
LYONS O'DOWD

ATTORNEYS & COUNSELORS

To: Captain Kidd Association
From: Lyons O'Dowd, PLLC
Date: 7/17/2020
Re: Legal Opinion re: Affidavit and Statement of Intent

The Captain Kidd Association has received an email from member Susan Loper, whose parents were the original developers of the subdivision. Ms. Loper states that she is providing guidance to the Board related to any proposals regarding the extended spit portion of Peninsula Drive. She attached a recorded document signed by her mother, Sue Fall, titled "Affidavit and Statement of Intent." The following is our opinion with respect to the effect of the document and the authority of the Association.

1. Dedication of Beach Front

The *Dedication of Beach Front* dedicates all of the beachfront west of the westernmost lot lines in the Falls Bay Lots to the Owners of all of the Falls Bay Lots and its additions: "to enjoy the beach and water front of the above described property reasonably and with due regard to the rights of others and under such regulations as may from time to time be reasonably established by the undersigned (the Falls) or their successors for the use and enjoyment thereof, the undersigned expressly reserving the right of such regulation thereon."

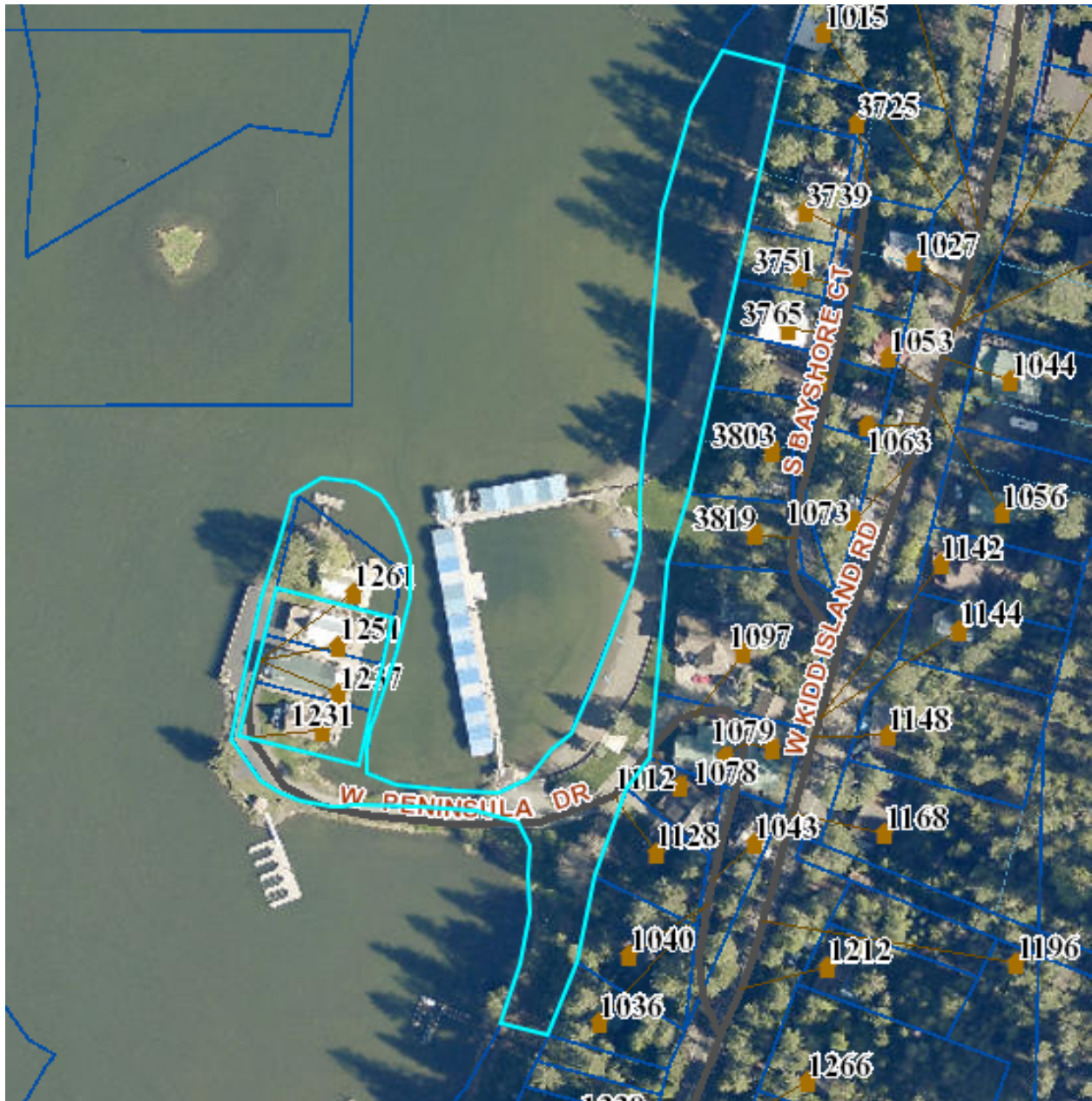
A "dedication is not a transfer of title in the land, but the grant of an easement. Common law dedication does not grant ownership of the parcel in another, but a limited right to use the land for a specific purpose. In this instance an easement was granted by the district court to the Association for recreational purposes." *Saddlehorn Ranch Landowner's, Inc. v. Dyer*, 203 P.3d 677, 680 (Idaho 2009).

Thus, as a result of this dedication grant, the Falls remained the owners in fee (which included the right to impose reasonable regulations over the Common Area) subject to the lot owners' rights to enjoy the beach and water front area.

This document was recorded in 1971.

2. Warranty Deed

In 1978, the Falls conveyed via warranty deed the same beachfront to the Association, plus that area containing the spit and peninsula, excepting the four lots thereon. This new parcel is identified as Tax Parcel No. 10957 and can be seen on Kootenai County mapping sites:



This conveyance granted the property “except easements and rights of way of record or in view....” Under Idaho law, such language can be interpreted as an easement by exception held by the owner/grantor. In other words, after the conveyance, the Association held fee title to the common area (including the spit), subject to any prior easements granted by the Falls or in plain view.

Notably, an owner cannot create an easement on their own land. Therefore, the ‘right to regulate’ held by the Falls was not an easement. *Fitzpatrick Trustees of Fitzpatrick Revocable Tr. v. Kent Trustees of Alan & Sherry Kent Living Tr. Dated 11/07/2003*, 458 P.3d 943, 947 (Idaho 2020) (“[O]ne cannot have an easement in one’s own lands”).

3. Affidavit and Statement of Intent

The Affidavit and Statement of Intent was signed by Sue Fall, one of the original declarants of the subdivision. Although the intent is not entirely clear, it appears that she is asserting the Falls maintained a right of regulation, and attempts to designate Ms. Loper as the “successor” to exercise that right, despite the conveyance to the Association.

Based on the foregoing, there is no easement that could have been reserved by Ms. Fall regarding the right to regulate the Common Area. In short, the Falls lost any rights to regulate the use of the beach front parcel when they deeded it to the Association. Even if this were possible, that regulatory right was limited to the beachfront and likely did not include the additional spit and peninsula that was conveyed pursuant to the Warranty Deed.

The Association is the “successor” for purposes of the Dedication, not a relative designated by the Falls later. Mrs. Fall’s statement under the heading “Articles of Incorporation and Bylaws” that she or her successors “maintain the right of reasonable overall regulation,” applies to the Association as the successor in title, not to Mrs. Fall’s designated successor or heir.

4. Peninsula Drive

The Affidavit states that when they conveyed the property to the Association via the Warranty Deed, it was the Falls’ intent to “include what is currently the paved portion of the road known as W Peninsula Drive from its start at the Kidd Island County Road to the start of the gravel spit causeway portion of W Peninsula Drive as specially detailed below.” However, the Warranty Deed describes all the land west of the western boundary of the platted lots and only excepts out those four lots located within the peninsula. If the intent was to also exclude the peninsula itself, presumably that would have been expressly stated. Also, the only reference in the deed to Peninsula Drive is “to a 12 foot road easement,” without specifying where that easement stops and starts.

She also states that it was *not* the Falls’ intent that the spit portion become part of the Association’s Common Area or be maintained by the Association. However, where the Association owns the perimeter of the peninsula, which is used for the benefit of its members to access the dock access and other uses for its members, the Association actually has an obligation to maintain such access.

Further, her affidavit does state “in summary, the costs to maintain or improve the gravel spit causeway portion of the road is the primary responsibility of the four peninsula homeowners ***with such other contribution, if any, determined by the appropriate vote of the members of the CKA.***” Therefore, she’s essentially acknowledging that the members can vote to assume certain repair obligations with respect to the spit. Yes, there are certain peninsula homeowners that have assumed certain maintenance obligations with respect to the spit but those maintenance obligations are arguably limited to the impact caused by their own use—anything more would be a source of unjust enrichment to the Association. Also, if the Association is expanding the use of the spit in order to provide additional docks and boat slips for its members, then the Association is obligated to contribute to the improvements for the benefit of the members.

5. Global Easement

Please note that we have written the maintenance portion of the easement to still require certain maintenance to be done by the Peninsula Drive homeowners, with the Association having the right, but not necessarily the obligation, to perform certain maintenance and improvements. (See Easement Paragraph 4). It was indicated to us that major projects would be subject to member approval and it is our recommendation to obtain the same. Such approval also seems consistent with the ultimate request by Ms. Fall in her affidavit.

We also recommend that the Association request that Ms. Fall revoke her of-record affidavit as it is likely to create future issues for the Association's ability to properly manage this portion of its Common Area.