

APR 22 2020

BOISE, IDAHO

Governor Brad Little, Chairman
Idaho State Board of Land Commissioners
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BEFORE THE IDAHO STATE BOARD OF LAND COMMISSIONERS

SHARLIE-GROUSE NEIGHBORHOOD)	
ASSOCIATION, INC.,)	
)	
Petitioner,)	FINAL ORDER
)	
v.)	
)	
IDAHO STATE BOARD OF LAND)	
COMMISSIONERS,)	
)	
Respondent,)	
)	
and)	
)	
PAYETTE LAKES COTTAGE SITES OWNERS)	
ASSOCIATION, INC., and WAGON WHEEL)	
BAY DOCK ASSOCIATION, INC.,)	
)	
Intervenors.)	
)	

The Idaho State Board of Land Commissioners, upon review and consideration, hereby ADOPTS without modification the Recommended Decision and Order on Petition for Declaratory Ruling and the Decision on Petition for Reconsideration submitted by Hearing Officer Jim Jones and ISSUES this final order.

This is a final order of the agency. Any party may file a motion for reconsideration of this final order within fourteen (14) days of the service date of this order. The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5246(4), Idaho Code.

Pursuant to Sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by this final order or orders previously issued in this case may appeal this final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held;
- ii. The final agency action was taken;
- iii. The party seeking review of the order resides; or
- iv. The real property or personal property that was the subject of the agency action is attached.

An appeal must be filed within twenty-eight (28) days (a) of the service date of this final order, (b) of an order denying petition for reconsideration, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See Section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

DATED this 22nd, April, 2020.

STATE OF IDAHO
IDAHO BOARD OF LAND COMMISSIONERS



GOVERNOR BRAD LITTLE, CHAIRMAN

DEC 17 2019

BOISE, IDAHO

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BEFORE THE STATE BOARD OF LAND COMMISSIONERS

SHARLIE-GROUSE NEIGHBORHOOD
ASSOCIATION, INC.

Petitioner,

v.

IDAHO STATE BOARD OF LAND
COMMISSIONERS,

Respondent,

and

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

Intervenors.

**DECISION ON PETITION FOR
RECONSIDERATION**

The Petitioner, Sharlie-Grouse Neighborhood Association, Inc. (SGNA), has filed a Petition for Reconsideration of the Recommended Order proposed in this matter by the undersigned hearing officer. Having considered the arguments raised and authorities cited in SGNA's supporting memorandum, it does not appear that SGNA has shown sufficient grounds for reconsidering the Recommended Order. The Petition for Reconsideration is therefore denied for the reasons set forth below.

SGNA contends that the action taken by the Idaho State Board of Land Commissioners (Land Board) on October 15, 2013, did not constitute an “agency action” within the meaning of Idaho Code section 67-5201(3)(c). That provision defines an “agency action” as “[An] agency’s performance of, or failure to perform, any duty placed on it by law.”

At its October 15 meeting, the Land Board voted to approve a plan to dispose of any interest the State retained in and to the roads and common areas of Southwest Payette Cottage Sites Subdivision (Subdivision). The Land Board’s action approved: (1) the filing of an amended plat for the Subdivision; (2) a Declaration of Covenants, Conditions and Restrictions (CC&Rs) for an incorporated nonprofit association, “Payette Lakes Cottage Sites Owners Association, Inc.” (PLCSOA), to operate and maintain the roads and common areas of the Subdivision; and (3) the execution and recording of a quitclaim deed, relinquishing to PLCSOA any interest of the State of Idaho in and to the Subdivision roads and common areas. Such a quitclaim deed was recorded with the Valley County Recorder on April 25, 2014, and an amended quitclaim deed was recorded on January 30, 2015.

SGNA did not seek judicial review of any action taken by the Land Board on October 15, 2013, or of any of the ministerial acts authorized to be taken by the Land Board’s action on that date – the recording of the amended plat, the execution and recording of the CC&Rs, or the execution and recording of the two quitclaim deeds.

It is without doubt that the Land Board has the constitutional responsibility of holding, managing, and disposing of State endowment lands, such as the lands encompassed within the Subdivision, and that it is charged with the responsibility of doing so in accordance with constitutional and statutory law. In its Petition for Declaratory Ruling, SGNA claimed that the Land Board’s disposal of the State’s interest in the roads and common areas of the Subdivision

violated several duties placed on the Land Board by Idaho law. SGNA alleged that the Land Board's actions violated "its Constitutional and Statutory Duties," specifying Article IX, section 8 of the Idaho Constitution and the provisions of Idaho Code section 58-313. The claim was that the Land Board failed to conduct the disposal of the property interests in accordance with the duties placed upon it by these provisions of Idaho law. The Land Board's action on October 15 was clearly a discretionary agency action, which was subject to judicial review under Idaho Code section 67-5270(2).

SGNA argues that only ministerial acts can be characterized as agency actions subject to judicial review. The recording of the CC&Rs and quit claim deeds were obviously ministerial acts required pursuant to the Land Board's action of October 15, 2013. The problem for SGNA is that it did not seek judicial review of those ministerial acts. Indeed, even if the Land Board were to have second thoughts about the propriety of its action taken on October 15, whatever remedial action it might try to take would likely not qualify for judicial review under SGNA's concept of agency action. That is, any remedial action taken by the Land Board would not be in the form of a ministerial act and would not, in SGNA's view, be subject to judicial review by any party. Discretionary actions of an agency are without a doubt subject to judicial review. See, Idaho Code section 67-5279(2)(d).

SGNA next argues that it has a right to seek a declaratory ruling under Idaho Code section 67-5232(1) to determine the propriety of the Land Board's action in disposing of the Subdivision's roads and common areas. That provision allows for a declaratory ruling as to the applicability of any statutory provision or rule administered by an agency. It does not authorize declaratory rulings involving constitutional provisions. SGNA seeks a ruling that: (1) the advertisement and auction requirements in Idaho Code section 58-313 apply to the Land Board's actions and (2) the Land

Board's actions violated the provisions of that code section. The latter request certainly seems to exceed the scope of the statutory provision. It also overlooks the fact that SGNA did not seek judicial review of any actions taken by the Land Board between October 15, 2013, and January 30, 2015, when the amended quitclaim deed was filed with Valley County. None of those actions were the subject of a petition for judicial review within the 28-day time limitation in Idaho Code section 67-5273(3). Where a party has failed to avail itself of an available remedy, Idaho Code section 67-5232 does not provide an alternate avenue for attacking an agency action. If that were the case, an aggrieved party could use the declaratory ruling provision to launch serial attacks against a disappointing decision without having to observe any time limit.

Additionally, it is not clear that a declaratory ruling would produce the type of result SGNA wishes. The Subdivision consisted of endowment property and clearly was subject to being disposed of pursuant to applicable Land Board statutes and rules. The lots would obviously have to be disposed of in accordance with the provisions of Idaho Code section 58-313 regarding the advertisement and sale of lands or Idaho Code section 58-138 regarding equal-value exchanges.

However, the Land Board points out that the roads and common areas were platted and disposed of pursuant to Idaho Code section 58-317, which authorizes the Land Board to lay out State lands in subdivisions when it determines that the property "will sell at a better price than when undivided." It contends that Subdivision was developed to take advantage of this better price option and that lot owners have paid a higher price for their individual lots over the years because of the access roads and common areas that came along with the deal.

Nevertheless, SGNA claims that the State's underlying fee interest in Community Beach had a residual value that should have been advertised and auctioned instead of being deeded to PLCSOA. In its opening brief SGNA states: "When SGNA members learned that the Land Board

was considering conveying Community Beach, they urged that it be conveyed to SGNA, so they could maintain it in its natural state for community and public use.” The Land Board chose, instead, to proceed with its plan to transfer its remaining interest in the dedicated property to PLCSOA for future maintenance and management.

The dispute appears to be more of a management controversy than a question of fee ownership. Because of the dedication of all of the common areas to the use and enjoyment of all lot owners in the Subdivision, and perhaps the public, there is not much the owner of the underlying fee could do with the property other than manage it for the benefit of those to whom the dedication was made. A brief look at the dedication history is instructive.

When the Subdivision plat was filed in 1924, “the streets, roads, alleys, commons and public grounds shown on the plat,” were donated and dedicated to the use of the public forever. An amended 1932 plat reiterated the donation and dedication. Starting in 1986, all deeds issued for Subdivision lots contained language vesting “in common” in all Subdivision lot holders “the right to use and enjoyment” of the previously dedicated roads and common areas. The vesting was to occur “upon conveyance of the last state-owned lot in fee simple.” It is not entirely clear from the record when the last lot was sold but appears that the sale must have been the event that triggered the Land Board’s action on October 15, 2013. The roads and common areas of the Subdivision have been donated and dedicated to the use and benefit of either the public, as stated in the plats, or the lot owners, as stated in documents recorded in and after 1986.

In its memorandum, SGNA notes that lot owners have had “the full benefit of use of the roads and Community Beach for many decades” by virtue of the “common law dedication in 1924 and/or 1932.” It recognizes that the State’s residual interest in the roads was valueless, that the conveyance of the roads to PLCSOA was a “housekeeping matter that facilitated management of

the roads” and that the State’s quitclaim of any interest in the roads to PLCSOA did not need to comply with the auction requirement of Idaho Code section 58-313. The same observation can be made with regard to the ten common areas, including Community Beach, that were quitclaimed to PLCSOA by the two deeds.

Each and every lot owner in the Subdivision has a vested, perpetual right to the use and enjoyment of Community Beach and the nine other common areas. This is an amenity that factored, to some degree, into the price they paid for their lot. There is no way short of judicial intervention that any lot owner in any part of the Subdivision can be deprived of the right to the “in common” use of all of the common areas. The Land Board appears to have made the determination that one management entity for all common areas would be more workable than having separate management entities for each common area, where all Subdivision lot owners had a vested interest in and to all of the ten common areas.

It appears that all SGNA lot owners are either members of, or eligible for membership in, PLCSOA, where they could have a voice in management decisions. There are certainly imperfections in the manner common area management entities operate at times, as evidenced by the number of HOA lawsuits that make their way through the court system. However, those who have concerns about the manner in which such entities operate have available recourse through the court system, not through Land Board administrative proceedings. If PLCSOA takes action that infringes on the rights of SGNA members to the “in common” use and enjoyment of Community Beach or other Subdivision common areas, the courts provide a forum for potential relief.

Because of the perpetual dedication of Community Beach to the use and enjoyment of all Subdivision lot owners, and perhaps the public, no use can be made of the land that would be inconsistent with such purpose. That fact would certainly have an impact upon the market value

of the land. SGNA argues that the Land Board's quitclaim deeds transferred significant value to PLCSOA because the Bagley family and its entities paid estimated rentals in excess of \$100,000 to the State for a .216-acre encroachment into Community Beach over a period of 29 years. That does not necessarily mean that a willing buyer would pay that sum for the fee underlying the dedicated property. The Bagley family had no right to encroach on the land and, by rights, should have been required to remove the encroaching improvements for the benefit of those having the in common right to use and enjoy that property. Payment of the rental may have been easier than going to the trouble of removing the improvements. The payment amounts are not necessarily indicative of what a willing buyer may have been willing to pay for the property at any point in time.

One might question the Land Board's decision to enter into a lease granting one lot owner the exclusive right to occupy a portion of a common area that had been dedicated to the use of all Subdivision lot owners, but that is beyond the scope of this proceeding. What is more relevant is that the Land Board did not quitclaim its interest in the roads and common areas to a stranger to the Subdivision. Rather, the quitclaim deeds transferred the State's property interests to an entity that encompassed the entire Subdivision, making each lot-owning member of PLCSOA an equity owner of a proportionate share of those quitclaimed interests.

SGNA recognizes that the Land Board does not have the power to void all or part of the quitclaim deeds, but suggests that it could make a non-binding declaratory ruling to the effect that it had "violated requirements respecting public auctions." That would, in essence, be an advisory opinion. Courts decline to issue advisory opinions in declaratory proceedings. *Wylie v. State, Idaho Transp. Bd.*, 151 Idaho 26, 31, 253 P 3d 700, 705 (2011). They are no more appropriate in administrative proceedings.

SGNA reiterates that it sought and the Land Board granted a contested case hearing. The Recommended Decision and Order (Decision) considered those contentions and disagreed. They are no more persuasive the second time around. As noted in the Decision, SGNA specifically initiated its request for declaratory relief under IDAPA 20.01.01.400, which provides for a “declaratory ruling on the applicability of any statute, rule, or order administered by the agency.” Such a proceeding is not a contested case. Both types of proceedings, however, are decided by an order. See, IDAPA 20.01.01.400 and IDAPA 20.01.01.005.07.

The Director of the Department of Lands used his delegated authority under Idaho Code section 58-122 to appoint a hearing officer to conduct a hearing in this matter. That section does not automatically make every appointment of a hearing officer a contested case proceeding, particularly where the matter involves the Land Board’s duties under Article IX, sections 7 and 8 of the Idaho Constitution. The statute does not authorize the Director to initiate a contested case in those matters. In those cases, the Land Board may, in its discretion, initiate a contested case. There is no evidence that the Land Board exercised its discretion to initiate a contested case here. This hearing officer does not have the authority to initiate a contested case on his own. It must be initiated by action of the Land Board, not the Director. If SGNA continues to disagree on this issue, the matter may be raised directly with the Land Board in an exception under IDAPA 20.01.01.720.02.b.

In any event, it is likely that the outcome of this proceeding would be the same whether it was characterized as a declaratory proceeding or a contested case. The parties stipulated to the filing of dispositive motions and all parties submitted such motions, along with supporting briefs, affidavits and declarations. The hearing officer determined that there was no genuine issue as to any material fact regarding SGNA’s ability to attack the Land Board’s disposal of the State’s

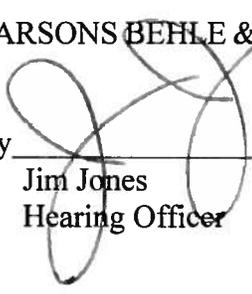
interest in and to Community Beach. It is likely that the same result would obtain whether the proceeding was labeled as a declaratory case or a contested case.

The undersigned hearing officer appreciates the diligent and inventive advocacy of SGNA's counsel, but can find no reason to reconsider the Recommended Order previously entered in this matter. An order will be entered, denying SGNA's Petition for Reconsideration and request for oral argument.

DATED this 16th day of December 2019.

PARSONS BEHLE & LATIMER

By



Jim Jones
Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2019, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

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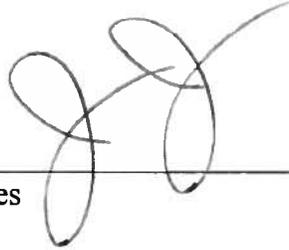
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Jim Jones

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right, positioned above a solid horizontal line.

BEFORE THE STATE BOARD OF LAND COMMISSIONERS

SHARLIE-GROUSE NEIGHBORHOOD
ASSOCIATION, INC.

Petitioners,

v.

IDAHO STATE BOARD OF LAND
COMMISSIONERS,

Respondent,

and

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

Intervenors.

**ORDER DISMISSING PETITION FOR
DECLARATORY RULING**

The Petitioner, Sharlie-Grouse Neighborhood Association, Inc., has filed a Petition for Reconsideration of the Recommended Order proposed in this matter by the undersigned hearing officer. Having considered the arguments raised and the authorities cited in the Petitioner's supporting memorandum, it does not appear that sufficient grounds have been shown for reconsideration of the Recommended Order or for setting the matter for additional oral argument.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

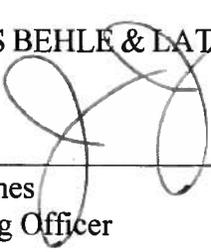
1. The Petition for Reconsideration is denied.
2. The request for oral argument is denied.

Within twenty-one (21) days after the service date of this order, any party may, in writing, support or take exceptions to any part of the recommended order and file briefs in support of the party's position on any issue in the proceeding.

Written briefs in support of or taking exceptions to the recommended order shall be filed with the agency head (or designee of the agency head). Opposing parties shall have twenty-one (21) days to respond. The agency head or designee may schedule oral argument in the matter before issuing a final order. The agency head or designee will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties or for good cause shown.

DATED and entered this 16th day of December 2019.

PARSONS BEHLE & LATIMER

By  _____
Jim Jones
Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2019, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

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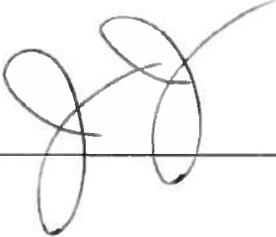
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<i>Attorneys for Intervenors Payette Lakes Cottage Sites Owners Association, Inc. and Wagon Wheel Bay Dock Association, Inc.</i>		

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Jim Jones



BEFORE THE STATE BOARD OF LAND COMMISSIONERS **BOISE, IDAHO**

SHARLIE-GROUSE NEIGHBORHOOD
ASSOCIATION, INC.

Petitioners,

v.

IDAHO STATE BOARD OF LAND
COMMISSIONERS,

Respondent,

and

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

Intervenors.

**ORDER DISMISSING PETITION FOR
DECLARATORY RULING**

The Idaho State Board of Land Commissioners, having reviewed and considered the Recommended Decision and Order on Petition for Declaratory Ruling prepared by Hearing Officer Jim Jones, finds the same to be in compliance with the applicable law. The Board finds that there is no genuine issue of material fact as to the jurisdiction of the Board to entertain this proceeding. Sharlie-Grouse Neighborhood Association, Inc., failed to seek judicial review of the Board's agency action of October 15, 2013, and may not collaterally attack that action in this proceeding, regardless of how the attack may be labeled. The Board hereby approves and adopts the decision of the Hearing Officer and dismisses the Petitioner's Petition for Declaratory Ruling.

This is a recommended order of the Hearing Officer. It will not become final without action of the agency head. Any party may file a petition for reconsideration of this recommended

order with the Hearing Officer within fourteen (14) days of the service date of this order. The Hearing Officer will dispose of any petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3), Idaho Code.

Within twenty-one (21) days after (a) the service date of this recommended order, (b) the service date of a denial of a petition for reconsideration from this recommended order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this recommended order, any party may, in writing, support or take exceptions to any part of this recommended order and file briefs in support of the party's position on any issue in the proceeding.

Written briefs in support of or taking exceptions to the recommended order shall be filed with the agency head (or designee of the agency head). Opposing parties shall have twenty-one (21) days to respond. The agency head or designee may schedule oral argument in the matter before issuing a final order. The agency head or designee will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties or for good cause shown.

DATED and entered this 12th day of November 2019.

PARSONS BEHLE & LATIMER

By _____

Jim Jones
Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2019, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

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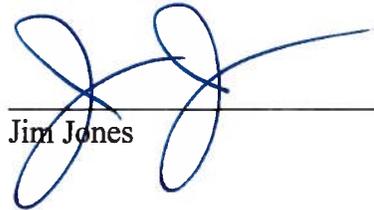
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*Attorneys for Respondent Idaho State Board of
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NOV 13 2019

BOISE, IDAHO

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BEFORE THE STATE BOARD OF LAND COMMISSIONERS

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Petitioner,

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

Intervenors.

**RECOMMENDED DECISION AND
ORDER ON PETITION FOR
DECLARATORY RULING**

The Petitioner in this matter seeks a declaratory ruling which would invalidate an agency action whereby the Respondent relinquished the State's interest in a parcel of real property located on Payette Lake in Valley County, Idaho.

BACKGROUND

In 1924, the Idaho State Board of Land Commissioners (Land Board) created and platted the Southwest Payette Cottage Sites Subdivision (Subdivision), located along Payette Lake in

Valley County. In addition to laying out subdivision lots, the 1924 plat donated and dedicated “the streets, roads, alleys, commons and public grounds shown on the plat to the use of the public forever.” An amended 1932 plat reiterated the donation and dedication. The dedicated common areas included a 1.01-acre parcel designated on the plats as “Community Beach.”

Starting in 1986, the Land Board decided to convey the roads and common areas to the lot owners as a whole. From then on, all deeds issued by the Idaho Department of Lands for Subdivision lots contained language vesting “in common” in all lot holders “the right to use and enjoyment” of the previously dedicated roads and common areas. The vesting of such rights was to occur, simultaneously with the divestment of any interest of the State of Idaho, “[u]pon conveyance of the last state-owned lot in fee simple” in the Subdivision.

At a meeting held on May 17, 2011, the Land Board voted to move forward with a plan for the eventual sale of all lots in the Subdivision. Over the next two years, the Land Department staff developed a plan to carry out the Land Board’s plan. It included the preparation of an amended plat, which provided that common areas and roads would be quitclaim deeded to an association of lot owners and lessees. A Declaration of Covenants, Conditions and Restrictions (CC&Rs) was prepared, which provided for members of an incorporated nonprofit association, known as “Payette Lakes Cottage Sites Owners Association, Inc.” (PLCSOA), to operate and maintain the roads and common areas. Final action was taken on the plan at a Land Board meeting held on October 15, 2013. All parties to this proceeding were represented by legal counsel at such meeting. None of the parties sought judicial review of the Land Board action. The amended plat and CC&Rs were then recorded. A quitclaim deed, which transferred to PLCSOA any interest of the State of Idaho in and to the Subdivision roads and common areas, was recorded on April 25, 2014. An amended quitclaim deed with the same effect was recorded on January 30, 2015.

PROCEDURAL POSTURE

Sharlie-Grouse Neighborhood Association, Inc. (SGNA), an association consisting of lot owners in the northern part of the Subdivision, filed a Petition for Declaratory Ruling with the Idaho Department of Lands on May 29, 2018, initiating this proceeding. SGNA sought a declaratory ruling that the two quitclaim deeds were issued in violation of various constitutional provisions and statutes, that the deeds were invalid to convey title to the roads and common areas to PLCSOA, and that the Land Board continues to hold title to the roads and common areas. The Land Board answered the Petition, raising a variety of affirmative defenses. On October 3, 2018, the Director of the Idaho Department of Lands appointed the undersigned as Hearing Officer “to decide all procedural and pre-hearing matters,” and “submit a recommended order to the State Board of Land Commissioners.”

Two additional groups of lot owners in the Subdivision, PLCSOA and Wagon Wheel Bay Dock Association, Inc., (Intervenors), subsequently sought and were granted intervention in this proceeding. The Intervenors have generally supported the position of Respondent in this matter. Following various procedural motions and orders, the parties were requested to file a stipulation regarding discovery, scheduling, and the manner of handling dispositive motions. The parties agreed upon and submitted such a stipulation, which was approved by order of the Hearing Officer. Dispositive motions with supporting memoranda, declarations, and affidavits were submitted by all parties pursuant to the stipulation and the same were scheduled for oral argument before the Hearing Officer on August 27, 2019. All parties characterized their dispositive motions as motions for summary judgment.

All of the parties were represented by counsel at the dispositive motion hearing. Prior to the hearing, Intervenors had submitted a motion to strike the declarations of Mark Richey,

Christopher A. Mothorpe, and Zephaniah Johnson, all of which had been filed by SNGA along with its moving papers. Having considered written arguments previously submitted by the parties in support and opposition, the Hearing Officer ruled from the bench before the submission of oral argument. The declarations of Richey and Mothorpe were stricken on grounds of relevance. The motion to strike the Johnson declaration was denied. The parties then submitted oral argument on all pending dispositive motions and the Hearing Officer took the matter under advisement.

ANALYSIS

Before launching into an analysis of the declaratory ruling issue, it is necessary to consider what actions of the Land Board are being challenged in this proceeding. In its summary judgment reply brief, SGNA specifically states that “it seeks no relief with respect to the roads.” Indeed, SGNA’s oral and written argument specifically focuses on the Land Board’s disposition of Community Beach, which SGNA claims was violative of controlling constitutional and statutory provisions. Thus, the analysis here will focus exclusively upon Community Beach.

SGNA contends that the Land Board violated its constitutional and statutory duties by acting to dispose of Community Beach, by recording CC&Rs relating to the disposal and by issuing the two quitclaim deeds. However, the alleged violations all stem from the Land Board’s action on October 15, 2013, which approved the Land Department staff’s plan for disposition of the Subdivision’s roads and common areas. That Land Board action authorized the recording of the amended plat, the CC&Rs and the quitclaim deeds. The execution and recording of those documents were simply ministerial acts to carry out the action taken by the Land Board on October 15, 2013. That action is the focus of this proceeding.

The next question is what occurred on October 15? That is, was it an “agency action” or an “order” or a “contested case” or something else? This is an important question because the answer dictates when and how the propriety of the Land Board’s may be subjected to challenge.

None of the parties assert that the October 15 action was the culmination of a contested case. Even though SGNA had participated in Land Board proceedings leading up to the October 15 meeting and was aware the Land Board would likely decide upon the disposition of the Subdivision streets and common areas at the meeting, the proceedings did not fit the statutory definition of a contested case. Idaho Code section 67-5201(6) defines a contested case as a proceeding “which results in the issuance of an order.” The action taken by the Land Board at that meeting does not fit the definition of “order” in Idaho Code section 67-5201(12). The Land Board’s action does, however, fit the definition of an “agency action” set out in Idaho Code section 67-5201(3)(c)— “[An] agency’s performance of, or failure to perform, any duty placed on it by law.” SGNA contends that in deciding how to dispose of Community Beach, the Land Board failed to perform its lawful duties.

The Land Board contends that SGNA’s sole mechanism for challenging the October 15 agency action was to file a timely petition for judicial review. Idaho Code section 67-5270(2) provides that a “person aggrieved by a final agency action other than an order in a contested case is entitled to judicial review.” Idaho Code section 67-5273 (3) specifies that a petition for judicial review “must be” filed within twenty-eight (28) days of the agency action. That did not occur here.

SGNA did not seek to challenge the October 15 agency action until four and one-half years later. Whether this challenge is called a request for judicial review or a petition for declaratory ruling, it is untimely. In *Cobbley v. City of Challis*, 143 Idaho 130, 139 P.3d 732 (2006), the Idaho Supreme Court stated:

Judicial review of an administrative decision is wholly statutory; there is no right of judicial review absent the statutory grant. ... Thus, a party's failure to physically file a petition for judicial review with the district court within the time limits prescribed by statute and the Rules of Civil Procedure is jurisdictional and results in a dismissal of the appeal.

Id. at 133, 139 P.3d at 735. The Court went on to say, "one cannot challenge in a separate civil suit the action of a board where that board has acted on matters within its jurisdiction." *Id.* at 134, 139 P.3d at 736. It almost goes without saying that a party may not challenge an agency action in a separate administrative proceeding where the party failed to file a timely petition for judicial review of that action.

SGNA creatively seeks to avoid the bar interposed by its failure to timely petition for judicial review by characterizing its Petition for Declaratory Ruling as the initiation of a contested case. There are two provisions of the Idaho Administrative Procedure Act pertaining to declaratory rulings. Idaho Code section 67-5255(1) allows any person to petition an agency for a declaratory ruling as to the applicability of any order issued by the agency. Because an "order" is not the subject of SGNA's petition, this provision does not apply.

Idaho Code section 67-5232(1) allows for a declaratory ruling as to the applicability of any statutory provision or rule administered by an agency. Subsection (2) goes on to provide that a petition for declaratory ruling does not preclude an agency from initiating a contested case in the matter. SGNA contends that the Notice of Appointment of Hearing Officer makes reference to Idaho Code section 58-122, which outlines certain procedures for contested cases. Section 58-122 authorizes the Director of the Land Department to appoint hearing officers for contested cases. However, it contains an important proviso pertaining to cases where the Land Board "is exercising its duties and authorities concerning the direction, control or disposition of the public lands of the state pursuant to sections 7 and 8 article IX," of the Idaho Constitution. Those actions "shall not

be considered to be contested cases ... unless the board, in its discretion, determines that a contested case hearing would be of assistance to the board in the exercise of its duties and authorities.”

While the Land Board decided to appoint a hearing officer at its meeting on July 17, 2018, there is no indication that it made a discretionary determination to initiate a contested case. At most, it gave the Director of the Land Department the authority to appoint a hearing officer to conduct a hearing on the petition and submit a recommended order. Where the hearing officer is appointed under the proviso, there should be a clear statement by the Land Board that it intends to have the hearing officer conduct a contested case hearing, along with a delineation of the scope of the contested case.

It should be noted that SGNA did not request the initiation of a contested case in its Petition for Declaratory Ruling. It filed the petition “pursuant to Idaho Code Sections 67-5232 and 67-5255” and the Land Board’s procedural rules. Although SGNA claimed the Land Board had violated its constitutional duties, the cited rules would allow it, at most, to obtain a ruling “as to the applicability of any statutory provision or of any rule administered by the agency.”

There are simply no administrative avenues of relief for SNGA to pursue in its quest to undo the actions taken by the Land Board at its meeting on October 15, 2013. It failed to seek judicial review of this agency action. Had it availed itself of this statutory remedy, most of the issues it seeks to raise here could have been presented to a district judge for determination. SNGA’s failure to seek judicial review resulted in the recording of the amended plat, the CC&Rs and the quitclaim deeds. Each of those actions has seriously complicated the possibility of undoing the Land Board’s action. Other lot owners in the Subdivision have accumulated certain rights under those documents, as well as previous deeds and plats, that cannot be taken away by any agency

action. Only a court of law could void those documents. SGNA claims that it only seeks relief with respect to Community Beach, but it has repeatedly claimed that both quitclaim deeds must be voided, which would affect all roads and common areas in the entire Subdivision.

The parties have devoted substantial briefing to the question of whether a declaratory ruling is an appropriate mechanism to obtain the relief SGNA seeks. Idaho Code section 67-5232(1) provides for a declaratory ruling “as to the applicability of any statutory provision.” SGNA is correct when it argues that the requirements of Idaho Code section 58-313 apply to the sale of State endowment lands, such as the Subdivision property. However, the Land Board is correct in pointing out the application of Idaho Code section 58-317, which authorizes the Land Board to lay out State lands in subdivisions when it determines that the property “will sell at a better price than when undivided.” This section also provides for the Land Board to file subdivision plats, which necessarily includes the dedication or designation of roads and common areas for the benefit of lot owners or the public. It appears that both statutes apply, which seems to be the extent of any determination under Section 67-5232.

Having failed to pursue judicial review of the Land Board’s action, there is no separate administrative avenue for SGNA to pursue for the relief it has requested. Indeed, the relief sought would only be a possibility in a regular civil action in the court system. Only a court of law could invalidate the quitclaim deeds that SGNA claims to be violative of constitutional and statutory provisions. Substantial legal and factual questions are presented that could only be dealt with in a court of law. Those questions would be outside the purview of a declaratory action in the court system, let alone an administrative proceeding.

Decisions of the Idaho Supreme Court under Idaho Code section 10-1201, the Declaratory Judgment Act provide guidance on the limits of declaratory relief. In *Farmers Ins. Exchange v.*

Tucker, 42 Idaho 191, 125 P.3d 1067 (2005), the Court had before it a case in which the principal question was the amount of damages payable under an insurance policy. The Court first noted, citing Idaho Code section 10-1209, that where a proceeding under the Act involved the determination of an issue of fact, such issue may be tried and determined as in other actions at law. *Id.* at 194, 125 P.3d at 1070. However, the Court stated further, citing *Country Ins. Co. v. Agricultural Development, Inc.*, 107 Idaho 961, 972, 695 P.2d 346, 357 (1984), “the Declaratory Judgment Act is not a freeway open for the litigation of factual disputes.” *Id.* The Court went on to say that in *Country Ins. Co.* it had “held that a declaratory judgment should not be allowed ‘where the issues presented should be the subject of judicial investigation in a regular action.’” *Id.*

In addition to presenting constitutional issues beyond the scope of an administrative action, this case would require resolution of substantial factual disputes which are inappropriate for determination in a declaratory proceeding. The principal issue in this matter is whether the Land Board received full market value for the roads and common areas that it dedicated and/or deeded to lot owners between 1924 and October 15, 2013. The Land Board contends the dedicated/deeded roads and common areas increased the prices it was able to charge for rental or sale of the lots. SGNA contends there was substantial residual value of the Land Board’s ownership interest in Community Beach as of October 15, 2013, that should have been realized upon its disposal. The valuation issue depends on a determination of the property rights held by the Land Board as of the October 15 meeting. While it still held the underlying fee to Community Beach, all of the lot owners in the Subdivision had vested rights in and to the “in common” use and enjoyment of all of the common areas, including Community Beach. This type of encumbrance would likely have a substantial impact on the market value of the Community Beach property. Resolution of such

factual issues would be well beyond the scope of either an administrative or judicial declaratory proceeding.

RECOMMENDED DECISION AND ORDER

The parties have raised interesting issues in their substantial briefing, but SGNA has been unable to demonstrate an available administrative avenue to pursue the relief it desires. It could have sought judicial review of the Land Board's October 15, 2013 decision but it failed to do so. There is no other available administrative remedy. A declaratory ruling would only result in a determination that a certain statute or rule might apply, but would not result in a determination of the outcome that the statute or rule would dictate. SGNA did not seek the initiation of a contested case and the Land Board did not authorize such a proceeding. A contested administrative proceeding seeking to undo the Land Board's action of October 15, 2013, would, in essence, constitute an impermissible collateral attack on that action.

The parties have styled their dispositive motions as motions for summary judgment and, therefore, a summary judgment standard will be applied here. This Hearing Officer can find no genuine issue as to any material fact regarding SGNA's ability to attack the Land Board's action of October 15, 2013, which approved the disposal of the State's interest in and to the roads and common areas of Southwest Payette Cottage Sites Subdivision, including Community Beach. SGNA failed to file a timely petition for judicial review of that agency action and may not collaterally attack the action in the present proceeding. Therefore, the Petition for Declaratory Ruling should be dismissed on summary judgment as a matter of law.

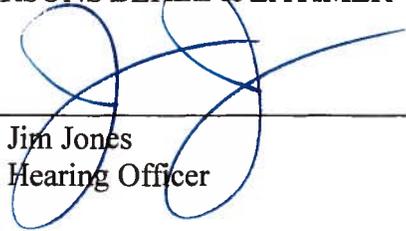
The Hearing Officer recommends that the Idaho State Board of Land Commissioners approve and adopt the foregoing decision and issue the recommended order served concurrent herewith, dismissing the Petition for Declaratory Ruling.

DATED this 12th day of November 2019.

PARSONS BEHLE & LATIMER

By _____

Jim Jones
Hearing Officer



CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2019, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

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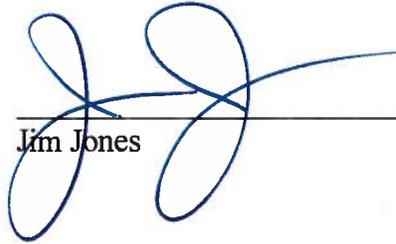
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