

RAMSDEN, MARFICE, EALY & DE SMET, LLP
700 Northwest Blvd.
P.O. Box 1336
Coeur d'Alene, ID 83816-1336
Telephone: (208) 664-5818
Facsimile: (208) 664-5884
Douglas S. Marfice, ISB #4072
dmarfice@rmedlaw.com

Attorneys for M3 ID Camp Bay, LLC.

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

M3 ID CAMP BAY, LLC, a foreign limited
liability company,

Petitioner,

vs.

BONNER COUNTY, IDAHO, a political
subdivision of the State of Idaho, acting
through the BONNER COUNTY BOARD OF
COUNTY COMMISSIONERS,

Respondent.

Case No. CV09-22-0316

PETITION FOR JUDICIAL REVIEW

Fee Category: L.3

Fee: \$221.00

TO: BONNER COUNTY, IDAHO AND THE BONNER COUNTY BOARD
OF COUNTY COMMISSIONERS

AND TO: THE CLERK OF THE ABOVE-ENTITLED COURT

COMES NOW M3 ID Camp Bay, LLC (hereinafter, "M3 ID" or "Petitioner"), by and
through its counsel of record, Ramsden, Marfice, Ealy & De Smet, LLP, and hereby petitions this
Court pursuant to Idaho Code §§ 40-203 and 40-208 and Rule 84 of the Idaho Rules of Civil
Procedure ("I.R.C.P.") for judicial review of the proceedings and decision referenced herein.

///

///

Buchanan, Barbara A.

I. INTRODUCTION

As a general matter, this petition seeks judicial review of the February 16, 2022, decision by the Bonner County Board of Commissioners (hereinafter, “Board”) denying Petitioner’s application to vacate the portion of Camp Bay Road abutting its property located in Camp Bay, Sagle, Idaho. More fundamentally, however, this petition seeks a judicial determination of the critical issue of whether Camp Bay Road terminates before the “natural” or “ordinary” high-water mark of Lake Pend Oreille and, therefore, does not provide direct public access to Lake Pend Oreille as a matter of law. Judicial determination of this issue is imperative as the Board’s professed uncertainty and indecision on the point expressly served to justify its flawed vote to deny the application.

To this end, the Board’s uncertainty and indecision on this issue is inherently unjustified since Petitioner provided direct evidence – both through prior written comment and at the February 16, 2022 public hearing - showing that Camp Bay Road unequivocally terminates well before reaching the ordinary high-water mark elevation of Lake Pend Oreille as judicially recognized by the United States Court of Appeals for the Ninth Circuit.¹ Moreover, the Board’s decision to deny the application under such uncertainty and indecision represents clear procedural error since it ultimately required the Board to disregard such factual evidence and cited authority in favor of entirely unsupported argument and conjecture. Such procedural error, and the contrary decision it therefore led to, is violative of Petitioner’s due process rights under State and Federal law.

¹ See *Swanson v. United States*, 789 F.2d 1368, 1369 (9th Cir. 1986).

The Board's decision left this matter unresolved, yet the Board still proceeded to deny the Petitioner's application. Rather than resolving this matter as a finder of fact, the Board instead passed the buck and asked for judicial direction. This Petition for Judicial Review carries out the Board's own express request for a judicial determination of whether Camp Bay Road provides direct public access to Lake Pend Oreille as a legal matter. Accordingly, Petitioner respectfully requests an order from this honorable Court recognizing that Camp Bay Road terminates before the judicially recognized ordinary high-water mark and, therefore, does not provide public access to Lake Pend Oreille as a legal matter. In the event this Court finds that no such access exists, Petitioner seeks further orders: (1) vacating the Board's decision to deny the application; and (2) remanding this matter back to the Board for further deliberations consistent with this Court's order. As to facilitate such an order, and pursuant to the express language of I.C. § 40-208(6), Petitioner respectfully requests: (1) "a judge who resides outside the county where the subject road or property is located be appointed to hear the case;" (2) that this honorable Court hear oral argument and receive written briefs concerning the issues set forth herein; and (3) that this honorable Court "accept[s] new evidence and testimony supplemental to the record provided by the county or highway district" and "shall consider those issues anew."

II. BACKGROUND & PROCEDURAL HISTORY

In the early 20th Century, Mr. John Van Schravendyk originated the certain portion of land that has come to be known as Camp Bay Road.² (R. at pp. 83, 296.) The Van Schravendyk and the decedent Green Family have owned the parcel of land encompassing the portion of Camp Bay Road at issue for nearly 120 years, having sold the underlying property at issue to Petitioner

² Mr. James Green is a longtime resident of Camp Bay, the grandson of John Van Schravendyk, and the President/Majority Shareholder of Applicant Green Enterprises, Inc. (Record in Case CV-09-21-0709 (hereinafter, "R.") at p. 83, 296.)

in June 2021. (R. at pp. 83, 299, 320.) Despite such lengthy and continuous ownership, Petitioner is unaware of even a single prescriptive easement claim, other than the conjecture and speculation offered in conjunction with the February 16, 2022, hearing - none of which would withstand requisite judicial scrutiny.

On or about February 2, 2021, J-U-B Engineers, Inc. filed the *Petition to Vacate Public Right-Of-Way (Idaho Code Title 40)* on behalf of Petitioner and Green Enterprises, Inc. (the former owner of the underlying property),³ thereby seeking to vacate a portion of Camp Bay Road abutting its property located in Camp Bay, Sagle, Idaho (hereinafter, “Application”). (R. at p.4.) Specifically, the Application sought “vacation of approximately 2,550 ft (2.93 acres) of the Camp Bay Road right-of-way from the north boundary of the Petitioners Parcel No. R56N01E184800A, to the terminus of the road at the high-water mark of Lake Pend Oreille, in Parcel No. R56N01E187801A” (hereinafter, “Application”). (R. at p.4.) For purposes of further background, it is helpful to bear in mind that Petitioner owns the littoral and wharfage rights surrounding this property as a matter of law, a point recognized by the Idaho Department of Lands through the issuance of a permit based upon such rights.

Subsequent to Bonner County’s satisfaction of the procedural requirements set forth in Idaho Code § 40-203, on April 7, 2021, a public hearing concerning the Application was held (hereinafter, “2021 Public Hearing”) whereat the Board voted to approve the Application. The Board decision to approve the Application was correspondingly memorializing by way of

³ Given its prior involvement in the application as the property’s then owner, it bears stressing that Green Enterprises, Inc. is in no way involved with this *Petition for Judicial Review*, nor did it participate in the underlying hearing (i.e., 2022 Public Session) serving as the basis for the same. Rather, this *Petition for Judicial Review* is brought by and on behalf of Petitioner M3 ID Camp Bay, LLC alone.

Resolution No. 21 37 Right of Way Vacation For a Portion of Camp Bay Road Planning Department File VS0002 21 (hereinafter, “2021 Resolution”).

On or about May 4, 2021, Alfred and Jennifer Arn moved for judicial review of the Board’s decision to approve the Application. Subsequent to briefing and oral argument, on November 15, 2021, the Honorable Cytnhia K.C. Meyer of the First Judicial District of the State of Idaho entered the *Memorandum Decision and Order on Petition for Review* (hereinafter, “Order”) thus vacating the Board’s decision to the approve the Application and remanding the matter to the Board “for further proceedings consistent with this decision.” Review of the Order makes clear that this decision to vacate and remand was effectively predicated upon the deficiencies inherent to the Board’s consideration of an alleged conflict of interest (both generally and with respect to its requisite “public interest” analysis) and the relative substantive paucity of the 2021 Resolution (namely, in articulating the applicable legal conclusions and findings of fact). While the Order does note that the Status Report prepared by the Bonner County Planning Department was “erroneous” in stating that “[t]here is no public access to the Lake as the road ends at the high-water mark,”⁴ this is neither dispositive of the instant issue nor contradictory to Petitioner’s position here. Instead, the Order’s express reference to *In re Sanders Beach* only supports the notion that the land laying above the ordinary high-water mark is indeed private property – the precise position taken by Petitioner.

In accordance with the Order, a second hearing concerning the Application was held on February 16, 2022 (hereinafter, “2022 Public Hearing”). Through both prior written comment

⁴ Order at p. 4, Fn. 16, referencing the *Bonner County Planning Department Board of County Commissioners Staff Report for April 7, 2021* (hereinafter, “2021 Staff Report”) and citing to I.C. § 58- 1201 and *In re Sanders Beach*, 143 Idaho 443, 453 (2006).

and live testimony at the 2022 Public Hearing, Petitioner argued and introduced evidence showing that Camp Bay Road unequivocally terminates well before reaching the ordinary high-water mark of Lake Pend Oreille as judicially recognized by the United States Court of Appeals for the Ninth Circuit. No such evidence was offered by those opposing the Application, instead only contrary argument and conjecture were presented (some under vague references to the “law” that were never actually supported as a practical matter). To this end, during deliberations, the Board made clear the critical importance of the question of whether the Camp Bay Road provided public access to Lake Pend Oreille as a legal matter and the fact that the Board’s decision hinged on this issue. Critically, the Board also made clear that it did not know the answer to this question and unabashedly sought judicial determination of the point by Petitioner. Notwithstanding the disparity in presented evidence and legal authority, and the Board’s ultimate professed uncertainty, the Board nonetheless voted to deny the Application. On March 2, 2022, the Board correspondingly issued a letter attempting to memorialize its decision to deny the Application. At the time of writing, it is unclear as to whether the Board will issue a further resolution amending or otherwise addressing the 2021 Resolution given its subsequent decision to the deny the Application.

III. LEGAL STANDARD

Judicial review is authorized and governed by Idaho Code § 40-208. As the owner and developer of the parcels of land abutting the portion of Camp Bay Road at issue, Petitioner has been indisputably aggrieved by the Board’s decision to deny the Application as the Petitioner has acquired this property, constructed millions of dollars’ worth of improvements, and conveyed lots to third parties, based upon the approval of the Board on April 7, 2021. The Board’s decision critically impacts Petitioner’s ability to develop and market these properties (particularly, the

specific parcel that is itself directly intersected by a portion of Camp Bay Road). Accordingly, Petitioner has standing to seek judicial review of the Board’s decision to deny the Application pursuant to I.C. § 40-208(1).⁵ Further, as this petition has been filed within twenty-eight (28) days of the 2022 Public Hearing in the District Court for the First Judicial District of the State of Idaho, in and for the County of Bonner, it clearly complies with the requirements set forth in I.C. § 40-208(2).⁶

As Petitioner is seeking a determination that Camp Bay Road terminates prior to the ordinary high-water mark of Lake Pend Oreille, it inherently seeks a “determination of the legal status or the width of a highway or public right-of-way” as contemplated under I.C. § 40-208(7). Accordingly, this petition for judicial review is a purely factual determination under applicable law. Pursuant to I.C. § 40-208(6), this court is authorized and empowered to “accept new evidence and testimony supplemental to the record provided by the county or highway district, and the court shall consider those issues anew.” Pursuant to I.C. § 40-208(6), Petitioner respectfully requests that this honorable Court hear oral argument and receive written briefs and evidence concerning the issues set forth herein. Furthermore, and also pursuant to I.C. § 40-208(6), Petitioner respectfully requests appointment of “a judge who resides outside the county where the subject road or property is located[.]”

⁵ I.C. § 40-208(1) provides: “Any resident or property holder within the county or highway district system, including the state of Idaho or any of its subdivisions or any agency of the federal government, who is aggrieved by a final decision of a board of county or highway district commissioners in an abandonment and vacation or validation proceeding is entitled to judicial review under the provisions of this section.”

⁶ I.C. § 40-208(2) provides that: “Proceedings for review are instituted by filing a petition in the district court of the county in which the commissioners have jurisdiction over the highway or public right-of-way within twenty-eight (28) days after the filing of the final decision of the commissioners or, if a rehearing is requested, within twenty-eight (28) days after the decision thereon.”

IV. I.R.C.P. 84(C) AVERMENTS

Pursuant to and in compliance with I.R.C.P. 84(c), Petitioner specifically avers the following:

(1) The name of the agency for which judicial review is sought: Bonner County Board of Commissioners, Bonner County, Idaho.

(2) The title of the district court to which the petition is taken: The District Court for the First Judicial District of the State of Idaho, in and for the County of Bonner.

(3) The date and the heading, case caption or other designation of the agency and the action for which judicial review is sought:

a. Date: February 16, 2022.

b. Heading, Case Caption, or Other Designation of the Agency:

Project Name: Green Enterprises, Inc.;
Public Right of Way Vacation, File No. VS0002-21,
Title 40 – Vacation of a Public Right of Way,
Applicant: Green Enterprises, Inc; M3 ID Camp Bay LLC,
Petition filed: February 4, 2021

c. The Action for Which Judicial Review Is Sought: Petitioner seeks review of the Board's denial of the Application on February 16, 2022, and a legal determination as to the predicate issue of whether the road underlying the Application (i.e., Camp Bay Road) provides direct public access to Lake Pend Oreille as a legal matter.

(4) A statement whether there was a hearing or oral presentation before the agency that was recorded or reported, together with an identification of the method of recording or reporting the hearing and the name and address of the person with possession of such recording or reporting when there was one: As set forth above, although there have been two hearings with respect to the Application (i.e., 2021 Public Hearing and 2022 Public Hearing), only the 2022

Public Hearing is applicable to the precise question raised herein. To this end, Petitioner understands that the 2022 Public Hearing was recorded and livestreamed on Youtube (at https://www.youtube.com/watch?v=Fd_StyWb7AY&t=15532s&ab_channel=BonnerCountyPlanning). Upon requesting a formal copy and a transcript of the same, Petitioner was advised by Ms. Veronica Dixon, Administrative Legal Assistant/Deputy Clerk for the Bonner County Board of Commissioners, that Bonner County maintains audio recordings of such hearings. Accordingly, the person in possession of such recordings is believed to be Ms. Veronica Dixon, Administrative Legal Assistant/Deputy Clerk, Bonner County Board of Commissioners, 1500 Hwy 2, Suite 308, Sandpoint, Idaho 83864, or another representative and/or employee of the Board and/or Bonner County.

(5) A statement of the issues for judicial review that the petitioner then intends to assert on judicial review; provided, the statement of issues may be filed separately within 14 days after the filing of the petition for judicial review and the statement does not prevent the petitioner from asserting other issues later discovered: While reserving its right to offer a further statement within the prescribed fourteen (14) days and to assert later discovered issues, Petitioner tentatively asserts the following issues for judicial review:

(A) Whether the portion of Camp Bay Road to be vacated under the Application provides direct public access to the ordinary high-water mark of Lake Pend Oreille as a matter of law. In other words, whether the terminus point of Camp Bay Road near or about Lake Pend Oreille is at an elevation higher than the ordinary high-water mark of the lake.

(B) Whether the Board violated Petitioner's due process rights under State and/or Federal Law by voting to deny the Application without resolving the question of

public access to Lake Pend Oreille, despite recognizing the importance of such issues and even imploring those involved to provide judicial guidance on these issues.

(C) Whether the Board violated Petitioner's due process rights under State and/or Federal Law by accepting and interpreting the unsupported argument and conjecture of those opposing the Application as being "evidence" or "legal authority" sufficient to offset if not outweigh the actual evidence and legal authority offered by Petitioner through prior written comment and live testimony at the 2022 Public Hearing, which clearly showed that there is no public access to Lake Pend Oreille and no public ownership of the littoral rights and wharfage rights in that area.

(6) A designation as to whether a transcript is requested: Petitioner formally requests a transcript and has endeavored to obtain the same. Petitioner contacted the Bonner County Prosecutor's Office who confirmed that in accordance with I.C. § 40-208 such a transcript would be prepared and thereafter quoted a cost of \$1,800.00. Upon further communications with the Bonner County Prosecutor's Office and the Bonner County Clerk's Office, and direction by Ms. Jeannie Welter, the Administrative Manager for the Bonner County Planning Department, Petitioner hand delivered a check for this amount to the Bonner County Planning Department, 1500 Highway 2, Ste 208, Sandpoint, Idaho 83864, on March 8, 2022.

(7) A certification by the attorney for the petitioner, or an affidavit by the petitioner if self-represented that:

(A) Service of the petition has been made upon the state agency or local government rendering the decision: Pursuant to and in compliance with I.R.C.P. 84, undersigned counsel for Petitioner certifies that service of this petition has been made upon the state agency or local government rendering the decision pursuant to I.R.C.P. 5(e)

and 84(c)(7), (d), specifically being the Board, the Bonner County Clerk of the Court, and the Bonner County Prosecutor's Office.

(B) The clerk of the agency has been paid the estimated fee for preparation of the transcript if one has been requested: As set forth above, Petitioner formally requests a transcript and has endeavored to obtain the same. Petitioner contacted the Bonner County Prosecutor's Office who confirmed that in accordance with I.C. § 40-208 such a transcript would be prepared and thereafter quoted a cost of \$1,800.00. Upon further communications with the Bonner County Prosecutor's Office and the Bonner County Clerk's Office, and direction by Ms. Jeannie Welter, the Administrative Manager for the Bonner County Planning Department, Petitioner hand delivered a check for this amount to the Bonner County Planning Department, 1500 Highway 2, Ste 208, Sandpoint, Idaho 83864, on March 8, 2022,.

(C) The clerk of the agency has been paid the estimated fee for the preparation of the record: Pursuant to and in compliance with I.R.C.P. 84, undersigned counsel for Petitioner certifies that Petitioner has endeavored to effectuate preparation of the record. Through its efforts, Petitioner contacted the Bonner County Prosecutor's Office who confirmed that in accordance with I.C. § 40-208 the record will be prepared and a quote for the costs of the same will be forwarded to Petitioner once available. Upon further communications with the Bonner County Prosecutor's Office and the Bonner County Clerk's Office, and direction by Ms. Jeannie Welter, the Administrative Manager for the Bonner County Planning Department, Petitioner hand delivered a check for this estimated fee in the amount of \$67.68 to the Bonner County Planning Department, 1500 Highway 2, Ste 208, Sandpoint, Idaho 83864, on March 8, 2022.

V. PRAYER FOR RELIEF

For the reasons set forth herein, Petitioner prays for an *Order* from this honorable Court:

1. Finding and declaring that the “natural” or “ordinary” high-water mark of Lake Pend Oreille is located at an elevation below the terminus of Camp Bay Road;

2. Finding and declaring that Camp Bay Road does not extend to Lake Pend Oreille’s “natural” or “ordinary” high-water mark;

3. Finding and declaring that since Camp Bay Road does not extend to Lake Pend Oreille’s “natural” or “ordinary” high-water mark, Camp Bay Road does not provide public access to Lake Pend Oreille as a matter of law;

4. Finding and declaring that the Board’s decision to deny the Application was contrary to law, erroneous, arbitrary, capricious, and/or otherwise not in accordance with law;

5. Finding and declaring that the Board’s decision to deny the Application despite its expressed uncertainty as to whether Camp Bay Road provides public access to Lake Pend Oreille as a matter of law and its explicit request for judicial guidance on the matter due to such uncertainty represented a violation of Petitioner’s due process rights under State and Federal law.

6. Vacating the Board’s decision to deny the Application;

7. Remanding the matter back to the Board for further deliberations pursuant to the findings of this Court;

///

///

///

///

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of March, 2022, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Bonner County Board of Commissioners
c/o Jessi Webster, Deputy Clerk
jessi.webster@bonnercountyid.gov

US MAIL
 Overnight Mail
 Hand Delivered
 Facsimile
 Email:

Bonner County Prosecutor
Louis Marshall
louis.marshall@bonnercountyid.gov

US MAIL
 Overnight Mail
 Hand Delivered
 Facsimile
 Email:

Bonner County, Idaho
William Wilson

US MAIL
 Overnight Mail
 Hand Delivered
 Facsimile
 Email:
prosefile@bonnercountyid.gov

/s/ Nicole Ryen
Nicole Ryen