DEPT. OF LANDS
2019 JUN 14 AM 11:49
BOISE, IDAHO

LAWRENCE G. WASDEN
ATTORNEY GENERAL

DARRELL G. EARLY
Chief Natural Resources Division

ANGELA SCHAER KAUFMANN, ISB # 5436
JOY M. VEGA, ISB # 7887
Deputy Attorneys General
700 W. State Street, 2nd Floor
P.O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-2400
Fax: (208) 854-8072
Email: angela.kaufmann@ag.idaho.gov
joy.vega@ag.idaho.gov

Attorneys for Idaho State Board of Land Commissioners

BEFORE THE STATE BOARD OF LAND COMMISSIONERS

SHARLIE-GROUSE NEIGHBORHOOD ASSOCIATION, INC., Petitioner, vs IDAHO STATE BOARD OF LAND COMMISSIONERS, Respondent, and PAYETTE LAKES COTTAGE SITES OWNERS ASSOCIATION, INC.; and WAGON WHEEL BAY DOCK ASSOCIATION, INC., Intervenor-Respondents	RESPONDENT'S MEMORANDUM IN OPPOSITION TO SGNA'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Respondent Idaho State Board of Land Commissioners ("Land Board" or "Respondent") submits the following response in opposition to the motion for summary judgment filed by Petitioner Sharlie-Grouse Neighborhood Association, Inc. ("SGNA").

II. BACKGROUND FACTS & LAW

In 1905, the Legislature authorized the Land Board to "cause any portion of State lands to be laid out in lots and blocks, to be sold from time to time, at public auction, in such quantities and on such terms as shall enable the State to realize the best prices therefor; and such land shall not be sold except in lots or blocks, as herein provided." 1905 Idaho Sess. L. 141. In 1927, the Legislature provided more specific procedures for the subdivision of endowment lands:

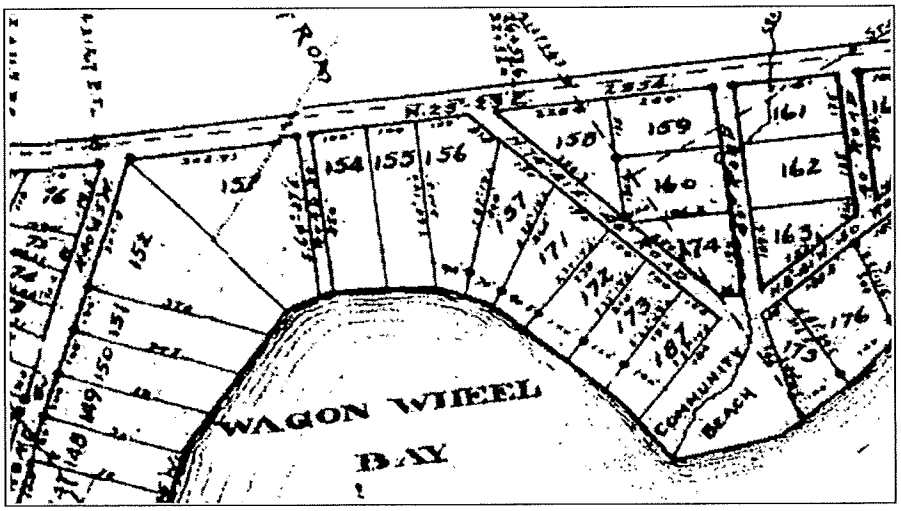
> The state board of land commissioners may cause any portion of state lands to be laid out in subdivisions of less area than the legal subdivisions of the United States survey, upon showing to the satisfaction of the board that said subdivisions will be more salable or will sell at a better price than when undivided or that public convenience will be served thereby. A plat of any such subdivisions shall be filed in the office of the recorder of the county where said lands are situated. The board may sell such subdivisions from time to time, at public auction, in such quantities and on such terms as shall enable the state to realize the best prices therefor . . . .

1927 Idaho Sess. L. 98 (codified at Idaho Code § 58-317).

Pursuant to the authority granted it by the Legislature, the Land Board created the Southwest Payette Cottage Sites Subdivision ("Payette Lake Subdivision"). The Payette Lake Subdivision was first platted in 1924. The plat includes a Certificate of Ownership and Deed of Donation that states: "It is the intention of the State of Idaho to, and it does hereby, subdivide and lay out in lots as shown on this plat said tract and premises to be designated as the Payette Lake Cottage Sites and does by these presents donate and dedicate the streets, roads, alleys, commons and public grounds as shown on this plat to the use of the public forever." (Affidavit of Steven

W. Strack ("Strack Aff."), filed contemporaneously herewith, Ex. 1.)[1] In 1932, the Land Board filed an amended plat, whose Certificate of Ownership and Deed of Donation states: "It is the intention of the State of Idaho to, and it does hereby, subdivide and lay out in lots as shown on this plat said tracts and premises to be designated as the Payette Lake Cottage Sites and does by these presents donate and dedicate the streets, roads, alleys, commons and public grounds as shown on this plat to the use of the public forever." (Strack Aff., Ex. 2).

Among the common areas designated on the plat was an area designated as "Community Beach," which is a lakefront area just north of Wagon Wheel Bay. It was shown on the 1932 plat as follows:



The Land Board's establishment of the Payette Lake Subdivision and its donation and dedication of the roads and common areas was authorized by Idaho Code § 58-317 and its predecessor session law. The authority to establish and file plats of subdivisions necessarily

[1] SGNA asserts that the 1924 plat "did not include community beach or other common areas." SGNA's Opening Brief on Motion for Summary Judgment ("SGNA Mem."), p.7 n.1. This assertion is incorrect. In fact, the portion of the 1924 plat on file did include the same common areas designated on later plats, but the copies of the original plat that survive today are missing the northern portion of the subdivision where Community Beach and Wagon Wheel Bay are located. *See* Strack Aff., Ex. 1 (1924 plat); *see also* Affidavit of Counsel in Support of Motion for Summary Judgment ("Resp't MSJ Aff. of Counsel"), Ex. 2 Bates Nos. Resp't 0012-13 (Jennifer A. Stevens, *The History of State Lands on Payette Lake, Idaho: 1924-2012* 6-7 (July 12, 2013)).

included the authority to create roads and common areas within the subdivision for the use or ownership of either the public or the lot owners. Idaho has longstanding support for the subdivision and dedication of land, for public or private use:

> Dedication is essentially the setting aside of real property for the use or ownership of others. Idaho recognizes common law dedication of land both for public, as well as for private use. *Monaco v. Bennion*, 99 Idaho 529, 532, 585 P.2d 608, 611 (1978). The elements of a common law dedication are (1) an offer by the owner clearly and unequivocally indicating an intent to dedicate the land and (2) an acceptance of the offer. *Worley Highway Dist. v. Yacht Club*, 116 Idaho 219, 224, 775 P.2d 111, 116 (1989). The offer to dedicate may be made in a number of ways, including the act of recording or filing a subdivision plat depicting the specific areas subject to dedication, so long as there is a clear and unequivocal indication the owner intends to dedicate the land as depicted. *Id.* In determining whether the owner intended to offer the land for dedication, the court must examine the plat, as well as "the surrounding circumstances and conditions of the development and sale of lots." *Dunham v. Hackney Airpark, Inc.*, 133 Idaho 613, 616, 990 P.2d 1224, 1226 (Ct.App.1999) (citing *Smylie v. Pearsall*, 93 Idaho 188, 191, 457 P.2d 427, 430 (1969)) (quotations omitted).

Sun Valley Land & Minerals, Inc. v. Hawkes, 138 Idaho 543, 548, 66 P.3d 798, 803 (2003). A plat is "sufficiently accepted by the public when some of its members acted upon [the owner's] offer and purchased lots with reference to the plat filed [by the owner]." *Boise City v. Hon*, 14 Idaho 272, 280, 94 P. 167, 169 (1908). Lot sales in the Payette Lake Subdivision began shortly after the filing of the 1924 plat and were made by reference to the plat. (*See* Strack Aff., Exs. 4-6; Resp't MSJ Aff. of Counsel, Ex. 2 Bates Nos. Resp't 0012-17).

Over the years, there was a continuing debate over whether the donation and dedication of the roads and common areas was for the use of the public at large, or for the private use of lot owners and lessees. (Resp't MSJ Aff. of Counsel, Ex. 2 Bates Nos. Resp't 0007-43; (Decl. of Matthew J. McGee, Exs. A and B); *see Ponderosa Homesite Lot Owners v. Garfield Bay Resort,*

Inc., 143 Idaho 407, 409, 146 P.3d 673, 675 (2006) ("Idaho recognizes common law dedication of land for private use.").

Regardless of the scope of the dedication, the Land Board at some point determined that income from the sale of Payette Lake Subdivision lots would be maximized if lot owners were assured that ownership and control of the roads and common areas would eventually reside with the lot owners. (*See e.g.* Decl. of Matthew J. McGee, Ex. A 2 and Ex. B 3-4 (opining that the Land Board received, or would receive, return on the land underlying common areas through the enhanced value upon sale of the adjoining lots)). Accordingly, starting in 1986 the Land Board determined to convey the roads and common areas to the lot owners as a whole. (Strack Aff., Ex. 29, Nov. 25, 1986 Land Bd. Mtg. Mins.; Ex. 30, Mar. 10, 1987 Land Bd. Mtg. Mins.; Ex. 31, July 14, 1987 Land Bd. Mtg. Mins.).

The resulting deeds conveyed a future interest in roads and common areas to the lot owners upon completion of lot sales in the Payette Lake Subdivision. *See Id.* For example, Deed No. 13280, issued December 15, 1998, included the following language:

> Upon conveyance of the last state-owned lot in fee simple located in the Amended Payette Lakes Cottage Sites Subdivision, any right, title and interest to the common areas, parks, beaches, reserves, roads, sewer systems, water systems and all other common facilities held by the State of Idaho shall automatically vest in common in all holders of the right to use and enjoyment described above, and the State of Idaho shall have no further right, title and interest in such common areas, parks, beaches, reserves, roads, sewer systems, water systems, and all other common facilities.

(Strack Aff., Ex. 24.) Similar provisions appear in at least twenty other deeds issued by the Land Board in the Payette Lake Subdivision. (*See* Strack Aff., Exs. 7-27.) The Restatement of the Law of Property describes such a future interest as a "remainder subject to a condition precedent." 2 *Restatement of the Law of Property* § 157(w) (1936). While the "condition precedent must be fulfilled before any certainty exists that the interest ever will become a present interest," that does

not mean that the condition precedent must be fulfilled before that interest begins to exist. *Id.* Rather, "it is an interest with present characteristics and consequences," and the owner of the interest can enjoin the present fee owner from taking actions inconsistent with the remainder. *Id.* Idaho law recognizes the enforceability of contingent future interests. Idaho Code § 55-106; *Kirk v. Westcott,* 160 Idaho 893, 901, 382 P.3d 342, 350 (2016) (citing Idaho Code § 55-106).

In 2011, the Land Board approved moving forward with the eventual sale of all lots in the Payette Lake Subdivision. (Strack Aff., Ex. 32, May 17, 2011 Land Bd. Mtg. Mins., Regular Agenda Item 6 Mem., and Verbatim Transcript.) Consistent with earlier deeds conveying a future interest held in common with all lot owners, an amended plat for the Payette Lake Subdivision was prepared that included the following provision: "The State will convey by quitclaim deed the following lots . . . as common areas and roads shown on this plat upon formation of an association of lessees and owners of lots within the Southwest Payette Cottage Sites, Amended Pinecrest Addition and Amended Cedar Knoll Acres Subdivisions, pursuant to the bylaws to be recorded in Valley County, Idaho." (Strack Aff., Ex. 3).

The creation of a homeowners' association was required in the Declaration of Covenants, Conditions, and Restrictions, prepared and recorded by the Land Board for the amended Payette Lake Subdivision. The Declaration, among other things, required that:

> [T]he [lot] Owners will hold a membership in an incorporated nonprofit Association, known or to be known as the Payette Lakes Cottage Sites Owners Association, Inc., which Association will operate and maintain certain property and facilities within the Plats and assume maintenance obligations by virtue of deeded ownership and an easement over State land.

(Resp't MSJ Aff. of Counsel, Ex. 8 Bates No. Resp't 0310).

The directive in the amended plat to convey roads and common areas to an association of lessees and lot owners was carried out, following unanimous Land Board approval, in two

quitclaim deeds to the Payette Lakes Cottage Sites Owners Association (PLCSOA): Quitclaim Deed, State Deed No. SD13867 (April 23, 2014) and Amended Quitclaim Deed, State Deed No. SD13867 (Jan. 28, 2015). (Strack Aff., Ex. 28; Resp't MSJ Aff. of Counsel, Ex. 7 Transcript 8:316-9:338, Bates Nos. Resp't 0307-308).

III. ARGUMENT

A. IDAHO CODE § 67-5232 DOES NOT VEST THE LAND BOARD WITH SUBJECT MATTER JURISDICTION TO ADJUDICATE WHETHER ITS FINAL ACTIONS VIOLATE CONSTITUTIONAL REQUIREMENTS—SUCH JURISDICTION IS VESTED EXCLUSIVELY IN THE COURTS BY IDAHO CODE § 67-5270.

Subject matter jurisdiction is as fundamental to administrative determinations as it is to judicial determinations. For such reason Idaho courts recognize that "an administrative order may generally be collaterally attacked when the issuing agency lacks jurisdiction over the matter considered . . . ." *Idaho Power Co. v. Idaho Pub. Utilities Comm'n*, 102 Idaho 744, 749, 639 P.2d 442, 447 (1981) (quoting *Utah-Idaho Sugar v. Intermountain Gas Co.*, 100 Idaho 368, 374, 597 P.2d 1058 (1979)). In short:

> As a general rule, administrative authorities are tribunals of limited jurisdiction and their jurisdiction is dependent entirely upon the statutes reposing power in them and they cannot confer it upon themselves, although they may determine whether they have it. If the provisions of the statutes are not met and compliance is not had with the statutes, no jurisdiction exists.

Washington Water Power Co. v. Kootenai Envtl. All., 99 Idaho 875, 879, 591 P.2d 122, 126 (1979). Therefore, before proceeding to the merits of this action, the Hearing Officer must determine if the Land Board has subject matter jurisdiction, under the term of Idaho Code § 67-5232, to issue a declaratory ruling adjudicating the constitutionality of past Land Board actions.

SGNA's request to have the Hearing Officer adjudicate the constitutionality of a transaction completed over five years ago violates the nature, purpose, and function of declaratory rulings. As explained in more detail in the Land Board's Motion for Summary Judgment and

Supporting Memorandum, incorporated herein by reference, the primary function of a declaratory ruling is to obtain an agency ruling on the applicability of a statute or rule in the context of a proposed or ongoing action, so that, from that point forward, there is a binding declaration of the law that the agency will apply to the situation at hand. (*See* Resp't MSJ and Supp. Mem. at 7-8 (citing cases)).

While there is no Idaho decision on point, courts in other jurisdictions have found that when the contested agency action occurred in the past and is long since final, a declaratory ruling serves no purpose. For example, the Iowa Supreme Court, in an unpublished opinion, upheld an agency's denial of a petition for declaratory ruling because the questions posed were "premised on past, not future, conduct." *Int'l Union, United Auto, Aerospace, Agric. & Implement Workers of Am. v. Iowa Dep't of Workforce Dev.*, 649 N.W.2d 17 (Table) 2002 WL 1285965 at *2 (Iowa 2002). The court concluded:

> The petition is out of plumb with the theory and purpose of declaratory relief. Declaratory actions differ from nearly all others, such as tort, contract, and most special actions. Typically, parties seek court judgments to resolve consequences of past acts or conduct. The view of most court proceedings is retrospective. The view for declaratory relief is prospective. These unique proceedings are designed to address the consequences of contemplated or imagined future conduct. In the present case no future conduct, hypothetical or otherwise, is at issue, only a complaint addressed to whether the agencies have been doing their job.
>
> . . . .
>
> A declaratory order petition contemplates a ruling, binding on only the parties to the action, on the specific facts alleged so long as the facts in question presented are purely hypothetical. The Union's request for an opinion regarding agency duties, based on prior conduct does not fulfill the declaratory order requirements. Because the purpose of a declaratory order is to set forth a legal opinion based on hypothetical or future circumstances, the petition does not serve to end the controversy. Rather it will serve only to commence litigation among groups not parties to this action. So the

> commissioner and district court correctly found the petition was inappropriate.[2]

Id. at *2-3 (citations omitted); *see also Women Aware v. Reagen*, 331 N.W.2d 88, 92 (Iowa 1983) ("An agency declaratory ruling statute provides a mechanism for requesting an agency determination, rather than for challenging a determination already made.").

Likewise, the Vermont Supreme Court, in reviewing a statute authorizing declaratory rulings by an agency as "to the applicability of any statutory provision or of any rule or order of the agency," held that:

> "(T)he primary purpose of the act (is) to have a declaration of rights not theretofore determined, and not to determine whether rights theretofore adjudicated have been properly adjudicated." We subscribe to this view, and note that other courts have also held that proceedings under various declaratory judgment statutes cannot be substituted for adequate and available remedies of review (as we have under 10 V.S.A. § 6089) of decisions by administrative tribunals.[3]

In re State Aid Highway No. 1, 328 A.2d 667, 669 (Vt. 1974) (quoting *Clark v. Memolo*, 174 F.2d 978, 981 (D.C. Cir. 1949)); *see also Petition of D.A. Assocs.*, 547 A.2d 1325, 1326 (Vt. 1988) ("it is the purpose of [declaratory] rulings 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." (emphasis original, citations omitted)). "[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 at 1326.

---

[2] The Iowa statute provided, in relevant part, that: "Any person may petition an agency for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the agency." Iowa Stat. § 17A.9.

[3] The Vermont statute provided, in relevant part, that: "Each agency shall provide 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, and may so provide by procedure or rule." 3 Vt. Stat. Ann. § 808.

The one case cited by SGNA in support of its petition for declaratory ruling, *Idaho Retired Fire Fighters Association v. Public Employee Retirement Board*, 2017 WL 6949778 (Idaho Indus. Comm'n 2017), has since been vacated. *See Idaho Retired Firefighters Assoc. v. Public Employee Retirement Bd.*, Dkt. No. 45769, slip op. (Idaho S. Ct., June 13, 2019) (finding that declaratory petition was properly filed with the Public Employee Retirement Board, but vacating Industrial Commission's ruling on appeal of Board's decision for lack of jurisdiction). Even had the decision not been vacated, it does not support SGNA's petition, for there, the petition sought a declaratory ruling on applicability of laws to current or future circumstances, not past agency conduct. The question addressed in the case was: "Is PERSI **acting** in violation of statute by including part-time firefighters employed by the City of Lewiston in the cost-of-living adjustments [COLAs] for the Fireman's Retirement Fund?" *Id.* at *1 (emphasis added). The petitioners challenged the methodology then being used by PERSI to calculate COLAS—they were not challenging past agency actions. Therefore, the ruling, determining the applicability of certain statutory terms to the COLA calculation, only affected current and future agency actions.

The principle that declaratory rulings are limited to determining how statutes or rules should be applied to current and future agency actions is confirmed by the plain language of the Administrative Procedure Act ("APA"). Idaho Code § 67-5270 limits agencies to determining the "applicability" of statutes and rules. The term "applicability denotes an 'advance' determination of how a statutory provision, rule, or order may apply to the interested person's 'circumstances.'" *AlohaCare v. Ito*, 271 P.3d 621, 656 (Haw. 2012) (Acoba, J., concurring and dissenting). Because declaratory rulings are forward-looking, Idaho Code § 67-5232 provides that "any person" may seek a ruling. In contrast, a person "aggrieved" by final agency action is directed to seek judicial review. *See* Idaho Code § 67-5270 ("[a] person aggrieved by final agency action other than an

order in a contested case is entitled to judicial review under this chapter"). The judicial review procedures of the APA "are the exclusive means by which [an agency] decision can be challenged." *Idaho State Speech & Hearing Servs. Licensure Bd. v. Brown*, No. 35393, 2009 WL 9151503 at *5 (Idaho Ct. App. Oct. 16, 2009).

The fact that declaratory rulings are not intended to provide a vehicle for adjudication of past agency actions is amply demonstrated by SGNA's arguments regarding redressability. (SGNA MSJ Br. 39-52.) As SGNA admits, the declaratory ruling it seeks will do nothing to resolve the injuries that SGNA alleges. (SGNA Br. 40, 42.) Rather, SGNA simply states that if it obtains a favorable declaratory ruling, "it is fair to assume that something will come of [it]." (SGNA Br. 40.) The "something" that SGNA identifies is a subsequent judicial action. (SGNA Br. 40-42).

In effect, SGNA concedes that an agency declaratory ruling, when directed to adjudication of past agency actions, is nothing more than an academic exercise, coupled to the vague hope that "something will come of [it]." (SGNA Br. 40.) This is especially true where, as here, the agency action at issue conveyed property rights to third parties. (*See* Intervenor-Resp't MSJ Supp. Mem., dated April 15, 2019.) The Land Board cannot simply unilaterally revoke a deed conveying fee simple title. *See* Idaho Code § 55-606 ("[e]very grant or conveyance of an estate in real property is conclusive against the grantor"). Instead, as SGNA recognizes, the Land Board, through the Attorney General, would have to bring a judicial action to declare the deeds void and quiet title in the Land Board. *See The David & Marvel Benton Tr. v. McCarty*, 161 Idaho 145, 151, 384 P.3d 392, 398 (2016) (grantor may "challeng[e], in a court of law, the enforceability of a written document purporting to convey property") (emphasis added); (SGNA Br. 40-41). The present action is therefore distinguishable from a permit, license, or lease that could be the subject of future

revocation by the agency—in such cases, a declaratory ruling could potentially provide relief by establishing the applicability of laws to be invoked in such revocation. But where, as here, the Land Board has conveyed fee simple title, the declaratory ruling is not only of no effect—it intrudes upon subject matter whose adjudication is vested exclusively in the judiciary under the terms of Idaho Code § 67-5270. And such jurisdiction is itself limited—Idaho Code § 67-5270 sets forth strict jurisdictional deadlines for review of final agency actions, which would be meaningless if an aggrieved party could avoid them by simply filing a petition for declaratory ruling nearly five years after the fact.

Moreover, even if the Hearing Officer were to conclude that judicial review of the Land Board's decision is not governed exclusively by Idaho Code § 67-5270, it would likely be governed by the Declaratory Judgment Act, Idaho Code § 10-1202. *See Wasden v. State Bd. of Land Comm'rs*, 153 Idaho 190, 199, 280 P.3d 693, 702 (2012) (recognizing that lessees asserting breach of lease by Land Board could seek declaratory judgment). The Declaratory Judgment Act provides:

> Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed.

Idaho Code § 10-1201 (emphasis added). The Act goes on to provide:

> Any person interested under a deed, will, written contract or other writings constituting a contract or any oral contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

Idaho Code § 10-1202.

In short, SGNA should have either sought review under Idaho Code § 67-5270, or sought to contest the deed itself by an action for declaratory judgment. (*But see* Intervenor-Resp't MSJ

Supp. Mem. 5-6 (describing the withdrawal of its member's motion to amend complaint to directly challenge the deed.)) Either way, jurisdiction to adjudicate the issue is vested in the courts, not the Land Board. SGNA very plainly concedes that: "Agencies are not courts." (SGNA Br. 30.) Consequently, SGNA's petition for a declaratory ruling must be denied for lack of subject matter jurisdiction.

B. THE LAND BOARD LACKS SUBJECT MATTER JURISDICTION TO DETERMINE THE CONSTITUTIONALITY OF IDAHO CODE § 58-317 – THE STATUTE UNDER WHICH IT ESTABLISHED THE SOUTHWEST PAYETTE COTTAGE SITES SUBDIVISION AND DEDICATED THE ROADS AND COMMON AREAS TO THE PLCSOA.

The legal precedent that governs this matter prohibits any declaration of a statute's constitutionality through an administrative proceeding. Idaho Code § 67-5232 limits declaratory rulings to "the applicability of any statutory provision or of any rule administered by the agency." Citing only to that statute, SGNA suggests that "the reference in section 67-5232 to 'statutes' should be read broadly to encompass both statutory and constitutional laws." (SGNA Br. 21 n.16.) However, the suggestion ignores the fact that in order to apply SGNA's version of the constitutional provisions to the Land Board's past acts, thus rendering a different outcome, the constitutionality of the statute authorizing the subdivision of state land must first be decided. The actual breadth of SGNA's Petition not only raises issues of the "applicability" of constitutional provisions, it also raises issues of the constitutionality of the statutes under which the Land Board acted in order to subdivide the endowment lands, dedicate the roads and common areas, and ultimately convey the roads and common areas to the lot owners within the subdivision. However, declaring a statute unconstitutional is beyond the authority of this tribunal.

In conveying the property to the PLCSOA the Land Board was necessarily acting pursuant to the authority granted to it by Idaho Code § 58-317 to subdivide property, record the plat, and sell the subdivided property "at public auction, in such quantities and on such terms as shall enable

the state to realize the best prices therefor." Idaho Code § 58-317. While it may have been possible for the Land Board to create lakeside lots, roads, and common areas without the authority granted to it by Section 58-317,[4] the creation and recording of subdivision plats, and the accompanying dedication of roads and common areas, is a creation of statute that cannot be duplicated using typical property conveyances. *See* Idaho Code § 50-1312; *State v. Bilbao*, 130 Idaho 500, 502, 943 P.2d 926, 928 (1997) ("Not only does the recording of a plat deed to the public rights of way and common areas, but it also serves to create legally-recognized lots within the subdivision. The mere filing of a record of survey carries with it no such consequences"); *Boise City v. Hon*, 14 Idaho 272, 94 P. 167, 169 (1908) (holding dedication accepted when lots purchased with reference to the filed plat). Hence, any adjudication of SGNA's Petition necessarily implicates the terms and constitutionality of Idaho Code § 58-317.

The Legislature had to understand that by granting the Land Board the authority to subdivide and plat endowment property, it was also granting the accompanying authority, under the common law, to establish roads and other areas subject to either the use of the general public or the private use of all lot owners. Such authority was well-established under Idaho law by the time the Legislature enacted the law now codified as § 58-317. In *Hon*, the Court addressed the filing of a plat and accompanying dedication that pre-dated Idaho statutes addressing such subjects, and found that when an "owner makes sales of property with reference to such survey or plat and representations in effecting the sales in regard to the location of streets, squares, parks, or other public grounds, a dedication of these necessarily follows." *Id.* at 279, 94 P. at 169 (quoting Abbott's *Municipal Corporations*, §§ 729 & 730); *see also Thiessen v. City of Lewiston*, 26 Idaho

[4] *See* 13 Michael A. Wolf, *Powell on Real Property* § 79D.03[4] (2019) (discussing creation of "subdivisions by deed").

505, 515, 144 P. 548, 551 (1914) (upholding district court's determination of common-law dedication of road).

Community Beach was set aside from disposal then donated and dedicated to public use in the 1932 plat, and likely in the 1924 plat as well.[5] (Strack Aff., Exs. 1, 2.) Then, the deeds conveying partial future interests in Community Beach and other common areas, to be held in common among all lot owners, were made in reference to the plats. (Strack Aff., Exs. 4-6.)Finally, the conveyance of Community Beach and other common areas to the requisite owner's association was memorialized in the amended plat recorded in 2013. (Strack Aff., Ex. 3).

In short, the actions challenged by SGNA all arise from the authorities granted to the Land Board by Idaho Code § 58-317. SGNA's assertion that the Land Board's actions violated the constitutional mandate of disposal at public auction requires the Hearing Officer to determine, as a threshold issue, whether the authority granted by Idaho Code § 58-317 to establish subdivision plats, with their accompanying dedications of roads and common areas, is constitutional. Such a determination is outside the authority of the Hearing Officer. The Land Board's Rules of Practice and Procedure provide as follows:

> A hearing officer in a contested case has no authority to declare a statute unconstitutional. However, when a court of competent jurisdiction whose decisions are binding precedent in the state of Idaho has declared a statute unconstitutional, or when a federal authority has preempted a state statute or rule, and the hearing officer finds that the same state statute or rule or a substantively identical state statute or rule that would otherwise apply has been challenged in the proceeding before the hearing officer, then the hearing officer shall apply the precedent of the court or the preemptive action of the federal authority to the proceeding before the hearing officer and decide the proceeding before the hearing officer in accordance with the precedent of the court or the preemptive action of the federal authority.

[5] As discussed *infra*, the portion of the plat with community beach is missing from IDL and Valley County files, but the portion on file includes all the common areas depicted on the 1932 plat.

IDAPA 20.01.01.415 (emphasis added). In reviewing an agency action in which the hearing officer correctly applied an identical administrative rule, the Idaho Supreme Court acknowledged that: "[T]he agency was unable to consider the constitutionality of the statute in question, because, '[p]assing on the constitutionality of statutory enactments, even enactments with political overtones, is a fundamental responsibility of the judiciary, and has been so since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 [2 L.Ed. 60 (1803)].'" *Alcohol Beverage Control v. Boyd*, 148 Idaho 944, 946, 231 P.3d 1041, 1043 (2010) (quoting *Miles v. Idaho Power Co.*, 116 Idaho 635, 640, 778 P.2d 757, 762 (1989)).

Given the limited scope of Idaho Code § 67-5232, the limited jurisdiction stated in IDAPA 20.01.01.415, and the Supreme Court's clear directive that agencies are not to decide the constitutionality of statutes, the Hearing Officer must deny SGNA's Motion.

C. THE DIRECTOR'S APPOINTMENT OF THE HEARING OFFICER TO ADJUDICATE THE ISSUES RAISED BY SGNA DOES NOT ESTABLISH THAT THOSE ISSUES ARE THE PROPER SUBJECT OF A DECLARATORY RULING.

SGNA asserts that: "Given that the Land Board has initiated a contested case, that puts to rest the question of whether SGNA had a right to petition for a declaratory ruling" and "moots the question of the scope of section 67-5232." (SGNA Br. 22.) This assertion skews the procedural record of this matter and is simply wrong in its misstatement of the APA.

The plain language of Idaho Code § 67-5232 authorizes agencies to issue "declaratory rulings," but goes on to provide that a "petition for a declaratory ruling does not preclude an agency from initiating a contested case in the matter." Idaho Code § 67-5232(1) and (2). Clearly the statute contemplates that a contested case is distinguished from a proceeding to determine a petition for declaratory ruling, and a contested case must be specifically initiated by the agency.

The Land Board has not initiated a contested case – SGNA initiated this matter. The Order appointing the Hearing Officer makes no reference to a contested case—it simply appoints a

hearing officer to "conduct a hearing" and "submit a recommended order to the State Board of Land Commissioners" pursuant to Rules 402 and 410 of the Rules of Practice and Procedure Before the State Board of Land Commissioners (IDAPA 20.01.01). (Not. of Appointment 1.) The directive to the Hearing Officer to prepare a "recommended order" does not initiate a contested case. Rather, Rule 402 states that: "The agency's decision on a petition for declaratory ruling on the applicability of any statute, rule, or order administered by the agency is a final agency action decided by order." IDAPA 20.01.01.402. Rule 402 then refers to the contemplated order as the "order issuing the declaratory ruling." In other words, the order contemplated by Rule 402 is a very specific and limited category of order, and must be construed in accordance with all limitations on the subject matter of declaratory rulings discussed herein.

Likewise, the reference to Rule 410 in the Notice of Appointment should not be construed to initiate a contested case rather than a proceeding to determine the Petition for Declaratory Ruling. While it is true that Rule 410 describes a hearing officer as "a person other than the agency head appointed to hear contested cases on behalf of the agency," the appointment of a hearing officer does not automatically initiate a contested case. Rule 410 must be read *in pari materia* with Rule 402, which clearly contemplates that hearings may be held to determine petitions for declaratory rulings. *See* IDAPA 20.01.01.402(02)(b) (judicial review of declaratory ruling may take place in the county where the hearing was held or where the declaratory ruling was issued). Unless Rule 402 were interpreted to require hearings by the agency head, it is inherent in an agency's power to issue declaratory rulings through an appointed hearing officer who recommends a declaratory ruling order to the agency head. *See also* IDAPA 20.01.01.411 (contrasting an agency head from a hearing officer).

In short, the Land Board, in appointing the Hearing Officer, did not initiate a contested case that would possibly result in something other than a declaratory ruling. Therefore, the Land Board's subject matter jurisdiction to determine the matters raised by the Petition for Declaratory Ruling must be determined by reference to the plain language of Idaho Code § 67-5232, not the provisions of Idaho Code § 67-5240 governing contested cases. The Land Board lacks jurisdiction to issue a declaratory ruling on the constitutionality of its past actions for all the reasons stated *infra*. Therefore, SGNA's Motion must be denied and its Petition dismissed.

D. SGNA'S ALLEGATIONS REGARDING STANDING ARE NOT RELEVANT TO THE CURRENT PROCEEDINGS, GIVEN THE FACT THAT THE ISSUES RAISED ARE NOT SUBJECT TO DETERMINATION BY DECLARATORY RULING.

The Respondent submits that it is unnecessary to reach the issue of SGNA's standing in the context of these particular proceedings because, given the lack of subject matter jurisdiction to determine the issues raised by SGNA, the issue of standing is moot. SGNA has failed to demonstrate that that the issues it raises are the proper subject of a declaratory ruling. Therefore, this proceeding must be dismissed, regardless of the standing of SGNA on the merits.

If, however, the Hearing Officer does not dismiss this action, and proceeds to issue a declaratory ruling properly limited to the scope of issues that may be addressed under Idaho Code §§ 67-5270 and 67-5232(1), Respondent concedes that the same standing requirements that would apply in judicial proceedings are not necessarily applicable here. Respondent makes this limited concession because the declaratory ruling statute, on its face, allows "any person" to petition for such a ruling. Idaho Code § 67-5232(1).

If this case were to proceed to the merits or if judicial review were sought, Respondent will and does specifically contest and preserve for future adjudication the issue of standing and issues closely related to standing, including but not limited to: (1) whether SGNA is an "aggrieved" party or person under the terms of Idaho Code § 67-5270; (2) whether substantial rights of SGNA have

been prejudiced, as required by Idaho Code § 67-5279 for the reversal or vacation of an agency action; and (3) whether SGNA's proposal that "something will come of [a declaratory ruling]" satisfies the redressability requirement of standing (*see infra* 11-12). However, at this time, SGNA's arguments regarding its standing, organizational or otherwise, to challenge the Land Board's final actions are not ripe for adjudication.

E. IF THE HEARING OFFICER REACHES THE MERITS OF SGNA'S ALLEGATIONS, THE RESULT WILL BE THAT THE DEDICATION AND ULTIMATE DISPOSITION OF THE ROADS AND COMMON AREAS COMPLIES WITH ALL CONSTITUTIONAL AND STATUTORY REQUIREMENTS.

As set forth in this Memorandum and in the Supporting Memorandum for Respondent's Motion for Summary Judgment, the well-reasoned and supported outcome of all pending motions for summary judgement is that the Land Board does not have subject matter jurisdiction to determine the merits of the issues raised in SGNA's Petition. If, however, the Hearing Officer determines to reach the merits, it must deny SGNA's Motion because the record demonstrates that the Land Board complied with its constitutional and statutory authorities to manage and dispose of endowment land.

When the Land Board determined it was in the best interest of endowment beneficiaries to proceed with the sale, at public auction, of almost all remaining lots in the Payette Lakes Subdivision, it had to address the issue of whether, and how, to dispose of its remaining interest, if any, in the Subdivision's streets and common areas. The public auction requirement of Idaho Constitution Article IX, § 8, applies to lands that are "preserved and held in trust" for endowment beneficiaries. Thus, the question that the Land Board had to answer was whether the streets and common areas were lands "preserved and held in trust" for the endowment beneficiaries.

As discussed at length in Section II *supra*, the Land Board, in the 1924 and 1932 plats, set Community Beach aside from disposal when it expressly "donated[d] and dedicate[d]" the streets and common areas within the Payette Lake Subdivision "to the use of the public forever." (Strack Aff., Exs. 1, 2.) The nature of the property interest donated and whether the donation was to the public at large or only to those members of the public purchasing lots, is determined by the common law because the statutory dedication provisions, at the time of recording, were limited to the dedication of roads and common areas in subdivisions within a city or proposed to be added to a city. 1 Compiled Statutes of Idaho: Political Code §§ 4087-4092 (1919); *Sun Valley Land & Minerals, Inc. v. Hawkes*, 138 Idaho 543, 548, 66 P.3d 798, 803 (2003) ("Idaho recognizes common law dedication of land both for public, as well as for private use"). The elements for a public or private common law dedication are: "(1) an offer by the owner clearly and unequivocally indicating an intent to dedicate the land and (2) an acceptance of the offer." *Ponderosa Homesite Lot Owners v. Garfield Bay Resort, Inc.*, 143 Idaho 407, 409, 146 P.3d 673, 675 (2006) (quoting *Armand v. Opportunity Mgmt. Co.*, 141 Idaho 709, 714, 117 P.3d 123, 128 (2005)). "The offer to dedicate may be made in a number of ways, including the act of recording or filing a subdivision plat depicting the specific areas subject to dedication ...." *Ponderosa Homesite Lot Owners*, 143 Idaho at 409, 146 P.3d at 675 (quoting *Sun Valley Land & Minerals, Inc.*, 138 Idaho at 548, 66 P.3d at 803). Acceptance of a common law dedication offer "can be accomplished 'when the offer is acted upon and lots are purchased with reference to the plat filed by the offeror.'" *Id.* (quoting *Armand*, 141 Idaho at 715, 117 P.3d at 129)).

For many years, it was the holding of the Idaho Supreme Court that a common law dedication in a plat could set aside either "use or ownership" of the dedicated property for others. *Sun Valley Land & Minerals, Inc.*, 138 Idaho at 548, 66 P.3d at 803 (citing *Monaco v. Bennion*,

99 Idaho 529, 532, 585 P.2d 608, 611 (1978)). In later years, however, the Court has held that common law dedications create only an easement and do not transfer title. *Ponderosa Homesite Lot Owners*, 143 Idaho at 410, 146 P.3d at 676. Regardless of whether an easement or ownership interest is conveyed, once a dedication is accepted by an owners association or the purchasers of lots referring to the plat, it is irrevocable "at least as to those who have purchased lots in reliance on the map or plat." 23 Am.Jur.2d *Dedications* § 59 (2013); *see also Ponderosa Homesite Lot Owners*, 143 Idaho at 410, 146 P. 676; *Boise City v. Hon*, 14 Idaho 272, 94 P. at 169.

While the Court has held that a dedication conveys only an easement, it has also held, in *Neider v. Shaw*, that when land is platted and "dedicated as a street for public use, the landowner owns to the center of the street and the public acquires an easement, not a title in fee simple." 138 Idaho 503, 507, 65 P.3d 525, 529 (2003). In *Ponderosa Homesite Lot Owners*, the Court extended that holding to a common law dedication. 143 Idaho at 410 n.3, 146 P.3d at 676 n.3. Presumably, the Court would apply this same presumption to the plats approved and recorded by the Land Board.

In addition to the irrevocable dedication of roads and common areas to the public or to lot owners, and the possibility that bare fee title to the center of roads rested with purchasers of adjacent lots, the Land Board, in determining whether roads and common areas remained "preserved and held in trust" for endowment beneficiaries, also had to address the legal effect of the twenty deeds sold at public auction that purported to convey fee title to all roads and common areas to all lot owners upon the sale of the last lot in the Payette Lake Subdivision. As discussed in Section II *supra*, the owners of the contingent future interest could enjoin any conveyance that would defeat their future ownership. 2 Restatement of the Law of Property § 157(w) (1936).

Given the dedications of roads and common areas in the 1924 and 1932 plats and the prior dispositions, at public auction, to lot owners of the rights of use and future ownership in roads and common areas, the Land Board reasonably concluded that the roads and common areas were not lands "preserved and held in trust" for endowment beneficiaries. (*See* Strack Aff., Exs. 7-27; Resp't MSJ Aff. of Counsel, Ex. 7 Transcript 2:59-64, 5:164-7:256, 8:316-9:338, Bates Nos. Resp't 0301, 304-308.) Moreover, the Land Board concluded that it had fulfilled, and would continue to fulfill, its fiduciary duty to maximize income from the disposal of endowment lands because the roads and common areas increased the value of the lots as they were sold at public auction. (*See* Decl. of Matthew J. McGee, Ex. A 2; Ex B 3-4.) Over time, the value of the roads and common areas was received by endowment beneficiaries as subdivided lots were disposed of at public auction, as authorized by Idaho Code § 58-317. (*See* Resp't MSJ Aff. of Counsel, Ex. 7 Transcript 5:182-199 (Bates No. Resp't 0304) (Oct. 15, 2013 Land Bd. Mtg. Mins.)).

As is shown by the record in this matter, the Land Board concluded that it either had no property interest to convey, or, in the alternative, that any property interest remaining after the dedications, lot sales, and sales of future interests had no independent salable value and could not be auctioned in good faith. Additionally, the Land Board reasonably determined that given its past transactions, any remaining property interest it held could not be conveyed to any entity representing less than all lot owners, due to the risk of litigation that would arise if an exclusive entity managed the lands primarily for the benefit of its members, rather than the benefit of all subdivision lot owners or the public at large. Such risk is aptly illustrated in SGNA's brief, which makes no bones about that fact that it desired to obtain title to Community Beach to preserve it "in its natural, undeveloped state for quiet relaxation, dog walking, swimming, and other peaceful pursuits" <u>by SGNA members</u>. (SGNA Br. 9; *see also* Declaration of Zephaniah Johnson at 2

("[t]he primary reason for the formation of SGNA was to pursue ownership of Community Beach, and the right and ability to preserve it in its natural state.")).

Doubtlessly, SGNA will assert that its preservation of Community Beach may have benefited all lot owners, but the record does not allow the hearing officer to make such a determination. Instead, the essential point is that because use of Community Beach, under the terms of each plat, was donated, at a minimum, to all lot owners, it is those owners, not an enclaved subset of owners, that are entitled to determine what uses best benefit the whole community. Given that fundamental and undeniable fact, the Land Board reasonably determined that conveyance to anyone other than a homeowners' association of all lot owners could not be accomplished in a manner consistent with the donations and dedications in the plats.

SGNA's Motion must be denied, in its entirety, and this matter dismissed. The record before the Hearing Officer supports the conclusion that the Land Board's actions, during the timeframe of 1924 through 2015, that resulted in the platting, amended platting and recording of the approved Southwest Payette Cottage Sites Subdivision were compliant with the Land Board's constitutional and statutory authorities to manage and dispose of endowment land for the maximum long term financial return to the endowment beneficiaries.

IV. CONCLUSION

For the foregoing reasons, Respondent State Board of Land Commissioners respectfully requests that the Hearing Officer deny SGNA's Motion for Summary Judgment in its entirety. Respondent further requests that the Hearing Officer dismiss the Petition for Declaratory Ruling on the basis that the Land Board lacks subject matter jurisdiction to issue a declaratory ruling on: (1) past final agency actions, (2) past actions that are not subject to revocation by the Land Board, and (3) the constitutionality of a statute. Alternatively, if the Hearing Officer determines the Land

Board has jurisdiction to decide the merits of the Petition, SGNA's Motion for Summary Judgment must still be denied because the Land Board's conveyance of all platted roads and common areas to the Payette Lake Cottage Site Owners Association was compliant with the Land Board's constitutional and statutory authorities.

DATED this 14th day of June, 2019.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

ANGELA SCHAER KAUFMANN
JOY M. VEGA
Deputy Attorneys General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of June, 2019, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Mr. Jim Jones PARSONS BEHLE & LATIMER 800 W. Main St, Ste 1300 P.O. Box 2701 Boise, ID 83701-2701 *Hearing Officer*	☐ U.S. Mail, postage prepaid ☑ Hand Delivery ☐ Overnight Mail ☐ Facsimile: (208) 562-4901 ☑ Email: jimjjust27@gmail.com
T. Hethe Clark Matthew J. McGee SPINK BUTLER, LLP 251 E. Front Street, Suite 200 P.O. Box 639 Boise, ID 83701 *Attorneys for Petitioner*	☐ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile: (208) 388-1001 ☑ Email: hclark@spinkbutler.com mmcgee@spinkbutler.com
Christopher H. Meyer GIVENS PURSLEY LLP 601 W Bannock St P.O. Box 2720 Boise, ID 83701-2720 *Attorneys for Petitioner*	☐ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile: (208) 388-1300 ☑ Email: chrismeyer@givenspursley.com
Mark D. Perison Tricia K. Soper MARK D. PERISON, P.A. 314 S. 9th Street, Suite 300 P.O. Box 6575 Boise, ID 83707-6575 *Attorneys for Intervenor-Respondents*	☐ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile: (208) 343-5838 ☑ Email: tricia@markperison.com

Idaho Department of Lands
c/o Renee Miller
300 North 6th Street, Suite 103
P.O. Box 83720
Boise, ID 83720-0050

☐ U.S. Mail, postage prepaid
☑ Hand Delivery
☐ Overnight Mail
☐ Facsimile: (208) 334-2339
☑ Email: RLMiller@idl.idaho.gov

ANGELA SCHAER KAUFMANN
JOY M. VEGA
Deputy Attorneys General