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BOISE, IDAHO

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Attorneys for Sharlie-Grouse Neighborhood Association, Inc.

BEFORE THE STATE BOARD OF LAND COMMISSIONERS

SHARLIE-GROUSE NEIGHBORHOOD)
ASSOCIATION, INC.,)

Petitioner,)

vs.)

IDAHO STATE BOARD OF LAND)
COMMISSIONERS,)

Respondent,)

and)

PAYETTE LAKES COTTAGE SITES)
OWNERS ASSOCIATION, INC., and)
WAGON WHEEL BAY DOCK)
ASSOCIATION, INC.,)

Intervenors/Respondents.)

**DECLARATION OF MATTHEW J.
MCGEE**

MATTHEW MCGEE, under penalty of perjury, hereby declares and states as follows:

1. I am co-counsel for the above-referenced Petitioners and make this declaration based upon my personal knowledge and belief.

2. Attached hereto as **Exhibit A** is a true and correct copy of a memorandum from legal counsel to the State of Idaho Department of Lands, dated September 4, 1979, regarding Payette Lakes Subdivisions, which my firm received from the Office of the Attorney General on or about May 14, 2018 in response to a public records request.

3. Attached hereto as **Exhibit B** is a true and correct copy of a memorandum from legal counsel to the State of Idaho Department of Lands, dated September 19, 1986, regarding Dedicated Streets, Roads, Etc. on Lands Adjacent to Payette Lake, which my firm received from the Office of the Attorney General on or about May 14, 2018 in response to a public records request.

I declare under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 15 day of April 2019.


Matthew J. McGee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15 day of April 2019, I caused a true and correct copy of the above to be served upon the following individuals in the manner indicated below:

Angela Schaer Kaufmann
Joy M. Vega
Idaho Department of Lands
P.O. Box 83720
Boise, ID 83720

U.S. Mail
 Hand-Delivery
 Federal Express
 Via Facsimile (208)854-8072
 Via E-Mail
(angela.kaufmann@ag.idaho.gov)
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Mark Perison
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*Attorneys for Payette Lakes Cottage Site
Owners Association, Inc. and Wagon Wheel
Bay Dock Association, Inc.*

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COURTESY COPY TO:

Jim Jones, Esq.
Parsons Pehle & Latimer
800 W. Main St., Ste. 1300
Boise, ID 83702
Hearing Officer

U.S. Mail
 Hand-Delivery
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 Via Facsimile
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Matthew J. McGee

EXHIBIT A

DC - CBTM
PC - CBNW
File Asst Dir.
ATTN GEN FILE
DATE: 4 September 1979

MEMORANDUM

TO: Assistant Director

FROM: Legal Counsel

FILE NO.:

SUBJECT: PAYETTE LAKES SUBDIVISIONS

QUESTIONS:

1. In State-developed subdivisions at Payette Lake, did the Board make a gift of the streets, alleys and common areas to the county?
2. Are the streets and alleys open for use by the general public or restricted to use by the lot owners and lessees of the subdivision?

CONCLUSIONS:

1. The Board did not make a gift of the streets and alleys. Rather, the streets and alleys enhanced the value of the lots and therefore the Board received a maximum return from the subdivision as a whole. The language of the plat indicates an attempted dedication of the streets and alleys to the County. However, the County did not formally accept the dedication and did not actually maintain the streets and alleys.
2. Since the County neither formally accepted nor actually maintained the streets and alleys, the streets and alleys of the subdivisions are open only to the lot owners and lessees subject to the regulation of the Board and the Director of the Department of Lands, who retained title thereto.

ANALYSIS:

In 1932 and again in 1948 the State Board of Land Commissioners approved and recorded subdivision plats on insane asylum endowment land on the west side of Payette Lake. These subdivisions are Payette Lakes Cottage Sites, Pine Crest Addition and the Cedar Knolls addition. The plats for these subdivisions all included a dedication of streets and alleys to the public use; the 1932 plats further dedicated commons and public grounds to public use. The County has refused to accept the responsibility for maintenance of the streets although occasional work has been done in the past by County crews. The 1932 plat included two common areas, several roads and alleys providing access to Payette Lake. These access points have been considered historically as well as by the Board as access for the lessees and owners of lots within the subdivisions rather than as access for the public at large.

The jurisdictional responsibility for the access points is important in the administration of the Lake Protection Act. The lessees have

repeatedly asked the Department of Lands for permits to place jointly-owned floats at the access points. If the State retained ownership, in spite of the dedication on the plat, then the Department of Lands could issue permits in the name of the State for mooring facilities. If the State does not own the access points, then the County and the State would be the jurisdictional authority. The question of ownership of the roads is also important to determine responsibility for maintenance and authority for granting easements for the Payette Lakes sewer lines.

1) The plat for the Payette Lake Cottage Sites which was recorded in 1932 contains the following language:

... said tract and premises to be designated as the Payette Lake Cottage Sites, and [the State of Idaho] does by these presents donate and dedicate the streets, roads, alleys, commons and public grounds as shown on this plat to the use of the public forever.

The question is whether the Board made an improper gift without compensation. It is clear from Idaho Code, 58-317 that the Board is empowered to divide State land into subdivisions and record the plat in the County where the lands are situated. Chapter 13, Title 50, Idaho Code, requires a plat of a subdivision to include streets and alleys. The Board, like a private subdivider, increased the value of lots in the subdivision by providing access roads to the lots. The lots without access would have minimal or no value. The Board received return on the land underlying the streets and alleys through the enhanced values of the adjoining lots. Thus, the Board did not make a gift without compensation of the lands underlying the streets and alleys.

Another important issue is whether the County controls the streets and alleys on behalf of the general public or whether the State Land Board and Department of Lands control the streets and alleys for the benefit of the lot owners and lessees. Although the plat for the subdivision was officially recorded in the County, there is no record of official acceptance of the streets and alleys by the County. Nor has the County performed anything more than occasional, minimal maintenance on these roads.

2) The preceding analysis showed that the access roads were designed to increase the value of the lots. Although the language on the plat purports to donate and dedicate the streets to the public, the intent was to dedicate the streets to the public who purchased or leased lots within the subdivision, rather than the general public. This analysis is consistent with the previous conclusion that the streets were intended to increase the value of the lots.

These conclusions are supported by the record that the County neither desires the responsibility for maintenance of the streets nor in the past has performed maintenance to any great extent. To the contrary, the State has provided some maintenance and improvement services.

Assistant Director
September 4, 1979
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Also, the County on June 11, 1973, officially vacated a roadway between lots 19 and 20. This should not be construed as evidence of County ownership, but rather a clear indication that the County does not want responsibility for maintenance and improvement of the streets. Finally, since the State has used and maintained periodically the streets, it may have a prescriptive right of ownership thereto, apart from any other claim.

In summary, the County's lack of formal acceptance of the streets and alleys leads to the conclusion that the State retained ownership thereof. Moreover, it is evident that the Board intended that these streets benefit the lots of the subdivision. It is only reasonable therefore to conclude that the streets and alleys may be used today solely by lot owners and lessees rather than the general public, subject to the regulations of the Department and the Board.

LMR:jh *AMR.*

EXHIBIT B

MEMORANDUM

TO: Stan Hamilton
Director

DATE: 1-19-86

FROM: Bob Becker *Bob*
Deputy Attorney General

FILE NO.:

SUBJECT: Dedicated Streets, Roads, Etc. on Lands Adjacent to
Payette Lake

CONFIDENTIAL -- PREPARED IN ANTICIPATION OF LITIGATION

I have undertaken a review of Mark Riddoch's memoranda on this subject. Also I have viewed the problem on the ground with Bryce Taylor. The following is a factual and legal summary as I see the problem.

FACTUAL SUMMARY

In 1932 and 1948 the State Board of Land Commissioners approved and recorded subdivision plats on insane asylum endowment lands on the west side of big Payette Lake near McCall, Idaho. These subdivisions consist of Payette Lake Cottage Sites, Pine Crest Addition and the Cedar Knoll Addition. Both plats included a dedication of streets and alleys to the public. Further, the 1932 plats dedicated commons and public grounds to the public. Included in these dedicated areas are numerous access ways leading down to the beach of Payette Lake.

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There is no record anywhere in the minutes of the Valley County Commissioners that they formally accepted these dedications. Furthermore, department staff have informed me that there has been almost no maintenance conducted by the county since these dedications were effected. Apparently the county has been almost entirely consistent in its denial of any claim to these dedicated areas. The only aberration in the county's position that I am aware of occurred in 1947 when the county approved a petition to close and abandon a section of a dedicated road. The petition was filed by an adjacent private landowner who had purchased the property from the state.

Presently, we have several different situations involving these dedicated areas. First, we have these dedicated roads, streets, etc. in areas where the state no longer has any adjacent ownership interests. In other areas, however, the state still has numerous leased lots adjacent to these dedicated streets, roads and access ways.

ANALYSIS

I have thoroughly reviewed Mark Riddoch's earlier research on this question, particularly his memo of August 18, 1981, and agree for the most part with his analysis. I will not reiterate what

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he has stated there other than to make comments about the two major legal arguments that point towards retained ownership of these dedicated areas with the state.

First of all, the trust responsibilities of the State Board of Land Commissioners preclude the board from dedicating and thereby divesting title to these access ways. This rule was laid down in a case out of Colorado involving facts very similar to the situation here. In Tuttle v. County Commissioners of Grand County, 44 Colo. App. 334, 613 P.2d 641 (1980), the Colorado Court of Appeals held that the Colorado Board of Land Commissioners could not dedicate streets and roads within a subdivision to the public. The court stated that the Board retained title to these areas. The Colorado court considered constitutional language very similar to article 9, section 8 of the Idaho Constitution, which governs the activities at issue here. My legal research of this matter revealed no other cases prior to or after Tuttle that are on point.

Based on Tuttle then, the Land Board could not convey title to these roads, streets and access ways by dedication but rather retained title thereto. (The only place that I would have a problem with such a conclusion is if the Land Board subdivided a parcel of property, dedicated streets and roads to the public and thereafter sold the entire platted subdivision. In that case, I would argue

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that the board could permissably dedicate certain areas to the public since such a dedication would certainly enhance the value of the lots. Further, if the board divested title to all the lots within the subdivision, there would be no reason whatsoever for the board to retain ownership to narrow strips for roads, streets, etc. The fair market value of these dedicated areas would certainly have been reflected in the enhanced value of the lots which were sold.)

However, in the case at hand, the situation is that the state still has ownership to numerous parcels adjacent to and served by these dedicated areas. Therefore, I believe that the rule in Tuttle applies.

The second main argument for state ownership is the majority rule that acceptance of a dedication is necessary for a valid dedication. Riddoch pretty well laid this out in his memo of August 18, 1981 and I won't repeat it all here. As he stated there, acceptance can be manifested either by a formal act such as a motion made at a county commissioners meeting or by actual maintenance and use of the dedicated areas. As stated earlier, the department can find no evidence that Valley County formally accepted the dedication, and the county has not conducted regular maintenance of the streets, roads and access ways. In fact, the county has conducted virtually no maintenance whatsoever outside

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of some minor snow removal and some minor repair work; furthermore, the county has consistently taken the position that it does not own the access areas. Therefore, the Land Board has a very good argument that it retained ownership of these access areas.

CONCLUSION

Based on the above analysis, it is my opinion that the Land Board does in fact own the areas that were ostensibly dedicated to the county. To clear up any cloud to the state's title though, I would recommend that the department approach the county and ask for a disclaimer to any and all access areas that we have an ownership interest in at this time. To do so we will have to have sufficient legal descriptions to include in the disclaimer and to locate the areas on the ground. Once this is accomplished, the department can then begin its determination of what to actually do with the access areas -- whether to retain the access areas or consolidate them into adjacent state lots if they are no longer needed. Furthermore, the department will have to approach each individual access area problem on a case by case basis and deal with each accordingly. For example, the access area bordering Eugene Thomas' property presents its own unique problems which can

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be solved either through a sale, exchange or through retention of ownership. But before it can be resolved the department will have to conduct a survey so that the state knows exactly where that access area is located.

RJB/pks