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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT KENAI

PATSY RUTH TIMPERLEY,)
now known as PATSY RUTH SHAW,)
in her personal capacity and as)
TRUSTEE of the SHAW TRUST DATED)
MARCH 02, 2018,)

Plaintiff,)

v.)

KENAI RIVER KEYS PROPERTY)
OWNERS ASSOCIATION, an Alaska)
Non-profit Corporation)

Defendant.)

Case No. 3KN-19-00797 CI

DEFENDANT’S CLOSING STATEMENT

The Association, as Defendant, has moved the Court for summary judgment dismissing Plaintiff’s Complaint on the grounds that the Association is the wrong defendant. Dedication to public use for the land in dispute was approved by the Kenai Peninsula Borough on Plat 74-85, and the approved plat is a material fact. No genuine issue is created by the Association’s reliance upon this plat because the Association does so as a matter of law. The Borough has statutory authority over platting of lands within the Borough, including authority to approve land dedication for public use. Plat 74-85 was approved by the Borough Planning Commission on July 1, 1974, and the plat contains a signature by Stanley F. Thompson, then mayor of the Borough, attesting to the Commission’s approval of the plat.

Patsy Ruth Timperley, Plaintiff, interprets her deed for Lot 11, Block 5, which incorporates Plat 72-62, as conveying title to her for the land in dispute before Plat 74-85 was approved. In contrast, the Association presents interpretation of Plat 72-62 consistent with its plain depiction. Plat 72-62 shows the developer’s intent to reserve land for future extension of Sockeye Lane to Tract A, and

the plat does not depict land beyond the boundary of Lot 11 as being part of Lot 11. Title remained with the developer. When the Borough approved Plat 74-85, The temporary turnaround depicted on Plat 72-62 was replaced with the extension of Sockeye Lane. Consistent with Borough Ordinance, the developer certified ownership of land on Plat 74-85 and requested plat approval showing dedication of streets to public use. Sockeye Lane extended was the only platted street.

The extension contains a shoreline of a manmade channel which Plaintiff believes she owns despite the dedication to public use. Plaintiff does not agree with the Association’s interpretation of subdivision plats, leading to the Complaint filed by Plaintiff. But Plaintiff failed to name the essential party, the Kenai Peninsula Borough, which is vested with exclusive authority by Alaska Statute over form of platting and approval of plats within the Borough, including land dedications.

Ms. Timperley has imposed upon the Court a misdirected effort by her attorney in attempting to circumvent jurisdiction of the Borough. The Association is not a substitute for the Borough and has no authority to define or defend the public interest.

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The Association is the wrong defendant

In his opening statement, Mr. Reges stated the Association is claiming an interest adverse to Ms. Timperley, and thus is the right defendant for quiet title action, citing *McGill v. Wahl*, 839 P.2d, 393 Alaska 1992, and AS 09.45.010. Mr. Reges states that the Association is the proper Defendant under the theory that the Association is challenging her title, citing *Davis v. Tant*, 361 P.2d, 763 Alaska 1961, and reiterated in *Kelly v. Matanuska Electric Association*, Sep 24, 2008 memorandum decision, (Alaska Supreme Court}

The Association does not claim either an interest in title or a non-possessory interest in the land. Disagreement between the Association and Ms. Timperley over use and dedication of the land does not create or imply a legal interest claimed by the Association. The Borough approved the subdivision plats upon which the Association properly relies, including dedication to public use for the land in dispute. The Borough would thus be the proper defendant to respond to Ms. Timperley's interpretation of plats and her claim of title.

The Borough Planning Commission has jurisdiction over platting under authority of AS 29.40 and AS 40.15. Were the Court to decide that the Borough erred in its approval of Plat 72-62 (Plaintiff Exhibit 1) or in approval of Plat 74-85 (Defendant Exhibit D) showing the dedication, the Court should refer subdivision plats to the Borough for resolution.

In the case of *McGill v. Wahl* cited by Mr. Reges, the Alaska Supreme Court upheld an injunction granted by the trial court against McGill because it found that Wahl was entitled to a permanent prescriptive easement. The Association makes no analogous demand. In Alaska, a statutory dedication of streets transfers title to the public trust, *State v. Simpson*, 397 P.2d, 288 Alaska 1964. Plaintiff's Complaint seeking quiet title action fails to state a claim upon which relief can be granted.

Ms. Timperley is claiming title to land beyond the boundary of Lot 11 based on her understanding of Plat 72-62, which is incorporated into her deed (Plaintiff Exhibit 19). As noted in *Shilts v. Young*, 643 P.2d, 686 Alaska 1981, "The normal rule is that a defendant in a quiet title action may always resist a decree against himself by showing simply that the plaintiff is without title. Once the plaintiff's claim of title is put in issue by the defendant, the plaintiff can succeed only on the strength of his own title, and not on the weakness of that of his adversary."

As Defendant in Ms. Timperley's Compliant, the Association simply demonstrates that Plat 72-62 depicts title for the land in dispute as having remained with the developer. Ms. Timperley's claim to title cannot be based on the weakness of a claim by the Association, or the non-existence of such a claim. With title held in public trust by virtue of dedication, the Association is not right defendant for this quiet title action.

Mr. Reges submits that the Association asserts an affirmative defense in claiming it is not the right defendant, and he cites *Morrow v. New Moon Homes*, 548 P.2d, 279 Alaska 1976 to require the Association to bear the burden of proof as to this defense. The Association has no legal recourse other than to rely on subdivision plats and its reliance is not a matter that asserts avoidance. The Association refers to Plaintiff Exhibit 20, KPB Ordinance 20.15 adopted May 7, 1968, Sections 20.15.015 and 20.15.020 for the statutory authority and jurisdiction of Kenai Peninsula Borough in effect when Plat 72-62 and Plat 74-85 were approved.

Plaintiff has wrongly named the Association as Defendant in an attempt to obscure Plaintiff's challenge to title for land that is held by the Borough in trust for the public. Mr. Reges is conflating the Association's reliance on approved subdivision plats with his perception of adversity.

Plaintiff does not meet statutory requirements to bring quiet title action

Mr. Reges cited *Davis v. Tant*, 361 P.2d, 763 Alaska 1961, as justifying Plaintiff's quiet title action naming the Association as Defendant, based on the Association's pretension challenging Ms. Timperley's ownership. *Davis v. Tant* names essential allegations to be contained in a plaintiff's suit to quiet title, including the necessity that the plaintiff be in possession of the property. Alaska Statute 09.45.010 states "A person in possession of real property, or a tenant of that person, may bring an action against another who claims an adverse estate or interest in the property for the purpose of determining the claim." Notwithstanding that the Association claims no title interest to the land in dispute, the Association disputes Ms. Timperley's assertion of possession because the property was dedicated to public use and is thus held by the public.

Defendant Exhibit Q is an Attorney General Memorandum confirming that dedicated land appearing on a plat of subdivision in Alaska is owned by the public. In the present case, title is

held by the Kenai Peninsula Borough which accepted the dedication by approving Plat 74-85. Title is held in trust by the Borough for the purpose intended in the offer of dedication.

Ms. Timperley's effort to obstruct use of the land after approval of the dedication does not convey possession to her. The Association questions both Ms. Timperley's assertion of possession and her presumed right of exclusive use. Plaintiff should have established her right to possession with the Borough before bringing quiet title action against the Association. Without possession, Ms. Timperley has no basis to bring action to quiet title against any defendant.

The Borough's unwillingness to engage with Ms. Timperley to resolve her claim of title is not an indication that the Borough concedes the public interest. The Borough's ability to vacate the public interest and convey land title to an adjacent lot owner is accomplished by approval of a vacation petition and replat under the procedure of KPB Ordinance 20.70, which is enacted under authority of AS 29.40.120 to 29.40.160. Ms. Timperley's naming of the Association as defendant is simply an attempt to circumvent the vacation procedure required by the Borough.

The Borough avoids entanglement by advising Ms. Timperley that the road easement is private (Plaintiff Exhibits 4 and 18). In her haste to ignore the dedication, Plaintiff failed to distinguish that a public interest also exists. The public interest would be vacated by the Borough Planning Commission upon approval of a petition from either the Borough or the owners of a majority of land fronting the right-of-way (KPB 20.70.040). The Borough must vacate the public interest before Ms. Timperley can bring suit to quiet title. Prior to such vacation, Ms. Timperley does not meet statutory requirements to bring quiet title action.

Ms. Timperley does not have good title to the land in question

In his opening statement, Mr. Reges described his case-in-chief as a quiet title action based on Ms. Timperley having acquired good title in 1972 to the land in dispute.

There is no issue before the Court regarding Ms. Timperley's title to land within the platted boundaries of Lot 11, Block 5 as depicted on Plat 72-62 which is incorporated by reference into her deed. Her actions in the past to discourage unauthorized entry into Lot 11 are also not disputed by the Association. However, the Association questions Ms. Timperley's claim of ownership for land

beyond Lot 11's platted boundaries, and specifically, the strip of land adjacent to Lot 11 identified on Plat 72-62 as part of a temporary turnaround.

The Association bases its understanding of ownership of land within the temporary turnaround, on the graphic depiction shown on Plat 72-62. No land beyond the platted boundary of Lot 11 is shown as an extension of Lot 11 or of any other adjacent lot, indicating the developer retained the land ownership. This is consistent with the developer's subsequent certification of ownership on Plat 74-85 and the request for approval of that plat showing streets dedicated for public use.

The Borough Planning Commission accepted the developer's offer of dedication with their approval of Plat 74-85 on July 1, 1974. By dedication to public use, title for land within Sockeye Lane extension was then transferred to the public. This action evidences that the Borough recognized the subdivision developer as holding good title. Had Ms. Timperley's claim to title been alleged or established at that time, her signature on Plat 74-85 would have been required by Borough platting ordinance 20.15.060(o)(1), which Plaintiff provided as Exhibit 20. If Ms. Timperley now believes the Borough should have required her signature, her recourse is with the Borough and not with the Association.

Mr. Aimonetti, Plaintiff's surveyor, testified that the developer's right to extend the Sockeye Lane road easement was established on Plat 72-62, and he suggested that this right eliminated the need for Ms. Timperley's signature on Plat 74-85. This argument is not credible with the requirements of Borough platting ordinance, and Plaintiff's assertion of good title to the land is appropriately disputed. The dedication of streets to public use was approved by the Borough on Plat 74-85 and defeats Ms. Timperley's claim of holding good title to the land in question.

The temporary turnaround shown on Plat 72-62 was not platted as part of Sockeye Lane

In his opening statement, Mr. Reges presented as the second element of Plaintiff's prima facie case, that the full length of Sockeye Lane, including its temporary turnaround stub easement, was created in 1972.

As Mr. Bennett testified, Plat 72-62 clearly depicts the Sockeye Lane road easement ending at Lot 10, before the temporary turnaround. The intent to extend Sockeye Lane to Tract A can be

inferred, but the temporary turnaround itself was not platted as part of the Sockeye Lane road easement. When the extension of Sockeye Lane road easement was platted on Plat 74-85, the location of the cul-de-sac was finalized and fully dimensioned, replacing the temporary turnaround. Based on Mr. Bennett's testimony, a private road easement can be distinguished from a temporary turnaround which is indefinite in location and temporary in nature.

Plaintiff's claim to title for this land derives from the note on Plat 72-62 stating that lot lines extend to the centerlines of road easements and manmade channels. The note does not say that lot lines extend through a temporary turnaround, and Plaintiff incorrectly applies the note to extend Lot 11 across the entire width of the temporary turnaround. Mr. Reges's attempt to define the temporary turnaround as a platted road easement for the purpose of applying this plat note, is not consistent with graphic depiction for Lot 11 on Plat 72-62.

Mr. Reges cited Plaintiff Exhibit 20, Section 20.15.075(11) in which Borough standards for cul-de-sacs state, "*Streets designed to have one end permanently closed shall be no more than 600 feet long and shall be provided at the closed end with a suitable turn-around with a minimum radius of 50 feet to the property line.*" Mr. Reges argues that by this standard, Sockeye Lane on Plat 72-62 extended to the cul-de-sac.

The Association does not agree. Sockeye Lane platted in 1972 did not have one end permanently closed, and the temporary turnaround indicated that Sockeye Lane was to be extended to a permanent turnaround in the future. When this extension was approved in 1974, the temporary turnaround was replaced with the final design for the road, and Sockeye Lane then met the Borough requirement to have a cul-de-sac at the one end permanently closed.

Mr. Reges is overlooking another key point from testimony by Mr. Bennett, that Lot 11 had no building setback line. Plaintiff Exhibit 20, Section 20.15.075(33) requires a minimum 20-foot building setback line for residential lots on all street frontages. The 20-foot building setback line is shown on Plat 72-62 for all lots with frontage on a platted road. The setback line is labelled in several places on the plat, and for Sockeye Lane is labelled along the frontage of Lots 2 and 3 of Block 5. This setback line extends through Lot 10, Block 5, but does not extend into Lot 11, indicating that Lot 11 did not have frontage on a street. Thus, the temporary turnaround was not a road easement in the context addressed in covenants and notes on Plat 72-62.

The temporary turnaround was temporary, and the easement granted on Plat 72-62 was for turning around. The temporary easement did not convey perpetual land title to Mrs. Timperley through a plat note. The right of use held by Ms. Timperley expired when the temporary turnaround was replaced, and her interest in the dedicated road easement then became as a member of the public.

On Plat 72-62, Lot 11 did not extend to and past the shoreline of the manmade channel

Ms. Timperley stated in her testimony that Lot 11 included the shoreline of the manmade channel and thus extended to the centerline of that channel. She noted the absence of a building setback line for Lot 11 on Plat 72-62 and attributed that to her lot being adjacent to a manmade channel. Although the temporary turnaround does contain a shoreline of the manmade channel, the uplands area between this shoreline and the platted boundary of Lot 11, separates Lot 11 from the manmade channel.

Mr. Reges presented photos in Plaintiff Exhibit 11 (later in color) and Exhibit 23 showing survey markers for the southeast corner of Lot 11. The location of this property corner in these photos is reasonably consistent with the location shown in Plaintiff Exhibit 17 (later revised by the Plaintiff for clarity). These exhibits show this property corner located within Ms. Timperley's driveway, and not at the shoreline of the channel. It is evident from Plaintiff Exhibit 17 that the platted boundary for Lot 11 does not extend to the shoreline of the manmade channel at normal river levels, or as Mr. Aimonetti defines in Exhibit 17, to the "Average Low Vegetation Line."

Mr. Reges described the land in dispute as consisting of an upland portion and a portion submerged at normal water levels in summer. Ms. Timperley's ownership of land for Lot 11 did not extend across the upland portion of the temporary turnaround. It ended at the boundary for Lot 11 depicted on Plat 72-62, which Mr. Bennett in his testimony characterized as a fixed boundary. In 1972 the developer may have granted Ms. Timperley permission to use the shoreline within the temporary turnaround for tying up a floatplane, but she has no valid claim to ownership of the land.

Plaintiff extends her claim of land ownership to a dashed line depicting the far edge of the temporary turnaround, that she believes to also represent center of channel. The Association

disputes this extension, contending that the upland portion of the temporary turnaround separated Lot 11 from the shoreline of the manmade channel. Ms. Timperley argues that she bought to the shoreline regardless of the platted boundary of Lot 11. The Association does not doubt her understanding, but her understanding does not grant her title to the land in question.

Graphic depiction for Lot 11 on Plat 72-62 did not show extension of side lot lines into the temporary turnaround, and Plaintiff's assumption that the outer edge of the temporary turnaround is also the center of channel is unfounded. Nowhere on Plat 72-62 are centers of channels fixed dimensionally, which would be the case were the far edge of the temporary turnaround to define center of channel (50-feet from Lot 11's eastern boundary). Had the temporary turnaround been constructed to this far edge, this outer boundary could not then have represented center of channel.

Plat 72-62 did not indicate locations for shorelines of manmade channels, nor did it locate dimensionally the center of channels. If a lot extended to center of channel, there was no need to define the shoreline. Plaintiff's contention that a shoreline bounded Lot 11 is in conflict with Exhibits 11, 17 and 23.

Plaintiff's claim that depiction of side lot line extensions for Lot 11 was an inadvertent omission on Plat 72-62, is irrelevant. Had this been an inadvertent omission, Plaintiff could have applied to the Borough for correction of the plat, per 11.AAC.53.260. The Association believes that rights held by the developer would preclude the Borough from approving such amendment.

Ms. Timperley's claim that she purchased a waterfront lot, was not forfeited by dedication of the land to public use. She has access to the shoreline but not title to the area and no right of exclusive use.

No plat note was needed for reservation of title or subsequent dedication

Mr. Reges presented as the third element of Plaintiff's case, that when exceptions were made by the developer, they were clearly spelled out, as when the developer expressly carved out Humpy Road on Plat 72-62 for dedication to public use.

The Association does not contest this observation, but the land in dispute was not dedicated on the 1972 plat. It remained in the ownership of the developer, and no exception was necessary on Plat 72-62. Mr. Reges argues that the exception made for Humpy Road in the Certificate of

Ownership and Dedication on Plat 72-62 should have included the temporary turnaround if the developer's intent was to dedicate a portion of that land in the future. Rather than acknowledge this as evidencing that Ms. Timperley did not own the land, Mr. Reges suggests the lack of an exception proves her ownership. This is a hypothetical argument which completely fails with the Borough's approval of dedication on Plat 74-85.

The land in dispute, except for the portion within Tract A, was conveyed from the individuals who established the subdivision to their development company, Kenai Keys Development, Inc., by deed evidenced in Plaintiff Exhibit 21. The portion within Tract A was conveyed separately by deed evidenced in Plaintiff Exhibit 24. The result was that all land within Sockeye Lane extended was owned by Kenai Keys Development, Inc. at the time Plat 74-85 was approved by the Borough.

There was no carve-out of an exception for the land now in dispute on either plat, nor was one needed. Plat 72-62 simply did not depict this land as being part of Lot 11. The land was subsequently offered for dedication by the developer on Plat 74-85, and being the only road depicted on that plat, no express carve-out was necessary in the developer's Certificate of Ownership and Dedication. On Plat 72-62 where the express carve-out for Humpy Road was stated, the carve-out was necessary to distinguish Humpy Road from the four other roads platted as private road easements.

Whether or not a plat is ambiguous is a question of law

Mr. Reges stated that when a plat is incorporated into a deed, whether or not the plat is ambiguous is a question of law, citing *HP Limited Partnership v. Kenai River Airpark LLC*, 270 P.3d, 719 Alaska 2012. He further stated that if no ambiguity, that too is a question of law. The Association does not hold Plat 72-62 to be unduly ambiguous and makes no presumption of an interpretation differing from the plat depiction.

Plat 72-62 clearly defines the boundary of Lot 11 and does not depict extension beyond its boundary. Looking within the four corners of the deed, and Plat 72-62 by incorporation, there is only one reasonable interpretation. Title to land encompassed by the temporary turnaround adjacent to Lot 11 remained with Kenai Keys Development, Inc. after the sale of Lot 11.

Mr. Reges states that Ms. Timperley has good title to the land though deed interpretation, but bases this interpretation on perceived ambiguity. The following addresses ambiguities:

- (1) On Plat 72-62, the lack of dashed extension lines graphically depicted from the northeast or southeast corners of Lot 11 to centerline of the temporary turnaround is not ambiguous. There is no reasonable interpretation of Plat 72-62 that would consider the missing lines as anything other than intended.
- (2) Without shorelines of manmade channels depicted on Plat 72-62, there is no reasonable basis to assume the center of channel coincides with the eastern edge of the temporary turnaround.
- (3) Dashed lines shown within the cul-de-sac on Plat 74-85 from Lots A-1 and A-2 may be unnecessary, but depiction does not imply ownership by Lots A-1 and A-2 within the dedicated area of the turnaround bulb. If the public interest were to be vacated, these dashed lines would be used in determining reversionary interests of Lots A-1 and A-2.
- (4) The dashed line shown within the cul-de-sac on Plat 74-85 extending from the northeast corner of Lot 11, is simply to locate the 50' turnaround bulb. It does not infer Lot 11's ownership of land within area dedicated. Lot 11's boundary is not affected by Plat 74-85.
- (5) The label "*Sockeye Lane 50' Road Easement*" appearing on Plat 74-85 over both private and dedicated portions of Sockeye Lane implies no more than stated by the plat note saying "*The 50' road easement (Sockeye Lane) has been extended to Tract A.*" This note does not state that land ownership within the extension is privately owned.
- (6) The lack of signature by the owner of Lot 20, Block 4, on Plat 74-85 does not negate the dedication. Although a portion of the redesigned cul-de-sac graphically encroaches on area of the channel previously within Lot 20, the center of channel was not a defined location, and the Borough may have considered signature by Lot 20's owner to be unnecessary.

Plaintiff cites *HP Limited Partnership v. Kenai River Airpark, LLC* to ask the Court to quiet title through deed interpretation, but Plaintiff is injecting assumptions if not ambiguity, where none reasonably exist. The area beyond the boundary of Lot 11 and within the temporary turnaround, is clearly depicted as the area where the developer intended to retain title.

Ms. Timperley testified that her understanding at time of purchase was that Lot 11 extended to the shoreline, and further to centerline of the channel by virtue of a note on the plat. She

disregarded the temporary turnaround and subsequent road easement believing no road would be built. She testified that she objected to the road easement approved on Plat 74-85, but she did not pursue vacation as suggested by the Borough. Ambiguity in the deed for Lot 11 is not created by Ms. Timperley's misunderstanding of land ownership, nor by the hurdle imposed by the Borough to vacate the easement, nor by Ms. Timperley's unwillingness to recognize that road easement was dedicated for public use. As Mr. Reges pointed out, whether or not the plat is ambiguous is a question of law. It is not a question of Ms. Timperley's understanding.

Interpretation of Plat 72-62

In his opening statement, Mr. Reges stated that quiet title turns on interpretation of the plat, citing *Persson-Mokvist v. Anderson*, 942 P.2d, 1154 (Alaska 1997), and *Cowan v. Yeisley*, 255 P.3d, 966 (Alaska 2011).

Mr. Reges cites *Persson-Mokvist v. Anderson*, Note 1 to place interpretation of a plat note before this Court as a question of law. *Persson-Mokvist v. Anderson* considered whether uses by a lot owner violated a note on the subdivision plat. The note limited uses of lots in a subdivision to residential and recreational uses. Interpretation of the note established acceptable use, but not a fee title interest for land.

In *Cowan v. Yeisley*, the Cowans sought quiet title to disputed land, claiming they were its owners through the deed or through adverse possession, and they claimed that subdivision plats were invalid in showing dedication of the disputed land without their signatures. The Court interpreted the original plat as granting only an easement to the Cowans, thus the subsequent dedication of that land was valid without their signatures, unless on remand the Superior Court determined that the Cowans had obtained fee title through adverse possession.

The present case now before this Court has similarities to *Cowan v. Yeisley* except that the time period from when Ms. Timperley acquired Lot 11 to when the developer dedicated the land was insufficient for adverse possession under Alaska statute. As approved by Ketchikan Gateway Borough in *Cowan v. Yeisley*, the Kenai Peninsula Borough properly approved dedication without recognition of a title interest held by an adjacent landowner and without requiring signature of that landowner on the plat.

The well-established three-step approach to deed interpretation is given in *Estate of Smith v. Spinelli*, 216 P.3d, 524 (Alaska 2009). Accordingly, the Association asks the Court to first consider whether Ms. Timperley's deed unambiguously presents the parties' intent. Ambiguities perceived on Plat 72-62 do not necessarily equate to an ambiguous deed.

Mr. Reges is asking the Court to interpret the deed based on Ms. Timperley's understanding in 1972 at the time she purchased Lot 11, suggesting this as the intent of the parties. Ms. Timperley stated that her intent was to acquire property that included the shoreline of the manmade channel. But the developer's intent on Plat 72-62 was clearly to preserve the option for extending Sockeye Lane to Tract A. The developer fulfilled Ms. Timperley's expectation by granting her permission to park her floatplane within the temporary turnaround, and her right to use the shoreline remained after the developer dedicated the extension of Sockeye Lane.

Estate of Smith v. Spinelli provides a process for a three-step analysis to be employed in interpreting a deed. First, if the deed "when taken as a whole is open to only one reasonable interpretation, the interpreting court need go no further." If the court determines that a deed is ambiguous, "the next step in determining the parties' intent is a consideration of facts and circumstances surrounding the conveyance. We have noted that this inquiry can be broad, looking at all of the facts and circumstances of the transaction in which the deed was executed, in connection with the conduct of the parties after its execution."

The Association offers the following for consideration in such analysis, presented in testimony by Messrs. Akin, Bailey and Bennett:

- a) With a temporary turnaround platted adjacent to Lot 11 on Plat 72-62 and no channel shoreline depicted, the graphic representation of Lot 11 would control over the more generalized plat note stating that lot lines extend to roadway and channel centerlines.
- b) No dashed lines are depicted on Plat 72-62 extending the eastern boundary of Lot 11. On Plat 74-85 the dashed lines shown within the redesigned cul-de-sac are depicted for locating the cul-de-sac bulb.
- c) Having limited the extent of Lot 11 to its platted boundaries on Plat 72-62, Kenai Keys Development, Inc. proceeded on Plat 74-85 to redesign the cul-de-sac at the end of the temporary turnaround to its ultimate location and shape, and to dedicate Sockeye Lane

extension to public use. This dedication would not have been approved by the Borough had there been recognition of an interest in title held by the Plaintiff.

- d) The developer's Certificate of Ownership and Dedication on Plat 74-85 attested to its ownership of property being subdivided in Tract A and its ownership of property within the extension of Sockeye Lane. The language used for the Certificate of Ownership and Dedication was consistent with standard language used for other subdivisions within the Borough where the intent was to dedicate roadways for public use.
- e) Plaintiff Exhibit 16 is the developer's letter dated June 3, 1974 transmitting to the Borough the plat of resubdivision for Tract A. The developer, then Kenai Keys Development, Inc., states that lots subdivided from Tract A will have access "*by the channel easement or private road easement via Sockeye Lane extended ...* ." This statement distinguishes private road easements from Sockeye Lane extended, and contrary to its reading by Mr. Reges, the word 'via' does not imply that Sockeye Lane extended is only a private road easement.
- f) Of the 122 lots in the subdivision shown on both plats, 14 lots do not border a shoreline and depend on shorelines along road easements within the subdivision for access to the Kenai River. Eleven of these fourteen lots are on Sockeye Lane. To deprive owners of lots along Sockeye Lane from convenient access to a shoreline, is inconsistent with the developer's intent to establish Kenai River Keys Subdivision as a recreational site on the Kenai River (established in Plaintiff Exhibit 8, page 1). Plaintiff's reference to a note on Plat 72-62 reserving Tract C in the subdivision as a boat launching area, specially references lot owners without road access. Lot owners along Sockeye Lane have road access and are not restricted to Tract C for launching boats.
- g) Subdivision owners according to Plat 72-62 include Delbert Jerry Groseclose, J. M. Linton, and G. J. Huggins. The July 6, 1972 platting exception request for Plat 72-62 (Plaintiff Exhibit 8) indicates clear knowledge by these owners of the difference between the typical subdivision dedication of roadways for public use and the platting of private road easements for use only by future lot owners in the subdivision. When Plat 74-85 was approved by the Borough, the subdivision owner was Kenai Keys Development, Inc.,

whose owners once again were Groseclose, Linton and Huggins. By their actions in 1972, these owners had a clear understanding of roadway dedication.

- h) Having requested and been granted a platting exception in 1972, the developer would have recognized that another platting exception would be required for Plat 74-85 to avoid dedication of Sockeye Lane extension. The platting process for Plat 74-85 was thus expedited by avoiding a new platting exception.
- i) The developer requested approval of Plat 74-85 showing easements for roadways dedicated to public use, with the extension of Sockeye Lane as the only roadway platted.
- j) Establishing Sockeye Lane extension as a dedication for public use did not diminish the developer's effort in 1972 to ensure restricted access for subdivision roads. While the extension is dedicated to public use, its connection only to road easements existing over privately-owned land, results in its use being limited to subdivision lot owners and the other users allowed by restrictive covenants. The only access for the public would be from water within the channel easement.
- k) Both a note on Plat 72-62 and a note on Plat 74-85 state that road easements may be dedicated to public use upon vote of the majority of lot owners. These provisions were not triggered for the public dedication appearing on Plat 74-85 because no part of the dedicated area was previously included as a private road easement on Plat 72-62. The note on Plat 74-85 simply affords the owners of Tract A lots the right to participate in a vote to dedicate any private road easement in the subdivision to public use.
- l) A note appearing on Plat 74-85 states "*The 50' road easement (Sockeye Lane) has been extended to Tract A.*" This note would not have appeared on Plat 74-85 if this road easement had extended to Tract A by virtue of Plat 72-62.

As evidenced by the foregoing, land ownership beyond the platted boundary of Lot 11 on Plat 72-62 was retained by the developer for the temporary turnaround. The developer subsequently dedicated this land to public use on Plat 74-85 for access to lots resubdivided from Tract A. This is the one reasonable interpretation surrounding the conveyance of Lot 11 to Ms. Timperley that is consistent with the plats and Borough approval of the developer's request for dedication.

Validity of the Dedication on Plat 74-85

Mr. Reges questions whether there has or has not been a dedication, and he raises the issue as a question of fact to be proven by clear and unequivocal evidence, as required in *Demoski v. New*, 737 P.2d 780-785 (Alaska 1987). *Demoski v. New* is distinguished from the present case by the subdivision of land not having been approved by Fairbanks North Star Borough, compared to this case in which Plat 74-85 was approved by Kenai Peninsula Borough. Mr. Reges also cites *Hamerly v. Denton*, 359 P.2d 121 125 (Alaska 1961) in which the Court concluded that evidence was not enough to support a finding that a public highway was established by public use. The court stated in *Hamerly v. Denton* that there must be a positive act on the part of the appropriate public authorities, or there must be a public user for such period of time and under such conditions as to prove that the grant has been accepted.

In the case now before this Court, dedication to public use was unequivocally requested by the subdivision developer on Plat 74-85, and a positive act by the Planning Commission of Kenai Peninsula Borough is demonstrated by approval of the plat showing that dedication. A statutory dedication was offered and accepted as evidenced by the Borough Mayor's signature on the plat attesting to plat approval by the Commission. A statutory dedication is made pursuant to the terms of a statute and was created by the filing and recording of Plat 74-85. The Borough Planning Commission has statutory authority over platting, including dedications, granted by AS 29.40 and AS 40.15.

The *Demoski* and *Hamerly* cases cited by Mr. Reges were common law dedications which are distinguished from the statutory dedication approved on Plat 74-85.

Mr. Reges's disregard of the Borough's approval of the dedication does not present a credible question of whether that approval was granted. Plaintiff's pleading to oppose a dedication recognized by law, is a failure to state a claim upon which relief can be granted.

Ownership of the land in dispute by Ms. Timperley prior to its dedication is the essence of Plaintiff's case. Mr. Reges presented the Plaintiff's understanding at the time Lot 11 was conveyed to her, and with this, alleges that Plaintiff possesses title. The Association relies on the clear meaning of Plat 72-62 depicting the developer's intent to reserve the land title for future access to Tract A. There is no dispute as to whether the developer held title to the land before Lot 11 was

conveyed to Ms. Timperley, and there is no credible basis for Plaintiff's claim that the developer conveyed title to Ms. Timperley for land beyond the platted boundary of Lot 11.

If the Plaintiff challenges validity of the dedication on Plat 74-85 due to a claim of prior ownership, Plaintiff's Complaint should have been directed at the Borough. The Association has no responsibility to address this challenge and does not represent Kenai Peninsula Borough. This case involves the rights of individual lot owners in the subdivision as well as the public, and the Association has no authority to defend a challenge to those rights.

Such a situation occurred in *Creary v. Kenai Peninsula Borough*, 671 P2.2d, 1286 (Alaska 1983), in which the Creary's produced a deed demonstrating they held title to land from which a portion had been dedicated to public use by a subdivision developer, as part of Arc Loop Road south of Soldotna. The Borough conceded that a valid dedication had not been effected, because the Creary's did not join in the subdivision plat, and the court decided the Creary's had not intended to make a dedication. The Creary's settled with the Borough and signed an amended plat, Plat 84-40 KRD.

Creary v. Kenai Peninsula Borough is pertinent to the case now before this Court for two telling reasons: (1) the case was filed against the Kenai Peninsula Borough which approved the statutory dedication; and (2) the Creary's produced a deed clearly demonstrating they held title to the land before a portion was wrongly dedicated by a developer to public use. In the present case, Plaintiff has not named the Kenai Peninsula Borough even though the Borough approved dedication of Sockeye Lane extended, and the Plaintiff has not produced evidence of title, arguing instead for plat interpretation.

The Borough refused to modify the Certificate of Ownership and Certification on Plat 74-85

Defendant Exhibit K is a request submitted by Mr. Reges to the Borough for removal of a plat note restriction on Plat 74-85. He requests removal of the words "*roadways and/or streets*" appearing on that plat within the developer's Certificate of Ownership and Dedication. His justification on page 2 of Exhibit K was that this wording "*has mistakenly led some citizens to believe that Sockeye Lane is public.*"

The Borough responded to his request by letter (Defendant Exhibit L) denying the requested modification to Plat 74-85. Paul Voeller, Platting Officer for the Borough, stated in Exhibit L that the Certificate of Ownership and Dedication is a sworn statement, attested to by an authorized signatory of Kenai Keys Development, Inc. Further, that the certification was required by Borough Ordinance 20.15.060 (now KPB 20.60.190) and therefore, cannot be removed or modified.

The Certificate of Ownership and Dedication appearing on Plat 74-85 states: *“We hereby certify that Kenai Keys Development, Inc. is the owner of this property and request the approval of this plat showing such easements for public utilities, roadways and or streets dedicated by us for public use.”* The certificate is signed by D. J. Grossclose, President, and attested to by J. M. Linton, Secretary.

Sockeye Lane extended is the only roadway platted on Plat 74-85. The pointed disregard of this plat certificate by Mr. Reges is willful. His argument to explain how the meaning of the certificate is the opposite of what it states, violates his duty of candor.

Plat amendments are possible through a process established by the Borough and requiring approval by the Borough Planning Commission. As pointed out in testimony by Mr. Bailey, such an amendment was approved for Plat 72-62 and filed in 1992 as Plat 92-44. If the Plaintiff believes there to be an error in depiction appearing on Plat 72-62 or Plat 74-85, a process of amendment could be pursued.

The extension of Sockeye Lane is both public and private

Mr. Reges has entered into evidence Exhibits 4, 5, 6 and 18 supporting Plaintiff’s contention that Sockeye Lane, including its extension, is a private road easement. Whether the extension of Sockeye Lane is a private or public easement has been an ongoing issue between the Association and the Borough with regard to responsibility for the easement.

As Mr. Bailey addressed in his testimony, the Association received comments from the Borough Planning Director pointing out that the road easement created on Plat 74-85 had been dedicated to public use. Mr. Bailey appropriately defined the easement as private by virtue of the subdivision gate and public by virtue of that dedication. This is not a situation endorsed by the Association, it was created by actions of the Kenai Peninsula Borough after the subdivision was

established. The Association accepted this dichotomy, given that the Association has no authority to do otherwise.

The issue this creates for the Association is regulation of use for this land. Subdivision covenants apply to lot owners, but the Association has no legal means to enforce covenants on lot owners who abuse public land, such as the owner of Lot 11 claiming exclusive use. This issue remains to be resolved with the Borough, but distinguishing Sockeye Lane extended as public or private, has no relevance in this case.

Legal access for lots subdivided from Tract A

Even though the extension of Sockeye Lane has not been constructed as a road, it is the only platted road access for Tract A lots. With the Borough's approval of Plat 74-85, the extension of Sockeye Lane established legal access to lots created in the resubdivision of Tract A. This remains today as the only legal access.

Owners of Tract A lots have the right to use private road easements within the subdivision by virtue of Plat 72-62, but Plat 72-62 did not depict a road for access to Tract A. The subdivision developer recorded a Declaration of Easements (Defendant Exhibit O) in 1972 to address access to lots where access had not been provided by a platted road. Paragraph 2d of this Declaration identified the lots affected within Block 5 of the subdivision, which are lots nearest by land to Tract A, but no right of access was conveyed to the owner of Tract A. Access rights for Tract A do not appear in any part of this Declaration, and the Declaration was not amended with Plat 74-85.

Defense Exhibit P is the Declaration of Easements filed by the developer in 1974 which references Plat 74-85. Lots created on this plat were given access through other Tract A lots along a 20-foot wide strip of land in established lanes running along the west bank of the Dolly Way Channel. Mr. Aimonetti in his testimony did not recognize the existing utility easement as an established lane, and he failed to recognize that the Dolly Way Channel exists on both sides of Tract A. Both Mr. Aimonetti and Mr. Reges opted instead to refer to the eastern branch of this channel as the 'unnamed channel'. But the significance of the 1974 Declaration of Easements is the lack of access rights for Tract A lot owners across lots outside of Tract A. The only access provided for lots resubdivided from Tract A is by Sockeye Lane extended.

Mr. Bailey testified that he is the owner of Lot A-5 and depends on Sockeye Lane extended for legal access to his lot. The road access that he actually uses is through lots in Block 5, whose owners allow him a permissive use. He does not have a legal claim for this permissive use and relies on the right of access established on Plat 74-85 and in Exhibit P. Protection of Sockeye Lane extended from adverse actions is provided by its dedication to public use. The loss of legal access could significantly impact the value of Mr. Bailey's property as well as for other Tract A lots.

Affirmative defense of laches

The Association asserted the affirmative defense of laches in its Answer to Plaintiff's Complaint. The defense of laches applies when the Court finds unreasonable delay in the plaintiff's assertion of a claim and resulting prejudice to the defendant, *Concerned Citizens of South Kenai Peninsula v. Kenai Peninsula Borough*, 527 P.2d, 447 457 (Alaska 1974). Both elements, unreasonable delay and resulting prejudice, can be established in this case now before the Court.

Ms. Timperley's purchase of Lot 11 occurred more than 47 years ago, and she has acknowledged discussions in the 1980's with the Borough regarding vacation of the road easement. The Association asks the Court to recognize unreasonable delay in her attempt to quiet title to land beyond the platted boundaries of Lot 11. By her own testimony she erected a fence in the summer of 1978 obstructing unauthorized access into Lot 11 but also obstructing a portion of the adjacent road easement, which by that time had been dedicated to public use.

Rather than resolve her claim of title, she just assumed title and now seeks to quiet title. Her strategy of last-person-standing is not recognized in law and creates prejudice to the Association.

The Association is unduly prejudiced without testimony being possible from deceased individuals who comprised the developer and the land surveyor who prepared the 1972 and 1974 plats. Also deceased is Mr. Ralph Darbyshire, Planning Director at the Borough in 1972 who is named in Exhibits 7, 8, and 13. These people are not available to confirm or dispute Ms. Timperley's claim or to offer a firsthand interpretation of plats. The Association benefits from reliance upon approved plats in which these individuals had key roles, but the Association cannot credibly contest Plaintiff's claim that these plats do not represent intent of the parties.

Mr. Reges may argue that Ms. Timperley is the only living person with direct knowledge of circumstance and intents at the time, but this only evidences the prejudice to this Defendant. Ms. Timperley's misunderstanding of a right to limit use by other lot owners of a would-be channel easement is substantiation of a bias imposed by the Plaintiff, even though this bias is clearly contrary to the establishment of easements on Plat 72-62 for use by subdivision lot owners.

We do not dispute the Plaintiff's understanding at the time she acquired Lot 11, but in waiting more than 47 years before attempting to quiet title, she has unduly impaired the Association's ability to prove the developer's intent. Ms. Timperley's statement of intent conflicts with the depiction appearing on Plat 72-62 and it prejudices the Association's reliance upon that plat.

Plaintiff's request for Declaratory Judgment should be denied

Mr. Reges cites *Cowan v. Yeisley*, 255 Pacific.3d, 966 971 Alaska 2011 to state that the goal of plat and deed interpretation is to discern the intent of parties to the deed. He frames this as what the developer thought they were selling and what Ms. Timperley thought she was buying in 1972, not today. Mr. Reges infers that the developer's intent at the time of purchase was different than appears on Plat 72-62, suggesting that the plat depiction is irrelevant. For this, he depends on Ms. Timperley's understanding of how the plat was interpreted at the time of purchase, which he renders as good title.

As stated in the foregoing, the Association has no alternative but to rely on Plat 72-62 and Plat 74-85 as approved by the Borough. Mr. Reges's suggestion that these plats do not represent the intent of the parties at the time, is in conflict with law, specifically AS 29.40 and AS 40.15, which gives the Borough jurisdiction over platting. It remains unclear to the Association how Mr. Reges can credibly believe that the Plaintiff merits declaratory judgment when such judgment would contradict statutory authority of the Borough.

Mr. Reges entered into evidence Plaintiff Exhibit 20, the Borough ordinance relating to subdivision plats and platting, in effect in 1972. Nowhere in this ordinance does intent of the parties override requirements for proper preparation of plats. The one reasonable interpretation of Plat 72-62 is as correct today as it was in 1972.

Plaintiff's motion for declaratory judgment should be denied because there remains a genuine issue of whether Plaintiff holds title interest superior to that held by the public. Plaintiff's understanding of the land she acquired by deed in 1972 is not consistent with land boundaries depicted on Plat 72-62.

Ms. Timperley's intent at the time of purchase may have been to acquire land to the shoreline, but this intent conflicts with the depiction on Plat 72-62. As the only surviving person of the parties involved in the purchase of Lot 11, she has not gained the right to interpret the plat differently than depicted. Plaintiff's request for declaratory judgment should be denied.

Defendant's Motion for Summary Judgment should be granted

The Association has asked the Court for Summary Judgment dismissing Plaintiff's Complaint with prejudice on the grounds that that the Association is the wrong defendant. Dedication to public use for the land in dispute was approved by the Kenai Peninsula Borough on Plat 74-85, and the approved plat is a material fact. There is no genuine issue caused by the Association's reliance upon this plat because the Association does so as a matter of law.

While there are disagreements between the Plaintiff and the Association, the facts are as follows:

1. Plat 74-85 contains a Certificate of Ownership and Dedication signed and attested to by officers of Kenai Keys Development, Inc. requesting approval of the plat showing such easements for public utilities, roadways and or streets dedicated for public use.
2. Plat 74-85 was approved by the Planning Commission of Kenai Peninsula Borough and is a matter of law.
3. Approval of dedication by the Planning Commission constitutes a statutory dedication.
4. By law, no further action by the Borough or Planning Commission is required for acceptance of that dedication.
5. Plaintiff was in possession of Lot 11, Block 5 on July 1, 1974 when Plat 74-85 was approved by the Planning Commission.
6. Lands contained within Plat 74-85 are within the Kenai Peninsula Borough and subject to its platting jurisdiction.

7. The Association has no authority to dismiss the validity of Plat 74-85.
8. The Kenai Peninsula Borough is vested by law with authority to approve subdivision plats and to regulate use of dedicated public land.
9. The Association does not claim either an interest in title or a non-possessory interest in the property. Disagreement between the Association and Ms. Timperley over use of the land does not create or imply a legal interest held or claimed by the Association.
10. Ms. Timperley cannot be a plaintiff in possession of land dedicated to the public.

Alaska Statute 29.33.150 (in effect at the time of the 1972 and 1974 plats) established the Borough Planning Commission with jurisdiction over platting, including the control of subdivisions and dedications. Alaska Statute 40.15.030 (1971) states *“if land proposed to be subdivided or dedicated is situated within a first or second class borough, the proposed subdivision or dedication shall be submitted to the borough planning commission for approval.”* Such approval was granted for Plat 74-85.

There exists one material fact in this case, the Borough’s approval of Plat 74-85 dedicating the land in dispute to public use for the purpose of a road easement. Plaintiff’s claim of prior title by virtue of Plat 72-62 is not an issue material to this Defendant. The Association has no legal option but to accept that title to the land is in the public by virtue of the approved dedication. Summary judgment to dismiss the Complaint should be granted because the Association is not the proper party to respond to Plaintiff’s claim of title.

Defendant is entitled to summary judgment based on law applicable to material fact, and therefore, the Association’s Motion should be granted, and Plaintiff’s Complaint dismissed with prejudice.

Conclusion

The Association reiterates that: (1) it claims no ownership interest in the land; (2) Plaintiff has not and cannot present credible evidence of an interest in title held by the Association; and (3) the Association relies on the 1974 plat approved by the Borough Planning Commission showing the land dedicated to public use for the purpose of a road easement.

Under AS 29.40 and AS 40.15, the Borough has exclusive authority over platting for lands within the Borough, including approval of land dedication for subdivision streets. If the Borough mismanaged its authority, the Court should refer this case to the Borough.

The land in dispute is encumbered by a platted road easement and will remain so burdened whether the Court grants, denies or dismisses Plaintiff's motion to quiet title. The Association was not in existence when the easement was platted, and responsibility for ownership, use and protection of this land does not now fall to the Association.

Plaintiff's attorney would have the Court believe that the Borough has not accepted the dedication, even when the Planning Commission's approval constituted a statutory dedication. Plaintiff's surveyor alleges ambiguity in graphical depictions on Plat 72-62, citing omission of "prolongations" of side lot lines for Lot 11 – even though for all lots where extensions of side lot lines were intended, they are shown clearly and consistently on that plat. Plaintiff would have the Court believe that she owns the land despite what the plats depict, and now 47 years later she can assert claim to title. But the pivotal fact remains: in approving the 1974 plat of resubdivision, the Borough Planning Commission accepted the developer's Certificate of Ownership and Dedication.

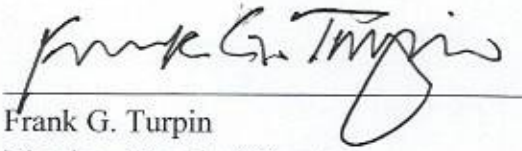
The Borough created this situation by approving Plat 74-85 containing a roadway dedicated to public use with overland access to that roadway only by crossing privately-owned lands. In this sense only, the roadway is a private road easement. Although in hindsight, it may have been poor practice for the Borough to have approved the dedication in the manner appearing on the plat, it is clear that the issues created by this action cannot be decided by Plaintiff's Complaint against the Association, despite the tedious presentation by Mr. Reges. Purchasers of lots in the subdivision rely on the plain depiction on Plat 72-62 and Plat 74-85.

We ask the Court to take judicial notice that the Borough is the only entity with authority to amend, revise or correct a plat. The quiet title action that Plaintiff asks of the Court would defeat the Borough's dedication of this land to public use and would insert conflict in use of Sockeye Lane extension, a platted road easement.

Based on the forgoing, Defendant asks the Court to deny Plaintiff's request for declaratory judgement and to dismiss Plaintiff's Complaint with prejudice.

We thank the Court for its patience with the Association's self-representation. Our subdivision plats are unusual and not readily understood by many attorneys. Our efforts over the years to apply the meaning of these plats has afforded the Association its confidence in responding to this Complaint. We look forward to resuming our discussions with the Borough to resolve responsibility for use of dedicated land within a gated subdivision.

Respectfully submitted this 15th day of October 2020:

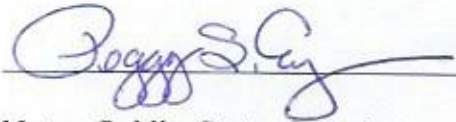


Frank G. Turpin

Member, Board of Directors

KENAI RIVER KEYS PROPERTY OWNERS ASSOCIATION

Subscribed and sworn to before me this 15th day of October 2020:



Notary Public, State of Alaska

My commission expires: July 01, 2023

PEGGY S. EYMANN
Notary Public
State of Alaska
My Commission Expires
July 01, 2023

Kenai River Keys Property Owners Association, Inc.
PO Box 1073, Sterling, Alaska 99672
Phone 907-953-9775

Certificate of Service

I certify that on October 16, 2020 a copy of the foregoing was emailed to:

Robert K. Reges,
robert@reevesamodio.com


Frank G. Turpin