "that less intrusive means were available to help with erosion prevention."[42] The Alaska Supreme Court upheld this determination, noting that the evidence had demonstrated that "other houses in the neighborhood use grass to control erosion on hillsides steeper than the property in question[.]"[43] As such, the decorative driveway improvements were not necessary to protect the driveway from erosion.[44]

Specifically to the question of motorized maintenance equipment being an exception to a non-motorized designation, the answer is likely no. If an easement indicated no motorized use, that clear language would govern and would likely

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[38] *Price*, 254 P.3d at 1129.
[39] *Id.*
[40] *Id.*
[41] *Labrenz,* 218 P.3d at 999.
[42] *Id.*
[43] *Id.* at 1000.
[44] *Id.*

exclude even motorized maintenance. However, if the language were less clear, perhaps "no motorized recreational use," there could be room for interpretation and the facts of the easement would help determine whether motorized maintenance was reasonably necessary for the use of the easement.

As discussed, easement holders and the underlying private property owners are not supposed to act to the detriment of the other. Thus, a private property owner should not be standing in the way of reasonably necessary maintenance activities or other reasonable uses of the easement. If a private property owner or a trail user believed the other was acting inappropriately, the proper legal recourse would be to obtain an injunction in court to stop the objectionable activity. However, as with any civil matter, conflicts could potentially be resolved with discussion, compromise, mediation, or litigation.

As to the specific question regarding the Alaska State Parks Trail Management Handbook,[45] the Handbook's stated purpose is to guide the maintenance and development of State-managed trails. The publication could be a helpful guide for anyone approaching trail maintenance, as much of the Handbook is devoted to trail sustainability, erosion control, and safety. In addition, using the Handbook as a guide could be beneficial if there were to be future litigation over the use, maintenance, or design of the trail as pointing the court to the Handbook could support the position that the work done was reasonably necessary. That said, a person looking to maintain a public trail should use caution in following the Handbook, as some suggestions in the Handbook would likely not be reasonably necessary for many trails; following many of these "best practices" could instead be overdevelopment for a particular trail. For example, installing a switch back and a retaining wall to avoid a steep climb on a traditional on-foot hiking trail could be found to be excessive and not necessary. Again, the assessment depends on the facts of each case.

CONCLUSION

I am hopeful that this memorandum is helpful in analyzing various trails issues that may come before the Trail Advisory Commission. If the Commission is interested in addressing a specific issue, I am happy to hear the circumstances of the issue and provide my legal advice as it relates to those particular facts. Although this memorandum is intended to provide overarching information that may help the Commission with the remaining questions, I will follow up with more specific answers to the Commission's remaining, Borough-specific questions at a later date.

[45] The comments in this paragraph likely apply to other trail development guides not currently before this author for review.