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DEPT. OF LANDS

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BOISE, IDAHO

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Attorneys for Intervenor/Respondents,
Payette Lakes Cottage Sites Owners Association, Inc.
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.)

**AFFIDAVIT OF TRICIA K. SOPER
IN SUPPORT OF PLCSOA &
WWBDA'S MOTION FOR
SUMMARY JUDGMENT**

STATE OF IDAHO)
 : ss.
County of Ada)

TRICIA K. SOPER, being first duly sworn upon oath, deposes and says as follows to-wit:

1. I am the attorney of record for Intervenor/Respondents Payette Lakes Cottage Sites Owners Association, Inc. (“PLCSOA”) and Wagon Wheel Bay Dock Association, Inc. (“WWBDA”), and as such, have personal knowledge of the facts set forth in this Affidavit.

2. Attached hereto as Exhibit “A” is a certified copy of the Opinion on Appeal entered January 4, 2018, in the District Court of the Fourth Judicial District of the State of Idaho, in and for Valley County, Case No. CV-2017-163-C.

3. Attached hereto as Exhibit “B” is a certified copy of the Order Awarding Litigation Expenses and Delay Damages entered March 20, 2018, in the District Court of the Fourth Judicial District of the State of Idaho, in and for Valley County, Case No. CV-2017-163-C.

4. Attached hereto as Exhibit “C” is a certified copy of the Amended Judgment entered March 20, 2018, in the District Court of the Fourth Judicial District of the State of Idaho, in and for Valley County, Case No. CV-2017-163-C.

5. Attached hereto as Exhibit “D” is a certified copy of the Memorandum Decision and Order entered April 12, 2018, in the District Court of the Fourth Judicial District of the State of Idaho, in and for Valley County, Case No. CV-2017-204.

6. Attached hereto as Exhibit “E” is a certified copy of the Judgment entered April 12, 2018, in the District Court of the Fourth Judicial District of the State of Idaho, in and for Valley County, Case No. CV-2017-204.

7. Attached hereto as Exhibit “F” is a certified copy of the Findings, Conclusions, and Decision issued in the Matter of the Appeal of Sharlie Grouse Neighborhood Association of Administrative Determination re: Wagon Wheel Bay Community Dock, adopted by the McCall Planning and Zoning Commission at a meeting held on September 11, 2018.

8. Attached hereto as Exhibit “G” is a certified copy of the Findings of Fact and Conclusions Regarding the Wagon Wheel Bay Community Dock, issued by the Valley County Board of County Commissioners on or about November 26, 2018.

9. Attached hereto as Exhibit “H” is a certified copy of the Valley County Board of County Commissioners’ letter to Spink Butler L.L.P., dated December 24, 2018.

10. Attached hereto as Exhibit “I” is a true and correct copy of the Annual Report filed by SGNA on June 26, 2018, with the Idaho Secretary of State.

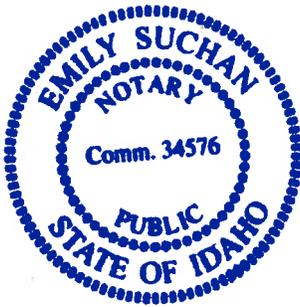
11. Attached hereto as Exhibit "J" is a true and correct copy of the Annual Report filed by Cottage Site, LLC, on December 19, 2018, with the Idaho Secretary of State.

FURTHER, YOUR AFFIANT SAITH NAUGHT.

DATED this 12th day of April, 2019.

Tricia K. Soper
Tricia K. Soper

SUBSCRIBED AND SWORN TO before me this 12th day of April, 2019.



Emily Suchan
Notary Public for Idaho
Residing at Boise, ID
Commission Expires: 08/25/2024

CERTIFICATE OF SERVICE

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

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Joy M. Vega
IDAHO DEPARTMENT OF LANDS
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Tricia K. Soper

EXHIBIT A

FILED

DOUGLAS A. MILLER, CLERK

By *DM* Deputy

Signed: 1/4/2018 11:14 AM

Date / Time: _____

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

ZEPHANIAH and ANNMARIE JOHNSON,
husband and wife; ANDREA UMBACH, a
single person; and COTTAGE SITE, LLC, an
Idaho limited liability company,

Appellants,

vs.

IDAHO DEPARTMENT OF LANDS,

Respondent,

and

WAGON WHEEL BAY DOCK
ASSOCIATION, INC.,

Respondent-Intervenor,

Case No. CV-2017-163

OPINION ON APPEAL

Last spring, the director of Respondent Idaho Department of Lands (“IDL”) issued an agency decision approving a permit application by Respondent-Intervenor Wagon Wheel Bay Dock Association, Inc. (“the Dock Association”). The permit allows the Dock Association to construct a dock off the shore of Community Beach, which is on the banks of Payette Lake. Appellants Zephaniah and AnnMarie Johnson, Andrea Umbach, and Cottage Site, LLC own lakefront properties near Community Beach. They oppose the dock. Under I.C. § 58-1306(c), they have appealed IDL’s decision. Their appeal was argued and taken under advisement on December 18, 2017. For the reasons that follow, IDL’s decision is now affirmed.

I.

BACKGROUND

In 1932, the State Board of Land Commissioners (“the Land Board”) recorded plats subdividing some property on the west side of Payette Lake. (Agency R. at 368.) More than eighty years later, in January 2015, the Land Board executed a quitclaim deed in favor of Payette Lakes Cottage Sites Owners Association, Inc. (“the Owners Association”) to portions of the platted property, including the Community Beach Common Area platted as Lot 1, Block 2, of the SW Payette Cottage Sites Subdivision (“Community Beach”). (*Id.* at 369.)

On January 12, 2017, the Dock Association obtained a non-exclusive lease of the Community Beach littoral rights from the Owners Association. (*Id.* at 25–27.) About a week later, the Dock Association filed encroachment permit application No. L-65-S-683 with IDL. (*Id.* at 7–29.) Through that permit application, the Dock Association sought permission to construct, for its members’ benefit, an eight-slip community dock off the shore of Community Beach. (*Id.*) None of the Dock Association members have lakefront homes. (*Id.* at 304–07.)

After issuing a public notice, IDL received around seventy-six objections to the application. A public hearing on the application was held on March 29. On April 27, IDL’s hearing coordinator issued a preliminary order with findings of fact and conclusions of law. The next day, the IDL director adopted the hearing coordinator’s findings of fact and conclusions of law and issued a final order approving the permit application.

Appellants filed a timely notice of appeal on May 25. On June 28, the Dock Association moved to intervene. On August 7, the Court allowed the Dock Association to intervene as a respondent. The Dock Association then moved under I.C. § 58-1306(c) and IDAPA 20.03.04.030.09 to require Appellants to post a bond designed to ensure that the Dock Association would be compensated, if it prevailed on appeal, for its litigation expenses and for

the damages resulting from appeal-related delay in dock's construction. On August 22, the Court made an oral order requiring Appellants to post a \$12,500 bond. That order was confirmed in writing two days later. The Court understands that, in satisfaction of the bond requirement, Appellants ultimately posted \$12,500 in cash.

On August 31, Appellants moved to stay proceedings pending the outcome of a related case, *Johnson v. Payette Lakes Cottage Sites Owners Ass'n, Inc.*, No. CV-2017-204, that the Court will call "the Owners Association litigation." At the time, Appellants' opening brief was due on September 5. Appellants missed their briefing deadline, evidently relying on their motion to stay as justification. On September 14, the Court denied Appellants' motion to stay as a sanction for failing, without good justification, to meet their briefing deadline. But the Court gave them more time—until September 19—to file their overdue opening brief.

Appellants complied with the new September 19 briefing deadline. On October 17, IDL and the Dock Association each filed respondent's briefs. Appellants filed their reply brief on November 14, taking one week longer to do so than was allowed by the operative scheduling order, which had been issued on August 22.

The Dock Association and IDL each moved to strike Appellants' untimely reply brief. In response, Appellants attributed the late filing to a clerical error. On November 29, the Court denied the motions to strike and agreed to consider Appellants' untimely reply brief, except to the extent it advanced arguments related to the Owners Association litigation that were not made in their opening brief.

As already noted, Appellants' appeal of IDL's decision was argued and taken under advisement on December 18, 2017. It is now ready for decision.

II.

LEGAL STANDARD

IDL is an agency and its actions are governed by the Idaho Administrative Procedures Act. I.C. §§ 58-104, 67-5201; IDAPA 20.01.01.000. IDL has authority to “regulate and control the use or disposition of lands in the beds of navigable lakes, rivers and streams, to the natural or ordinary high water mark thereof, so as to provide for their commercial, navigational, recreational or other public use” I.C. § 58-104(9)(a). In accordance with I.C. § 67-5206, IDL has made rules for community dock encroachment permits. *See* IDAPA 20.03.04.015.02.

I.C. § 67-5279 outlines the scope of judicial review of a final agency decision, such as IDL’s decision to approve the Dock Association’s encroachment application. Under that statute, an agency’s final order must be affirmed “unless the appellant shows that its substantial rights have been prejudiced,” *Kaseburg v. State Bd. of Land Comm’rs*, 154 Idaho 570, 577, 300 P.3d 1058, 1065 (2013), and also that the final order is:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) not supported by substantial evidence on the record as a whole; or
- (e) arbitrary, capricious, or an abuse of discretion.

Id. (quoting I.C. § 67-5279(3)). A final order may be affirmed “solely on the grounds that the petitioner has not shown prejudice to a substantial right,” without analyzing whether it is infirm in one of these five ways. *Hawkins v. Bonneville Cty. Bd. of Comm’rs*, 151 Idaho 228, 232, 254 P.3d 1224, 1228 (2011).

A reviewing court evaluating the factual findings made in a final order “shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.” I.C. § 67-5279(1). Instead, “[a]n agency’s findings of fact will stand if supported by

substantial and competent, although conflicting, evidence in the record.” *Williams v. Idaho State Bd. of Real Estate Appraisers*, 157 Idaho 496, 502, 337 P.3d 655, 661 (2014). “Substantial evidence is more than a scintilla of proof, but less than a preponderance.” *Pearl v. Bd. of Prof’l Discipline of Idaho State Bd. of Med.*, 137 Idaho 107, 112, 44 P.3d 1162, 1167 (2002) (citing *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 280, 939 P.2d 854, 856 (1997)).

III.

ANALYSIS

A. Substantial right

In their opening brief, Appellants assert that “[t]he proposed encroachment benefits a select few to the detriment of the Appellants and public in general. The approval of the encroachment, by extension, violates the Appellants [sic] and the publics [sic] right’s [sic] by granting exclusive private use to a portion of the community beach.” (Appellants’ Br. 4.) This is as close as they come in that brief to reckoning with their obligation to show that IDL’s decision to approve the Dock Association’s encroachment application prejudiced a substantial right of theirs. Yet even after IDL and the Dock Association challenged Appellants’ “substantial right” showing in their respondent’s briefs, Appellants continued to ignore this threshold issue in their reply brief, which never even uses the phrase “substantial right” except in quoting the statute, I.C. § 67-5279(4), that requires them to show prejudice to a substantial right. The best Appellants do on reply is to contend that the 1932 plat dedicated Community Beach to the public forever, establishing an irrevocable public right to use Community Beach, despite the Land Board’s decades-later quitclaiming of Community Beach to the Owners Association. (Appellants’ Reply Br. 7.)

To the extent Appellants have tried at all to make a “substantial right” showing, they haven’t done so successfully. That is so for two reasons.

First, IDL lacks authority to determine whether the public has rights in Community Beach by virtue of the 1932 plat, as Appellants contend. *See* I.C. § 58-104. Under Idaho law, “[a] fee simple title is presumed to be intended to pass by a grant of real property unless it appears from the grant that a lesser estate was intended,” I.C. § 55-604, and it is presumed “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). The owner of the littoral rights is the “fee owner of land immediately adjacent to a navigable lake, or his lessee” IDAPA 20.03.04.010.33. The Land Board quitclaimed the State of Idaho’s interest in Community Beach to the Owners Association in 2015. (Agency R. at 369–72.) IDL rightly recognized the presumption that the Owners Association, as the title holder, is the legal owner of Community Beach, and therefore also owns the associated littoral rights that it leased to the Dock Association. (*Id.* at 391–93.) IDL was powerless to recognize the public rights Appellants say exist. As such, it is unclear how IDL’s failure to recognize those rights could have prejudiced a substantial right of theirs. Whether those rights exist simply isn’t a proper part of this appeal; it is, instead, a subject of the Owners Association litigation, as the Court is about to discuss.

Second, even if the public has rights in Community Beach by virtue of the 1932 plat, those rights do not impede the Owners Association’s lease of its littoral rights to the Dock Association. This exact issue has been litigated and decided on summary judgment in the Owners Association litigation.¹ The conclusion reached there obtains here. Thus, even if the

¹ Mem. Decision & Order Summ. J. at 7, *Johnson v. Payette Lakes Cottage Sites Owners Ass’n, Inc.*, No. CV-2017-204, filed Dec. 28, 2017.

public has—and therefore Appellants, as members of the public, have—rights in Community Beach by virtue of the 1932 plat, those rights do not include the littoral rights. Consequently, those rights are not prejudiced by IDL’s decision to approve the dock encroachment.

Appellants have no demonstrated right to impede the Owners Association’s exercise of its littoral rights in Community Beach. They are simply owners of nearby lakefront property who prefer not to have a dock off the shore of Community Beach. This gave them a rooting interest in IDL’s decision, to be sure, but IDL’s decision nevertheless has not been shown to affect a substantial right of theirs. IDL’s decision can be affirmed on this basis alone. The Court nevertheless will proceed to consider whether IDL’s decision is so infirm as to be reversible upon a proper “substantial right” showing, as doing so yields another basis for affirmance.

B. Merits

Appellants argue that IDL’s decision is infirm because it isn’t supported by substantial evidence and is arbitrary and capricious. (Appellants’ Br. 3.) In determining whether to issue an encroachment permit, IDL must weigh “the protection of property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality” against the “the navigational or economic necessity or justification for, or benefit to be derived from the proposed encroachment.” I.C. § 58-1301. “IDL, based on its experience and expertise, is in the best position to weigh the competing interests involved in determining whether to approve additional encroachments, and [a reviewing court] will not independently evaluate those decisions unless they are not supported by the record or constitute an abuse of discretion.” *Brett v. Eleventh St. Dockowner’s Ass’n, Inc.*, 141 Idaho 517, 523–24, 112 P.3d 805, 811–12 (2005). The Court starts with IDL’s finding of a necessity or justification for the proposed dock, and then the Court turns to IDL’s analysis of the potential negatives associated with the dock’s construction.

1. Economic necessity, justification, or benefit

To show economic necessity, justification, or benefit for the proposed dock, IDL relied on the fact that the new dock location was “within approximately six-tenths of a mile from the lots owned by the eight members of [the Dock Association], and would allow [them] to walk to access their boats.” (Agency R. at 394.) An alternative location was “further away, and has a two to three year waiting list,” and charges \$1,800 per boat per season. (*Id.*)

Appellants don’t challenge the facts on which IDL relied. Instead, they argue that the facts aren’t sufficient to show an “economic necessity” for the proposed dock. To show a lack of economic necessity, Appellants state that the cost of the proposed deck would be \$51,617, which they say would pay for a rental for “many years.”² (Appellants’ Br. 5.) This evidence isn’t contained in the agency record; it is part of an affidavit supporting the Dock Association’s motion to require Appellants to post a bond. If Appellants wanted this evidence in the record, they should have requested it in accordance with I.C. § 67-5276. The information was not in the agency record or in a supplement and cannot be considered on appeal. I.C. § 67-5277.

Regardless, economic necessity isn’t the only standard—the decision can be based on other justifications or benefits. The dock would save the Dock Association members money in rental fees, would avoid the waiting-list problem, and would be more convenient to them. This is substantial evidence of a justification or benefit.

2. Protection of property

As already noted, the necessity or justification for the proposed dock was to be weighed against the need to protect other valuable things, including property. The protection-of-property factor includes the effect on neighboring property values. *See Brett*, 141 Idaho at 523, 112 P.3d

² The actual number is just under four years. Eight people renting boat slips over a four-year period at \$1,800 a season is \$57,600, well over the estimated cost of constructing the dock.

at 811. A presumption of infringement on adjacent littoral rights arises when a community dock is constructed within twenty-five feet of adjacent littoral right lines. IDAPA 20.03.04.015.13(e). IDL's decision notes that the proposed dock would be twenty-five feet from one neighbor and 228 feet from the other, (Agency R. at 395), which isn't close enough to trigger the presumption. Appellants do not contest this factual finding. Instead, Appellants contend that IDL failed to address their concerns about (1) the other work that will need to be done to allow access to the dock, (2) parking enforcement and the possibility of blocking the fire hydrant, (3) increased nuisance activity and possible security issues with nighttime use of the dock, (4) the absence of bathroom facilities for the dock, and (5) the lack of benefit to and decrease in property value for surrounding properties. These objections are largely speculative and unconvincing. IDL noted most of these concerns, (*id.* at 387), showing that it weighed them in coming to its decision. The Court will address only the more pertinent objections.

Appellants' strongest evidence of a risk of future decrease in property values is the following statement by Leviticus Johnson: "Increased traffic and noise will be unavoidable. I have some experience in real estate valuation, [sic] I'd say that a change in the character of the neighborhood will cause cabins to be worth less." (*Id.* at 162.) He does not state what his experience is, nor does he give an estimate of how much less the cabins will be worth. This statement is almost wholly conclusory, making it nearly impossible for IDL to weigh the actual impact on property values.

Mark Billmire, the Fire Chief for the McCall Fire Protection District, testified that his "only concern is maintaining access to the dry hydrant" near the proposed dock. (Tr. 25:23–26.) Billmire indicated he would have no concerns as long as parking was adequately enforced. (Tr. 26:3–16.) Marlee Wilcomb, who lives close to the proposed dock, stated that her insurance

would go up \$500 a year “if the hydrant was not available for use.” (Tr. 69:13–21.) However, Kevin Hanigan indicated the Dock Association would take measures to prevent people from parking in front of the fire hydrant, such as allowing only one disabled parking spot as far away as possible from the hydrant and prohibiting all other parking except for loading and unloading boats. (Tr. 17:16–18:11.) In fact, the Dock Association has rules implementing these measures. (Agency R. at 28.) IDL’s assessment of this factor is supported by substantial evidence.

3. Protection of navigation

IDL’s decision finds that motorized and non-motorized boats use the area where the proposed dock would be, but the dock wouldn’t impede navigation any more than any other dock. (*Id.* at 395.) There was testimony that the proposed dock would impede non-motorized boats, cut down the swimming area, and imperil children who swim there. (*Id.* at 165, 181, 189, 248; Tr. 74:24–75:5.) However, an aerial shot of Wagon Wheel Bay shows there are currently at least six docks in close proximity to the proposed dock’s location. (Agency R. at 287.) The presence of those other docks greatly weakens the argument that this dock must be scuttled to protect navigation in this portion of Payette Lake. Substantial evidence supports IDL’s conclusion regarding the protection-of-navigation factor.

4. Protection of wildlife and aquatic life

IDL’s decision notes that “there was no evidence that the proposed dock would in fact negatively impact fish, wildlife and aquatic life.” (*Id.* at 395.) Appellants say there was testimony that the dock would impair the fishing area and that it would harm wildlife. After reviewing Appellants’ thirty citations to the record, though, the Court sees mere assertions that the dock will impede fishing; that deer, raccoons, and moose visit Community Beach; and that the dock would harm the wildlife. The wildlife seemingly coexists with the six other nearby docks, with no clear reason why this dock is uniquely threatening.

IDL issued a notice regarding the proposed dock to eight governmental agencies, including the Idaho Department of Fish and Game. (Agency R. at 388.) The only response was a set of general comments from the Idaho Department of Environmental Quality. (*Id.*) The lack of response from the Idaho Department of Fish and Game, coupled with the weakness of Appellants' evidence, is substantial evidence supporting IDL's evaluation of this factor.

5. Protection of recreation

IDL's decision notes that recreational activities may be impacted by the proposed dock, but that current boating activity could disrupt recreational activities even without the dock. (*Id.* at 395–96.) IDL's conclusion is supported by substantial evidence. A letter from Appellant Andrea Umbach states that the “shallow point [on Wagon Wheel Bay] consistently grounds boats,” (*id.* at 94), which shows that boats not infrequently attempt to go through the swimming area. Having a dock cut across the shallow area would deter boaters from attempting to cut through the swimming area, making the area somewhat safer.

6. Protection of aesthetics

IDL's decision finds that the protection-of-aesthetics factor is “neutral” because some may find that past changes, such as adding “sod, a trail and riprap,” made the area more aesthetically pleasing and other people may not. (*Id.* at 396.) Past development of the area has little to do with what impact the dock itself will have on aesthetics. It appears the dock will have some impact on the aesthetics of Wagon Wheel Bay, but given that there are so many docks in close proximity already, the impact will be slight. Thus, this factor may militate slightly in Appellants' favor rather than being neutral.

7. Protection of water quality

As to protection of water quality, IDL's decision finds an absence of evidence that the proposed dock will adversely affect water quality. (*Id.*) The decision notes objector concerns

about increased human waste and trash, but correctly observes the public already has a right to recreate in and navigate through the waters off the shore of Community Beach, so risks associated with human waste and trash in the water are present regardless of the proposed dock. (*Id.*) This conclusion is supported by substantial evidence.

When the record is considered as a whole, it is clear that there is enough evidence to substantiate IDL's decision. The Court simply isn't empowered to substitute its own judgment for IDL's, which is what Appellants really want here. Further, the Court holds that IDL's decision was not arbitrary and capricious, given that it is supported by substantial evidence and given IDL's generally careful consideration of the matter. The decision therefore would be affirmed even if Appellants had shown that it prejudices a substantial right of theirs.

C. Litigation expenses

The Dock Association seeks an award of its litigation expenses under I.C. § 58-1306(c) and IDAPA 20.03.04.030.09. The former required the Court to order Appellants to post a bond in an amount designed to “insur[e] payment to the applicant . . . costs and expenses, including reasonable attorney’s fees, incurred on the appeal in the event the district court sustains the action of the director.” I.C. § 58-1306(c). The latter required the same thing, using slightly different wording. IDAPA 20.03.04.030.09. As a result, the Court ordered Appellants to post a \$12,500 bond. The Court understands Appellants satisfied this requirement by posting \$12,500 in cash. In any event, the Dock Association argues that these provisions require an award of its litigation expenses. Appellants offer no contrary argument in their briefs. The Court agrees that these provisions supplant the “American rule” in this narrow context; a contrary ruling would, in large part, defeat the purpose of the bond requirement. Because IDL's decision is affirmed, the Dock Association, as encroachment applicant, is entitled to an award of its litigation expenses. The amount of the award will be liquidated according to the procedures specified in I.A.R. 40

and I.A.R. 41. See I.R.C.P. 84(m) (“Any procedure for judicial review not specified or covered by these rules must be in accordance with the appropriate rule of the Idaho Appellate Rules to the extent not contrary to this Rule 84.”).

In conclusion, the Court affirms IDL’s decision in its Case No. PH-2017-PUB-50-001 to grant encroachment permit application No. L-65-S-683, and the Court awards the Dock Association litigation expenses in an amount to be determined.

Jason D. Scott Signed: 1/4/2018 08:06 AM

Jason D. Scott
DISTRICT JUDGE

State of Idaho	} ss.
County of Valley	
I hereby certify that the foregoing is a true and correct copy of the original on file in this office.	
Date Signed: 4/2/2019 01:57 PM	Douglas A. Miller
	Clerk
By <u>DS</u>	Deputy



CERTIFICATE OF SERVICE

I certify that on January 4th, 2018, I served a copy of this document as follows:

E. Don Copple
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DOUGLAS A. MILLER
Clerk of the District Court

By: Candice White Signed: 1/4/2018 11:14 AM
Deputy Court Clerk

EXHIBIT B

CERTIFIED COPY

Filed: 03/20/2018 08:57:43
Fourth Judicial District, Valley County
Douglas A. Miller, Clerk of the Court
By: Deputy Clerk - White, Candice

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

ZEPHANIAH and ANNMARIE JOHNSON,
husband and wife; ANDREA UMBACH, a
single person; and COTTAGE SITE, LLC, an
Idaho limited liability company,

Petitioners,

vs.

IDAHO DEPARTMENT OF LANDS,

Respondent,

and

WAGON WHEEL BAY DOCK
ASSOCIATION, INC.,

Respondent-Intervenor,

Case No. CV-2017-163

ORDER AWARDING LITIGATION
EXPENSES AND DELAY DAMAGES

On May 25, 2017, Petitioners appealed a decision by the Idaho Department of Lands (“IDL”) approving a dock permit for Wagon Wheel Bay Dock Association, Inc. They named only IDL as a party to the appeal. On June 13, 2017, Wagon Wheel asked Petitioners to stipulate to its intervention in the appeal. (Soper Aff. Supp. Mem. Litigation Expenses Ex. B.) Petitioners did not respond. (*Id.* ¶ 11.) On June 28, 2017, Wagon Wheel moved to intervene. At the hearing on that motion, which was held on August 2, 2017, Petitioners stated they had drafted a non-opposition to the motion, but they failed to submit it before the hearing. In any event, being both unopposed and plainly appropriate, Wagon Wheel’s intervention was allowed.

On August 10, 2017, Wagon Wheel filed a motion to require Petitioners to post a bond under I.C. § 58-1306(c) and IDAPA 20.03.04.030.09 to cover its estimated litigation expenses and dock-construction-delay damages. Wagon Wheel asked for a bond large enough to cover \$7500.00 to \$10,000.00 in estimated litigation expenses and \$4129.00 in estimated delay damages. On August 24, 2017, the Court ordered Petitioners to post a bond in the amount of \$12,500.00. The Court understands they posted cash in that amount.

After Petitioners requested and received multiple extensions of the deadline for their opening brief, they missed the deadline of September 5, 2017. On that date, instead of an opening brief, they filed what amounted to a motion asking for an additional extension, given their then-pending motion to stay these proceedings in deference to a companion case. Petitioners' failure to file an opening brief prompted Wagon Wheel, on September 8, 2017, to move to dismiss this appeal. On September 14, 2017, the Court declined to dismiss this appeal, but sanctioned Petitioners less harshly by denying their motion to stay without reaching its merits and by giving them only a few more days—until September 19, 2017—to file their by-then-late opening brief.

Petitioners met that new deadline. On October 17, 2017, Wagon Wheel and IDL filed separate response briefs. Petitioners filed a reply brief on November 14, 2017, one week past their deadline. The reply brief contained new arguments that are beyond the scope of this appeal and the agency record. For that reason, Wagon Wheel moved the next day to strike the reply brief. On November 27, 2017, IDL also moved to strike the reply brief or, in the alternative, be permitted to file a sur-reply brief addressing the new arguments. On November 29, 2017, the Court denied the motions to strike and to file a sur-reply brief, but informed the parties it would not consider the new arguments raised in Petitioners' reply brief.

The parties presented oral argument on December 18, 2017. On January 4, 2018, the Court issued its opinion affirming IDL's decision and awarding litigation expenses to Wagon Wheel against Petitioners in an amount to be determined later.

On January 17, 2018, Wagon Wheel filed a timely memorandum requesting \$81.11 in costs, \$19,110.00 in attorney fees, and \$4129.00 in delay damages, for a total of \$23,320.11. Petitioners filed a timely reply memorandum on January 30, 2018, in which they objected to the attorney fees as unreasonably high but did not object to the requests for costs or damages, except by asking the Court to award Wagon Wheel a total of only \$500.00.

The governing law required the Court to order Petitioners to post a bond "insuring payment to the applicant [here, Wagon Wheel] of damages caused by delay and costs and expenses, including reasonable attorney's fees, incurred on the appeal in the event the district court sustains the action of the board." I.C. § 58-1306(c); *see also* IDAPA 20.03.04.030.09 (requiring the same). In its opinion deciding this appeal, the Court held that these provisions supplant the normal "American rule" in this narrow context, and that an award to Wagon Wheel is proper. (Opinion 12–13, Jan. 4, 2018.) Petitioners seem to agree that this is the case, or at least fail to present any argument that it is not the case.

The Court awards Wagon Wheel \$81.11 in costs and \$4129.00 in delay damages, given that, as already noted, Petitioners offer no reason the Court should not do so. (Their argument that the total award should not exceed \$500.00, if accepted, would defeat the bond requirement's purpose and would not tend to promote justice.) And, in any event, Wagon Wheel's requests for those amounts are well supported. (*See* Soper Aff. Supp. Mem. Litigation Expenses Ex. A, last page; Hanigan Aff. Supp. Mem. Litigation Expenses Ex. A.)

Petitioners contest Wagon Wheel's request for \$19,110.00 in attorney fees, arguing that (1) this was a "run-of-the-mill" appeal not warranting such a high outlay, (2) the appeal's subject matter was similar to a companion case, to which some of the attorney fees should have been charged instead, (3) relying on IDL's legal work would have sufficed, and (4) awarding a substantial amount of attorney fees would deter future appeals. These arguments are not persuasive. The Court will briefly explain why.

Petitioners' attorney proffered an opinion that "[t]he legal issues were standard for this type of appeal" and that it was a "fact driven appeal." (Decl. Jay Gustavsen Supp. Obj. Intervenor's [sic] Mem. Litigation Expenses ¶ 9.) It is true that Wagon Wheel's original request of \$7500.00 to \$10,000.00 in attorney fees is much lower than the actual amount incurred in the appeal. But Wagon Wheel's inability to confine its outlay of attorney fees to its own early estimate appears to have resulted from Petitioners' actions in (1) failing to file an opening brief on time, prompting a motion to dismiss, (2) failing to file a reply brief on time, prompting a motion to strike, and (3) filing a reply brief with entirely new arguments beyond the scope of this appeal and the agency record. Additionally, Petitioners failed to act on Wagon Wheel's request for a stipulation to its intervention in this appeal, causing Wagon Wheel to incur more attorney fees than otherwise would have been necessary to obtain permission to intervene. The attorney time Wagon Wheel expended on this appeal is reasonable in the Court's judgment.

Further, the Court disagrees that Wagon Wheel has improperly allocated to this appeal attorney fees incurred in the companion case. As Wagon Wheel's counsel says, its response to Petitioners' opening brief in this appeal was filed on October 17, 2017, before it had any need, in the companion case, to brief the issues Petitioners inappropriately injected into this appeal in their reply brief. (Suppl. Soper Aff. Supp. Mem. Litigation Expenses ¶¶ 4, 6.)

The Court next addresses Petitioners' argument that Wagon Wheel simply could have relied on IDL's legal work, so only a small award of attorney fees is appropriate. That argument is baseless. The point of intervention is allowing the intervenor to represent its own interests.

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. The Court must implement the legislature's policy choice of fee-shifting.

The Court awards Wagon Wheel \$19,110.00 in attorney fees against Petitioners.

Accordingly,

IT IS ORDERED that Wagon Wheel is awarded litigation expenses and delay damages totaling \$23,320.11 against Petitioners, jointly and severally, consisting of (i) costs of \$81.11, (ii) attorney fees of \$19,110.00, and (iii) delay damages of \$4129.00.

IT IS FURTHER ORDERED that the Clerk of Court shall promptly pay over Petitioners' cash bond to Wagon Wheel, and the amount paid over shall be applied against this award.

Jason D. Scott Signed: 3/19/2018 01:17 PM
Jason D. Scott
DISTRICT JUDGE

State of Idaho }
County of Valley } ss.

I hereby certify that the foregoing is a true and correct copy of the original on file in this office.

Date Signed: 4/11/2019 11:31 AM Douglas A. Miller

Clerk

By *[Signature]* Deputy



CERTIFICATE OF SERVICE

I certify that on March 20, 2018, I served a copy of this document as follows:

E. Don Copple
Jay Gustavsen
DAVISON, COPPLE, COPPLE & COPPLE
edcopp@davisoncopp.com
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DOUGLAS A. MILLER
Clerk of the District Court

By: Cardice White Signed: 3/20/2018 08:58 AM
Deputy Court Clerk

EXHIBIT C

CERTIFIED COPY

Filed: 03/26/2018 10:18:23
Fourth Judicial District, Valley County
Douglas A. Miller, Clerk of the Court
By: Deputy Clerk - White, Candice

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Attorneys for Intervenor/Respondent,
Wagon Wheel Bay Dock Association, Inc.

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY**

ZEPHANIAH and ANNMARIE)
JOHNSON, husband and wife,)
ANDREA UMBACH, a single person,)
and COTTAGE SITE, LLC, an Idaho)
limited liability company,)
)
Appellants,)
)
vs.)
)
IDAHO DEPARTMENT OF LANDS,)
)
Respondent,)
)
and)
)
WAGON WHEEL BAY DOCK)
ASSOCIATION, INC., an Idaho non-)
profit corporation,)
)
Intervenor/Respondent.)

Case No. CV-2017-0000163-C
AMENDED JUDGMENT

JUDGMENT IS ENTERED AS FOLLOWS:

Intervenor-Respondent, Wagon Wheel Bay Dock Association, Inc., shall have judgment against Petitioners, Zephaniah and AnnMarie Johnson, Andrea Umbach, and Cottage Site, LLC, jointly and severally, in the amount of \$23,320.11, less \$12,500.00 to be distributed from the cash bond posted by Petitioners, for a total remaining judgment in the amount of \$10,820.11.

DATED: Signed: 3/26/2018 09:32 AM

Jason D. Scott
Jason D. Scott
District Judge

State of Idaho }
County of Valley } ss.

I hereby certify that the foregoing is a true and correct copy of the original on file in this office.

Date Signed: 4/2/2019 01:54 PM Douglas A. Miller
Clerk
By BS Deputy



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 26, 2018, I caused a true and correct copy of the foregoing to be served via the File and Serve system to the email that was identified as the party's service contact:

E. Don Copple
Jay Gustavsen
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*Attorneys for Wagon Wheel Bay
Dock Assoc.*

Candice White

Signed: 3/26/2018 10:18 AM

Deputy Clerk

EXHIBIT D

CERTIFIED COPY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

ZEPHANIAH and ANNMARIE JOHNSON,
husband and wife; ANDREA UMBACH, a
single person; CUTLER and NANCY
UMBACH, husband and wife; ROBERT and
DEANNE SEILER, husband and wife; and
W.H. SHARLIE, INC., an Idaho corporation,

Plaintiffs,

vs.

PAYETTE LAKES COTTAGE SITES
OWNERS ASSOCIATION, INC., an Idaho
corporation,

Defendant,

and

WAGON WHEEL BAY DOCK
ASSOCIATION, INC.,

Defendant-Intervenor.

Case No. CV-2017-204

MEMORANDUM DECISION AND ORDER

Plaintiffs claim Community Beach, on the banks of Payette Lake, is publicly accessible. Initially, they hoped a ruling in their favor would invalidate a lease by Defendant Payette Lakes Cottage Sites Owners Association, Inc. (“the Owners Association”) to Defendant-Intervenor Wagon Wheel Bay Dock Association, Inc. (“the Dock Association”) of the littoral rights associated with Community Beach. The lease positions the Dock Association to construct a dock at Community Beach, which Plaintiffs oppose. The Court previously ruled, however, that the lease wouldn’t be impaired by a finding that Community Beach is publicly accessible, so such a finding wouldn’t help Plaintiffs scuttle the dock project.

Despite not being able to scuttle the dock project, Plaintiffs still wish to pursue their public-accessibility claims. Because Plaintiffs, who own nearby properties, undisputedly have access to Community Beach even if it isn't publicly accessible, whether they have standing to pursue those claims is in question. That question arises in the context of motions for summary judgment by the Owners Association and the Dock Association. Plaintiffs try to demonstrate standing through affidavits or declarations suggesting, counterintuitively, that the properties they own near Community Beach are more valuable if it is publicly accessible than if access is limited to Plaintiffs and other owners of nearby properties. The Owners Association and the Dock Association move to strike these and other affidavits or declarations, contending they are inadmissible. They also move for sanctions under I.C. § 12-123, contending Plaintiffs have engaged in frivolous litigation conduct. Finally, Plaintiffs move to amend their complaint to, among other things, assert a new claim seeking a declaratory judgment that Plaintiffs Cutler and Nancy Umbach and Robert and Deanne Seiler have the right to use and enjoy Community Beach by virtue of covenants in exchange deeds by which they acquired their properties. This proposed claim presents a question somewhat similar to the just-described standing question: whether there is even a justiciable controversy, given the absence of any dispute between the parties as to whether the Umbachs and the Seilers have the right to use and enjoy Community Beach.

These motions were argued and taken under advisement on March 19, 2018. For the reasons that follow, the Owners Association's and the Dock Association's motions to strike are granted in part and deemed moot in part, their motions for summary judgment are granted, and their motions for sanctions are denied, as is Plaintiffs' motion to amend their complaint.

I.

BACKGROUND

Plaintiffs own lots in the Payette Lakes Cottage Sites subdivision. (Compl. ¶ I; Soper Aff. Exs. A–G, Feb. 2, 2017.) In April 2014 and January 2015, the State of Idaho issued original and amended quitclaim deeds to the Owners Association, conveying its interest in property, including Community Beach, within the boundaries of the subdivision.¹ (Compl. ¶¶ XXXVI, XXXVIII; Stacey Aff. Exs. D, E, Nov. 6, 2017.) In January 2017, the Owners Association leased the littoral rights associated with Community Beach to the Dock Association, positioning the Dock Association to build a dock there. (Compl. ¶ XLI; Soper Aff. Ex. A, Nov. 6, 2017.)

On July 10, 2017, Plaintiffs sued the Owners Association, claiming the lease is invalid. Their complaint is somewhat difficult to interpret. It refers in several instances to Count I but contains no Count I. Count I may mean the complaint's general allegations. Count II seemingly seeks a ruling that the land quitclaimed to the Owners Association had been dedicated to the public decades earlier. (Compl. ¶¶ XLV–L.) Count III seemingly seeks a ruling that that same land is subject to equitable servitude in favor of the public. (*Id.* ¶¶ LI–LXIII.) And Count IV seeks an award of quiet title that recognizes the public rights flowing from the alleged public dedication and equitable servitude. (*Id.* ¶¶ LXIV–LXXI.) Part of the relief for which Plaintiffs prayed is invalidation of the Owners Association's lease to the Dock Association of the littoral rights associated with Community Beach. (*Id.* at 18.) Because Plaintiffs' pursuit of this action jeopardized the Dock Association's lease rights, the parties stipulated for the Dock Association to intervene as a defendant. On August 31, 2017, the Court approved its intervention.

¹ Community Beach is listed as Block 2 of Lot 1 in the SW Payette Cottage Sites subdivision. (Stacey Aff. Ex. E, Nov. 6, 2017.)

A couple of months later, the Owners Association and the Dock Association moved for summary judgment against Plaintiffs' claims. They contended that no public dedication of Community Beach occurred and no equitable servitude affecting Community Beach was created. Alternatively, they contended that whether a public dedication occurred or an equitable servitude was created are questions that can be elided if the Court simply ruled that neither would divest the State of title to Community Beach, allowing the State to quitclaim its rights in Community Beach to the Owners Association as it did, and in turn allowing the Owners Association to lease the associated littoral rights to the Dock Association as it did. Plaintiffs ultimately conceded that their claims don't provide a means of invalidating the lease. But they nevertheless perceived a need to adjudicate whether the public may access Community Beach. In a decision issued on December 28, 2017, the Court granted partial summary judgment against Counts II and III to the extent those counts sought to invalidate the lease. (Mem. Decision & Order Summ. J. 7.) But, expressing a concern that Plaintiffs may lack standing to pursue Counts II and III more broadly than that, the Court declined to determine whether a public dedication occurred or an equitable servitude was created. (*Id.* at 6.) The Court invited a second bid for summary judgment, addressing standing. (*Id.*)

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.

On February 2, 2018, the Owners Association and the Dock Association filed the invited second motions for summary judgment, addressing both standing and the merits. Plaintiffs' opposition papers included declarations of Plaintiffs Zephaniah Johnson, Robert Seiler, and Cutler Umbach and of Frederick Bagley, Mark Butler, and Mark Richey. The Owners Association and the Dock Association then moved to strike those declarations. In doing so, they also revived their prior motions to strike—filed in connection with the first go-round on summary judgment and deemed moot by the Court in its December 28 decision—to the extent those prior motions challenged affidavits or declarations of Don Copple, Art Troutner, Marlee Ann Wilcomb, Finley Tevlin, and Plaintiffs Andrea Umbach and Cutler Umbach filed on November 20, 2017, and another affidavit of Don Copple filed on December 11, 2017.

On March 2, 2018, Plaintiffs moved to amend their complaint. The proposed amended complaint makes the public-dedication claim Count I. Count II is a new claim cast as one for breach of covenants included in exchange deeds by which the Umbachs and the Seilers obtained properties in the Payette Lakes Cottage Sites subdivision, but actually seeking a declaration that the Umbachs and the Seilers have the right to use and enjoy Community Beach (and other Owners Association properties) under those deeds. Count III remains the equitable-servitude claim, and Count IV remains the quiet-title claim. The proposed amended complaint also attempts to bolster Plaintiffs' effort to demonstrate standing with allegations that their properties are worth substantially less money if Community Beach isn't publicly accessible than if it is.

Finally, on March 5, 2018, the Owners Association and the Dock Association moved to sanction Plaintiffs under I.C. § 12-123. They say Plaintiffs engaged in frivolous conduct in defending against their first round of motions for summary judgment. They also say Plaintiffs engaged in frivolous conduct in pursuing their own motion for summary judgment on the unpleaded public-auction theory. And they say Plaintiffs engaged in frivolous conduct in withdrawing their first motion to amend shortly before the scheduled January 29 hearing.

All these motions were argued and taken under advisement on March 19, 2018. They are now ready for decision. It is important to note that, during the hearing, Plaintiffs' counsel expressly conceded that Plaintiffs aren't being excluded from Community Beach (though both sides agree that Plaintiffs won't be allowed to use the Dock Association's dock once it is built). Similarly, the respective counsel for the Owners Association and the Dock Association took the position that neither of their clients has authority to exclude Plaintiffs from Community Beach. Plaintiffs' counsel also expressly conceded that succeeding on any of Plaintiffs' existing or proposed claims wouldn't furnish a basis for scuttling the dock project.

II.

LEGAL STANDARDS

A. Defendants' motions to strike

Affidavits or declarations may be considered on summary judgment only to the extent they are "made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." I.R.C.P. 56(c)(4). If an opponent exercises the right to object to the admissibility of an affidavit or declaration, *see* I.R.C.P. 56(c)(2), the proponent must show that this standard is met. *E.g., Mattox v. Life Care Centers of Am., Inc.*, 157 Idaho 468, 473, 337 P.3d 627, 632 (2014) ("The party offering an affidavit must show that the facts set forth therein are admissible, that the witness is competent to

testify regarding the subject of the testimony, and that the testimony is based on personal knowledge.”). Conclusory or speculative statements don’t meet it. *E.g., id.*

B. Defendants’ motions for summary judgment

Summary judgment is proper “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” I.R.C.P. 56(a). The movant then is entitled to summary judgment unless the nonmovant “respond[s] . . . with specific facts showing there is a genuine issue for trial.” *Wright v. Ada Cty.*, 160 Idaho 491, 495, 376 P.3d 58, 62 (2016). In deciding whether to grant summary judgment, the trial court ordinarily must construe the record in the light most favorable to the nonmovant, drawing all reasonable inferences in the nonmovant’s favor. *Id.* But when the trial court—not a jury—is the trier of fact, it “is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences.” *J.R. Simplot Co. v. Bosen*, 144 Idaho 611, 615, 167 P.3d 748, 752 (2006) (quoting *Shawver v. Huckleberry Estates, L.L.C.*, 140 Idaho 354, 360–61, 93 P.3d 685, 691–92 (2004)). In any event, “[a] mere scintilla of evidence or only slight doubt as to the facts is not sufficient” for the nonmovant to avoid summary judgment. *AED, Inc. v. KDC Invs., LLC*, 155 Idaho 159, 163, 307 P.3d 176, 180 (2013).

C. Plaintiffs’ motion to amend their complaint

I.R.C.P. 15(a)(2) governs pretrial motions for leave to amend pleadings. Under that rule, trial courts “should freely give leave when justice so requires.” I.R.C.P. 15(a)(2). Whether that standard is met in a given instance is a matter of discretion. *E.g., PHH Mortg. v. Nickerson*, 160 Idaho 388, 396, 374 P.3d 551, 559 (2016). Leave to amend should be given, however, unless (i) there is undue delay, bad faith, or a dilatory motive on the movant’s part, (ii) the movant has

repeatedly failed to cure deficiencies in its pleadings by amending them, (iii) the amendment would unduly prejudice the nonmovant, or (iv) the amendment would be futile. *E.g., id.*

The futility exception confirms that there is no abuse of discretion in “refus[ing] to allow a party to amend a complaint in order to include claims which, as a legal matter, have no possibility of success.” *Eagle Equity Fund, LLC v. TitleOne Corp.*, 161 Idaho 355, 362, 386 P.3d 496, 503 (2016). Weighing the evidence in support of a proposed claim, however, isn’t the proper way to determine whether it is futile. *See, e.g., Estate of Becker v. Callahan*, 140 Idaho 522, 527, 96 P.3d 623, 628 (2004). Instead, a proposed claim is futile if the supporting factual allegations don’t state a claim for relief. *E.g., id.* In other words, it is futile if it wouldn’t survive a motion under I.R.C.P. 12(b)(6) to dismiss for failure to state a claim for relief.

Under Rule 12(b)(6), the claimant’s factual allegations “will be accepted as true, unless they are purely conclusory.” *Orrock v. Appleton*, 147 Idaho 613, 618, 213 P.3d 398, 403 (2009). Consequently, when dismissal is sought under that rule, the trial court’s task is to determine whether the claimant’s well-pleaded (*i.e.*, not conclusory) factual allegations, taken as true, state a claim that is viable under the law. *Id.* (“[O]n a motion to dismiss for failure to state a claim upon which relief may be granted, the question is whether the non-movant has alleged sufficient facts in support of his claim, which if true, would entitle him to relief.”). If so, the claim passes muster under Rule 12(b)(6). If not, it doesn’t.

The proper Rule 12(b)(6) analysis entails considering not only well-pleaded allegations, but also the content of any document on which the claim necessarily relies, so long as the pleading refers to the document, the document is central to the claim, and its authenticity isn’t in question. *E.g., Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006). Any such document may be treated as part of the pleading itself. *E.g., id.* As already noted, a Rule 15(a)(2) futility analysis

and a Rule 12(b)(6) analysis are much the same. Consequently, any such document also may be considered in determining whether a proposed claim is futile.

D. Defendants’ motions for sanctions under I.C. § 12-123

A party that engages in “frivolous conduct”—conduct that “obviously serves to merely harass or maliciously injure another party” or “is not supported in fact or warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law”—can be ordered to pay the attorney fees an adversely affected opponent reasonably incurs as a result. I.C. § 12-123. Whether conduct is frivolous according to that definition is determined in the trial court’s discretion. *E.g., Lincoln Land Co., LLC v. LP Broadband, Inc.*, 163 Idaho 105, 408 P.3d 465, 473 (2017).

III.

ANALYSIS

A. Defendants’ motions to strike

The Owners Association and the Dock Association move to strike, in whole or in part, thirteen affidavits or declarations, namely those by (i) Don Copple (Plaintiffs’ counsel), Art Troutner, Marlee Ann Wilcomb, Finley Tevlin, Andrea Umbach, and Cutler Umbach filed on November 20, 2017, (ii) Copple filed on December 11, 2017, (iii) Frederick Bagley, Mark Richey, Cutler Umbach, Robert Seiler, and Zephaniah Johnson filed on March 2, 2018, and (iv) Mark Butler filed on March 5, 2018. Some of them—affidavits or declarations by Robert Seiler, Zephaniah Johnson, Cutler Umbach, Mark Richey, and Mark Butler—include testimony to the effect that actions of the Owners Association and the Dock Association have caused a decline in the value of Plaintiffs’ properties. Other than the testimony to that effect, the challenged portions of the thirteen affidavits or declarations at issue don’t figure into the outcome of the Owners Association’s and the Dock Association’s motions for summary judgment (or of

Plaintiffs' motion to amend their complaint). The motions to strike are deemed moot except to the extent they challenge the admissibility of testimony about Plaintiffs' property values.

The Court begins with the affidavits or declarations by Robert Seiler, Cutler Umbach, and Zephaniah Johnson, all of whom own property close to Community Beach. (Compl. ¶ I; Soper Aff. Supp. 2d Mot. Summ. J. Exs. A–G.) Under Idaho law, “the owner of property is qualified to testify to its value.” *Reed v. Reed*, 157 Idaho 705, 715, 339 P.3d 1109, 1119 (2014) (quoting *Empire Lumber Co. v. Thermal–Dynamic Towers, Inc.*, 132 Idaho 295, 306, 971 P.2d 1119, 1130 (1998)). Similarly, an owner may give opinions on the value of his property both before and after some particular event. *Weaver v. Vill. of Bancroft*, 92 Idaho 189, 193, 439 P.2d 697, 701 (1968). And an owner need not explain his reasons for his opinions on the value of his property. *Smith v. Big Lost River Irrigation Dist.*, 83 Idaho 374, 386, 364 P.2d 146, 153 (1961) (“The owner’s failure or inability to explain the basis for his appraisal may affect the weight of his testimony, but it does not disqualify him as a witness.”). But by explaining his reasons for believing his property is worth less now than it once was worth, the owner might reveal that he attributes the decline in value to something that is disconnected from his legal theories. When that happens, the owner’s opinion about the decline isn’t relevant. And that has happened here.

Seiler, Umbach, and Johnson opine that their properties have declined in value.

Collectively, they attribute that decline to four events: (1) title to Community Beach was conveyed from the State to the Owners Association; (2) the Owners Association leased the littoral rights associated with Community Beach to the Dock Association, which plans to build a dock that will obstruct views of Payette Lake from their properties and increase boat and vehicle traffic near their properties; (3) the Owners Association once offered to sell a portion of Community Beach to an owner of adjacent property; and (iv) the Owners Association adopted a

rule excluding the general public from Community Beach. (Seiler Decl. Opp'n Def.'s 2d Mot. Summ. J. 3-4; C. Umbach Decl. Opp'n Def.'s 2d Mot. Summ. J. 2-3; Johnson Decl. Opp'n Def.'s 2d Mot. Summ. J. 3.) Seiler, Umbach, and Johnson offer these opinions to try to demonstrate Plaintiffs' standing to pursue their existing claims, through which they seek recognition of a public right to access Community Beach. As discussed more fully in this decision's next subsection, to have standing "a litigant must allege or demonstrate an injury in fact and a substantial likelihood the relief requested will prevent or redress the claimed injury." *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002). But recognizing a public right of access to Community Beach would compel a reversal of only the fourth event, and Seiler, Umbach, and Johnson attribute no decline in property values to it alone. Their opinions suffer from grave relevance problems as a result.

The first event contributing to the supposed decline in their property values, again, is the transfer of title to Community Beach to the Owners Association. Were Plaintiffs to succeed on their existing claims, that transfer wouldn't be reversed. Plaintiffs aren't even claiming that the transfer was invalid. Thus, whether Plaintiffs succeed or fail on their existing claims, the Owners Association will continue to own Community Beach. Similarly, the second event is the Owners Association's lease of littoral rights to the Dock Association for purposes of constructing a dock, but the Court has already granted summary judgment against Plaintiffs' existing claims "to the extent those claims are advanced as a basis for invalidating the Owners Association's lease to the Dock Association of the littoral rights associated with Community Beach." (Mem. Decision & Order Summ. J. 8.) Thus, the lease's validity and the impending construction of the dock will be unaffected by whether Plaintiffs succeed or fail on their existing claims. So, to the extent Seiler, Umbach, and Johnson attribute a supposed decline in their property values to

Community Beach's conveyance to the Owners Association, leading to a lease of the associated littoral rights to the Dock Association and the impending construction of the dock, their opinions are irrelevant. Success on Plaintiffs' existing claims wouldn't reverse or stop those events.

The third event is that the Owners Association once offered to sell a portion of Community Beach to an owner of adjacent property. That offer was made in early 2016 to someone whose decades-old improvements encroach onto Community Beach, which had given rise to a decades-long arrangement to lease a small portion of Community Beach from the State. (Gustavsen Aff. Supp. Pls.' Mot. Leave Amend Compl. 2, Jan. 25, 2018; Soper Aff. Supp. Mot. Summ. J. Exs. C–E, Nov. 6, 2017.) It has been two years since the offer was made, and there is no evidence a sale is being pursued now or will be pursued in the near future. But any sale to the encroaching landowner would be subject to, and wouldn't extinguish, any preexisting right the general public has, by virtue of the alleged public dedication or the alleged equitable servitude, to access Community Beach. Thus, there is no relationship between Plaintiffs' existing claims and any decline in their property values resulting from whatever prospect there is now or ever has been that a portion of Community Beach could be sold to the encroaching landowner. Success on those claims simply wouldn't stop any such sale from happening.

Finally, the fourth event is the Owners Association's adoption of a rule excluding the general public from Community Beach. Unlike the other three events, the rule of exclusion would be reversed were Plaintiffs to succeed on their existing claims. But even though Seiler, Umbach, and Johnson list the rule of exclusion as a contributor to a supposed decline in their property values, not one of them says that it alone is sufficient to have caused any decline. Instead, their opinions appear to be based mainly on the other events, most notably Community Beach's transition into private ownership and the impending construction of a dock there. So

their testimony, even if taken as true, doesn't show that the rule of exclusion, standing alone, caused any decline in their property values. As a result, it isn't relevant.

Alternatively, to any extent that Seiler, Umbach, or Johnson have opined that the rule of exclusion, standing alone, caused a decline in property values, that opinion is excluded under I.R.E. 701. As already noted, under Idaho case law an owner is presumed competent to testify to the value of his property. Idaho case law doesn't address whether or to what extent an owner's opinions about the value of his property are exempt from scrutiny under I.R.E. 701, which governs the admissibility of lay opinions. Perhaps, as a general principle, an owner's opinions as to the value of his property aren't subjected to that sort of scrutiny. But principles have limits, and this one is no different. One limit is that owner's presumed competence to give opinions about the value of his property doesn't allow him to give what amount to expert opinions on that subject unless he is qualified as an expert witness. See *LifeWise Master Funding v. Telebank*, 374 F.3d 917, 929–30 (10th Cir. 2004). As the *LifeWise* court noted, Rule 701 of the Federal Rules of Evidence—which is substantively the same as I.R.E. 701—doesn't allow opinions that are based on specialized knowledge. *Id.* at 929 (citing Fed. R. Evid. 701). Thus, Rule 701 didn't allow a business owner to use a sophisticated economic model to opine about lost profits, even though the business owner was presumed competent to opine on that subject in a more straightforward way. *Id.* at 729–30.

Umbach's testimony in particular is problematic in this regard. He says he "researched the impact of private ownership restricting access to the beach and of a large dock encumbering a once safe, non-motorized recreation area and determined that our rental rate [for one particular property] will be decreased by 15%, if access to the community beach is restricted by association rules or the recreation area is compromised by a large dock," contributing to a supposed 15%

decline in that property's value. (C. Umbach Decl. Opp'n Def.'s 2d Mot. Summ. J. 3.) What his research consisted of isn't clear, but what seems clear is that this particular opinion is based on some sort of specialized knowledge developed through research undertaken for the purpose of rendering it, making it an improper lay opinion under I.R.E. 701. And it isn't a proper expert opinion either because Umbach hasn't been shown to have the relevant expertise.

Furthermore, while Seiler, Umbach, and Johnson are presumed to have a sense of what their properties are worth and therefore may give their opinions in that regard, giving opinions about what their properties are worth is a far cry from giving opinions that isolate one event—among a confluence of events they say is acting upon the value of their properties at the same time—and deem it sufficient, standing alone, to cause a decline in value. A qualified expert may well be able to do this, but there is no reason to presume an owner can. So even if I.R.E. 701 doesn't regulate an owner's testimony about the value of his property at a particular point in time, this very different sort of opinion should be scrutinized under I.R.E. 701. If so scrutinized, it plainly doesn't pass muster. Plaintiffs' counsel admitted that Plaintiffs aren't being excluded from Community Beach, and Plaintiffs presented no evidence that their renters aren't permitted to exercise their access rights. So the rule excluding the general public from Community Beach has no limiting effect on Plaintiffs and no demonstrated limiting effect on their renters. Sharply limiting the universe of people who may compete with Plaintiffs to access Community Beach cannot reasonably be thought to harm Plaintiffs. According to classical economics, the price of a commodity (such as access rights to Community Beach) increases when its supply decreases, assuming constant demand for that commodity. *See, e.g., Adam Smith, The Wealth of Nations* 79–80 (Edwin Cannan ed., 5th ed. 2003). Thus, the Owners Association's adoption of the rule of exclusion, standing alone, probably bolsters the value of Plaintiffs' properties (even if the other

events at issue have had the opposite effect). Regardless, any opinion that the rule of exclusion, standing alone, caused a decline in the property values isn't rationally based on the perceptions of Seiler, Umbach, or Johnson and isn't helpful to a clear understanding of their testimony or of a fact in issue. I.R.E. 701 therefore disallows any such lay opinion.

For all these reasons, the valuation opinions given by Seiler, Umbach, and Johnson aren't admissible and will be disregarded.

This brings the Court to the expert opinions of Mark Richey and Mark Butler. Expert opinions may be given only by a witness "qualified as an expert by knowledge, skill, experience, training, or education" in the relevant subject matter. I.R.E. 702.

Butler seems qualified to opine on land use and planning, but not on property values. (*See* Butler Decl. Opp'n Def.'s 2d Mot. Summ. J. 2 & Ex. A). Butler doesn't appear to opine that excluding the general public from Community Beach, standing alone, caused Plaintiffs' property values to decline. But if some such opinion can be found somewhere in his declaration, it is excluded for lack of relevant expertise. To the extent Butler opines that the transfer of Community Beach to the Owners Association "opens up a huge potential for change of use impacting adjacent and nearby property" and that significant changes in use could "drastically impact[] vested property rights," (*id.* at 8), these opinions are irrelevant. That is because Plaintiffs make no claim that the transfer is invalid, as well as because there is no evidence of any planned change in Community Beach's use beyond the impending construction of the dock, which also is unaffected by Plaintiffs' claims.

Richey, by contrast, is qualified to give an opinion on property values, as he has extensive experience and education in the appraisal industry. (*See* Richey Decl. Opp'n Def.'s 2d Mot. Summ. J. Ex. A.) He opines that Plaintiffs' properties have diminished in value by ten to

twenty percent because the State transferred title to Community Beach to the Owners Association, which subsequently “placed signs restricting public access to the beach,” “negotiated rights permitting the construction of a private dock to a third-party entity,” and “offered a portion of the community beach on March 1, 2016 to an adjacent owner for \$200,000.” (*Id.* at 6–7.) But his opinion shares the major admissibility problems from which the opinions of Seiler, Umbach, and Johnson suffer.

Specifically, Richey attributes the supposed decline in property values to events that won’t be reversed or stopped even if Plaintiffs succeed on their existing claims. Again, the transfer of title wouldn’t be reversed if Plaintiffs were to succeed on those claims, nor would succeeding on those claims mean that Plaintiffs could stop either the impending construction of the dock or any transfer of a portion of Community Beach by the Owners Association to the encroaching landowner. Further, he gives no opinion that the Owners Association rule excluding the public from Community Beach, standing alone, caused a decline in property values. Whether he holds any such opinion simply can’t be gleaned from his declaration. And, as already noted, any such opinion would outwardly be nonsensical; Plaintiffs’ property values shouldn’t decline because far fewer people are eligible to compete with them for space and time on Community Beach after the rule’s adoption than were before. The rule plainly benefits Plaintiffs by excluding others. That is so even if the transfer of title to Community Beach and the impending construction of the dock caused a decline in Plaintiffs’ property values. Thus, Richey’s opinion that Plaintiffs’ property values have declined is excluded on essentially the same reasoning that the opinions of Seiler, Umbach, and Johnson are excluded.

B. Defendants' motions for summary judgment

Through their existing claims, Plaintiffs try to establish the general public's right to access Community Beach. In addition to arguing that those claims fail as a matter of law on the merits, the Owners Association and the Dock Association argue that Plaintiffs lack standing to pursue them, as they have suffered no injury that would be redressed by a favorable ruling. (Mem. Supp. 2d Mot. Summ. J. Def. Wagon Wheel Bay Dock Ass'n, Inc. 9–12; 2d. Mot. Summ. J. Def. Payette Lakes Cottage Sites Owners Ass'n, Inc. 1.) Plaintiffs respond by arguing that they don't have to show damages, but even if they do, their property values have declined because the Owners Association has begun excluding the general public from Community Beach. (Pls.' Mem. Opp'n Def.'s 2d Mot. Summ. J. 16–17.)

The Court begins with standing because it is “a preliminary question to be determined . . . before reaching the merits of the case.” *Young*, 137 Idaho at 104, 44 P.3d at 1159 (citing *Miles v. Idaho Power Co.*, 116 Idaho 635, 637, 639, 778 P.2d 757, 759, 761 (1989)). “The doctrine of standing is a subcategory of justiciability” that “focuses on the party seeking relief and not on the issues the party wishes to have adjudicated.” *Id.* To demonstrate standing, “a litigant must allege or demonstrate an injury in fact and a substantial likelihood the relief requested will prevent or redress the claimed injury. This requires a showing of a distinct palpable injury and fairly traceable causal connection between the claimed injury and the challenged conduct.” *Id.* (internal citations and quotation marks omitted). So, while Plaintiffs are right that they don't have to show a prospective entitlement to money damages, they must demonstrate a substantial likelihood that granting them the relief they request will either prevent them from suffering some sort of injury or redress some sort of injury they have already suffered.

Plaintiffs' sole argument as to why they have standing, again, is that the general public's exclusion from Community Beach caused a decline in their property values. But in this decision's section III.A, the Court determines to be inadmissible all of Plaintiffs' evidence of diminished property values. As a result, their argument is devoid of factual support. And even if the Court should've reached the opposite conclusion as to admissibility, Plaintiffs' evidence of diminished property values would be insufficient at trial to carry their burden of demonstrating standing and therefore fails to show a genuine factual dispute for trial. That evidence attributes a supposed decline in Plaintiffs' property values to several different events, all but one of which aren't remediable in this action and the remaining one of which—the rule excluding the general public from Community Beach—wasn't pegged by a single witness as a stand-alone cause of any decline in property values. Because there is no evidence that the rule of exclusion, standing alone, caused a decline in Plaintiffs' property values, the question is whether it would be reasonable to infer as much from the evidence. It simply wouldn't be reasonable to infer that the rule of exclusion, standing alone, caused a decline in Plaintiffs' property values. The rule of exclusion naturally tends to benefit Plaintiffs, who aren't among the persons excluded and who, by virtue of it, have far fewer prospective competitors for space and time on Community Beach. The Court declines to draw that inference and instead draws the much more probable inference that the rule of exclusion, standing alone, didn't cause any decline in Plaintiffs' property values. This is the Court's prerogative, as it would be the trier of fact were Plaintiffs' claims to survive for trial. *See J.R. Simplot Co.*, 144 Idaho at 615, 167 P.3d at 752.

Of course, proving that the general public's exclusion from Community Beach caused a decline in Plaintiffs' property values isn't the only possible way of demonstrating standing. Plaintiffs instead could've tried to prove that if the general public can be excluded from

Community Beach, then so can they. But Plaintiffs' counsel expressly admitted during the hearing that Plaintiffs haven't been excluded from Community Beach, and Plaintiffs presented no evidence of a risk of their future exclusion from Community Beach. Indeed, as noted elsewhere in this decision, the Owners Association and the Dock Association concede they have no right to exclude Plaintiffs from Community Beach. Plaintiffs have shown that they won't be permitted to use the Dock Association's dock once it is built. But, as Plaintiffs' counsel admitted during a prior hearing, and as the Court determined in a prior ruling, (Mem. Decision & Order Summ. J. 7), the littoral rights associated with Community Beach weren't dedicated to the public. Thus, Plaintiffs' exclusion from the dock, once it is built, isn't an injury that would be averted by prevailing on their existing claims. Any argument to that effect would've failed.²

Because Plaintiffs haven't demonstrate a substantial likelihood that granting them the relief they request will either prevent them from suffering some sort of injury or will redress some sort of injury they have already suffered, the Owners Association and the Dock Association are entitled to summary judgment against Plaintiffs' existing claims. This includes not only the public-dedication and equitable-servitude claims, which identify the sources of the public's alleged right to access Community Beach, but also the quiet-title claim, which is simply a mechanism for formally recognizing that alleged right.

² Plaintiffs also have presented evidence of a past instance—in early 2016—in which the Owners Association offered to sell a portion of Community Beach to the owner of a neighboring parcel, whose decades-old improvements encroach onto Community Beach, resulting in a decades-long lease arrangement for a small portion of Community Beach between the State of Idaho (which owned Community Beach before quitclaiming it to the Owners Association) and the owner of that parcel. (Gustavsen Aff. Supp. Pls.' Mot. Leave Amend Compl. 2, Jan. 25, 2018; Soper Aff. Supp. Mot. Summ. J. Exs. C–E, Nov. 6, 2017.) The offer to sell doesn't really figure into Plaintiffs' standing argument. But even if it did, the prospect of any such sale wouldn't help them demonstrate standing, as any such sale would be subject to, and wouldn't extinguish, any preexisting rights arising from the alleged public dedication and equitable servitude. Thus, any such sale wouldn't cause Plaintiffs to suffer any injury.

C. Plaintiffs' motion to amend their complaint

Plaintiffs move to amend their complaint by (1) partially renumbering their claims, (2) adding allegations addressing their standing to pursue their claims, and (3) adding a claim for breach of covenants in exchange deeds by which the Umbach and Seiler plaintiffs acquired their properties. (Mot. Leave File Am. Compl. Ex. A, ¶¶ XLI–XLV, XLIX–LIV, Mar. 2, 2018.) There is nothing wrong with the proposed renumbering. It would be allowed if substantive amendments are allowed. But amendments need not be permitted if they are futile, *e.g.*, *PHH Mortg.*, 160 Idaho at 396, 374 P.3d at 559, and the proposed substantive amendments are futile, as the Court is about to explain. Because the proposed substantive amendments are disallowed, and Plaintiffs' existing claims fail on summary judgment, this action is at its end and there is no need for the proposed renumbering.

In this decision's section III.B, the Court evaluates Plaintiffs' evidence on the subject of standing and finds it insufficient to demonstrate a genuine factual dispute about standing. Plaintiffs lack standing to pursue their existing claims because they don't have evidence demonstrating standing. That conclusion has nothing to do with how well standing is alleged in either their original complaint or their proposed amended complaint. Nothing would be accomplished by allowing Plaintiffs to add standing-related allegations to their complaint in support of defeated claims (or in support of their proposed claim for breach of covenants in exchange deeds, which is being disallowed as futile for reasons unrelated to standing). The proposed standing-related allegations are futile.

The proposed claim for breach of covenants in the exchange deeds, made only by the Umbachs and the Seilers, is perhaps mistitled. They seem to allege that the State of Idaho made the covenants at issue. (Mot. Leave File Am. Compl. Ex. A, ¶¶ L–LI, Mar. 2, 2018.) The exchange deeds show as much. (Copples Aff. Opp'n Def.'s 2d Mot. Summ. J. Exs. A, E, J.) The

Owners Association and the Dock Association cannot possibly have breached covenants they didn't make. And Plaintiffs don't seek traditional remedies for breach like damages or an injunction against further breaches. Instead, as the proposed prayer for relief denotes, the Umbachs and the Seilers seek a declaratory judgment that they have the right to use and enjoy Community Beach (among other Owners Association properties³). (Mot. Leave File Am. Compl. Ex. A, at 22–23, Mar. 2, 2018.)

The problem they face, though, is the absence of a live controversy on that point. The judicial power extends only to actual controversies, not hypothetical ones. *E.g., Noh v. Cenarrusa*, 137 Idaho 798, 800, 53 P.3d 1217, 1219 (2002) (“A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character”) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937)). The Court has no call to determine whether the Umbachs and the Seilers have the right, by virtue of covenants in the exchange deeds or otherwise, to use and enjoy Community Beach. That is because, although the proposed amended complaint alleges exclusion from Community Beach, (Mot. Leave File Am. Compl. Ex. A, ¶¶ XLI–XLIII, XLIX, Mar. 2, 2018), the parties plainly agree that the Umbachs and the Seilers in fact haven't been and can't be excluded from Community Beach.

Indeed, during the hearing, Plaintiffs' counsel stated unequivocally, in response to a direct question from the Court, that Plaintiffs haven't been excluded from Community Beach.

³ None of the other Owners Association properties merit further discussion. That is because the proposed amended complaint doesn't allege that Plaintiffs have been excluded, or are threatened with exclusion, from them. In the absence of any such allegation, there is no live controversy warranting the Court's involvement under the case law the Court is about to mention in determining whether there is a live controversy as to Community Beach. Unlike the other Owners Association properties, Community Beach at least merits further discussion, as the Umbachs and the Seilers have been excluded from it, according to the proposed amended complaint. (Mot. Leave File Am. Compl. Ex. A, ¶¶ XLI–XLIII, XLIX, Mar. 2, 2018.)

Further, despite that evidence of Plaintiffs' exclusion from Community Beach probably would have demonstrated standing to pursue their existing claims, Plaintiffs presented no such evidence and, as a result, are witnessing the failure of those claims on summary judgment. Not only do Plaintiffs admit there has been no exclusion, and not only did they fail to present evidence of exclusion when doing so necessary to sustain their existing claims, but also the Owners Association and the Dock Association, in their briefing and in their respective counsel's statements to the Court during the hearing, stated unequivocally that neither has any right to exclude Plaintiffs from Community Beach.⁴ So, both sides agree that the Umbachs and the Seilers aren't being excluded—and may not be excluded—from Community Beach. As such, there is simply no live controversy that justifies making rulings on the meaning or effect of the covenants in the exchange deeds.

The Court understands that a party pursuing a motion to amend need not come forward with evidence to support a proposed claim. Whether a proposed claim is viable, or instead futile, generally is determined by the sufficiency of the movant's proposed allegations. That said, the Court need not shut its ears when both sides' counsel, during the hearing on a motion to amend, intentionally make statements that plainly confirm the absence of a live controversy. Nor is the Court obligated to ignore the fact that, just as the Umbachs and the Seilers ultimately would need to muster evidence of their exclusion from Community Beach to demonstrate the existence of a live controversy as to their proposed claim, they needed to muster that same evidence to

⁴ Near the outset of the hearing, the Court expressed skepticism about the analysis in the Dock Association's briefing (in which the Owners Association joined) as to the particular source of Plaintiffs' right to use and enjoy Community Beach. Interchanges on that subject were had with both the Dock Association's counsel and the Owners Association's counsel. The Court sees no reason to get into the details, but simply notes that it found persuasive the explanation given by the Owners Association's counsel, which differs from the analysis in the briefing.

demonstrate standing to pursue their existing claims but failed to do so, causing those claims to fail on summary judgment. Granting the motion to amend inevitably would lead to the proposed claim's failure on summary judgment for absence of evidence of a live controversy; the Umbachs and the Seilers would fail to present evidence of their exclusion from Community Beach because, as their counsel acknowledged during the hearing, they haven't been excluded. That makes the proposed claim futile by any reasonable approach to gauging futility. As already noted, "refus[ing] to allow a party to amend a complaint in order to include claims which, as a legal matter, have no possibility of success" is the right thing for a district court to do. *Eagle Equity Fund, LLC*, 161 Idaho at 362, 386 P.3d at 503.

For all these reasons, Plaintiffs' motion to amend is denied as futile.

D. Defendants' motions for sanctions under I.C. § 12-123

The Owners Association and the Dock Association ask the Court to sanction Plaintiffs for their allegedly "frivolous conduct," as that term is defined in I.C. § 12-123, in three different contexts: (1) the first round of defense motions for summary judgment; (2) Plaintiffs' motion for summary judgment; and (3) Plaintiffs' first motion to amend. (Mem. Supp. Def. PLCSOA's Mot. Att'y Fees 2; WWBDA's Mot. Att'y Fees 2.) As already noted, "frivolous conduct" is conduct that either "obviously serves to merely harass or maliciously injure another party" or "is not supported in fact or warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law." I.C. § 12-123. The Court sees no reason to think Plaintiffs set out, in any of those three contexts, to harass or injure the Owners Association or the Dock Association. The motions for sanctions are summarily denied to the extent they so argue. The Court proceeds to a context-by-context analysis of the motions to the extent they argue that Plaintiffs' conduct wasn't supported by the facts or by the law.

First, the Owners Association and the Dock Association contend that, when faced with the initial defense motions for summary judgment, Plaintiffs filed several partly or wholly inadmissible affidavits and declarations (some timely, some not) and then needlessly waited until the hearing to make plain that they conceded the point on which partial summary judgment ultimately was granted. (Mem. Supp. Def. PLCSOA's Mot. Att'y Fees 3–6.) The Court agrees that Plaintiffs' affidavits and declarations are problematic in some respects in terms of compliance with the rules of evidence. But, in its discretion, the Court determines that the admissibility problems don't justify a conclusion that filing the affidavits and declarations was so unsupported by the facts or the law as to warrant sanctions. And, as to the notion that Plaintiffs waited longer than necessary to concede the point on which partial summary judgment was granted, the Court notes that Plaintiffs didn't even contest that point in their opposition brief, (*see generally* Pls.' Mem. Opp'n Def.'s Mot. Summ. J., Nov. 20, 2017), as was pointed out on reply, (Reply Pls.' Mem. Opp'n Def.'s Mot. Summ. J. 10–11, Nov. 27, 2017). For sanctions to be appropriate, the Owners Association and the Dock Association must show that they were "adversely affected." I.C. § 12-123(2). Because Plaintiffs did not contest the point in their opposition brief, their failure to expressly concede it until the hearing hasn't been shown to have had the requisite adverse effect.

Second, as the Owners Association and the Dock Association argue, (Mem. Supp. Def. PLCSOA's Mot. Att'y Fees 6–8), Plaintiffs made a clear procedural mistake in seeking summary judgment on an unpleaded claim, *see Nava v. Rivas-Del Toro*, 151 Idaho 853, 860, 264 P.3d 960, 967 (2011). In that sense, their motion for summary judgment wasn't warranted by existing law. But Plaintiffs were free afterward to file a motion to amend their complaint to add the unpleaded claim. And they did just that. In opposing that motion, the Owners Association and the Dock

Association were able to reuse the research they had done in opposing summary judgment. Consequently, in the end, they weren't meaningfully adversely affected by Plaintiffs' inappropriate pursuit of summary judgment. They just had to do a bit of work to argue—in an opposition brief whose contents were later repurposed, and in a hearing that was going to be held anyway because it involved several other motions—that Plaintiffs were pursuing summary judgment inappropriately. In its discretion, the Court determines that the absence of a meaningful adverse effect makes sanctions inappropriate.

Third, and finally, the Owners Association and the Dock Association see as frivolous conduct Plaintiffs' pursuit, and then last-minute withdrawal, of their motion to amend their complaint to pursue the unpleaded claim that had been the subject of their procedurally inappropriate motion for summary judgment. (Mem. Supp. PLCSOA's Mot. Att'y Fees 9–11.) During the hearing on the motion for sanctions, Plaintiffs' counsel told the Court that the motion was withdrawn because he was convinced by the opposition argument that Plaintiffs lack standing to pursue the proposed claim. What Plaintiffs are accused of, essentially, is waiting too long to do the right thing. That sort of thing isn't likely to justify sanctions. *See Huyck v. Morton*, 2008 WL 9468541, at *2 (Idaho Ct. App. July 16, 2008) (reversing I.C. § 12-123 sanctions that had been imposed by the district court on grounds that the sanctioned party “wait[ed] until the last minute only to stipulate to the issuance of a preliminary injunction”). In any event, though the motion likely wouldn't have been granted, the Court doesn't perceive it as frivolous. Because the motion wasn't frivolous, asking the Court for a ruling wouldn't have been frivolous conduct. It follows that conceding the motion without need for a ruling, even at the last minute, isn't frivolous conduct either (given that the motion wasn't pursued in the first place just to drive up litigation costs).

For these reasons, the motions for sanctions are denied.

Accordingly,

IT IS ORDERED that the Owners Association's and the Dock Association's motions to strike are granted in part and deemed moot in part, as described in this decision's section III.A.

IT IS FURTHER ORDERED that the Owners Association's and the Dock Association's motions for summary judgment are granted.

IT IS FURTHER ORDERED that Plaintiffs' motion to amend their complaint is denied.

IT IS FURTHER ORDERED that the Owners Association's and the Dock Association's motions for sanctions under I.C. § 12-123 are denied.

Jason D. Scott

Signed: 4/12/2018 09:39 AM

Jason D. Scott
DISTRICT JUDGE

State of Idaho }
County of Valley } ss.

I hereby certify that the foregoing is a true and correct copy of the original on file in this office.

Date ^{Signed: 4/2/2019 01:48 PM} Douglas A. Miller
Clerk

By *DS* Deputy



CERTIFICATE OF SERVICE

I certify that on April 12th, 2018, I served a copy of this document as follows:

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DOUGLAS A. MILLER
Clerk of the District Court

By: Candice White
Deputy Court Clerk Signed: 4/12/2018 12:38 PM

EXHIBIT E

CERTIFIED COPY

Filed: 04/12/2018 12:39:01
Fourth Judicial District, Valley County
Douglas A. Miller, Clerk of the Court
By: Deputy Clerk - White, Candice

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

ZEPHANIAH and ANNMARIE JOHNSON,
husband and wife; ANDREA UMBACH, a
single person; CUTLER and NANCY
UMBACH, husband and wife; ROBERT and
DEANNE SEILER, husband and wife; and
W.H. SHARLIE, INC., an Idaho corporation,

Plaintiffs,

vs.

PAYETTE LAKES COTTAGE SITES
OWNERS ASSOCIATION, INC., an Idaho
corporation,

Defendant,

and

WAGON WHEEL BAY DOCK
ASSOCIATION, INC.,

Defendant-Intervenor.

Case No. CV-2017-204

JUDGMENT

JUDGMENT IS ENTERED AS FOLLOWS:

This action is dismissed with prejudice. No relief is awarded to Plaintiffs.

Jason D. Scott

Signed: 4/12/2018 09:40 AM

Jason D. Scott
DISTRICT JUDGE

State of Idaho }
County of Valley } ss.

I hereby certify that the foregoing is a
true and correct copy of the original on file
in this office.

Date Signed: 4/2/2019 01:36 PM Douglas A. Miller

By *DS* Clerk Deputy



CERTIFICATE OF SERVICE

I certify that on April 12th, 2018, I served a copy of this document as follows:

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DOUGLAS A. MILLER
Clerk of the District Court

By: Cardice White
Deputy Court Clerk Signed: 4/12/2018 12:39 PM

EXHIBIT F

CERTIFICATE

I, BessieJo Wagner, City Clerk do hereby certify that the foregoing is a full, true, and correct copy of Findings, Conclusions, and Decision In the Matter of the Appeal of Sharlie Grouse Neighborhood Association of Administrative Determination re: Wagon Wheel Bay Community Dock adopted by The McCall Planning and Zoning Commission at a meeting held on the 11 day of September 2018, and that the same is now in full force and effect. IN WITNESS WHEREOF, I have hereunto set my hand and impressed the official seal of the City, this 1 day of April 2019.



BessieJo Wagner
BessieJo Wagner, City Clerk

BEFORE THE MCCALL AREA PLANNING AND ZONING COMMISSION

In the Matter of the Appeal of:)
)
Sharlie Grouse Neighborhood Association) **FINDINGS, CONCLUSIONS, AND**
) **DECISION**
)
Of Administrative Determination re: Wagon)
Wheel Bay Community Dock)
)

This matter comes before the McCall Area Planning and Zoning Commission ("Commission"), pursuant to McCall City Code 3.15.09, as an appeal by an aggrieved party of an administrator decision. An appeal hearing on the matter was initiated before the Commission on August 7, 2018 and continued for oral arguments to August 21, 2018. The matter was heard for final adoption of this written Decision on September 11, 2018. The Commission does hereby make and set forth the following Record of Proceedings and the Commission's Decision as follows:

I. RECORD OF PROCEEDINGS

On May 25, 2018, staff was alerted by the Sharlie Grouse Neighborhood Association ("SGNA") of a community dock being constructed on Lot 1, Block 2, SW Payette Cottage Sites, a designated common area. The City, acting as the administrator of planning and zoning matters in the McCall Area of Impact, initially issued a notice of violation to the Wagon Wheel Bay Dock Association ("WWBDA") calling for work to cease until proper permitting was in place. Upon further review, the City Planner determined on June 8, 2018, that no conditional use permit (CUP) was required for the WWBDA dock ("Administrator Decision"). On June 18, 2018 the SGNA, alleging itself to be an aggrieved party, appealed the Administrator Decision that the WWBDA dock did not require a CUP.

The SGNA appeal was set for hearing before the Planning and Zoning Commission, pursuant to McCall City Code 3.15.09, on August 7, 2018. Due to some miscommunication regarding the ability of the parties to present, the hearing was continued for oral arguments to August 21, 2018.

The Record includes the following:

- A. McCall P&Z Staff Report on SGNA Appeal of Administrative Decision, dated August 7, 2018.
- B. Letter dated August 1, 2018 from Tricia Soper, representing the WWDBA.
- C. Letter dated August 2, 2018 from Tricia Soper, representing the WWDBA.
- D. McCall Impact Area Citizen Code Complaint Form, including photographs, submitted by SGNA [Ex. A to 8/7/18 Staff Report]
- E. Email with City Planner Determination of No CUP Requirement [Ex. B to 8/7/18 Staff Report]
- F. Idaho Department of Lands dock application materials [Ex. C to 8/7/18 Staff Report]
- G. Idaho Department of Lands mail log [Ex. D to 8/7/18 Staff Report]
- H. Idaho Department of Lands Final Order [Ex. E to 8/7/18 Staff Report]
- I. 4th Judicial District, Opinion on Appeal [Ex. F to 8/7/18 Staff Report]
- J. Amended Judgment [Ex. G to 8/7/18 Staff Report]
- K. Judgment [Ex. H to 8/7/18 Staff Report]
- L. Appeal of Administrative Determination letter, dated June 18, 2018, from Hethe Clark representing the SGNA, including Addendum materials
- M. Letter, dated July 31, 2018, from Hethe Clark representing the SGNA, including Addendum materials

- N. Letter, dated August 3, 2018, from Hethe Clark representing the SGNA.
- O. Hearing Presentation, dated August 21, 2018, presented by Hethe Clark representing the SGNA.

At the hearing on August 21, 2018, appeared the following:

- Tricia Soper, attorney at law with Mark D. Perison, P.A., appeared on behalf of WWBDA.
- Hethe Clark, attorney at law with Spink Butler, LLP, appeared on behalf of SGNA.

II. JUDICIAL NOTICE AND REVIEW STANDARD

The Commission takes judicial notice of the McCall City Code, which by ordinance adopted by the Board of Commissioners for Valley County, Idaho is made applicable to the McCall Area of Impact. Pursuant to McCall City Code 3.15.09 the Commission makes its determination considering the administrative record below along with written and oral arguments by the Parties.

III. FINDINGS, CONCLUSIONS, AND DECISION

1. The City of McCall and Valley County, Idaho have established a joint Planning and Zoning Commission, as authorized by and with the duties set forth in the Idaho Local Land Use Planning Act, Chapter 65 of Title 67 Idaho Code. McCall City Code 1.10.2(A) and Title 3.
2. The duties of the Commission include application and interpretation of McCall regulations (McCall City Code 3.1.05) and, when necessary, to hear administrative

appeals brought by a person aggrieved by an administrative decision (McCall City Code 3.15.09).

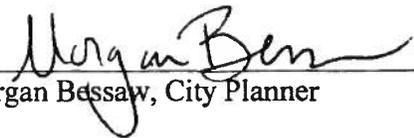
3. This matter concerns an administrative decision that the requirements and regulations of McCall City Code Title 3, Chapter 7, were not applicable to the WWDBA dock based on the determination that the WWDBA dock was a community dock which is not defined in or regulated by such chapter.
4. The Commission finds and understands the SGNA to be an aggrieved party able to submit an administrative appeal in this matter.
5. The Commission finds and understands the WWDBA to be treated as the equivalent of an applicant party, though no permit application is required under the Administrator Decision.
6. The Commission finds that the Parties were given substantial and equal opportunity to present arguments on appeal in relation to this matter and as documented in the Record.
7. The Commission finds that any previous administrative determination regarding treating community docks as commercial docks has previously been revoked and is not applicable in the current matter.
8. The Commission finds that McCall City Code 3.7.012, Conditional Uses, makes no reference to and does not regulate a "community dock."
9. The Commission concludes that, based upon the record, the WWDBA dock is not devoted to commercial or business purposes and is not a "commercial dock" nor a wharf, pier, or marina, as contemplated for regulation under McCall City Code 3.7.012.
10. The Commission concludes that the administrator's decision was correct in its interpretation and application of McCall City Code and the regulations thereunder.

Based upon the foregoing review and analysis, and good cause appearing from the record in these proceedings, the Commission affirms and upholds the Administrator Decision as presented in this matter and authorizes the Chair to sign this Decision on behalf of the Commission.



Fallon Fereday, Chair

ATTEST:

By: 

Morgan Bessaw, City Planner

EXHIBIT G

THE VALLEY COUNTY BOARD OF COUNTY COMMISSIONERS

In the Matter of the Appeal of:)
Sharlie Grouse Neighborhood Association)
_____)

FINDINGS OF FACT AND
CONCLUSIONS REGARDING
THE WAGON WHEEL BAY
COMMUNITY DOCK

This matter came before the Valley County Board of County Commissioners at a public hearing on Monday, November 5, 2018 pursuant to an appeal by the Sharlie Grouse Neighborhood Association ("SGNA") regarding the Findings, Conclusions, and Decision of the McCall Area Planning and Zoning Commission as it related to a dock which was constructed based on a lease by the Wagon Wheel Bay Dock Association ("WWBDA") of the littoral rights to property belonging to the Payette Lakes Cottage Sites Owners Association Inc. ("PLCSOA"). In order to render a decision on this appealed matter, the Valley County Board of County Commissioners considered the submitted materials, the arguments of T. Hethe Clarks, Esq. for the SGNA and Tricia Soper, Esq. for the Wagon Wheel Bay Dock Association, letters which were submitted, exhibits presented, and comments from the general public. The Valley County Board of County Commissioners hereby make the following findings and conclusions:

PROCEEDINGS:

On May 25, 2018, the McCall Planning and Zoning staff was notified by the SGNA that a community dock was being constructed on Lot 1, Block 2, SW Payette Cottage Sites. This location is designated a common area belonging to the PLCSOA. The City staff researched the matter and determined that an Administrative Decision authored in 2012 required "community docks" to be treated as "commercial docks". Commercial docks require a Conditional Use Permit ("CUP") in order to be constructed. Accordingly, the McCall staff issued a "stop work order" for the construction of the dock until the proper permit was obtained. Upon further

review and consultation with counsel, the staff discovered the Administrative Decision requiring the particular treatment of the community dock as a commercial dock had been rescinded. As a result, the staff withdrew the stop work order and the dock was completed. On June 18, 2018 the SGNA, alleging itself to be the aggrieved party, appealed the Administrative Decision that the WWBDA did not require a CUP to construct their dock. That appeal was heard by the McCall Area Planning and Zoning Commission and the Administrative Decision of the McCall City staff, Planning and Zoning department was upheld thereby not requiring a CUP for the construction of the dock. SGNA now appeals that decision to the Valley County Board of County Commissioners as provided for in Valley County Code § 7-1-3.C which states in part, “[a]ll final decisions, including legislative matters and quasi-judicial matters, made in the McCall area of city impact are appealable to the Valley County Board of Commissioners as the governing board. . . .” In order to make a decision, the Valley County Board of County Commissioners will consider the record below along with the oral arguments presented at the hearing, any exhibits entered into the record, and public comments.

FINDINGS

1. The McCall City Code § 1.10.2 establishes the planning and zoning commission which is further governed by McCall City Code Title 3. Additionally, Valley County Code § 7-1-1 through § 7-1-5 define the relationship between the city of McCall and Valley County. Finally, Idaho Code §67-6501 *et. seq.* provides additional guidance regarding local land use planning.
2. The City of McCall and Valley County, Idaho have established a joint Planning and Zoning Commission as authorized by law.
3. McCall City Code § 3.1.01 pronounces the authority of the city to enact zoning regulations.

4. Individuals who are “aggrieved” by a decision may appeal such decision following the procedure set forth in McCall City Code § 3.15.08.
5. Appeals from a decision of the McCall City Planning and Zoning Commission are presented to the Valley County Board of County Commissioners. Valley County Code § 7-1-3.C.
6. This matter is in regards to an Administrative Decision of the McCall Planning and Zoning staff wherein the staff determined a dock built by WWBDA was not a commercial dock and therefore did not require a CUP prior to construction.
7. Per applicable protocols, the SGNA appealed the decision not to require a CUP to the McCall City Planning and Zoning Commission.
8. The McCall City Planning and Zoning Commission held a hearing and ultimately upheld the Administrative Decision that the dock, built by WWBDA, was not a “commercial dock” and therefore did not require a CUP.
9. SGNA appealed that decision to the Valley County Board of County Commissioners.
10. WWBDA is in essence an applicant party despite there being no requirement for a permit application pursuant to the Administrator Decision.
11. The public hearing on the matter was properly noticed and published.
12. A public hearing was held on November 5, 2018.
13. Both SGNA and WWBDA were provided the opportunity to be heard regarding this matter.
14. Members of the public were allowed to speak to the issue.
15. The public hearing was recorded and a record of the hearing was produced simultaneously.
16. Both parties submitted materials to be considered by the Valley County Board of County Commissioners. Those materials included

- a. Submission from Tricia Soper, Esq. which included color maps of the PLCSOA area, other private community docks in the PLCSOA neighborhood, Wagon Wheel Bay and Slyvan Beach Aerial View, McCall City Code § 3.7.011, McCall City Code § 3.7.012
- b. Valley County Board of Commissioners Staff Report
- c. Minutes of the McCall Area Planning and Zoning Commission – Special Meeting from August 21, 2018
- d. Print out of the slides used in the SGNA presentation
- e. A map of the State Subdivision – Southwest Payette Cottage Sites
- f. A letter from Tricia Soper dated August 1, 2018 re: Appeal by Sherlie-Grouse neighborhood Assoc., Inc
- g. Associated exhibit A from Soper letter of August 1, 2018
 - 1. McCall Impact Area Citizen Code Complaint Form with complainant Sharlie-Grouse Neighborhood Association
 - 2. Email from Sharlie Grouse NA dated May 25, 2018 to Morgan Bessaw
 - 3. Five photographs of the neighborhood
- h. Associated exhibit B from Soper letter of August 1, 2018
 - 1. Email chain from Morgan Bessaw to Kevin Hanigan originally dated May 25, 2018 with further discussion on June 8, 2018
- i. associated exhibit C from Soper letter of August 1, 2018
 - 1. Letter from Jasen X. King, Lands and Waterways, LRSsr, of January 18, 2017 re: Notice of Application (Wagon Wheel Bay Dock Association – L65S683)
 - 2. Joint Application for Permits from WWBDA, Inc.
 - 3. Letter from Tricia Soper, Esq. to Scott Corkill/Jasen King, Idaho Department of Lands dated January 17 2017 re: Wagon Wheel Bay Dock Association, Inc. Application for Encroachment Permit for Payette Lake
 - 4. Articles of Incorporation for the Wagon Wheel Bay Dock Association
- j. Associated exhibit D from Soper letter of August 1, 2018
 - 1. State of Idaho, Department of Lands Monthly Mail Log, January 2017
- k. Associated exhibit E from Soper letter of August 1, 2018
 - Final Order in the Matter of: Encroachment Permit Application Wagon Wheel Bay Dock Association, Inc. – Applicant
 - l. Associated exhibit F from Soper letter of August 1, 2018
 - 1. Opinion on Appeal, Zephaniah and Annmarie Johnson, husband and wife, Andrea Umbach, a single person, and Cottage Site LLC, an Idaho Limited Liability Company, appellants, vs. Idaho Department of Lands, Respondent, and Wagon Wheel Bay Dock Association, Inc., Respondent – Intervenor dated January 4, 2018
 - m. Associated exhibit G from Soper letter of August 1, 2018
 - 1. Amended Judgment from CV 2017-163-C of March 26, 2018, Zephaniah and AnnMarie Johnson, husband and wife, Andrea Umbach, a single person, and Cottage Site, LLC, an Idaho limited liability company, Appellants, vs. Idaho Department of Lands, respondent and Wagon Wheel Bay Dock Association, Inc. an Idaho non-profit corporation, Intervenor/Respondent
 - n. Associated exhibit H form Soper letter of August 1, 2018
 - 1. Judgment from CV-2017-204 filed April 12, 2018, Zephaniah and AnnMarie Johnson, husband and wife, Andrea Umbach, a single person, Cutler and Nancy Umbach, husband and wife, Robert and Deanne Seiler, husband and wife, and W.H. Sharlie, Inc. an Idaho

Corporation, plaintiffs, vs. Payette Lakes Cottage Sites Owners Association, Inc. and Idaho corporation, defendant and Wagon Wheel Bay Dock Association, Inc., defendant-intervenor

2. Letter from Heathe Clark of July 31, 2018 to Michelle Groenevelt re: May 25, 2018 Notice of Violation – Community Dock SB file No. 23253.0

3. Letter from Zeke & AnnMarie Johnson to City of McCall attn: Michelle Groenevelt, Community Development Director dated July 31, 2018

4. Letter from Cutler Umbach dated July 26, 2018 to the City of McCall, attn: Michelle Groenevelt, Community Development Director

5. Letter from Robert J. Seiler dated July 30, 2018 to Michelle

6. Letter from Marlee Wilcomb dated July 30, 2018 to City of McCall re: SB file No. 23253.0

7. Letter from Christian G. Zimmerman, MD dated July 26, 2018 to: To Whom It May Concern

8. Letter from Andrea Umbach dated July 26, 2018 to City of McCall attention: Michelle Groenevelt, Community Development Director re: Requesting public review of dock installed on Wagon Wheel, Community Beach

9. Letter from Allison Korte undated

10. Letter from Diane Bagley dated July 25, 2018 to Michelle Groenevelt, Community Development Director, City of McCall re: May 25, 2018 Notice of Violation – Community Dock SB File No. 23253.0

11. Letter from Tim and Mary Wilcomb dated July 31, 2018 to the City of McCall

12. Letter from Steve and Paula Shultz dated July 31, 2018 to the City of McCall, attention: Michelle Groenevelt, Community Service Director, re: Appeal of Administrative Decision NOT to require a CUP for WWBDA Dock

13. Letter from Janey Cooke Vogt undated to the City of McCall, attention: Michelle Groenevelt

14. Letter from Gladys H. Johnson dated July 31, 2018 to City of McCall, attention Michelle Groenevelt, Community Development Director, re: Objection off Sharlie Lane Community Beach

15. Letter from Janis Lynn Johnson dated July 31, 2018 to the City of McCall, attention Michelle Groenevelt, Community Development Director re: Wagon Wheel Bay Community Beach Dock Objection

16. Letter from Don & Crane Johnson dated July 28, 2018 to the City of McCall attention: Michelle Groenevelt, re: Impact to Sharlie/Grouse Neighborhood from Dock Construction

17. Letter from Hethe Clark, Esq. dated August 3, 2018 re: May 25, 2018 Notice of Violation – Community Dock SB File No. 23253.0

18. Letter from Tricia Soper, Esq. dated August 2, 2018 re: Appeal by Sharlie-Grouse Neighborhood Assoc., Inc.

19. Letter from Kevin R. Hanigan, President Wagon Wheel Bay Dock Association, Inc. undated, to Michelle Groenevelt, Community Development Director re: WWBDA Inc Private Community Dock at Community Beach, Payette Lake

20. Approval of Site Work dated March 20, 2018

o. Letter from Michael and Pamela Riddle undated to the Valley County Commission Members

- p. Letter from Tricia Soper dated September 26, 2018 re: Notice of Appeal to County Commissioners by Sharlie-Grouse Neighborhood Assoc., Inc.
- q. Letter from Michael L. Simplot dated October 18, 2018 re: to Valley County Planning and Zoning Commissioners
- r. Findings, Conclusions, and Decision Before the McCall Area Planning and Zoning Commission, in the Matter of the Appeal of: Sharlie Grouse Neighborhood Association Of Administration Determination re: Wagon Wheel Bay Community Dock
- s. Compiled submission of Hethe Clark, Esq with the following documents included:
 - 1. Appeal of Administrative Determination Letter, dated June 18, 2018 from Hethe Clark representing the SGNA, including Addendum materials
 - 2. Letter, dated July 31, 2018, from Hethe Clark representing the SGNA, including Addendum materials
 - 3. Letter dated August 1, 2018 form Tricia Soper, representing the WWBDA
 - 4. McCall Impact Area Citizen Code Complaint Form, including photographs, submitted by SGNA (Ex. A)
 - 5. Email with City Planner Determination of No CUP Requirement (Ex B)
 - 6. Idaho Department of Lands dock application materials (Ex. C)
 - 7. Idaho Department of Lands mail log (Ex. D)
 - 8. Idaho Department of Lands Final Order (Ex. E)
 - 9. 4th Judicial District, Opinion and appeal (Ex. F)
 - 10. Amended Judgment (Ex. G)
 - 11. Judgment (Ex. H)
 - 12. Letter dated August 2, 2018 from Tricia Soper, representing the WWBDA
 - 13. Letter dated August 3, 2018, from Hethe Clark representing the SGNA
 - 14. McCall P&Z Staff report on SGNA Appeal of Administrative Decision dated August 7, 2018
 - 15. Hearing Presentation, dated August 21, 2018, presented by Hethe Clark representing the SGNA
 - 16. Findings, Conclusions and Decisions
 - 17. Transcript
- t. Letter from Clay Carley to Valley County Board of County Commissioners dated October 18, 2018 re: Appeal to County Commissioners – Wagon Wheel Bay Community Dock, McCall Impact Area
- u. Large visual exhibit of the Payette Lakes Cottage Site Owners Association

- 17. McCall City Planning and Zoning staff had previously issued an Administrative Decision treating community docks as “commercial docks”.
- 18. That Administrative Decision was rescinded.
- 19. The McCall City Planning and Zoning clearly made a distinction between community docks and commercial docks, understanding how to regulate community docks if they had intended to include the definition of community docks in the permitting process.

20. The McCall City Code §3.7.012 Conditional Uses provides for permitting for commercial docks, wharves, piers, and marinas. There is no reference to “community dock”.
21. A community dock is defined as, “[a] structure that provides private moorage for more than two (2) adjacent littoral owners, or other littoral owners possessing a littoral common area with littoral rights including, but not limited to homeowner’s associations. No public access is required for a community dock. (IDAPA 20.03.04.010.11).
22. There is no definition in the IDAPA rules for commercial dock, however, a commercial marina is defined as, “[a] commercial navigational encroachment whose primary purpose is to provide moorage for rental or for free to the general public. (IDAPA 20.03.04.010.09). It follows that a commercial marina would use a commercial dock to provide the moorage. Accordingly, a commercial dock is to provide moorage for rental or for free to the general public.
23. A commercial Navigational Encroachment is defined as, “[a] navigational encroachment used for commercial purposes. (IDAPA 20.03.04.010.10).
24. WWBDA’s dock is not used for commercial purposes. There is no moorage for rental or for free to the general public. The only individuals who have access to the dock are the members of the WWBDA.
25. The Valley County Board of County Commissioners conclude that the WWBDA dock is not a commercial dock as contemplated in McCall City Code § 3.7.012.
26. Accordingly, pursuant to McCall City Code, there is no requirement for a CUP. The McCall City Planning and Zoning Department’s Administrative Ruling and the subsequent decision by the Planning and Zoning Commission was correct in its application of the requirements regarding a community dock.

CONCLUSION

Based upon the foregoing review and analysis, and good cause appearing from the record in these proceedings, the Valley County Board of County Commissioners affirms and upholds the Administrative Decision and the Findings, Conclusions, and Decision of the McCall Area Planning and Zoning Commission.



GORDON CRUICKSHANK
Chairman, Valley County Board of County Commissioners

STATE OF IDAHO, County of Valley) ss.
I hereby certify that the foregoing is a true
copy of the original on file and of record in
this office.

Douglas A. Miller
Dated: 1/8/19
Clerk, Auditor & Recorder

By Cheri Wiggert, Deputy

EXHIBIT H

Valley County Board of County Commissioners

P.O. Box 1350 • 219 N. Main Street
Cascade, Idaho 83611-1350

Phone (208) 382-7100
Facsimile (208) 382-7107



GORDON L. CRUICKSHANK
Chairman of the Board
gcruckshank@co.valley.id.us

BILL WILLEY
Commissioner
bwilley@co.valley.id.us

ELTING G. HASBROUCK
Commissioner
ehasbrouck@co.valley.id.us

DOUGLAS A. MILLER
Clerk
dmiller@co.valley.id.us

December 24, 2018

Spink Butler L.L.P.
Attn: T. Hethe Clark
251 E. Front Street, Suite 200
P.O. Box 639
Boise, Idaho 83701

Re: REQUEST FOR RECONSIDERATION, In the Matter of the Appeal of Sharlie Grouse
Neighborhood Association

Dear Mr. Clark:

The Board of County Commissioners considered your request for reconsideration in the matter captioned above and has determined to decline your request.

The decision in this matter is affirmed.

Sincerely,

Gordon Cruickshank, Chairman, Valley County Board of County Commissioners

cc: Mark Perison, P.A., attn: Tricia K. Soper, P.O. Box 6575, Boise, Idaho 83707
City of McCall, attn: Morgan Bessaw, 216 E. Park Street, McCall, Idaho 83638

RECEIVED

JAN 07 2019

MARK D. PERISON, P.A.

STATE OF IDAHO, County of Valley) ss.
I hereby certify that the foregoing is a true
copy of the original on file and of record in
this office

Dated: 4/8/19 **Douglas A. Miller**
Clerk, Auditor & Recorder

By Cheri Wingert, Deputy

EXHIBIT I

No. C 199384	Due no later than Aug 31, 2018	2. Registered Agent and Address (NO PO BOX)	
Return to: SECRETARY OF STATE 700 WEST JEFFERSON PO BOX 83720 BOISE, ID 83720-0080 NO FILING FEE IF RECEIVED BY DUE DATE	Annual Report Form		CUTLER UMBACH 7225 W BETHEL ST BOISE ID 83704
	1. Mailing Address: Correct in this box if needed. SHARLIE-GROUSE NEIGHBORHOOD ASSOCIATION, INC. (THE) DIANE BAGLEY 7225 W BETHEL ST BOISE ID 83704		
4. Corporations: Enter Names and Business Addresses of President, Secretary, and Directors. Treasurer (optional).			
Office Held	Name	Street or PO Address	City State Country Postal Code
PRESIDENT	DIANE BAGLEY	7225 W BETHEL ST	BOISE ID USA 83704
SECRETARY	ANNMARIE JOHNSON	7225 W BETHEL ST	BOISE ID USA 83704
5. Organized Under the Laws of: ID C 199384	6. Annual Report must be signed.* Signature: Diane M. Bagley Name (type or print): Diane M. Bagley		Date: 06/26/2018 Title: President
Processed 06/26/2018		* Electronically provided signatures are accepted as original signatures.	

EXHIBIT J



0003375364



STATE OF IDAHO
Office of the secretary of state, Lawrence Denney
ANNUAL REPORT
 Idaho Secretary of State
 PO Box 83720
 Boise, ID 83720-0080
 (208) 334-2301
 Filing Fee: \$0.00

For Office Use Only
-FILED-
 File #: 0003375364
 Date Filed: 12/19/2018 12:02:17 PM

Entity Name and Mailing Address:
COTTAGE SITE, LLC
 The file number of this entity on the records of the Idaho Secretary of State is: 0000118589
 Address: 7225 W BETHEL ST
 BOISE, ID 83704-9226

Entity Details:
 Entity Status: Active-Existing
 This entity is organized under the laws of: IDAHO
 If applicable, the old file number of this entity on the records of the Idaho Secretary of State was: W35314

The registered agent on record is:
 Registered Agent: **DIANE M BAGLEY**
 Registered Agent
 Physical Address
 7225 BETHEL ST
 BOISE, ID 83704
 Mailing Address

Limited Liability Company Managers and Members

Names of managers or members	Title	Address
DIANE M BAGLEY	Manager	6932 W IRVING LANE BOISE, ID 83705

The annual report must be signed by an authorized signer of the entity.
DIANE M BAGLEY _____ 12/19/2018
 Sign Here Date
 Signer's Capacity: **MANAGER**

B0124-8150 12/19/2018 12:02 PM Received by ID Secretary of State Lawrence Denney