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,	)	
Defendants.	)	Case No. 3KN-19-00797 CI

PLAINTIFF'S WRITTEN CLOSING ARGUMENT
IN SUPPORT OF PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT

I. RESTATEMENT OF THE ISSUE AND SHORT ANSWER

Who holds title to the real property that is servient to the road easement known as "Sockeye Lane Extended"?[1] Is it Patsy Timperley by virtue of her 1972-1973 deed?[2] Or is it the Kenai Peninsula Borough, in trust for the public, by virtue of public dedication in 1974?[3] Given the evidence produced -- assessed in light of burdens of proof, legal presumptions, and standards of review -- the answer is clearly 'Patsy Timperley by virtue of her deed.'[4]

An ancillary topic is Defendant's claim that Kenai River Keys Property Owners'

[1] This moniker was coined by Groseclose, Huggins and Linton in **Exhibit 16** (Corres. of June 3, 1974) when they refer to the private road easement created by their recordings of 1972.

[2] Ms. Timperley's deed, **Exhibit 19** was dated December 29, 1972. It was recorded January 05, 1973.

[3] *State v. Simpson*, 397 P.2d 288, 291 (Alaska 1964)(right of way dedication vests title in the local government in trust for the public).

[4] Ms. Timperley makes no claim to that portion of Sockeye Lane cul-de-sac owned by Lots A-1, A-2 and Lot 20, Block 4 as established by testimony regarding the two plats. Her claim is to the straightway clearly bounded on three sides by the 1972 plat as clarified by an added dashed line on the 1974 plat. **Exhibits 1 and Def. Exh. D**. For brevity we refer to this area simply as "Sockeye Lane Extended."

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Association **("KRKPOA"** or **"the Association")** is not the real party in interest for this quiet title cause of action. They allege that the real party is Kenai Peninsula Borough. But it is the Association's claim of dedication that questions Patsy's title. It is they who have pretensions adverse to Patsy. Whether the Association's "interest" in the property is as members of the public or as an organization trying to abrogate its obligation to address disputes between lot owners involving private roads within the subdivision, it is the Association, not the Borough, who has challenged Patsy's title. The aim at KRKPOA is correct.[5]

II. PROCEDURAL HISTORY

At the start of this litigation the parties contemplated Motions for Summary Judgment and set up a date for an "Evidentiary Hearing" so that they could dispel any material questions of fact. The Association filed its Motion for Summary Judgment on January 21, 2020. Patsy's Cross Motion was filed February 27, 2020. Evidence presentations then occurred over portions of June 09, June 11, August 26, September 30 and October 05. Surely all material facts have been addressed.

KRKPOA asked for dismissal of the action. They theorized that Kenai Peninsula Borough is the "sole and exclusive authority" vested with power to enforce rights in the subject land given that the Association "interprets the plat of resubdivision as dedicating the roadway to public use."[6] The Association asserted this despite having been told by the Borough Planning Director, on behalf of the Borough's Mayor: "This is a private property dispute that the borough does not have the authority or jurisdiction to adjudicate."[7]

By her opposition, Patsy seeks denial of Defendant's request for dismissal. By her Cross-Motion she seeks to quiet her title in the servient lands. She asked that the allowable scope of use of existing road and channel easements be decided later in this litigation. This court allowed that current focus on title. Thank you. The cross motions are now ripe for decision.

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[5] *Davis v. Tant*, 361 P.2d 763, 765 (Alaska 1961) as recounted in *Miscovich v. Tryck*, 875 P.2d 1293, 1303-1304 (Alaska 1994) and in *Kelley v. Matanuska Elec. Ass'n*, No. S-12488, 2008 Alas. LEXIS 133, at *22-23; 2008 WL 4367550 (Sep. 24, 2008) (A quiet title action is aimed "at the pretensions of all individuals claiming adversely . . . to enable the plaintiff to quiet his title as against unfounded claims of all nature.")

[6] Association's Summary Judgment Motion at pg. 1 thereof, and Memorandum at pg. 1 thereof.

[7] **Exhibit 5 pg. 1** (March 1, 2019) responding to a letter from Bill Bailey and Frank Turpin in which they asked the Mayor to overrule "a long-held position by the Borough's Planning Department" that Sockeye Lane Extended is not a dedicated road right-of-way. ***Id***. **at pg. 2** (February 11, 2019).

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III. APPLIED BURDENS OF PROOF, PRESUMPTIONS AND STANDARDS OF REVIEW

Quiet title is generally considered an equitable cause of action.[8] Analysis begins with the deed and the Plat incorporated therein by reference.[9] Patsy's deed incorporates Plat 72-62 for its legal description of that which is being conveyed.[10] An important part of Plat 72-62 is the note saying lot lines extend to the middle of channels. Interpretation of a plat note is a question of law.[11]

The goal for this Court is to ascertain the intent of the parties to the transaction at the time they engaged in the transaction.[12] Here, the three developers are deceased. Their intent must be ascertained from exhibits. Patsy, however, was a party to the 1972 conveyance following her review of Plat 72-62 with input from Developer "Red" Huggins and his wife.[13] Her first-hand testimony must be given great weight.

The Timperleys wanted a waterfront lot. Although they doubted that the "Temporary Turn Around" would ever get built, seeing that it was in the water, the key was to be able to pull the family floatplane up to a waterfront bank they owned. Whether that pullout was going to be at the 1972 meander line or along what had been the middle of the channel on the outer edge of a future-constructed, private, dead-end road was not dispositive. But not holding title to the line where water met land at Lot 11 would have been cause for purchase of a different lot. With assurances from the people who had created the plat, as well as that which she and her husband could plainly see was platted waterfront extending to the middle of the channel, Patsy and her late-husband purchased Lot 11, "according to Plat 72-62."

For the next 45 years, nobody doubted that Patsy owned the land servient to Sockeye Lane Extended. Plat 72-62 depicts Lot 11. The channel in front of Lot 11 is divided by a dashed line marked "CL" which Expert Bennett conceded meant "center line." Lot 11's southern boundary

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[8] *McGill v. Wahl*, 839 P.2d 393, 397 n.7 (Alaska 1992)("Under Alaska statutes, the plaintiff in possession does not have to show that it has a right to judgment at law in a separate proceeding before seeking to quiet title in equity.")

[9] *Estate of Smith v. Spinelli*, 216 P.3d 524, 529 (Alaska 2009).

[10] Patsy's Deed, **Exhibit 19,** conveys "Lot 11 Block 5 … according to Plat 72-62."

[11] *Persson-Mokvist v. Anderson*, 942 P.2d 1154, 1156 n.1 (Alaska 1997).

[12] *Estate of Smith, supra* at 529.

[13] Timperley testimony concerning discussions and considerations at the December 1972 party.

extends to that middle of the channel by a solid line.

On Plat 72-62 all extensions for all lots are solid lines, not dashed lines, when drawn along the end of a channel where water meets land. Recall that expert Mark Aimonetti brought this to everyone's attention whereas expert John Bennett was surprised and befuddled when this was brought to his attention. Surely expert Aimonetti was more thoroughly steeped in relevant fact and his 2018 As-Built Survey, although somewhat hard to read, is a comprehensive depiction of all relevant survey lines.[14]

A plat note says lot lines extend to the middle of the channel. No exception has ever been stated for Lot 11 although exceptions and peculiarities for other lands are noted both on Plat 72-62 and on other deeds of the day.[15] As of 2002 the Association noted: "All easements for roadways are private and are not available for use by the general public."[16] As of 2017 the Association noted: "The road easement for Sockeye Lane is private, including its extension to Tract A. It is not owned or maintained by the Borough and they have no interest in resolution of easement rights."[17]

Then, in 2018, despite no new evidence -- Mr. Bailey having confirmed under oath that he was aware, in 2017, of all the same material he now relies upon -- the Association adopted a litigation posture that would take away that which Ms. Timperley bought in 1972. Forfeitures are never enforced in equity unless the right thereto is so clear as to permit no denial.[18] Consequently, the dedication now suggested by KRKPOA is not to be presumed.[19] Rather, whether there was a dedication is a question of material fact for which KRKPOA had the burden of proving by clear and unequivocal evidence.[20] They didn't even come close.

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[14] The As-Built Survey is **Exhibit 17**. A clearer, digital, courtesy copy was also digitally provided.

[15] Plat 72-62, **Exhibit 1**, has "Legends and Notes" describing unique and particularized treatment for Tract B, Tract C and, in the both the Certification and on the road itself, an exception to private road easements specific to Humpy Lane. **Exhibit 21**, another deed from December 1972, explicitly "Saves and Excepts" portions of the land it is conveying to carve them out from land described "according to Plat 72-62."

[16] Bill Bailey testimony about the Association's revised *Reservations and Restrictive Covenants for Kenai River Keys Subdivision,* Document #2002-008058-0 (08/26/2002) at Article IV. "Easements," ¶B.

[17] **Exhibit 3** ("Status of Land at the End of Sockeye Lane" Sept. 26, 2017).

[18] *Hendrickson v. Freericks*, 620 P.2d 205, 212 (Alaska 1980). *And see Moran v. Holman*, 501 P.2d 769, 771 (Alaska 1972) ("It is also well established in this jurisdiction that equity abhors a forfeiture and will seize upon slight circumstances to relieve a party therefrom . . .")

[19] *Hamerly v. Denton,* 359 P.2d 121, 125 (Alaska 1961).

[20] *Id*.

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When we set aside the Association's incomplete readings of Plat 72-62 (arguments such as the Temporary Turn Around is not "shown on the plat" or that "there are no extension lines for Lot 11" given that both Defense Surveyors (Charles Aikens and John Bennett) ultimately acknowledged the plainly visible markings for Sockeye Lane's 1972 extension and that solid lines do mark extensions and that bearings do sometimes change at extensions) the Association's entire argument rests on the Certification of Plat 74-85. Said plat is unclear and equivocal.

The Association wrote in 2017 that "Sockeye Lane is private, including its extension to Tract A" and Mr. Bailey admitted that he and his fellow directors had studied the 1974 plat before coming to that finding; yet they now argue now that Sockeye Lane was made public by the very same plat they had reviewed in 2017.[21] That in itself screams ambiguity. The Association noted that there is only one road shown on Plat 74-85 but when confronted with the future tense of the plat's covenant -- "road easements shown may be dedicated" and "this can only be done by the majority of the lot owners" -- their feeble 'rebuttal' was that this was mere boilerplate. As if boilerplate designated a "Covenant" on the plat would have no legal import. In fact, Plat notes are enforceable covenants that run with the land.[22]

Although Plat 74-85 explicitly, on its face, incorporates the covenants from Book 68, Page 299, the Association had no proof that the dedication process delineated in those covenants had ever taken place. Their only response was to deny the applicability of those covenants despite the plat's explicit incorporation.[23]

Defense Expert Bennett first opined that Kenai Keys Development Inc. could dedicate the entire roadway in 1974 on the theory that Tract A had extended all the way to the southern boundary of Lot 11, then later admitted that the original boundary of Tract A in the cul-de-sac area was the meander line marked N 54° 58' E for 139.42 feet; a line that lies north of Lot 11. It was counter-intuitive that Tract A had extended in the channel east of Lot 11 simply because no dashed line extended into the Temporary Turn Around on Plat 72-62 and the foolishness of that proposal was demonstrated when a dashed line was drawn to extend the northern boundary of Lot 11 on Plat 74-85. Indeed, the Association had to admit that their theory of Developer-retained ownership

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[21] The Association's 2017 finding is **Exhibit 3 pg. 2**.

[22] *Spinell Homes, Inc. v. Municipality of Anchorage,* 78 P.3d 692, 698 (Alaska 2003).

[23] Book 68, Page 299 is **Exhibit 15** and the mandated dedication process is on **pg. 2** thereof. Those covenants are expressly adopted in the lower right corner of **Exhibit D, Plat 74-85**.

for the entirety of Sockeye Lane Extended did not withstand scrutiny when applied to the "Elephant Ear" cul-de-sac's encroachment into the submerged lands of Lot 20 Block 4.

Whether a plat is ambiguous is a question of law.[24] From the evidence presented that question is plainly answered: Plat 74-85 is ambiguous. It does not provide clear and unequivocal evidence of dedication. Rather, when coupled with extrinsic evidence of the Developer's intent, the one clear conclusion is this: Land beneath Sockeye Lane Extended was deeded to Patsy in 1972.

IV. THE DEVELOPER'S INTENT

As needed to resolve ambiguities, extrinsic evidence may be considered.[25] Extrinsic evidence -- Patsy's testimony as summarized above and the paper trail left by the developers itemized below -- overwhelmingly establish that Sockeye Lane Extended was a private road easement created in 1972; shown on the 1972 plat; and included as part of Lot 11 Block 5 deeded to Mr. and Mrs. Timperley. The developer's intent is readily ascertained when their paper trail is followed in chronological order:

April 29, 1972: The developers sought a "private" subdivision with an exception from all road dedication requirements.[26]

June 12, 1972: Kenai Peninsula Borough Planning Commissioners noted that Alaska statutes prohibit private roads and asked the developers to research the matter and come back with "an exception to the public dedication requirements of [state law and] the borough's subdivision ordinance."[27]

Also, the Commissioners gave us assistance in understanding the 1972 plat we now have by subjecting the preliminary plat to the condition that: "All lots to be a minimum of 12,000 sq. ft. exclusive of rights-of-way and land below the mean high water mark."[28] Implicit is that
(a) waterfront lots will show the mean high water mark as a dimensional boundary, but
(b) beyond 12,000 sq.ft., lots can extend below the mean high water mark into submerged lands.

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[24] *Estate of Smith, supra*, 216 P.3d at 528-529 (Alaska 2009).
[25] *Id.* at 529-530.
[26] **Exhibit 12** (Corres. Developers to G.S. Best, Assoc. Planner, submitting a Preliminary Plat).
[27] **Exhibit 7, pg. 2 "Agenda Item 6"** recounted retrospectively.
[28] **Exhibit 14 at pg. 3, Item d.1**. recounted retrospectively.

July 06, 1972: The developers propose ways around the dedication requirement. Under one approach "easements would be dedicated on the plat to the cities of Kenai and Soldotna and to the Kenai Borough for fire-protection, police enforcement, and any other municipal functions … ."[29] Under a different approach, the developers would create restrictive covenants preserving the Soldotna, Kenai and the Borough's right to use a portion of lots "as an easement for the provision of municipal services … . The effect of these covenants would be to create so-called 'negative easements' in that a property owner's use of his land would be limited by the easement within the area covered by the covenant."[30]

There are now negative easement covenants from 1972 (Exhibit 15) but not easement dedications on the 1972 Plat (except for Humpy Road, an item later singularly required.) Developer reference to easements limiting "a property owner's use of his land" reflect Developer knowledge that easements are rights to use the land of another, not titular possessory rights.[31]

July 24, 1972: Planning and Zoning Commissioners provisionally approve the exception request for all but "the right of way shown on the east boundary of the tract to be subdivided" (later named "Humpy Road"). One proviso requires a covenant be placed on the plat noting that dedication to public use of "easements shown on the plat" can only be done by a "majority of the lot owners."[32] Ralph Darbyshire is identified as presenter of the Borough's "staff report."

August 14, 1972: Huggins and Linton write to Mr. Darbyshire. They note "with further reference to the July 24 meeting … we wish to submit the following revised covenant." They then propose, in pertinent part:

> "Easements for roadways within the subdivision are shown on the Recorded Plat. Such easements are reserved for the exclusive use of land owners…and the Kenai Borough, which shall have a right of access … . All easements for roadways are private and are not available for use by the general public. … [E]asement areas shall not be used in calculating the size of a lot in order to determine whether that lot exceeds the minimum size authorized for the subdivision. If, at any time after there are 60 lot owners within the subdivision, a majority of such owners votes in a duly noticed and constituted meeting …to dedicate some or all of the roadway easements…such public dedication shall become effective … ."[33]

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[29] **Exhibit 8 at pg. 4** (Developers' Corres. to P&Z Cmmsn., July 6, 1972)(emphasis added).

[30] ***Id***. at pg. 5 (emphasis added).

[31] *Hansen v. Davis*, 220 P.3d 911, 912 fn. 1 (Alaska 2009)

[32] **Exhibit 7, pg. 3 (typed "Page 8")** (P&Z Commission Minutes July 24, 1972, discussing Planning Staff provisos. Approval of the exception to dedication is found at fourth page of **Exh. 7 (typed "Page 9")**.

[33] **Exhibit 13** (Developers' Corres. to Ralph Darbyshire,, August 14, 1972)

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This is easement language, not dedication language: "the Kenai Borough shall have a right of access" on private roadways. Also, a process for future dedication is proposed. It requires at least 60 lot owners and a duly constituted meeting with majority vote by those many owners. And, this proposal tends to confirm that lots will have a dimensional boundary at mean high water or at the road's edge but will extend, for purposes of owning the servient estate, into easement areas.

September 11, 1972: Planning and Zoning Commissioners give final approval to the Plat that comes to be numbered 72-62. Commission approval is subject to staff approval of the covenants because "[t]he key to the private subdivision will be in the covenants."[34] Also noteworthy, a particular lot is explicitly carved out for singular treatment. It is not Lot 11.[35]

October 30, 1972: "Reservations and Restrictive Covenants for Kenai River Keys Subdivision" are recorded in Book 68, Page 299. In the material respects noted above, they mirror the covenant proposed to Mr. Darbyshire by letter of August 14. They declare that "Easements for roadways within the subdivision are shown on the Recorded Plat."[36]

November 03, 1972: Plat 72-62 is recorded. It shows both the straightway and the "Temporary Turn Around" cul-de-sac for "Sockeye Lane Road Easement" along its entire length, including the extension.[37] Such showing was required by the Platting Ordinance.[38]

November 27, 1972: Huggins, Groseclose and Linton -- after expressly referencing Plat 72-62 for the easements "reflected" thereon, as well as Book 68 Page 299 for the covenants therein -- declare their desire to reserve "other easements and rights of way" to provide "private and permanent easements and rights of way for ingress and egress by foot or motor vehicle for the purpose of access." Several such additional access routes are then "established, reserved, laid upon, or made appurtenant to, as the sense may require" enumerated lots. This instrument creates the Dolly Way Easement discussed by several witnesses.[39] Recall that in 1972 Patsy was aware Dolly Way provided access to Tract A when she noted Sockeye Lane Extended was in the water.

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[34] **Exhibit 14** (P&Z Notice of Action, Sept. 11, 1972) **at pp. 3 (last Item numbered 1.) and pg. 4**, "Commissioner Poppin asked…")

[35] ***Id*. pg. 3, (last item numbered 3)**("Lot 8, Block 1 be reserved as a boat launching…")

[36] **Exhibit 15**, pp. 1-2.

[37] **Exhibit 1**.

[38] **Exhibit 20** (Controlling Ordinance) at **pg. 12** ¶(19)("Temporary Dead End Streets. Streets which are stub streets must provide some type of temporary turnaround…" on the plat).

[39] **Def. Exhibit O** (Declaration of Easements).

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December 1 and December 29, 1972: In one deed the developers explicitly hold back land from a conveyance by using the phrase "SAVE AND EXCEPT THEREFROM" (all caps in original.)[40] Later that month, nothing is held back from R.E. and Patsy Ruth Timperley.[41] Patsy is told by the developers at their party that the Developers intend to keep Tract A for themselves (which they did, by the Save and Except deed).

1972-1974: There is a drivable surface to Tract A through Dolly Way Easement and also across Lot 11 but the latter is upland, not in the platted Sockeye Lane "Temporary Turn Around" easement as shown on plat 72-62.[42]

June 03, 1974: Groseclose, Linton and Huggins convey Tract A to Kenai Keys Development, Inc. **("KKDI")**. They describe Tract A "according to Plat K62-72" [sic].[43] Thus, whatever KKDI received in terms of land encompassed within Tract A, that area was defined by the 1972 plat.

Expert Bennett waivered but his final conclusion was that Tract A's original southern boundary in the area of the Temporary Turn Around was the 1972 Meander Line (N 54° 58' E, 139.42') with some extension into the "CL" of the channel. Expert Aimonetti opined that Tract A clearly ended at the common boundary with Lot 11; that the bearing of that boundary line's extension into the channel was probably a continuation of its upland bearing (S 74° 26' W); and that such extension line's bearing was confirmed when it was depicted as a dashed line on the 1974 plat. Expert Bennett agreed that the later-added dashed line was informative because it was a convention of the draftsman.

Also on June 03, 1974, KKDI, through its shareholders Groseclose, Linton and Huggins, informed the Borough that access to Tract A is "via Sockeye Lane Extended, as recorded in Bk. 68 Pg. 299 K.R.D. and Declaration of Easements of November 27, 1972."[44]

July 29, 1974: KKDI signs Plat 74-85 which, among other things, explicitly incorporates "Additional Covenants" of Book 68 Page 299.[45]

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[40] **Exhibit 21** (Deed, Groseclose, Linton and Huggins to Kenai Keys Development, Inc., Dec. 01)
[41] **Exhibit 19** (Deed, Kenai Keys Development, Inc. to Mr. and Mrs. Timperley, Dec. 29).
[42] Testimony of Patsy Timperley as depicted on **Exhibit 22 (Aerial Photo**, Sept. 24 1972).
[43] **Exhibit 24** (Deed, Groseclose, Linton and Huggins to KKDI, "Tract A Deed", June 3, 1974).
[44] **Exhibit 16** (Corres. from Groseclose, Linton and Huggins through KKDI to G.S. Best, June 3 1974).
[45] **Def. Exh. D.**

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From this historical record there is absolutely a clear and unequivocal insight to the Developers' intent. They wanted all roads in the subdivision to be private. In 1972 they secured an exception to local and state dedication requirements for all roads shown on Plat 72-62 except Humpy Lane. The full length of Sockeye Lane, including its extension, was a beneficiary of that exception.

Sockeye Lane is an easement. One beneficial holder of that easement is the Kenai Borough, who has a right of access to perform municipal functions. However, the Borough does not have title. That was deeded to Mr. and Mrs. Timperley on December 29, 1972. The Borough recognizes this and has repeatedly said so.[46] Patsy is in possession and has asserted her ownership continuously since December 1972. The Certification on Plat 74-85 does raise an ambiguity but nothing supports the Association's reading. Indeed, had there been an attempt by KKDI to dedicate Sockeye Lane Extended in 1974, that attempt would have been void *ab initio* for failure to follow the mandatory procedure established by Book 68, Page 299 Covenants.

This dispute arose from the Association's interest in utilizing Patsy's waterfront by and for other lot owners.[47] KRKPOA is the real defendant in interest.

V. CONCLUSION

For all the foregoing reasons, and in accord with AS 09.45.010, Patsy Ruth Timperley Shaw (in her plaintiff-Trustee capacity) is entitled to a judicial determination that she is the lawful title holder to all of Lot 11, including the waterfront and submerged lands extending eastward from Lot 11's dimensional boundary, as depicted in Mark Aimonetti's "Plat 72-62 As Built" (Exhibit 17), to be resubmitted upon order of this Court with a less "busy" depiction and more clearly legible bearings and distances.

SO ARGUED this 15TH day of October, 2020.

REEVES AMODIO LLC
Attorneys for Plaintiff

By:/s/ Robert K. Reges
Robert K. Reges
ABA#: 8612152

[46] Borough disavowal of holding title can be found in **Exhibits 4, 5, 6, and 18.**
[47] **Exhibit 25** (the Petition) and **Exhibits 2 & 3**, referencing the Petition.

Certificate of Service
I certify that a true and correct copy of the
foregoing was served this 15th day of October 2020
on the following party by U.S. mail and
a courtesy copy by email:

Frank Turpin
Kenai River Keys Property Owners Association
P.O. Box 1113
Sterling, Alaska 99672
fgturpin@gmail.com

/s/ Tayler Haag
Tayler Haag

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