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BOISE, IDAHO

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and Wagon Wheel Bay Dock Association, Inc.

**BEFORE THE STATE BOARD OF LAND COMMISSIONERS**

SHARLIE-GROUSE )  
NEIGHBORHOOD ASSOCIATION, )  
INC., )  
 )  
Petitioners, )  
 )  
vs. )  
 )  
IDAHO STATE BOARD OF LAND )  
COMMISSIONERS, )  
 )  
Respondent, )  
 )  
and )  
 )  
PAYETTE LAKES COTTAGE SITES )  
OWNERS ASSOCIATION, INC., an )  
Idaho non-profit corporation, and )  
WAGON WHEEL BAY DOCK )  
ASSOCIATION, INC., an Idaho non- )  
profit corporation, )  
 )  
Intervenor/Respondents. )  
 )

**MEMORANDUM IN SUPPORT OF  
MOTION FOR SUMMARY  
JUDGMENT**  
  
**(Intervenor-Respondents, Payette  
Lakes Cottage Sites Owners  
Association, Inc. and Wagon Wheel  
Bay Dock Association, Inc.)**

COME NOW Intervenor/Respondents Payette Lakes Cottage Sites Owners Association, Inc. (“PLCSOA”) and Wagon Wheel Bay Dock Association, Inc. (“WWBDA”), by and through their attorneys, Mark D. Perison, P.A., and hereby move the Hearing Officer for a recommendation that this Motion for Summary Judgment be granted and the Petition dismissed as a matter of law.

## I. INTRODUCTION

PLCSOA and WWBDA hereby adopt and incorporate the Memorandum in Support of Motion for Summary Judgment filed by the State Board of Land Commissioners (“Land Board”), including its recitations of Undisputed Material Facts and Argument, as well as the supporting Affidavit of Joy M. Vega, and all exhibits attached thereto. In addition, PLCSOA and WWBDA offer the following argument in support of their Motion for Summary Judgment.

## II. BACKGROUND

The Land Board has accurately set forth the context and timeline for Sharlie-Grouse Neighborhood Association, Inc.’s (“SGNA”) involvement in relation to the conveyance of the roads and common areas via quitclaim deeds from the Land Board to PLCSOA, and this timeline will not be repeated here. However, this case did not occur in a vacuum, and cannot be fully understood without needed context resulting from the history of previous actions brought by SGNA and/or its members that are related to the current Petition.

PLCSOA and WWBDA have intervened in this matter to defend against SGNA's efforts to undermine the Quitclaim Deed and Amended Quitclaim Deed ("Deeds") from the Land Board to PLCSOA, which quitclaimed the State's interest in roads and common areas located within the boundaries of the PLCSOA. These roads and common areas are situated along the shores of Payette Lake. As the titled owner of these roads and common areas, PLCSOA leased the littoral rights associated with one of those common areas, known as Community Beach, to WWBDA. In accordance with its lease, WWBDA ultimately constructed an eight-slip community dock extending from Community Beach in May 2018, despite numerous legal maneuvers from SGNA and/or its members, pursued in an effort to thwart the dock. Affidavit of Kevin Hanigan, ¶¶ 7-8.

While the common areas and roads were conveyed via quitclaim deeds in 2014 and 2015 (with approval for the conveyance from the Land Board occurring in October 2013<sup>1</sup>), neither SGNA nor its members took any administrative or other legal action regarding such conveyances at that time. Rather, SGNA members waited until 2017 to take any legal action at all, which timing corresponded to WWBDA's application to the Idaho Department of Lands ("IDL") for an encroachment permit required prior to install the dock upon the waters of Payette Lake. This encroachment permit was granted to WWBDA following a public hearing conducted by IDL.

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<sup>1</sup> Affidavit of Joy M. Vega, Exh. "6," Resp't 0304-0306.

The first legal action taken by SGNA members was to seek judicial review to overturn IDL's decision to grant the encroachment permit to WWBDA. The petition for judicial review was brought by petitioners Zephaniah and AnnMarie Johnson, Andrea Umbach, and Cottage Sites, LLC, in *Johnson v. Idaho Department of Lands*, Valley County Case No. CV-2017-163 ("Judicial Review").<sup>2</sup> Even though it was WWBDA's encroachment permit that the SGNA petitioners sought to overturn, they did not name WWBDA in their petition, and WWBDA was forced to intervene to protect its interests.

The petitioners' effort to overturn IDL's decision to grant the encroachment permit was unsuccessful. In his Opinion on Appeal, Judge Jason Scott, Fourth District Judge for Valley County, upheld IDL's decision and awarded WWBDA its attorney fees and "delay damages." Soper Aff., Exh. "A," pp. 12-13. In his follow-up Order Awarding Litigation Expenses and Delay Damages, Judge Scott stated:

Finally, while Petitioners are correct that a sizeable award of attorney fees could deter future petitioners from pursuing future appeals of a similar sort, the deterrent effect is simply a consequence of faithful judicial application of I.C. § 58-1306(c). The legislature provided for fee-shifting, seemingly wanting prospective appellants to think carefully about whether there are grounds for appeal. *There were not grounds for this appeal.*

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<sup>2</sup> All of the petitioners in the Judicial Review, and/or their principals, are believed to be members of SGNA. Diane Bagley is listed as the president of SGNA, AnnMarie Johnson is listed as secretary, and Cutler Umbach is listed as the registered agent, on SGNA's Annual Report dated June 26, 2018, filed with the Idaho Secretary of State. Soper Aff., Exh. "I." Diane Bagley is listed as the manager of Cottage Site, LLC, on its Annual Report dated December 19, 2018, filed with the Idaho Secretary of State. ("Soper Aff., Exh. "J.")

Soper Aff., Exh. “B,” p. 5 (emphasis added); Soper Aff., Exh. “C.” The amount of the award to WWBDA was \$23,320.11.

While the Judicial Review was pending, SGNA members Zephaniah and AnnMarie Johnson, Cottage Site, LLC, Andrea Umbach, Cutler and Nancy Umbach, and others brought a second lawsuit against PLCSOA, in *Johnson v. Payette Lakes Cottage Sites Owners Association, Inc.*, Valley County Case No. CV-2017-204 (“Second Lawsuit”).<sup>3</sup> In that case, the SGNA members sought to invalidate WWBDA’s lease of PLCSOA’s littoral rights as a means to thwart the installation of WWBDA’s dock. Despite the fact that it was WWBDA’s lease that the plaintiffs sought to invalidate, WWBDA was not named in that lawsuit, and was again forced to intervene to protect its lease rights.

The SGNA plaintiffs were unsuccessful in the Second Lawsuit as well, as Judge Scott ultimately dismissed all of their claims with prejudice. Soper Aff., Exh. “D,” p. 26; Soper Aff. Exh. “E.” Interestingly, in the course of the Second Lawsuit, the plaintiffs at one point brought a motion to amend their complaint to include a count to invalidate the Deeds at issue in this action for precisely the same reason as alleged here—that the State failed to conduct an auction for the property. However, the plaintiffs withdrew this motion prior to hearing, with their counsel indicating on the record that they lacked standing to bring such a count. In his very thorough

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<sup>3</sup> Again, all of the plaintiffs in the Second Lawsuit, and/or their principals, are believed to be members of SGNA.

Memorandum Decision and Order, Judge Scott set forth the context of the entire case, and with respect to the public auction issue, stated:

While awaiting the Court's decision, Plaintiffs filed their first motion to amend their complaint. *They sought permission to pursue a claim that the State's original and amended quitclaim deeds to the Owners Association are invalid for failure to hold a public auction.* Plaintiffs previously had sought summary judgment on an unpleaded claim to that effect, but during the hearing on that motion (held on December 21, 2017), the Court made clear that it would not consider an unpleaded claim on summary judgment. So, to pursue the public-auction theory, Plaintiffs had to move to amend their complaint. That motion to amend was set for hearing on January 29, 2018. On the day of the hearing, however, Plaintiffs withdrew the motion. *They explained to the Court, during the later hearing on the motions now at hand* (described in this decision's next few paragraphs), *that they did so because they were convinced by the opposing arguments that they lacked standing to pursue the public-auction theory.*

(Soper Aff., Exh. D, pp. 4-5) (emphasis added).

Neither the Judicial Review nor the Second Lawsuit was appealed; however, this was not the end of the legal efforts to thwart WWBDA's dock. This time, SGNA itself sought recourse, first through the City of McCall's staff, then the City's Planning and Zoning Department, and finally, the Valley County Board of Commissioners, including a request for reconsideration of its adverse decision. The first step taken in this succession of actions was to seek a stop-work order from the City's staff that was issued literally as WWBDA's dock was being installed, on May 25, 2018. Soper Aff., Exh. "F," p. 1. City staff reversed itself shortly thereafter, and rescinded the stop-work order on June 8, 2018. *Id.*

SGNA appealed this action by the City's staff, and in each of the successive proceedings, SGNA argued that a City ordinance required WWBDA to obtain a

conditional use permit prior to installation of its community dock. At each step, SGNA's arguments were rejected. Soper Aff., Exh. "F," pp. 4-5; Soper Aff., Exh. "G," pp. 7-8; and Soper Aff., Exh. "H." SGNA did not seek judicial review of the Commissioners' final denial of SGNA's request for reconsideration.

In the meantime, SGNA's current Petition was filed very shortly after obtaining the erroneous stop-work order.<sup>4</sup> It is against this backdrop, then, that the current Petition must be understood. While SGNA's purported goal in this matter is to seek a declaratory ruling that the Deeds themselves are void, this result is simply a means to an end. The true purpose of this action is to reach a result whereby WWBDA is forced to remove its dock from Community Beach. However, for all of the reasons set forth in the Land Board's Memorandum and as set forth below, SGNA's Petition should be dismissed.

### III. ARGUMENT

#### A. SGNA is a Stranger to the Deed and Therefore Lacks Standing.

The doctrine of standing focuses on the *party* seeking relief and not on the *issues* the party wishes to have adjudicated. *Miles v. Idaho Power Co.*, 116 Idaho 635, 641, 778 P.2d 757, 763 (1989) (citing *Valley Forge College v. Americans United*, 454 U.S. 464, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982)) (emphasis added). Further,

A generalized interest in seeing that the government follows the law or its regulations is insufficient to confer standing absent some particularized harm to the party.

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<sup>4</sup> SGNA requested and received the stop-work order from the City on May 25, 2018. Soper Aff., Exh. "F," p. 1. The current Petition was filed on May 29, 2018.

*Pro Indiviso, Inc. v. Mid-Mile Holding Trust*, 131 Idaho 741, 746, 963 P.2d 1178, 1183 (1998) (citing *Student Loan Fund of Idaho, Inc. v. Payette County*, 125 Idaho 824, 828, 875 P.2d 236, 240 (Ct.App.1994)).

In *Pro Indiviso*, the purchaser at a tax deed sale was seeking to eject the occupants of the property. The occupants sought to invalidate the tax deed due to claimed procedural irregularities. *Id.* at 745, 963 P.2d at 1182. However, because the occupants had no interest in the property itself, the Supreme Court held that they could not claim the requisite individualized harm, and therefore did not have standing to contest the tax deed sale. *Id.*

Here, neither SGNA nor its members have alleged an interest in the property at issue. SGNA merely alleges that it wanted the Land Board to deed certain roads and Community Beach to SGNA, and the Land Board declined to do so.<sup>5</sup> This request and denial is not an “interest” in the property.

The titled owner here is PLCSOA, with the former owner being the State of Idaho. “Idaho law presumes that the holder of title to property is the legal owner of that property.” *Luce v. Marble*, 142 Idaho 264, 270, 127 P.3d 167, 173 (2005) (citing *Hettinga v. Sybrandy*, 126 Idaho 467, 469, 886 P.2d 772, 774 (1994); *Russ Ballard & Family Achievement Inst. v. Lava Hot Springs Resort, Inc.*, 97 Idaho 572, 579,

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<sup>5</sup> It should not be lost on this tribunal that despite SGNA’s contention that an auction was required for conveyance of the roads and common area, SGNA did not actually offer to purchase the common area and roads, via an auction or otherwise. Rather, SGNA simply requested that the Land Board convey that property to it. Vega Aff., Exh. 6, Resp’t 0292-0297.

548 P.2d 72, 79 (1976)). As strangers to the Deeds, with no interest alleged in the property at issue, SGNA lacks standing to seek invalidation thereof.

B. SGNA Has Not Alleged an “Injury,” and Therefore Does Not Have Standing.

A party must have a “distinct and palpable injury” in order to be conferred standing. *State v. Philip Morris, Inc.*, 158 Idaho 874, 881, 354 P.3d 187, 194 (2015) (quoting *Young*, 137 Idaho at 104, 44 P.3d at 1159) (quoting *Miles*, 116 Idaho at 639, 778 P.2d at 761)). Even more basic to this analysis, however, is that SGNA needs to have had an “injury” to begin with.

While Petitioners will argue that its “injury” is the alleged violation of the Idaho Constitution and statutes when the Land Board conveyed the roads and common areas to PLCSOA without a separate auction, the true “injury” felt by Petitioner and its members is the existence of the dock. This is made clear by the fact that SGNA and its members have known since 2013 that the Land Board was considering conveying the roads and common areas to PLCSOA. However, it was not until WWBDA sought approval for its dock that SGNA’s legal activities began. Had the true injury been the conveyance of the land itself, SGNA’s legal activities would have (and should have) begun immediately following the approval of the conveyance, or at least the conveyance itself. In other words, the evidence that SGNA’s injury is not truly the conveyance, but rather the existence of the dock, is the very fact that SGNA did nothing until approval for the dock was sought.

However, even if it were true that the Land Board conveyed the roads and common areas without authority, SGNA does not allege how this is in fact an “injury” to SGNA or its members. Simply wishing that it could have been deeded title to the common area and roads and not having that wish fulfilled is not an “injury” as that word should be understood in the context of the standing analysis. Indeed, in order to have been injured by the Land Board, SGNA or its members would need to have been entitled in some way to this conveyance.

Even after a careful reading of the Petition, it is still not clear that an injury has been alleged at all. Paragraphs 5 through 8 of the Petition are about as close to such an allegation as SGNA comes, and even still, the contention is simply that SGNA wanted to obtain title to Community Beach and nearby roads, and was denied this request by the Land Board. Paragraphs 9-19 essentially allege that the Land Board failed to capture the value of the common areas and roads. However, any such injury would have resulted in harm to the beneficiaries of the endowment funds, not SGNA or its members.

The remainder of the Petition sets forth the alleged violations of the Idaho Constitution and Idaho statutes; however, the inquiry should not even get this far. Recall, under *Miles*, the focus of the standing inquiry is the party seeking relief, not the issues that party seeks to have adjudicated. In other words, because SGNA did not experience an injury at all, the issues it seeks to have heard are irrelevant.

C. SGNA's "Injury" is Not Redressable in this Forum.

The Land Board has discussed its lack of authority to reverse a previous action. In a more general sense, though, this tribunal simply cannot give Petitioner the relief it seeks, even if the Land Board did have such authority. This is actually made clear by Petitioner's own prayer for relief. SGNA seeks a declaration that:

Because the Deed and Amended Deed are void and without effect, the Board continues to hold title to the State Lands, and *may* commence with a public auction thereof in accordance with the requirements of state law.

Petition, ¶ 25(h) (emphasis added). Even Petitioner knows that it cannot force the Land Board to auction the property to SGNA or anyone else. Without the ability to force an auction, SGNA's Petition will have accomplished nothing toward thwarting WWBDA's dock, even if it were able to convince the Land Board to undo the Deeds. The Supreme Court has stated:

Standing's redressability element ensures that a court has the ability to order the relief sought, which must create a substantial likelihood of remedying the harms alleged. Redressability requires a showing that "a favorable decision is *likely* to redress [the] injury, not that a favorable decision will *inevitably* redress [the] injury." However, it cannot be only speculative that a favorable decision will redress the injury.

*Employers Resource Management Company v. Ronk*, 405 P.3d 33, 36, 162 Idaho 774, 777 (Idaho, 2017) (quoting *Tucker v. State*, 162 Idaho 11, 24, 394 P.3d 54, 67 (2017) (internal citations omitted).

The State has already indicated its desire not to further fractionalize the roads and common areas within the PLCSOA boundaries to create little enclaves of neighbors who might block off access to the lake. Vega Aff., Exh. 6, Resp't 0298-

0299. So not only is the ultimate relief sought by SGNA speculative, *i.e.* convincing the Land Board to conduct a separate auction for roads and common areas, it is almost certainly not going to happen. Without the ability to redress SGNA's concerns, this tribunal has no authority to entertain SGNA's Petition and it should be dismissed.

D. SGNA Has Failed to Join Indispensable Parties.

PLCSOA and WWBDA were forced to intervene in this matter to protect their interests. Even if this tribunal was the proper forum to redress SGNA's concerns, SGNA also failed to name the numerous parties who have purchased cottage sites from the State at auction within PLCSOA for amounts higher than the lots would be valued independently without lake access via the common areas. Each of these purchasers have acquired an intervening interest in the roads and common areas that would be affected if the Deeds were deemed void. Hanigan Aff., ¶¶ 1-10; Affidavit of Andrew Connolly, ¶¶ 1-6; Affidavit of Laurie McNamara, ¶¶ 1-7; Affidavit of Mike Riddle, ¶¶ 1-7.

In determining which parties must be joined in a particular action, the Supreme Court has made the following distinction:

It is not necessary that all persons with an interest in the subject matter of the suit be joined as parties, but only those who have an interest in the object of the suit.

*Pro Indiviso*, 131 Idaho at 746, 963 P.2d at 1183.

In *Pro Indiviso*, the purchaser at a tax deed sale who was seeking ejectment of the occupants did not name the former owner of the property. The occupants alleged that the former owner was an indispensable party. However, the Court held that the former owner was not an indispensable party because the district court had only been asked to determine the interests *as between* the purchaser of the property and the current occupants. The former owner was not necessary for this determination.

In contrast, the object of SGNA's Petition here is invalidation of the Deeds. All cottage site owners who purchased at auction did so subject to a higher valuation due to the fact that access to the roads and common areas was included. Because the conveyance of the common areas and roads to PLCSOA is the very object of the Petition, every auction purchaser is interested in the outcome here and is thus an indispensable party. SGNA has failed to join indispensable parties and its Petition should be dismissed.

E. SGNA's Petition is Barred by Laches.

Finally, and along the same lines as the discussion regarding indispensable parties, SGNA's tardy request to invalidate the Deeds, occurring more than four years after the Land Board approved the conveyance of the roads and common areas, would work to upend dozens of parties' property interests that have vested in the meantime, and should be barred by laches.

Like quasi-estoppel, laches is an affirmative defense and the party asserting the defense has the burden of proof. Whether or not a party is guilty of laches is a question of fact. The necessary elements to maintain a defense of laches are:

(1) defendant's invasion of plaintiff's rights; (2) delay in asserting plaintiff's rights, the plaintiff having had notice and an opportunity to institute a suit; (3) lack of knowledge by the defendant that plaintiff would assert his rights; and (4) injury or prejudice to the defendant in the event relief is accorded to plaintiff or the suit is not held to be barred.

Because the doctrine of laches is founded in equity, in determining whether the doctrine applies, consideration must be given to all surrounding circumstances and acts of the parties. The lapse of time alone is not controlling on whether laches applies.

*Thomas v. Arkoosh Produce, Inc.*, 137 Idaho 352, 359, 48 P.3d 1241, 1248 (2002)(internal citations omitted).

If SGNA now claims that the Land Board "invaded its rights" due to the conveyance to PLCSOA, it certainly had notice and opportunity to protect its interests sooner than nearly five years after such action was taken. Here, we know that SGNA was aware, since 2013, that the Land Board intended to convey the roads and common areas to PLCSOA. Vega Aff., Exh. 7, Resp't 0306-0307. At the October 15, 2013 public meeting, Jay Gustavson spoke on behalf of SGNA. Mr. Gustavson is the attorney who represented the SGNA members in the Judicial Review and Second Lawsuit. SGNA objected at the time, but did nothing within the requisite time frame for seeking the only recourse it had—seeking judicial review of the Land Board's action.

Further, neither the Land Board, nor PLCSOA or WWBDA knew that SGNA would contest the validity of the deeds. This is obvious from the actions each entity took subsequent to the conveyance to PLCSOA: the Land Board auctioned dozens of cottage sites, capturing the added value to each cottage site due to the purchasers'

access to the roads and common areas; PLCSOA leased its littoral rights to Community Beach to WWBDA; IDL granted WWBDA's application for an encroachment permit based on the lease of PLCSOA's littoral rights, and defended that action on judicial review; WWBDA defended itself in litigation and administrative actions brought by SGNA and its members, ultimately prevailing and installing its dock, all at great cost to its members.

For years after the conveyances, neither SGNA nor its members gave any notice to the Land Board, PLCSOA, or WWBDA that it considered the deeds to be invalid. Indeed, even after the SGNA members began their legal efforts to thwart the dock in 2017, they withdrew a motion to amend their complaint in the Second Lawsuit that would have sought to invalidate the Deeds due to their own perception that they lacked standing to do so. Soper Aff., Exh. D, pp. 4-5.

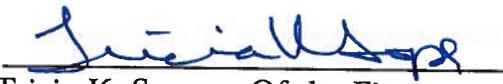
While SGNA slept on its purported rights, numerous interests have vested which will be severely prejudiced if SGNA is granted the relief it seeks. SGNA's Petition should be barred by laches.

#### IV. CONCLUSION

There are no disputed facts in this matter. For all of the foregoing reasons, the Petition should be dismissed in its entirety.

MARK D. PERISON, P.A.

DATED: April 15, 2019.

By:   
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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of April, 2019, I caused to be served a true and correct copy of the foregoing, by the method indicated, and addressed to the following:

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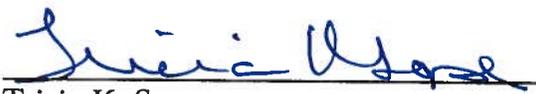
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