

I. MOTION FOR SUMMARY JUDGMENT

COMES NOW Respondent Idaho State Board of Land Commissioners (“Land Board”), by and through the Office of the Attorney General, its counsel of record, and pursuant to IDAPA 20.01.01.260, hereby moves the Hearing Officer for a recommended order granting judgment as a matter of law that the Land Board lacks subject matter jurisdiction over the claims asserted and requests for relief sought by Petitioner Sharlie-Grouse Neighborhood Association, Inc. (“SGNA”) in this instance. The Land Board submits that the Hearing Officer must recommend dismissal of the Petition for Declaratory Ruling (“Petition”) in its entirety.

This Motion for Summary Judgment is made and supported by the following Supporting Memorandum and the Affidavit of Counsel in Support of Respondent’s Motion for Summary Judgment filed contemporaneously herewith.

II. INTRODUCTION

The Land Board is a constitutional entity charged with the administration of directing, controlling and disposing of the public lands in the state of Idaho. SGNA’s Petition seeks to challenge a final action of the Land Board that occurred on October 15, 2013, when the Land Board approved and adopted a plan to subdivide and dispose of specific state lands along Payette Lake near McCall, Idaho. SGNA did not seek judicial review of that final agency action. Nor did SGNA seek judicial review of the ministerial acts of issuance of the Quitclaim Deed, recorded April 25, 2014, or the Amended Quitclaim Deed, recorded January 30, 2015 (collectively “Deeds”). However, SGNA now seeks relief from the final agency action through a declaratory ruling that the Deeds are void. Based upon the following precedent and argument, the Land Board requests a recommended order from the Hearing Officer finding that no subject matter jurisdiction exists over SGNA’s Petition and that the same be dismissed.

III. UNDISPUTED MATERIAL FACTS

1. On July 16, 2013, the Land Board held a regular meeting during which the Idaho Department of Lands (“IDL”) presented the Southwest Payette Lake Lot Solution package.¹

2. Following IDL’s presentation on July 16, 2013, the Land Board passed a motion that “approve[d] the concepts outlined in the Southwest Payette Lake Lot Solution package and ... direct[ed] the Department to circulate the draft association bylaws and covenants, conditions and restrictions for comment by lessees and deeded owners” for future report to the Land Board.²

3. On August 20, 2013, the Land Board held a regular meeting during which IDL updated the Land Board on the comments received from lessees and deeded owners on the draft association bylaws and covenants, conditions and restrictions.³

4. IDL concluded the update by advising the Land Board that a thirty-day extension of the comment period was recommended, and the results of the extended comment period and a recommendation would be presented to the Land Board at a future meeting.⁴

5. As of the August 20, 2013 Land Board meeting, IDL had received a letter from Jeanne Gorrissen for the Sharlie-Grouse Neighborhood Owners and Lessees, a letter signed by each individual deeded owner or lessee within the Sharlie-Grouse neighborhood, and other letters from individual residents in the Sharlie-Grouse neighborhood.⁵

¹ Aff. of Counsel, Ex. 1 July 16, 2013 Agenda; Ex. 2 July 16, 2013 Agenda Item 6.

² Aff. of Counsel, Ex. 2 July 16, 2013 Agenda Item 6 (bracketed material added).

³ Aff. of Counsel, Ex. 3 Aug. 20, 2013 Agenda; Ex. 4 Aug. 20, 2013 Agenda Item 11.

⁴ Aff. of Counsel, Ex. 4 Aug. 20, 2013 Agenda Item 11.

⁵ Aff. of Counsel, Ex. 4 Aug. 20, 2013 Agenda Item 11, Bates Nos. Resp’t 0183, 0185-190, 192-195.

6. On October 15, 2013, the Land Board held a regular meeting during which IDL presented on, and recommended approval of, the Southwest Payette Declaration of Covenants, Conditions & Restrictions.⁶

7. Prior to the October 15, 2013 meeting, attorney Jay Gustavsen, on behalf of SGNA, delivered a letter to IDL requesting that SGNA be excluded from participation in the proposed master association, the Payette Lake Cottage Site Owners Association (“PLCSOA”), and that the immediate roads and common areas be granted by quitclaim deeds to SGNA.⁷

8. The Office of the Attorney General responded to Mr. Gustavsen by letter dated October 8, 2013, denying the request and expressly advising that: “Part of the process for Payette Lake will involve the transfer of a majority of the roads, easements and common areas to PLCSOA.... The roads, easements and common areas will be available for all members of PLCSOA, which will be responsible for maintenance and repair in accordance with the association documents.”⁸

9. During IDL’s October 15, 2013 presentation to the Land Board, it was advised that: “The solutions package included the ultimate transfer of the ownership of the roads and the common areas to an association for that area for management and oversight in the future.”⁹

10. IDL highlighted for the Land Board that both the Sylvan Beach Mutual Corporation and the Sharlie-Grouse Neighborhood Association had requested that the “roads and/or common areas within their neighborhood boundaries [be] deeded to them directly.”¹⁰

⁶ Aff. of Counsel, Ex. 5 Oct. 15, 2013 Agenda; Ex. 8 Oct. 15, 2013 Agenda Item 9.

⁷ Aff. of Counsel, Ex. 6 Oct. 15, 2013 Agenda Item 9, Bates Nos. Resp’t 0292-297.

⁸ Aff. of Counsel, Ex. 6 Oct. 15, 2013 Agenda Item 9, Bates Nos. Resp’t 0298-299.

⁹ Aff. of Counsel, Ex. 7 Transcript 1:31-33, Bates No. Resp’t 0300.

¹⁰ Aff. of Counsel, Ex. 7 Transcript 2:45-49, Bates No. Resp’t 0301.

11. Regarding these requests, IDL's recommendation to the Land Board was as follows:¹¹

59 **Ms. Langford:** And so, at the end of that paragraph we have, "After due consideration the State believes
60 the currently proposed plan for the Southwest Payette Lakes area is in the best interest of the
61 state endowment lands and does not intend to further fragment ownership or control of the
62 roads and easements or common areas among other homeowners' associations." This of course
63 will honor any of the prior rights that were conferred either in previous plats or previous deeds
64 that have happened over a number of decades.

12. IDL recommended that the Land Board approve the proposed Declaration of Covenants, Conditions, and Restrictions [for] Amended Cedar Knoll Acres, Amended Pinecrest Addition and Southwest Payette Cottage Sites ("Declaration").¹² It was made clear that "adoption of the CC&R's is the last official action that we need from the Board.... And then we can conclude or continue with disposition activities for that location," including the roads and common areas.¹³

13. During the October 15, 2013 Land Board meeting, there was also discussion regarding whether a public auction was required for transfer of common areas,¹⁴ and a verbal request by Mr. Gustavsen, on behalf of SGNA, that SGNA be exempt from the Declaration.¹⁵

14. Following further discussion on SGNA's request, the Land Board unanimously passed a motion that, "the Board approve the Department's recommendation, with the addition that the Department be directed to prepare a report to the Board presenting options for either leasing or disposing of the five lots adjacent to Syringa Park."¹⁶

¹¹ Aff. of Counsel, Ex. 7 Transcript 2:59-64, Bates No. Resp't 0301 (quoting Ex. 6 Oct. 15, 2013 Agenda Item 9, Bates Nos. Resp't 0298-299).

¹² Aff. of Counsel, Ex. Ex. 6 Oct. 15, 2013 Agenda Item 9, Bates No. Resp't 0205.

¹³ Aff. of Counsel, Ex. 7 Transcript 2:79-3:85, Bates Nos. Resp't. 0301-302.

¹⁴ Aff. of Counsel, Ex. 7 Transcript 5:164-7:256, Bates Nos. Resp't. 0304-306.

¹⁵ Aff. of Counsel, Ex. 7 Transcript 7:268-8:312, Bates Nos. Resp't 0306-307.

¹⁶ Aff. of Counsel, Ex. 7 Transcript 8:316-9:338, Bates Nos. Resp't. 0307-308.

15. The adopted Declaration was signed by Governor Otter and Secretary of State Ysursa, and recorded with Valley County on November 14, 2013, as Instrument No. 381830.¹⁷

16. A Quitclaim Deed to the PLCSOA was signed by Governor Otter and Secretary of State Ysursa, and recorded April 25, 2014, as Instrument No. 384477.¹⁸

17. An Amended Quitclaim Deed to PLCSOA was signed by Governor Otter and Secretary of State Denney, and recorded with Valley County on January 30, 2015, as Instrument No. 389629.¹⁹

18. SGNA did not file for judicial review of the Land Board's final action.²⁰

IV. ARGUMENT

A. **No Subject Matter Jurisdiction Exists in the Land Board to Invalidate any Final Agency Action Arising Out of the Declaration, including the Deeds.**

1. Any Declaratory Ruling Could Only be an Untimely Advisory Opinion – Not Resulting in Voiding the Deeds.

SGNA initiated this contested case and seeks declaratory relief pursuant to Idaho Code § 67-5232 and IDAPA 20.01.01.400.²¹ The statutory provision allows a person to request a “declaratory ruling as to the applicability of any statutory provision or of any rule administered by the agency,” I.C. § 67-5232 (emphasis added). Similarly, the Rules of Practice and Procedure before the State Board of Land Commissioners allow any person to petition for “a declaratory ruling on the applicability of a statute, rule or order administered by the agency” IDAPA 20.01.01.400 (emphasis added). The laws identified by SGNA as being applicable to its Petition

¹⁷ Aff. of Counsel, Ex. 8 Declaration.

¹⁸ Petition for Declaratory Ruling ¶ 2; Answer to Petition for Declaratory Ruling ¶ 3.

¹⁹ Petition for Declaratory Ruling ¶ 3; Answer to Petition for Declaratory Ruling ¶ 4.

²⁰ See Petition for Declaratory Ruling ¶¶ 5, 6, 9, 10; Answer to Petition for Declaratory Ruling ¶¶ 7, 10.

²¹ Petition for Declaratory Ruling ¶ 25. Idaho Code § 67-5255, also cited by SGNA, is nearly identical, except that it provides for declaratory rulings “as to the applicability of any *order* issued by the agency” (emphasis added). SGNA, however, does not assert that the Land Board violated any orders.

are Article IX, Section 8 of the Idaho Constitution, and Sections 58-313 and 58-322 of the Idaho Code. (Pet. ¶¶ 14, 17, 18). However, SGNA’s reliance on the declaratory ruling provision of the Idaho Administrative Procedure Act (“APA”) is merely a thinly veiled effort to circumvent the limits on judicial review of final agency actions that now prohibit review of the Land Board’s actions regarding and arising out of the Declaration. *See* discussion *infra* Part IV.A.2.

The Idaho Legislature first authorized declaratory rulings in 1965 when it adopted an administrative procedures act. 1965 Sess. L. 701. The 1965 statute was based on the 1961 Model Administrative Procedures Act,²² and provided as follows:

Each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency. Rulings disposing of petitions have the same status as agency decisions or orders in contested cases.

1965 Sess. L. at 706. Commentary on the 1961 Model Act describes the declaratory ruling provision as a means of “obtaining advisory opinions from agencies as to the meaning of agency rules and the applicability thereof in particular factual circumstances, so that a person proposing a course of action could obtain ‘a binding declaration concerning the consequences of his proposed action.’” Frank E. Cooper, 1 *State Administrative Law* 239-40 (1965) (quoting *Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. 30-33 (1941)).

Subsequent amendments to the declaratory ruling statute have retained its primary function as a means of obtaining advisory opinions. The statute currently provides in relevant part as follows:

²² A copy of the 1961 Model Act is available at: <http://www.japc.state.fl.us/Documents/Publications/USAPA/MSAPA1961.pdf> (last visited March 12, 2019).

Declaratory rulings by agencies. (1) Any person may petition an agency for a declaratory ruling as to the applicability of any statutory provision or of any rule administered by the agency.

I.C. § 67-5232. By its plain terms, the statute addresses only the “applicability” of a statute or rule—it does not authorize the agency to adjudicate whether a past agency action violated a statute or rule. Notably, courts addressing similar provisions recognize that the “declaratory ruling was originally devised to provide a means of testing the applicability of a rule before a person became involved in a dispute with an administrative agency, that is, apart from a contested case.” *Chrysler Corp. v. Dep't of Civil Rights*, 323 N.W.2d 608, 613 (Mich. Ct. App. 1982) (O'Brien, J., concurring) (emphasis added). “[T]he purpose of such rulings [is] to declare the rights of the parties in the first instance, not whether rights already acted upon at the agency level have been properly determined [D]eclaratory rulings are not appellate in nature, and cannot be resorted to as a substitute for, or in lieu of, proper appellate remedies.” *Petition of D.A. Assocs.*, 547 A.2d 1325, 1326 (Vt. 1988) (citations omitted); see *Cobbley v. City of Challis*, 143 Idaho 130, 133-34, 139 P.3d 732, 735-36 (2006) (explaining how judicial review is the exclusive method to challenge a final agency decision).

In cases analogous to the present proceedings, the Hawaii Supreme Court has been particularly diligent in blocking attempts to seek declaratory rulings when petitioners failed to timely appeal an agency action. In *Citizens Against Reckless Dev. v. Zoning Bd. of Appeals of City & Cnty. of Honolulu*, 159 P.3d 143 (Haw. 2007), parties opposing construction of a Wal-Mart petitioned Honolulu’s Department of Planning and Permitting (“DPP”) for a declaratory ruling that a conditional use permit (“CUP”) had been wrongfully issued, after their previous appeals of the CUP were dismissed as untimely. *Id.* at 148-49. The DPP refused to issue a declaratory ruling, and the court upheld that decision for the following reasons:

[T]he declaratory ruling procedure was not intended to be utilized to seek review of agency determinations that have already been made and which have not been timely appealed.

HRS § 91–8, entitled “Declaratory rulings by agencies,” provides that:

Any interested person may petition an agency for a declaratory order as to the applicability of any statutory provision or of any rule or order of the agency....²³

[B]earing in mind the plain meaning of the term ‘applicability,’ it cannot seriously be maintained that the procedure was intended to review already-made agency decisions....

Id. at 155-56. The court then reviewed the Hawaii statutes regarding appeal of final agency decision or orders,²⁴ and held:

Given this panoply of review options available to interested parties, each specified to a different type of agency action, it would appear that the legislature intended the declaratory ruling procedure to likewise have a unique and independent role in the statutory scheme. ... We therefore presume that the legislature acted intentionally when it chose the term ‘applicability’ to denote a special type of procedure, whereby an interested party could seek agency advice as to how a statute, agency rule, or order would apply to particular circumstances not yet determined. It is therefore inconsistent with the structure of HRS chapter 91 to allow declaratory orders as a means of review of agency decisions.

Id. at 156 (citations omitted). In short:

²³ As is true for Idaho Code § 67-5232, the provision for declaratory rulings on the applicability of statutes or rules has its origin in the 1961 Model Administrative Procedure Act. *Citizens Against Reckless Dev*, 159 P.3d at 157-58.

²⁴ The court cited the Hawaii statutes providing for: petitions to adopt, amend, or repeal a rule; judicial declarations as to the validity of agency rules; and appeal of final agency decisions or contested cases. *Id.* at 156. The Idaho APA has similar provisions. See Idaho Code § 67-5230 (“[a]ny person may petition an agency requesting the adoption, amendment, or repeal of a rule”); Idaho Code § 67-5278 (“[t]he validity or applicability of a rule may be determined in an action for declaratory judgment in the district court”); Idaho Code § 67-5270 (persons aggrieved by a final order of a final agency action other than an order is entitled to judicial review).

The declaratory ruling procedure is intended to allow an individual to seek an advance determination of how some law or order applies to his or her circumstances. ... [T]he declaratory ruling procedure cannot be used to review decisions that agencies have already rendered.

Id. at 157 (citations omitted). The reasoning of the court is equally applicable to Idaho's declaratory ruling statute, given the similarity in the structure of the Idaho and Hawaii administrative procedure acts, and the nearly-identical wording of Hawaii Revised Statute § 91-8 and Idaho Code § 67-5232.

SGNA had the opportunity to appeal the Land Board's approval of the Declaration and the issuance of the Deeds. As conceded in the Petition, SGNA was informed in writing more than five months before issuance of the Deeds that the property would be conveyed to the PLCSOA.²⁵ For reasons unstated in the Petition, SGNA chose not to appeal the Land Board's actions. The plain language of Idaho Code § 67-5232 does not allow SGNA to circumvent the consequences of that decision by seeking a declaratory ruling years after the final agency action occurred. SGNA's Petition must be dismissed as a matter of law.

2. The Exclusive Option for Judicial Review of the Land Board's Final Agency Action is No Longer Available to SGNA.

The Land Board is an "agency" as defined by I.C. § 67-5201(2); therefore, its final actions are reviewable pursuant to the APA. *Idaho Watersheds Project, Inc. v. State Bd. of Land Comm'rs*, 128 Idaho 761, 764, 918 P.2d 1206, 1209 (1996). The exclusive option for review of a Land Board action is to file for judicial review pursuant to the APA. *See* I.C. § 67-5273(3); *Cobbley*, 143 Idaho at 133-34, 139 P.3d at 735-36. Further, review of an agency action is purely statutory – there is no such right absent, or outside the scope of, the statutory grant. I.R.C.P. 84(a)(1); *Gibson v. Ada*

²⁵ Petition for Declaratory Ruling ¶ 10; *see infra* Part III. Undisputed Material Facts ¶¶ 1-8.

Cnty. Sherriff's Dep't, 139 Idaho 5, 8, 72 P.3d 845, 848 (2003). Without an enabling statute, there is an absence of subject matter jurisdiction. *Laughy v. Idaho Dep't of Transp.*, 149 Idaho 867, 870, 243 P.3d 1055, 1058 (2010); *Williams v. State Bd. of Real Estate Appraisers*, 149 Idaho 675, 677, 239 P.2d 780, 782 (2010); *Taylor v. Canyon Cnty. Bd. of Comm'rs*, 147 Idaho 424, 430-31, 210 P.3d 532, 538-39 (2009). "A petition for judicial review of a final agency action other than a rule or order must be filed within twenty-eight (28) days of the agency action, except as provided by other provision of law." I.C. § 67-5273(3). "The failure to file a timely petition for judicial review is jurisdictional and causes automatic dismissal of the petition." *City of Eagle v. IDWR*, 150 Idaho 449, 451, 247 P.3d 1037, 1039 (2011) (citing I.R.C.P. 84(n)) (emphasis added). "The failure to physically file a petition for judicial review ... with the district court within the time limits prescribed by statute and these rules is jurisdictional and will cause automatic dismissal of the petition ... on motion of any party...." I.R.C.P. 84(n).

The final agency action that is the gravamen of this dispute occurred on October 15, 2013, at a regularly scheduled Land Board meeting where the Land Board, by unanimous vote, approved and adopted the Declaration (drafts of which had been provided to SGNA's members), which expressly states that "common areas" of the subdivisions shall include "all roads, easements, rights-of-way, and lake access lots which are shown on the Plats."²⁶ The Declaration further states that the PLCSOA "will operate and maintain certain properties and facilities within the Plats and assume maintenance obligations by virtue of deeded ownership and an easement over State

²⁶ See *infra* Part III. Undisputed Material Facts ¶¶ 6-14; Aff. of Counsel, Ex. 7 Transcript 9:328-338, Bates No. Resp't 0308; Aff. of Counsel, Ex. 8 Declaration ¶ 1.14, Bates No. Resp't 0313; see also Ex. 2 July 16, 2013 Agenda Item 6, Bates No. Resp't 0047; Ex. 4 Aug. 20, 2013 Agenda Item 11, Bates No. Resp't 0103; Ex. 6 Oct. 15, 2013 Agenda Item 9, Bates No. Resp't 0208.

land.”²⁷ The public, including SGNA, was notified that ownership of the roads and common areas would be transferred to the PLSCOA without a public auction.²⁸ Additional notice had been provided at prior public meetings of the Land Board, at which the lot solutions package for the Southwest Payette Cottage Sites had been thoroughly vetted, including the fact that “when implemented, [the Land Board] will transfer ownership of roads and common areas to an association.”²⁹ SGNA and its members were involved throughout this public process.³⁰ However, after all of its participation, SGNA did not seek judicial review of the Land Board’s final action.³¹

The question of the constitutionality of conveyance of the common areas without an auction specific to those lands was posed to the Land Board at the October 15, 2013 meeting and discussed, in part, as follows:³²

166 **Mr. Robert Forrey:** Governor, members of the Board, I'm Bob Forrey, 4900 Ridgewood Road in Nampa.
167 My question is it appears that the roadways, and common areas, and easements will be deeded
168 over to an association. I don't see anything about an auction for before that deed is signed or
169 any monetary value for the roadways. They're still—the roads and common areas are still
170 endowment lands. Can they simply be deeded over without—?

182 **Mr. Steve Strack:** Governor, members of the Board, I'm Steven Strack, Deputy Attorney General in the
183 Natural Resources Division. This is an issue that we did extensive research on. And we found—I
184 think we've briefed the Board on this before, and this is just a reminder that in 1924 and 1932
185 when these cottage sites were platted there was dedication language in the plat that basically
186 dedicated these roads and common areas to public use. By law when you do that kind of
187 dedication it's basically a conveyance of title to the public.
188

²⁷ Aff. of Counsel, Ex. 8 Declaration ¶ B, Bates No. Resp't 0310 (emphasis added); *see also* Ex. 2 July 16, 2013 Agenda Item 6, Bates No. Resp't 0044; Ex. 4 Aug. 20, 2013 Agenda Item 11, Bates No. Resp't 0101; Ex. 6 Oct. 15, 2013 Agenda Item 9, Bates No. Resp't 0206.

²⁸ *See infra* Part III. Undisputed Material Facts ¶¶ 8-13.

²⁹ Aff. of Counsel, Ex. 4 Aug. 20, 2013 Agenda Item 11, Bates No. Resp't 0099; *see also* Ex. 2 July 16, 2013 Agenda Item 6, Bates No. Resp't 0003-4.

³⁰ *See infra* Part III. Undisputed Material Facts ¶¶ 2-13.

³¹ *See infra* Part III. Undisputed Material Facts ¶ 18.

³² Aff. of Counsel, Ex. 7 Transcript 5:166-199, *see also* 6:201-7:256.

189 And we concluded that that was within the Board's authority, because by dedicating these
190 properties to the public that it basically increased the value of the subdivided lots to an extent
191 that there was compensation made to the trust. So basically, even though you don't get paid for
192 the roads per se, the trust and the endowments are compensated through that increased value
193 for the lots. And so, as part of this platting process, we do not change those previous
194 dedications. They are taking title to these roads. The associations will take title to these roads
195 subject to whatever the legal effect of those past dedications are, and that has not been
196 litigated, so it's still an open question. But regardless of whether the dedication is to the public,
197 or for some reason the court was to conclude that it was just to the members, or the lessees
198 and owners of those lots, either way the value of the lots has increased to the point that there is
199 compensation to the endowments.

Further, the Declaration identified the Wagon Wheel Bay Neighborhood of the Southwest Payette Cottage Sites subdivision to include the Sharlie-Grouse area that primarily utilizes the “common areas” known as Grouse Way, Sharlie Lane, Sharlie Way, Community Beach Road, and Community Beach Common Area.³³ During the comment period preceding the October 15, 2013 Land Board action, IDL received a letter from all the deeded owners and lessees within the Sharlie-Grouse area, and another letter on behalf of Sharlie-Grouse Neighborhood Owners and Lessees.³⁴ Both letters requested that the Sharlie-Grouse area be excluded from governance under the Declaration.³⁵ IDL also received a letter from SGNA’s former attorney with similar requests and proposed language for the amendment to the then-draft Declaration.³⁶ SGNA’s proposed language would have expressly allowed the common areas of Sharlie-Grouse area to be managed by SGNA – not the PLCSOA.³⁷ None of their suggested changes were incorporated into the final, approved Declaration.³⁸ SGNA’s request to be excluded from the Wagon Wheel Bay Neighborhood was

³³ Aff. of Counsel, Ex. 8 Declaration Exs. A and C, Bates Nos. Resp’t 0328-329, 334; *see* Petition for Declaratory Ruling ¶ 6.

³⁴ *See infra* Part III. Undisputed Material Facts ¶ 5.

³⁵ *See infra* Part III. Undisputed Material Facts ¶¶ 7, 8, 10, 11, 13.

³⁶ **

³⁷ *See infra* Part III. Undisputed Material Facts ¶ 7.

³⁸ *See infra* Part III. Undisputed Material Facts ¶ 14.

rejected by IDL.³⁹ At the October 15, 2013 Land Board meeting, Mr. Gustavsen spoke with the Land Board about SGNA's request. The discussion was, in part, as follows:⁴⁰

268 **Mr. Jay Gustavsen:** My name is Jay Gustavsen and I represent the Sharlie-Grouse Association. I,
269 unfortunately, yesterday stuck a letter from our office to all of you under your doors yesterday.
270 I don't know if you, yes, received that or not. Basically, the Sharlie-Grouse Neighborhood
271 Association is to the south of Sylvan Beach, which is being exempt from this in my
272 understanding, and that's simply what the Sharlie-Grouse Neighborhood Association is asking,
273 to be exempt from this.
274
275 In the event that this goes through, they can opt in at a later date. But at this point they would
276 like the Exhibit C to exclude them from this draft association.

280 **Secretary of State Yursa:** Governor, I'd like to hear some comments from the Department on this
281 issue; Ms. Langford or Mr. Follett.

298 **Mr. Robert Follett:** No. Robert Follett with Deputy Attorney General. I believe Kate indicated really the
299 import of the matter, and that is that neither the Sylvan Beach Association nor the Sharlie-
300 Grouse Association would be deeded any separate roads; they will all go to the primary
301 association. And the members of Sylvan Beach, and the members of Sharlie-Grouse, can
302 become part of the entire membership of the association, and negotiate within the association,
303 you know, how they would like.
304
305 But we believe that for the endowments and for the endowment land that we're retaining, and
306 that we will obviously continue to have access across those roads for the same purposes to
307 reach our property, that it is in the best interest of the endowments to transfer all of those
308 roads and common areas as one body, so that we don't have fragmentation which might—and
309 I'm not saying that anybody necessarily would, but we don't want the possibility of different
310 associations trying to close off areas. We just thought it would be the cleanest thing, and the
311 most equitable scenario, to have all of those roads and common areas handled by the
312 association.

Following the receipt of all information and SGNA's request, Attorney General Wasden moved that the Land Board approve IDL's recommendation.⁴¹ The motion was seconded by

³⁹ See *infra* Part III. Undisputed Material Facts ¶ 8.

⁴⁰ Aff. of Counsel, Ex. 7 Transcript 7:268-8:312, Bates Nos. Resp't 0306-307.

⁴¹ Aff. of Counsel, Ex. 7 Transcript 8:316-9:338, Bates No. Resp't 308.

Secretary of State Ysursa, and the motion carried on a vote of 5-0.⁴² That final agency action authorized and directed the subsequent ministerial acts of issuing the Deeds.⁴³ On November 14, 2013, the Declaration was filed with the Valley County Recorder as Instrument No. 381830.⁴⁴

Neither SGNA nor any member sought judicial review of the Land Board's final action approving the Declaration.⁴⁵ Having failed to pursue the judicial review process, SGNA cannot now attack the Land Board's decision in a separate proceeding. SGNA's inaction is jurisdictional and must result in the dismissal of the Petition.

B. The Land Board Lacks the Legal Authority to Grant SGNA's Requested Relief of Voiding the Deeds.

SGNA takes issue with the Land Board's informed decision to not conduct a public auction to dispose of certain "common area" properties that were the subject the Deeds. SIGNA seeks a declaration that the conveyances were made without authority and jurisdiction, and therefore the resulting Deeds "are void and without effect."⁴⁶

The Petition fails because the Land Board has no authority to declare a previously-conveyed deed to be void. Both the Idaho Constitution and the Idaho Code authorize the Land Board to convey endowment land, Idaho Const. Art. IX, §§ 7 & 8; I.C. §§ 58-313, 58-317; but, neither the Constitution nor the Idaho Code authorize the Land Board to unilaterally void such conveyances once a deed is delivered to the grantee. This absence of authority is consistent with the rule of law in Idaho that: "Questions of contract interpretation and enforcement are normally

⁴² Aff. of Counsel, Ex. 7 Transcript 8:316-9:338, Bates No. Resp't 308.

⁴³ See *infra* Part III. Undisputed Material Facts ¶ 12.

⁴⁴ Aff. of Counsel, Ex. 8 Declaration.

⁴⁵ See *infra* Part III. Undisputed Material Facts ¶ 18.

⁴⁶ Petition for Declaratory Ruling ¶ 25.g.

the sole province of the courts.” *Idaho Power Co. v. Cogeneration Inc.*, 134 Idaho 738, 748, 9 P.3d 1204, 1214 (2000).

The granting of a deed is not a state administrative action subject to revision or revocation by the Land Board. Rather, granting a deed is the culmination of a contractual arrangement between grantor and grantee.⁴⁷ “It is a well established rule of law that prior stipulations are merged in the final and formal contract executed by the parties, and this rule applies to a deed When a deed is delivered and accepted as performance of the contract to convey, the contract is merged in the deed.” *Sainsbury Constr. Co. v. Quinn*, 137 Idaho 269, 272, 47 P.3d 772, 775 (Ct. App. 2002) (quoting *Jolley v. Idaho Sec., Inc.*, 90 Idaho 373, 382, 414 P.2d 879, 884 (1966)). Once a deed is conveyed, Idaho law presumes that the holder of record title is the legal owner of the property. *Hettinga v. Sybrandy*, 126 Idaho 467, 469, 886 P.2d 772, 774 (1994) (citation omitted). Such presumption can only be rebutted in a judicial action. The Land Board is not authorized to vacate recorded titles. *Compare* I.C. § 10-1202 (authorizing declaratory judgment actions to determine rights, status, or other legal relations affected by a deed) *with* Idaho Const. Art. IX, §§ 7 and 8, and I.C. § 58-104 (describing powers of Land Board).

SGNA’s attempt to avoid the judicial process by seeking a declaratory ruling from the Land Board must be denied. To the extent that SGNA seeks to have the Deeds declared void, such remedy can only be granted by a court of competent jurisdiction. Likewise, to the extent SGNA seeks a determination that the Land Board violated constitutional or statutory provisions when the Land Board voted to not hold a public auction specific to the common areas described in the

⁴⁷ *See* Aff. of Counsel, Exs. 1-8.

Declaration and Deeds, the exclusive remedy was judicial review of the Land Board's action within the twenty-eight day timeframe provided in the APA. *See discussion supra* Part IV.A.2.

It is the Legislature's intent that persons aggrieved by a final agency action must turn to the courts for relief. There is no provision of the APA that authorizes an agency to unilaterally alter contracts that vested a third-party with property rights. The relief sought in the Petition is beyond the Land Board's authority to adjudicate. Summary judgment that this tribunal lacks subject matter jurisdiction over the claims in the Petition is appropriate.

V. CONCLUSION

For the foregoing reasons, Respondent State Board of Land Commissioners respectfully requests that Sharlie-Grouse Neighborhood Association, Inc.'s Petition for Declaratory Ruling be denied in its entirety. Respondent requests that the Hearing Officer submit a recommended order finding an absence of subject matter jurisdiction and dismissing the Petition without any award or relief to Petitioner.

DATED this 15th day of April, 2019.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL


ANGELA SCHAEER KAUFMANN
JOY M. VEGA
Deputy Attorneys General
for State Board of Land Commissioners

CERTIFICATE OF SERVICE

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

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