

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

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| <p>M3 ID CAMP BAY, LLC, a foreign limited liability company, <i>Petitioners,</i></p> <p>v.</p> <p>BONNER COUNTY, IDAHO, a political subdivision of the State of Idaho, acting through the BONNER COUNTY BOARD OF COUNTY COMMISSIONERS, <i>Respondent,</i></p> <p>and ALFRED ARN and JENNIFER ARN, husband and wife, <i>Intervenors.</i></p> | <p>Case No. CV09-22-0316</p> <p>MEMORANDUM DECISION AND ORDER ON REMAND</p> |
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Petition for Judicial Review of a resolution of the Bonner County Board of Commissioners.

The decision of the Bonner County Board of Commissioner is remanded for further proceedings.

Zorik “Rick” Haruthunian, Ramsden, Marfice, Ealy & De Smet, LLP, for Petitioner M3 ID Camp Bay, LLC.

William S. Wilson, Deputy Prosecuting Attorney, for Respondent Bonner County.

Preston Carter, Givens Pursley, LLP, for Intervenors Alfred Arn and Jennifer Arn.

This case involves judicial review of the Bonner County Board of County Commissioners’ (“BOCC”) denial of a petition to vacate a segment of Camp Bay Road.

Following a public hearing and deliberation, the BOCC determined that it was not in the public interest to vacate Camp Bay Road while the terminus point of the road, and the corresponding right of the public to access Lake Pend Oreille, was unknown. On that basis, M3 initiated this petition. For the reasons set forth in this opinion, the court remands the decision of the BOCC for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

Camp Bay Road is a gravel road in Bonner County that is maintained by the Board of County Commissioners for Bonner County. On February 2, 2021, J-U-B Engineers, Inc. filed a petition (hereinafter, “Application”) to vacate a segment of Camp Bay Road on behalf of Petitioner and Green Enterprises, Inc. (the former owner of the underlying property). 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”.¹

In exchange for that vacation, Petitioner would build a privately owned, paved road to service its own property and several properties located to the south, a central mailbox location, and construct a gated entrance and a new turn-around area for school buses and plow trucks.² The two maps below depict the location of Camp Bay Road in its present configuration and its proposed relocation.

¹ Agency Record on Judicial Review (“R.”) at 4. Bonner County Board of Commissioners Public Hearing Transcript (4/7/2020) (“Tr. (4/7/2020)”) p.7.

² R. at 4.

before reaching the ordinary high-water mark of Lake Pend Oreille while the public by and large contended that it terminated at the ordinary high-water mark. Faced with these competing interpretations, the BOCC decided it was unable to determine that vacating Camp Bay Road was in the public interest while the terminus point of the road, and the corresponding right of the public to access Lake Pend Oreille, was unknown. On this basis, the BOCC denied the application, expressing a desire for a judicial determination on whether Camp Bay Road provides public access to the lake:

COMMISSIONER McDONALD: Okay. Given the information by our attorney, at this point I don't know that we have any other move other than to deny and then hopefully M3 can – we can get something adjudicated in the courts that tells us yes or no. And for that very reason, because I think the legal access – legal public access to the lake is yet undetermined from testimony we heard today from both sides of the issue. So my recommendation would be that we move to deny the petition for now. Hopefully M3 can provide us with a – with some adjudication. Or even the other side, if you guys want to get together and see if you can get it in front of a judge so that we can make a move – or make a different move, if we need to or not... But that would be my recommendation, is that we move to deny because we haven't seen a determination yet on whether truly there is legal access or not. I think that needs to be adjudicated by a judge and not by us. Do you guys have any thoughts on that?

COMMISSIONER BRADSHAW: Yeah. I think it would be great if a court would say, yep, they had legal access or no they did not... But without a definitive answer as to whether or not that access legally exists, I am going to have to make a motion to deny.⁷

In the written findings and conclusion⁸, the Board stated:

Conclusion 2

Bonner County **has** received objections to the petition or application to vacate the described area.

Finding: It is currently unknown where Camp Bay Road legally ends.

⁷ Tr. p. 191, ll. 12; p. 193, ll. 16.

⁸ R. 562

Finding: It is currently unknown where the high-water mark of Lake Pend Oreille was at the time Camp Bay Road was created.

Finding: It is currently unknown if Camp Bay Road provides legal public access to Lake Pend Oreille.

Conclusion 3

The abandonment of the public right-of-way **is not** in the public interest.

On March 8, 2022, M3 filed a Petition for Judicial Review (“Petition”) of BOCC’s denial of their application. The Petition sought “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.”⁹ Pursuant to Idaho Code § 40-208(6), M3 moved to present additional evidence related to the Petition.

On August 8, 2022, Petitioner filed a Motion for Order Permitting Presentation of Evidence or, in the Alternative, Remand (Motion for Remand). Petitioner stated that it had formulated a proposal concerning the Application in which Petitioner would create and dedicate a public pathway to provide public access to the Lake in exchange for the Application’s approval.¹⁰ Given the prospect of a resolution beneficial to the parties, Petitioner sought an order under Idaho Code § 40-208(5) directing:

(1) the presentation of information/evidence pertaining to the proposal set forth herein to the Bonner County Board of County Commissioners for purposes of reconsidering its February 16, 2022, decision concerning Petitioner’s application for vacation/abandonment in light of the same; and (2) reconsideration of the same. In the alternative, Petitioner respectfully moves for an order pursuant to Rule 13.3 of the Idaho Appellate Rules remanding this matter back to the Board directing such reconsideration.¹¹

⁹ Petition at 2.

¹⁰ Petition at 2.

¹¹ Motion for Remand at 2.

The Intervenors filed a brief in response, which questioned whether M3's proposal was the type of "additional evidence" for which Idaho Code § 40-208(5) contemplates a possible remand. In the event that the court did order a remand, the Intervenors requested that the court impose the following conditions to limit the scope of the deliberations:

- The commissioners shall establish a hearing date.
- The commissioners must follow the public notice procedures set forth in Idaho Code Title 40, Chapter 2, which include making public notice available to the public not later than thirty days prior to any hearing.
- The public notice must specify the scope of the hearing, making it clear that the terminus point of the road is not being considered.¹²

On August 10, 2022, Petitioner's motion came on for hearing before the court.

II. STANDARD OF REVIEW

A. *Idaho Code § 40-208(5)*.

Idaho Code § 40-208(5) states in relevant part that

parties *may* present additional evidence to the court, upon a showing to the court that such evidence is material to the issues presented to the court. In such case, the court *may* order that the additional information be presented to the commissioners upon conditions determined by the court.

(emphasis added). The Idaho Supreme Court has "interpreted the meaning of the word 'may' appearing in legislation, as having the meaning or expressing the right to exercise discretion. When used in a statute, the word 'may' is permissive rather than the imperative or mandatory meaning of 'must' or 'shall.'" *Rangen, Inc. v. Idaho Dep't of Water Res.*, 160 Idaho 251, 256, 371 P.3d 305, 310 (2016) (citation omitted).

B. *Idaho Appellate Rule 13.3(a)*

¹² Arn's response to M3's Motion for Order Permitting Presentation of Evidence or In the Alternative, *Remand* at 2.

A Board of County Commissioners “is treated as an agency for the purposes of judicial review.” *Galli v. Idaho Cnty.*, 146 Idaho 155, 158 (2008) (applying concepts of administrative law to decision by Board of County Commissioners under Idaho Code § 40-208). “Proceedings in the district court in cases involving judicial review of an agency’s action are governed by I.R.C.P. 84.” *Mercy Med. Ctr. v. Ada Cnty., Bd. of Cnty. Commissioners of Ada Cnty.*, 146 Idaho 226, 230, 192 P.3d 1050, 1054 (2008). Rule 84 does not explicitly provide for remand to the agency; rather, I.R.C.P. 84(r) provides, in relevant part: “[a]ny procedure for judicial review not specified or covered by these rules shall be in accordance with the appropriate rule of the Idaho Appellate Rules to the extent the same is not contrary to this Rule 84.”

Idaho Appellate Rule 13.3(a) provides:

At any time before the issuance of an opinion, the Supreme Court may on its own motion, or on motion of any party showing *good cause*, order a case to be remanded to the district court or to the administrative agency to take further action as designated in the order of remand.

Id. (emphasis added). “A trial courts’ decisions involving application of a ‘good cause’ standard are discretionary decisions.” *Phillips v. E. Idaho Health Servs., Inc.*, 166 Idaho 731, 757, 463 P.3d 365, 391 (2020), *reh’g denied* (May 29, 2020).

When an appellate court reviews an alleged abuse of discretion, the court determines his Court determines “[w]hether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason.” *Lunneborg v. My Fun Life*, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018).

III. DISCUSSION

The procedure to consider an application for the abandonment of a road or right-of-way is set forth in Idaho Code § 40-2...03. Idaho Code § 40-203(a) provides in pertinent part: “[t]he commissioners may by resolution declare their intention to abandon and vacate any highway or public right-of-way or to reclassify a public highway as a public right-of-way, *where doing so is in the public interest.*” I.C. § 40-203(a) (emphasis added). The public-interest finding is a discretionary determination rather than a factual finding. *Palmer v. E. Side Highway Dist.*, 167 Idaho 813, 821, 477 P.3d 248, 256 (2020). When a court reviews the decision of a board to vacate a road, Idaho Code § 40-208(6) states: “[t]he court shall consider the record before the board of county or highway district commissioners and shall defer to the board of county or highway district commissioners on matters in which such board has appropriately exercised its discretion with respect to the evaluation of the public interest.”

“[Idaho Code] § 40–208 governs the standard of review for judicial review of decisions by a board of county or highway district commissioners.” *Floyd v. Bd. of Comm'rs of Bonneville Cnty.*, 131 Idaho 234, 237, 953 P.2d 984, 987 (1998). While Idaho Code § 40–208(7) states that “[t]he court shall not substitute its judgment for that of the commissioners as to the weight of the information on questions of fact,” Idaho Code § 40-208(5) states in relevant part that

parties *may* present additional evidence to the court, upon a showing to the court that such evidence is material to the issues presented to the court. In such case, the court *may* order that the additional information be presented to the commissioners upon conditions determined by the court.

I.C. § 40-208(5) (emphasis added).

To begin, the court shares the Interveners’ concern that § 40-208(5) is inapplicable for this motion, and Idaho case law lacks guidance on this statute. The court also recognizes that the § 40-208(5) is ambiguous regarding what parties may present to the court. Does the statute

concern “additional evidence” or “additional information?” However, the court declines to address this ambiguity because the Proposal is not additional evidence/information that is material to determine the issue presented to the court.

This court was tasked to determine whether Camp Bay Road provides public access to Lake Pend Oreille as a legal matter. *See Petition for Judicial Review* at 8. Pursuant Idaho Rule of Evidence 401, relevant evidence is evidence that has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Here, while M3 proposal may affect the BOCC public interest determination, it does not make the existence of any fact regarding the legal status of Camp Bay Road more or less probable. As discussed above, the public interest determination is a discretionary determination of the BOCC, not a factual finding. *See Palmer* 167 Idaho at 821. Instead, the Proposal appears to be in the similar vein as a settlement offer. Therefore, Idaho Code § 40-208(5) is not applicable’s

However, after considering the parties’ argument and briefing on this matter, the court determines that good cause exists to remand this matter back to the BOCC pursuant to Idaho Appellate Rule 13.3(a). The court determines that good cause exists to allow the BOCC to consider Petitioner’s Proposal, which is material to the BOCC’s public interest determination regarding public access to the lake. Good cause also exists for judicial efficiency, mitigating costs for the litigants, and would allow the BOCC to review its factual determinations regarding the legal status of Camp Bay Road, if it so chooses. Accordingly, Petitioner’s motion for remand is granted.

IV. CONCLUSION

This matter having come before this Court on Petitioner M3 ID Camp Bay, LLC’s (“Petitioner”) Motion for Order Permitting Presentation of Evidence or, in the Alternative,

Remand, the court, having heard the argument of counsel and having considered the parties' written submissions, and the reasons for the court's rulings having been stated on the record,

NOW THEREFORE,

IT IS HEREBY ORDERED that Petitioner's Motion for Order Permitting Presentation of Evidence or, in the Alternative, Remand is granted in part and denied in part. Petitioner's Motion for Order Permitting Presentation of Evidence is denied.

Pursuant to I.R.C.P. 84(r) and I.A.R. 13.3, the court remands this matter to the Bonner County Board of County Commissioners ("BOCC") to consider the Proposal as set forth in M3 ID Camp Bay, LLC Motion for Order Permitting Presentation of Evidence or, in the Alternative, Remand.

The BOCC may otherwise determine, in its sole discretion, the scope of the issues to be considered or reconsidered, including whether it will reconsider its findings regarding (1) the terminus point of Camp Bay Road, (2) the location of the ordinary high-water mark of Lake Pend Oreille at the time that Camp Bay Road was created, or (3) whether Camp Bay Road provides public access to Lake Pend Oreille.

The BOCC may modify its findings and conclusions, if necessary, and make such other findings and conclusions necessary with respect to Petitioner's Application and Proposal.

DATED this 20th day of September, 2022.

BY THE COURT:



Cynthia K.C. Meyer
District Judge

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was delivered on the date and in the manner indicated to the following:

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Dated: 9/21/2022

JIM BRANNON
CLERK OF THE COURT

By: Jb
Deputy Clerk