

6-4-2010

Ciszek v. Kootenai County Bd. Of Com'rs Clerk's Record v. 1 Dckt. 37562

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LAW CLERK

IN THE SUPREME COURT
OF THE STATE OF IDAHO

LINDA CISZAK, individually; RONALD
G. WILSON and LINDA A. WILSON,
husband and wife; BILL DOLE and
MARION DOLE, husband and wife;
MIKE ANDERSON and RAYELLE
ANDERSON, husband and wife;
JOE CULBRTH and SHARON
CULBRTH, husband and wife; KIRK
HOBSON and KIMBERLY HOBSON,
husband and wife; SETH MOULDING
and JENNIFER MOULDING, husband
and wife; CASY NEAL and KRISTIN
NEAL, husband and wife; WILLIAM
GIRTON and DOLLY GIRTON, husband
and wife,

Plaintiffs/Appellants,

vs

KOOTENAI COUNTY BOARD OF
COMMISSIONERS and COEUR D'ALENE
PAVING, INC.,

Defendant/Respondents ,

CLERK'S RECORD ON
APPEAL FROM THE DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT OF IDAHO, IN AND
OUT OF KOOTENAI

FILED - COPY

JUN 14 2010
COURT CLERK FOR APPELLANTS
Dana L Rayborn Wetzel

COURT CLERK FOR RESPONDENTS
Jethelyn H Harrington
Michael Chapman

SUPREME COURT DOCKET 37562-2010

37562
Volume 1

SEE AUGMENTATION
RECORD

IN THE SUPPREME COURT OF THE STATE OF IDAHO

LINDA CISZAK, individually; RONALD)
 G. WILSON and LINDA A. WILSON,)
 husband and wife; BILL DOLE and)
 MARION DOLE, husband and wife;)
 MIKE ANDERSON and RAYELLE)
 ANDERSON, husband and wife;)
 JOE CULBRTTH and SHARON)
 CULBRTTH, husband and wife; KIRK)
 HOBSON and KIMBERLY HOBSON,)
 husband and wife; SETH MOULDING)
 and JENNIFER MOULDING, husband)
 and wife; CASY NEAL and KRISTIN)
 NEAL, husband and wife; WILLIAM)
 GIRTON and DOLLY GIRTON, husband)
 and wife,)
)
 Plaintiffs/Appellants,)
 vs)
)
 KOOTENAI COUNTY BOARD OF)
 COMMISSIONERS and COEUR D'ALENE)
 PAVING, INC.,)
)
 Defendant/Respondents ,)
)

CLERK'S RECORD

SUPREME COURT NO.
37562-2010

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai.

HONORABLE BENJAMIN R SIMPSON
District Judge

Dana L Rayborn Wetzel
618 N 4th St Suite 2
Coeur d'Alene ID 83814

John Cafferty
Kootenai County Legal Services
PO Box 9000
Coeur d'Alene ID 93916

Attorney for Appellants

Attorneys for Respondents
Michael R Chapman
PO Box 1600
Coeur d'Alene ID 83816

Attorneys for Respondents

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9/4/2008	NCOC	MCCORD	New Case Filed - Other Claims	Charles W. Hosack
		MCCORD	Filing: A - Civil Complaint for more than \$1,000.00 Paid by: Wetzel & Wetzel Receipt number: 0811493 Dated: 9/4/2008 Amount: \$.00 (Check) For:	Charles W. Hosack
	SUMI	HUFFMAN	Summons Issued	Charles W. Hosack
9/8/2008	AFSV	BAXLEY	Affidavit Of Service on 09/08/08 served Board of Commissioners of Kootenai County Idaho	Charles W. Hosack
9/24/2008	MNDS	LSMITH	Motion To Dismiss	Charles W. Hosack
	MEMO	LSMITH	Memorandum in Support of Motion to dismiss	Charles W. Hosack
	AFFD	ROHRBACH	Affidavit of Sandi Gilbertson in Support of Motion to Dismiss Under IRCP 12(b)(1)	Charles W. Hosack
9/25/2008	PETN	SREED	AMENDED Petition for Declaratory Judgment, Petition for Judicial Review and Complaint - Steven Wetzel OBO Ciszek	Charles W. Hosack
	SUMI	SREED	AMENDED Summons Issued	Charles W. Hosack
	HRSC	ROHRBACH	Hearing Scheduled (Motion to Dismiss 11/24/2008 10:00 AM) Harrington/45 min	Charles W. Hosack
	AFSV	CRUMPACKER	Affidavit Of Service on Board of Commissioners of Kootenai Cty	Charles W. Hosack
9/26/2008	NOHG	SREED	Notice Of Hearing on Motion to Dismiss	Charles W. Hosack
11/3/2008	HRSC	ROHRBACH	Hearing Scheduled (Motion 11/24/2008 10:00 AM) to Limit Transcript/Wetzel	Charles W. Hosack
11/6/2008	NOHG	LEU	Notice Of Hearing - 11/27/08 - 10 am	Charles W. Hosack
	MOTN	LEU	Motion To Limit Transcript	Charles W. Hosack
	AFFD	LEU	Affidavit Of Steven C. Wetzel In Support Of Motion To Limit TranscriptCY	Charles W. Hosack
11/10/2008	AFFD	HUFFMAN	Affidavit of Dana L Rayborn Wetzel in Support of Memorandum Opposing Motion to Dismiss	Charles W. Hosack
	MEMO	HUFFMAN	Memorandum in Opposition to Motion to Dismiss	Charles W. Hosack
	MOTN	HUFFMAN	Motion to Bifurcate Claims	Charles W. Hosack
	NOTC	HUFFMAN	Notice of Hearing	Charles W. Hosack
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11/19/2008	MEMO	BAXLEY	Reply Memorandum In Support Of Motion To Dismiss	Charles W. Hosack
11/24/2008	HRHD	ROHRBACH	Hearing result for Motion held on 11/24/2008 10:00 AM: Hearing Held to Limit Transcript/& Bifurcate/Wetzel	Charles W. Hosack
	HRHD	ROHRBACH	Hearing result for Motion to Dismiss held on 11/24/2008 10:00 AM: Hearing Held Harrington/45 min	Charles W. Hosack

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11/24/2008	DCHH	ROHRBACH	District Court Hearing Held Court Reporter: JoAnn Schaller Number of Transcript Pages for this hearing estimated:	Charles W. Hosack
12/22/2008	CVDI	SREED	Civil Disposition entered for: Kootenai County Board of Commissioners, Defendant; Anderson, Mike, Plaintiff; Anderson, Rayelle, Plaintiff; Ciszek, Linda, Plaintiff; Culbreth, Joe, Plaintiff; Culbreth, Sharon, Plaintiff; Dole, Bill, Plaintiff; Dole, Marian, Plaintiff; Girton, Dolly, Plaintiff; Girton, William, Plaintiff; Hobson, Kimberly, Plaintiff; Hobson, Kirk, Plaintiff; Moulding, Jennifer, Plaintiff; Moulding, Seth, Plaintiff; Neal, Casy, Plaintiff; Neal, Kristin, Plaintiff; Wilson, Linda A, Plaintiff; Wilson, Ronald G, Plaintiff. Filing date: 12/22/2008	Charles W. Hosack
	FJDE	SREED	Memorandum Decision and Order Re: Defendant's Motion to Dismiss, Petitioners Motion to Bifurcate and Limit Transcript	Charles W. Hosack
	STAT	SREED	Case status changed: Closed	Charles W. Hosack
2/6/2009	NOTC	HUFFMAN	Notice of Lodging of Partial Transcript	Charles W. Hosack
2/23/2009	NOTC	SREED	Notice of Settlement and Filing of Partial Transcript	Charles W. Hosack
3/2/2009	HRSC	ROHRBACH	Hearing Scheduled (Motion 03/24/2009 03:30 PM) to Augment Transcript/Wetzel/15 min	Charles W. Hosack
3/9/2009	NOHG	JOKELA	Notice Of Hearing	Charles W. Hosack
	AFFD	JOKELA	Affidavit of Kevin P Holt in Support of Motion to Augment Transcript	Charles W. Hosack
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4/17/2009	ORDR	MCCORD	Order for Extension of Time to Lodge Agency Record & Transcript	Charles W. Hosack
4/22/2009	NLTR	MCCORD	Notice of Lodging Augmented Transcript & Agency Record	Charles W. Hosack

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5/7/2009	NOTC	SREED	Notice of Settlement and Filing of Augmented Transcript and Agency Record	Charles W. Hosack
5/8/2009	MISC	JOKELA	Briefing Schedule	Charles W. Hosack
5/13/2009	FILE	MCCORD	New File Created *****FILE 3 EXPANDO***** expando contains agency transcripts/records	Charles W. Hosack
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6/1/2009	HRSC	ROHRBACH	Hearing Scheduled (Motion to Dismiss 06/30/2009 03:30 PM) Wetzel - 15 min	Charles W. Hosack
	MNDS	VICTORIN	Motion To Dismiss Zonig Appeal	Charles W. Hosack
	NOHG	VICTORIN	Notice Of Hearing	Charles W. Hosack
6/12/2009	STIP	VICTORIN	Stipulation to Dismiss Zoning Appeal	Charles W. Hosack
6/17/2009	NOHG	HUFFMAN	Notice Of Hearing-6/30/09 3:30 PM	Charles W. Hosack
	MOTN	HUFFMAN	Motion for Leave to Join Real Party in Interest	Charles W. Hosack
6/29/2009	STIP	CRUMPACKER	Stipulation to Join Coeur d'Alene Paving Inc	Charles W. Hosack
6/30/2009	ORDR	ROHRBACH	Order of Dismissal of Zoning Appeal	Charles W. Hosack
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	HRVC	ROHRBACH	Hearing result for Motion to Amend held on 06/30/2009 03:30 PM: Hearing Vacated Wetzel - 15 min / Add party	Charles W. Hosack
7/1/2009	ORDR	ROHRBACH	Order Joining Coeur d'Alene Paving, Inc.	Charles W. Hosack
	ORDR	ROHRBACH	Order Establishing Briefing Schedule	Charles W. Hosack
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8/4/2009	MEMO	COCHRAN	Memorandum in Support of Declaratory Judgment	Charles W. Hosack
	CERT	COCHRAN	Certificate Of Foreign Law	Charles W. Hosack
8/5/2009	ORDR	ROHRBACH	Order to Amend Briefing Schedule	Charles W. Hosack
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10/6/2009	BRIE	HUFFMAN	Coeur d'Alene Paving's Brief In Opposition to Declaratory Judgment	Charles W. Hosack
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10/29/2009	BRIE	BAXLEY	Ciszek's Reply Brief	Charles W. Hosack
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	AFIS	BAXLEY	Affidavit of Kristin E Neal In Support of Declaratory Judgment	Charles W. Hosack

Date	Code	User		Judge
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	AFIS	BAXLEY	Affidavit of Michael Sherman In Support of Declaratory Judgment	Charles W. Hosack
	AFIS	BAXLEY	Affidavit of Ronald G "Tiny" Wilson In Support of Declaratory Judgment	Charles W. Hosack
	AFIS	BAXLEY	Affidavit of Michael J Anderson In Support of Declaratory Judgment	Charles W. Hosack
	AFIS	BAXLEY	Affidavit of Heather Sherman In Support of Declaratory Judgment	Charles W. Hosack
	AFIS	BAXLEY	Affidavit of Linda Ciszek In Support of Declaratory Judgment	Charles W. Hosack
10/30/2009	NOTC	SREED	Notice of Unavailable Dates - Rayborn-Wetzel	Charles W. Hosack
	NOTC	SREED	Notice of Unavailable Dates - Jethelyn Harrington	Charles W. Hosack
	ORDR	JOKELA	Order Clarifying	Charles W. Hosack
11/5/2009	HRSC	ROHRBACH	Hearing Scheduled (Motion for Summary Judgment 11/24/2009 03:30 PM) Wetzel	Charles W. Hosack
	NOHG	LEU	Notice Of Hearing	Charles W. Hosack
11/24/2009	INHD	ROHRBACH	Hearing result for Motion for Summary Judgment held on 11/24/2009 03:30 PM: Interim Hearing Held Wetzel	Charles W. Hosack
	DCHH	ROHRBACH	District Court Hearing Held Court Reporter: JoAnn Schaller Number of Transcript Pages for this hearing estimated:	Charles W. Hosack
	HRSC	ROHRBACH	Hearing Scheduled (Motion for Summary Judgment 12/03/2009 10:00 AM) cross msj	Charles W. Hosack
11/30/2009	STIP	BAXLEY	Stipulation RE Motion For Summary Judgment and Notice of Hearing on 12/03/09 at 10:00 AM	Charles W. Hosack
12/3/2009	HRHD	ROHRBACH	Hearing result for Motion for Summary Judgment held on 12/03/2009 10:00 AM: Hearing Held cross msj	Charles W. Hosack
	DCHH	ROHRBACH	District Court Hearing Held Court Reporter: JoAnn Schaller Number of Transcript Pages for this hearing estimated:	Charles W. Hosack
1/5/2010	ADMR	MEYER	Administrative assignment of Judge (batch process)	
1/7/2010		LEU	Notice of Reassignment of Case to Correct Jurisdiction and Judge	Benjamin R. Simpson

Date	Code	User	Judge	
2/22/2010	CVDI	LEU	Civil Disposition entered for: Coeur d'Alene Paving Inc, Defendant; Kootenai County Board of Commissioners, Defendant; Anderson, Mike, Plaintiff; Anderson, Rayelle, Plaintiff; Ciszek, Linda J, Plaintiff; Culbreth, Joe, Plaintiff; Culbreth, Sharon, Plaintiff; Dole, Bill, Plaintiff; Dole, Marian, Plaintiff; Girton, Dolly, Plaintiff; Girton, William, Plaintiff; Hobson, Kimberly, Plaintiff; Hobson, Kirk, Plaintiff; Moulding, Jennifer Christine, Plaintiff; Moulding, Seth, Plaintiff; Neal, Casy, Plaintiff; Neal, Kristin, Plaintiff; Wilson, Linda A, Plaintiff; Wilson, Ronald G, Plaintiff. Filing date: 2/22/2010	Charles W. Hosack
	FJDE	LEU	Final Judgement, Order Or Decree Entered	Charles W. Hosack
	STAT	LEU	Case status changed: Closed	Charles W. Hosack
3/9/2010		PARKER	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Wetzel & Wetzel Receipt number: 0011430 Dated: 3/9/2010 Amount: \$101.00 (Check) For: Anderson, Mike (plaintiff), Anderson, Rayelle B (plaintiff), Ciszek, Linda J (plaintiff), Culbreth, Joe (plaintiff), Culbreth, Sharon (plaintiff), Dole, Bill (plaintiff), Dole, Marian (plaintiff), Girton, Dolly (plaintiff), Girton, William (plaintiff), Hobson, Kimberly (plaintiff), Hobson, Kirk (plaintiff), Moulding, Jennifer Christine (plaintiff), Moulding, Seth (plaintiff), Neal, Casy (plaintiff), Neal, Kristin (plaintiff), Wilson, Linda A (plaintiff) and Wilson, Ronald G (plaintiff)	Benjamin R. Simpson
	BNDC	PARKER	Bond Posted - Cash (Receipt 11434 Dated 3/9/2010 for 100.00)	Benjamin R. Simpson
	STAT	PARKER	Case status changed: Closed pending clerk action	Benjamin R. Simpson
	APDC	PARKER	Appeal Filed In Supreme Court	Benjamin R. Simpson
	NOTC	PARKER	Notice of Appeal	Benjamin R. Simpson
4/1/2010	NOTC	CRUMPACKER	Notice of Filing Original Transcript	Benjamin R. Simpson
4/5/2010	TRAN	BAXLEY	Notice Of Filing Original Transcript	Benjamin R. Simpson

SUMMONS ISSUED
SEP 04 2008

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
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2008 SEP -4 PM 2:02
CLERK DISTRICT COURT
DEPUTY *Kathleen*
See

Steven C. Wetzel ISB # 2988
Kevin P Holt ISB # 7196
WETZEL & WETZEL, P.L.L.C.
1322 Kathleen Ave., Suite 2
Coeur d'Alene, Idaho 83815
Telephone: (208) 667-3400
Facsimile: (208) 664-6741

Attorneys for CISZEK

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

LINDA CISZEK, individually; RONALD G.)
WILSON and LINDA A. WILSON, husband)
and wife; BILL DOLE and MARIAN DOLE,)
husband and wife; MIKE ANDERSON and)
RAYELLE ANDERSON, husband and wife;)
JOE CULBRTH and SHARON)
CULBRTH, husband and wife; KIRK)
HOBSON and KIMBERLY HOBSON,)
husband and wife; SETH MOULDING and)
JENNIFER MOULDING, husband and wife;)
CASY NEAL and KRISTIN NEAL, husband)
and wife; and WILLIAM GIRTON and)
DOLLY GIRTON, husband and wife,)
)
Petitioners/Plaintiffs,)
)
vs.)
)
BOARD OF COMMISSIONERS,)
KOOTENAI COUNTY, STATE OF IDAHO,)
)
Respondent/Defendant.)

7074
Case No. CV-08-7074
PETITION FOR DECLARATORY
JUDGMENT, PETITION FOR JUDICIAL
REVIEW AND COMPLAINT
Fee \$88.00
Category A.1./G.3.

ASSIGNED TO
JUDGE HOSACK

COMES NOW, Petitioners/Plaintiffs, LINDA CISZEK, et al (collectively "CISZEK") by and through their attorneys, Wetzel, Wetzel, Bredeson & Holt, P.L.L.C., and petitions this Court as set forth below:

COUNT ONE
PETITION FOR DECLARATORY JUDGMENT

1.1 CISZEK petitions this Court, pursuant to the Uniform Declaratory Judgment Act, Idaho Code § 10-1201, *et seq.*, for a judicial examination and determination that the Kootenai County Board of Commissioners ("BOARD") acted without authority on August 7, 2008, when the BOARD approved FINDINGS OF FACT, APPLICABLE LEGAL STANDARDS, COMPREHENSIVE PLAN ANALYSIS, CONCLUSIONS OF LAW AND ORDER OF DECISION in Case NO. ZON08-0001, and enacted Ordinance No. 417 ("DECISION"), true and correct copies of which are attached hereto collectively as Exhibit "A."

1.2 CISZEK owns property located at 15950 N. Knudson Road, Rathdrum, Idaho, which property is located within 300 feet of the property rezoned by the DECISION and is, therefore, an interested person as defined in Idaho Code § 10-1202.

1.3 A true judiciable controversy exists which will be terminated by the Court's judgment or decree, pursuant to Idaho Code §§ 10-1205 and 10-1206.

1.4 The property owned by CISZEK lies within Kootenai County, the DECISION was rendered in Kootenai County, and the Kootenai County Board of Commissioners have been made a party to this action. Therefore, this Court has jurisdiction and authority to consider this Petition under Idaho Code §§ 1-705, 5-401-403, and 10-1201.

1.5 The BOARD, on August 6, 2008, approved the DECISION authorizing the rezoning of two separate parcels as a "swap zone." There exists no authority under the Constitution of the State of Idaho, under the general laws of the State of Idaho, the general laws

affecting Counties or the Local Land Use Planning Act that authorizes the BOARD to change the zoning of two parcels of property by a procedure which simply swaps the zone for each parcel.

COUNT TWO
PETITION FOR JUDICIAL REVIEW

2.1 The above-named Petitioners/Plaintiffs, CISZEK, realleges and repeats as if again set forth at length each and every allegation contained in Paragraphs 1.1 through 1.5, and further alleges the following:

2.2. CISZEK appeals the DECISION to swap the zones on two separate parcels of property approved by the BOARD and enacted as Ordinance No. 417 on August 7, 2008, as an affected person under the Local Land Use Planning Act, Idaho Code Title 67, Chapter 65, specifically Idaho Code § 67-6521.

2.3. CISZEK has a right to appeal to the District Court as an affected person pursuant to Idaho Code § 67-6521 because the zoning action by the Kootenai County Commissioners is quasi-judicial by nature and a zoning permit within the meaning of said section.

2.4. A limited transcript of the proceedings before the Kootenai County Commissioners and the proceedings before the Kootenai County Planning and Zoning Commission in Case NO. ZON08-0001 has been requested, as set forth by Stipulation filed even date herewith.

2.5. CISZEK requests the preparation of a limited Agency record as provided in Idaho Code § 67-5249, as set forth by Stipulation filed even date herewith.

2.6. CISZEK requests the opportunity to present additional evidence to the Court as allowed under Idaho Code. § 67-5276 due to irregularities in the procedure before the Board, including that the Commissioners had ex-parte communication with individuals promoting the

application of Coeur d'Alene Paving, Inc.'s request to change the zoning classification of the properties at issue in the DECISION.

2.7. The action of the BOARD to swap-zone the two parcels at issue is in violation of constitutional or statutory provisions.

2.8. The action of the BOARD to swap-zone the two parcels at issue is in excess of the statutory authority of Kootenai County.

2.9. The action of the BOARD to swap-zone the two parcels at issue is made upon unlawful procedures.

2.10. The action of the BOARD to swap-zone the two parcels at issue is not supported by substantial evidence on the record as a whole.

2.11. The action of the BOARD to swap-zone the two parcels at issue is arbitrary, capricious, or an abuse of discretion.

2.12. Substantial rights of CISZEK have been affected.

COUNT THREE COMPLAINT

3.1 In the alternative, the above-named Petitioners/Plaintiffs, CISZEK, realleges and repeats as if again set forth at length each and every allegation contained in Paragraphs 1.1 through 1.5, Paragraphs 2.1 through 2.12, and further alleges the following:

3.2. CISZEK has a right to bring an action to the District Court as a civil action commenced by the filing of a complaint as allowed under Rule 3(a) of the Idaho Rules of Civil Procedure.

3.3 Defendant Kootenai County is a body politic and corporate; a political subdivision of the state with the power to sue and be sued as set forth in Idaho Code § 31-604. and is a person subject to the jurisdiction of Courts of this state pursuant to Idaho Code § 5-514.

3.4 Venue is proper pursuant to Idaho Code § 5-403.

3.5 The DECISION of the BOARD which rezoned two separate parcels of property through a procedure which swapped the zones of each parcel was an ultra vires act.

3.6 The resulting rezone resulted in a decrease in value of the property owned by CISZEK without due process of law.

3.7 That service of this Petition/Appeal/Complaint has been made upon all parties required to be served pursuant to Rule 4(d)(5), Idaho Rules of Civil Procedure.

WHEREFORE, Petitioners/Plaintiffs prays for judgment against Respondent/Defendant, as follows:

1. For an order vacating the DECISION.
2. For an amount equal to the amount that Plaintiff's property has been devalued by the DECISION, such amount to be proven at trial, to be not less than \$10,000.00.
3. For reasonable costs and attorney's fees incurred in pursuing this claim pursuant to Idaho Code §§ 10-1210, 12-117 and 12-121. In the event of default the amount of such attorney fees shall equal \$8,000.00.
5. For such other and further relief as the Court deems just and reasonable.

Petitioners/Plaintiffs request a court trial.

DATED this 4th day of September, 2008.

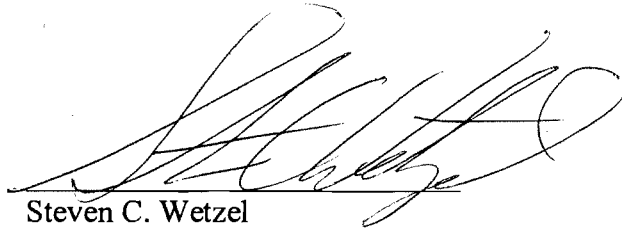
WETZEL, WETZEL, BREDESON
& HOLT, P.L.L.C.

By: 

Steven C. Wetzel
Attorneys for CISZEK

CERTIFICATION

I, Steven C. Wetzel, attorney for the Petitioners/Plaintiffs in the above entitled matter, hereby certify that service of this Petition has been made upon the Board of County Commissioners, and that the clerk of such Board has been paid the estimated fee for preparation of the transcript, set forth by Stipulation.



Steven C. Wetzel

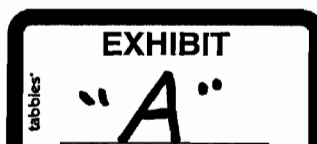
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BEFORE THE BOARD OF COMMISSIONERS OF KOOTENAI COUNTY, IDAHO

IN THE MATTER OF THE APPLICATION OF)	CASE NO. ZON08-0001
COEUR D'ALENE PAVING, INC. A REQUEST)	FINDINGS OF FACT,
TO CHANGE THE ZONING CLASSIFICATION)	APPLICABLE LEGAL
ON APPROXIMATELY 20 ACRES FROM)	STANDARDS, COMPREHENSIVE
MINING TO AGRICULTURAL AND)	PLAN ANALYSIS, CONCLUSIONS
APPROXIMATELY 20 ACRES FROM)	OF LAW AND ORDER OF
AGRICULTURAL TO MINING)	DECISION

I COURSE OF PROCEEDINGS

- 1.01 On or about January 6, 2008, a pre-application conference was held to discuss this request.
- 1.02 On January 16, 2008, a complete application was submitted to the Kootenai County Building and Planning Department.
- 1.03 The Building and Planning Department issued a Notice of Public Hearing on this application, Case No. ZON08-0001, with the hearing held March 6, 2008. On February 5, 2008, notice was published in the *Coeur d'Alene Press*. On January 31, 2008, notice was provided to adjacent property owners within 300 feet of the project site. On February 5, 2008, notice was posted on the site. Based on signed affidavits in the file, the requirements for public notification have been met.
- 1.04 On March 6, 2008, a public hearing was held before the Kootenai County Hearing Examiner. Mark Mussman introduced the case. He testified that an affidavit of notice had been received from the applicants. He testified that the applicants were seeking a zone change from Mining to Agricultural on 20 acres of land, and requesting at the same time that 20 acres of land zoned Agricultural be re-zoned to Mining. He testified that the Comprehensive Plan identified the future land use in the area to be rural residential. Phil Weist, applicant's representative, testified that they applicants were trying to essentially trade zoning designations so that an expansion of their mining operation could remain contiguous with the existing operation, and allow them to utilize their existing driveway access to Highway 53. He introduced into the record an easement demonstrating that there is a valid access easement through Stepping Stones Subdivision for gravel and mining operations, with said easement dedicated to the subject properties that are being requested to be re-zoned from Mining to Agricultural (Exhibit HE-1000). He testified that 11 properties will be negatively effected if the applicants expand their mining operations on the twenty acres currently requested to be re-zoned Agricultural, while only 2 property owner will be impact if the zone change is approved, thus allowing them to expand their mining operation to the area that is requested to be rezoned from Agricultural to Mining. Mr. Weist introduced into the record a letter from Don Davis, Transportation Planner for Idaho Department of Transportation, indicating that ITD had no concerns related to traffic operations, given that their was no net change in the area zoned for mining (Exhibit HE-1001). Mr. Weist also testified that rezoning the property as requested to allow for relocation of the mining operation expansion would ultimately improve the final elevations and the overall "lay of the land" upon restorations. He noted that their operation was adjacent to an Interstate Concrete & Asphalt mining operation that had been in this location since the 1970's. He introduced into the record an aerial photo of the vicinity of the rezone and their current operation to demonstrate how a contiguous pit would result in preferable ultimate elevations than two pits, as would be the outcome if the rezone was not approved (Exhibit HE-1002). He also submitted into the record documentation of



reclamation plan approval by Idaho Department of Lands, noting that the approval required that the operations mine to no closer than 30 feet of the existing water table (**Exhibit HE-1003**). Craig Conrad, applicant's representative, also testified that the applicant's proposal would keep the mining operations closer to Highway 53, and generally keep the mining operations in a more concentric area, thus minimizing impacts. He also testified that if the mining expansion occurred in the area currently zoned Mining (that was being requested to be re-zoned as Ag), it would require excavation to begin at the level of the existing homes in the immediate vicinity. He noted that since the current operation was bought by Coeur d'Alene Paving, they have cleaned up operations at the pit. Todd Kauffman, applicant's representative, testified that expansion into the area currently zoned for mining would result in significantly amounts of excavated materials being transported around Atlas Road to Highway 53, to the existing mining operation in order to weigh the materials prior to shipment.

One member of the public spoke in favor of the requested re-zone, indicating that he felt the proposal made common sense, and was better for the community. He noted that the Atlas Road and Highway 53 intersection was a blind intersection, thus making transport via Atlas to Highway 53 to the existing scale a bad option. Two other people indicated they were in favor, but did not wish to speak. Two people with neighboring residences spoke in opposition, citing concerns related to negative impacts and nuisances from the proposed mining operation, and testifying that it will cost significantly more for the applicant to develop the existing mining lands, as opposed to the lands proposed to be rezoned. They testified that they purchased their property with the knowledge that adjacent lands were agricultural, and that the applicant was aware of the zoning of their land and the conditions associated with those lands at the time they bought the mining operation. Paul Franz, representative of Interstate Concrete and Asphalt, which owns an adjacent mining operation, also spoke in opposition to the request. He testified that if the applicants were to expand their operation in the area that is currently zoned for mining, they would only be able to mine down 20 to 30 feet from existing ground levels. He noted that the surrounding land use is large lot residential, with average lot sizes of approximately 10 acres in the vicinity, even though the applicant is requesting that a portion of the land be zone AG. He suggested that mining in this area should be phased out, due to the growth of residential in the vicinity, and that this proposal would serve to prolong mining in the area. He proposed the need for conditional zoning, at a minimum, to provide buffering for adjacent residential uses, and limits on the land use. He submitted his comments into the record as **Exhibit HE-1005**. One other person indicated he was opposed, but did not wish to speak.

Phil Weist provided rebuttal testimony. He testified that their proposal provided less opportunity for vehicles to effect public roads if approved. He also testified that the home of one of the people who testified in opposition would be 205 feet from the toe of the proposed berm. He also testified that concerns from the neighbors regarding impacts such as dust and noise are unfounded, because the wind blows from the SW to NE. He also noted that their mining permit limits them to excavations no closer than 30 feet from the aquifer. Craig Conrad, applicant's representative, also testified in rebuttal. He stated if they don't get the zone change approved, they will expand their operation in the area currently zone Mining, which will impact more people, and be closer to neighboring houses. No other testimony was heard, and the hearing was closed.

- 1.05 The Building and Planning Department issued a Notice of Public Hearing on this application, Case No. ZON08-0001, with the hearing held May 8, 2008. On April 8, 2008, notice was published in the *Coeur d'Alene Press*. On April 1, 2008, notice was provided to adjacent property owners within 300 feet of the project site. On April 4, 2008, notice was posted on the

site. Based on signed affidavits in the file, the requirements for public notification have been met.

- 1.06 On May 8, 2008, a hearing was held before the Board of County Commissioners. Mark Mussman introduced the case, stating the Hearing Examiner recommended denial. The Applicant's representative, Sandy Young, testified that the 20 acres requested to change from Agricultural to Mining is a natural progression of the existing mining activity and the 20 acres requested to change from Mining to Agricultural would prevent adverse impacts to the surrounding property owners. Because the existing mining operation is below the grade of Highway 53 and the adjacent properties, Ms Young stated that continuing the operation to the 20 acres adjacent to the south would not have an adverse impact on the surrounding property owners. Ms. Young further stated that by consolidating the mining operation, traffic associated with the mining operation will be restricted to the existing access on Highway 53. There was further testimony from individuals supporting this request mainly centered on keeping the traffic associated with the mining activity away from the residential uses on the surrounding properties. There was considerable testimony in opposition to this request. The opposition centered on the adverse affect additional mining zoned property would have on the value of the surrounding properties. In addition, those opposed were concerned with potential environmental issues associated with mining activities. Finally, testimony revealed concerns with a water line running through the 20 acres requested to be re-zoned to Mining. This water line is part of the Stepping Stones subdivision water system. In rebuttal, the Applicants testified that dust mitigation and other environmental concerns are addressed in the required reclamation plan filed with the State of Idaho. Also, the Applicants assured Stepping Stones residents that the water line will be appropriately relocated without interruption of water service.
- 1.07 When all testimony was received, the Board of County Commissioners closed the public hearing. Commissioners Piazza and Tondee expressed disagreement with the Hearing Examiner's recommendation while Chairman Currie agreed with the Hearing Examiner. Because the Board indicated that they would make a substantial change to the Hearing Examiner's recommendation, the Board passed a motion to schedule an additional public hearing.
- 1.08 The Building and Planning Department issued a Notice of Public Hearing on this application, Case No. ZON08-0001, with the hearing held June 26, 2008. On May 27, 2008, notice was published in the *Coeur d'Alene Press*. On May 22, 2008, notice was provided to adjacent property owners within 300 feet of the project site. On May 28, 2008, notice was posted on the site. Based on signed affidavits in the file, the requirements for public notification have been met.
- 1.09 The Board of County Commissioners held a public hearing on June 26, 2008. Mark Mussman introduced the case. The Applicant's representative, Sandy Young, briefly reminded the Board of the particulars of this request. Ms. Young also submitted a site disturbance agreement form, including the amount of the required financial guarantee and plans for a berm around the perimeter of the proposed Mining zone (Exhibit B-2000). Ms. Young also reiterated that continuing the existing mining to the south into the 20 acres currently zoned Agricultural would have far less impact than mining the 20 acres that the Applicants proposed to re-zone to Agricultural. There was additional testimony in favor of this request centering on supporting the traffic associated with the existing mining activity to access Highway 53. The opposition testimony again centered on environmental concerns, aquifer protection, traffic on Highway 53, adverse affect on property values, zone "swapping" is illegal and this request does not comply with the Comprehensive Plan. In rebuttal, Ms Young stated that this request does not include

- increasing the Mining zone in the area, only to relocate property zoned Mining so that it is contiguous to existing mining activities.
- 1.10 After all testimony was taken, the Board of County Commissioners closed the public hearing and moved to take this request under advisement and scheduled this request for deliberations on July 10, 2008.
- 1.11 At their deliberations July 10, 2008, the Board of County Commissioners discussed this request. Commissioner Tondee stated that the Applicant has shown the need for this zone change

II FINDINGS OF FACT

Mining zone – to – Agricultural zone Request

- 2.01 **Applicant.** Coeur d'Alene Paving, Inc., 120 E. Anton Avenue, Coeur d'Alene, ID 83814. (Exhibit A-1, Application)
- 2.02 **Owner.** Beacon West, LLC, P.O. Box 1402, Hayden, ID 83835.
- 2.03 **Proposal.** The Applicant is requesting to change the zoning classification on approximately 20 acres from Mining to Agricultural. The Applicant's narrative states that they are requesting the zone change to allow current Mining that is removed from the current mining activities performed by the Applicant to be able to be development residentially. (Exhibit A-4, Narrative)
- 2.04 **Location and Legal Description.** The site is located south of Highway 53 and north of Boekel Road between Ramsey Road and Atlas Road. The site is described as Lots 3 and 4, Block 4, Stepping Stones Subdivision. The parcel numbers are 0-7635-004-003-0 and 0-7635-004-004-0, and the serial numbers are 178543 and 178544.
- 2.05 **Surrounding Zoning.** The subject property is adjacent to Mining zoned property on the north and by Agricultural zoned property on the south, east and west. There is other property zoned Mining to the north and also to the southeast as well as property zoned Rural to the north, south and west. In addition, there is property zoned Commercial in close proximity to the north. (Exhibit S-1, Zone Map)
- 2.06 **Surrounding Land Use.** The surrounding land use in the area consists of single family residences with accessory buildings on lots and parcels five acres and larger in size. There is mining activity adjacent to the north.
- 2.07 **Comprehensive Plan Designation.** The Kootenai County Future Land Use Map designates this area as Rural Residential. Rural Residential designations are given to areas that border rural areas and may actually be rural in appearance. Distinguishing these areas from those designated Rural is the size of the existing parcels and the level of police and fire protection.
- 2.08 **Existing Land Use.** All of the property subject to this request is currently undeveloped.
- 2.09 **Flood Zone and Wetlands.** According to the Flood Insurance Rate Map panel number 160076-0100D, the property is not located within an area of special flood hazard. There are no wetlands on the site.
- 2.10 **Area of City Impact.** The subject property is not located within any Area of City Impact.

- 2.11 **Physical Characteristics.** The *Soil Survey of Kootenai County Area, Idaho* identifies the soil in the area to generally be Avonville fine gravelly silt loam. This is a very deep, well drained soil that is mainly used for pasture, hay and small grain production. Permeability is moderate, runoff is slow, and the hazard of erosion is slight. *Vegetation:* The entire site is vegetated with grass and weeds. *Topography:* The entire site could be considered very flat.
(Exhibit A-5, Photographs)
- 2.12 **Water and Sewage Disposal.** The Applicant did not state whether water or sewage disposal will be provided. The Panhandle Health District was asked to comment on this request but has not done so at this time.
- 2.13 **Access.** Access to these two lots will be provide by O'Connell Road, a privately maintained within the Stepping Stones Subdivision.
- 2.14 **Fire Protection.** The subject property is within the boundaries of the Northern Lakes Fire District. In a letter dated February 3, 2008, Fire Chief Dean Marcus stated that the District approves this request and further stated that future development will require Fire Code and Fire District compliance. (Exhibit PA-1, Letter)
- 2.15 **Department of Environmental Quality (DEQ).** It does not appear that DEQ had any comments regarding the Mining to Agricultural portion of this request.
- 2.16 **Noxious Weeds.** In a Memorandum dated February 11, 2008, Weed Specialist Bill Hargrave stated that the site contains leafy spurge. As such, the Noxious Weeds Department requires that no soil can be removed from the property and that all equipment used for construction or excavation activities must be steamed cleaned or power washed prior to leaving the site.
(Exhibit PA-3, Memorandum)
- 2.17 **Amendments to Zoning.** Idaho Code Title 67 Chapter 65-11(d) states that if a governing board adopts a zoning classification pursuant to a request by a property owner based upon a valid, existing Comprehensive Plan and Zoning Ordinance, the governing board shall not subsequently reverse its action or otherwise change the zoning classification of said property without the consent in writing of the current property owner for a period of four (4) years from the date the governing board adopted said individual property owner's request for a zoning classification change.
- 2.18 **Application Requirements.** Section 9-21-4 of the Kootenai County Zoning Ordinance states that an application for a change of zone must show the following:
- a. The date the existing zoning became effective (January 3, 1973).
 - b. The changed conditions which are alleged to warrant other or additional zoning.
 - c. Facts to justify the change on the basis of advancing the public health, safety, and general welfare.
 - d. The effect the zone change will have on the value and character of adjacent property.
 - e. The effect on the property owner if the request is not granted.
 - f. Such other information the Hearing Body shall require.
 - g. The effect the zone change will have on the Comprehensive Plan.

The Applicant's narrative includes responses to these items.
(Exhibit A-4, Narrative)

Idaho Code requires that in the course of deciding zone change request, "particular consideration shall be given to the effects of any proposed zone change upon the delivery of services by any political subdivision providing public services, including school districts, within the planning jurisdiction.

- 2.19 **Public Comment.** The Building and Planning Department received two (2) comments in support of this request, two (2) neutral comments and five (5) comments opposed.
(Exhibit P-1 through P-9, Comments)

Agricultural zone – to – Mining zone Request

- 2.20 **Applicant.** Coeur d'Alene Paving, Inc., 120 E. Anton Avenue, Coeur d'Alene, ID 83814.
(Exhibit A-1, Application)
- 2.21 **Owner.** Beacon West, LLC, P.O. Box 1402, Hayden, ID 83835.
- 2.22 **Proposal.** The Applicant is requesting to change the zoning classification on approximately 20 acres from Agricultural to Mining. The Applicant's narrative states that they are requesting the zone changes so that the Mining zoned property will be closer to the existing mining operations in the area. Further, the Applicant stated the mining operations will continue to utilize the current access and not impact the private roads in the area. (Exhibit A-4, Narrative)
- 2.23 **Location and Legal Description.** The site is located south of Highway 53 and north of Boekel Road between Ramsey Road and Atlas Road. The site is described as Lots 1 and 2, Block 3, Stepping Stones Subdivision all in Section 34, Township 52 North, Range 4 West, B.M., Kootenai County, Idaho. The parcel numbers are 0-7635-002-001-0 and 0-7635-002-002-0, and the serial numbers are 178536 and 178537.
- 2.24 **Surrounding Zoning.** The subject property is adjacent to Mining zoned property on the north and west and by Agricultural zoned property on the south, east. There is other property zoned Mining to the north and also to the southeast as well as property zoned Rural to the north, south and west. In addition, there is property zoned Commercial in close proximity to the north.
(Exhibit S-1, Zone Map)
- 2.25 **Surrounding Land Use.** The surrounding land use in the area consists of single family residences with accessory buildings on lots and parcels five acres and larger in size. There is mining activity adjacent to the north.
- 2.26 **Comprehensive Plan Designation.** The Kootenai County Future Land Use Map designates this area as Rural Residential. Rural Residential designations are given to areas that border rural areas and may actually be rural in appearance. Distinguishing these areas from those designated Rural is the size of the existing parcels and the level of police and fire protection.
- 2.27 **Existing Land Use.** All of the property subject to this request is currently undeveloped.
- 2.28 **Flood Zone and Wetlands.** According to the Flood Insurance Rate Map panel number 160076-0100D, the property is not located within an area of special flood hazard. There are no wetlands on the site.
- 2.29 **Area of City Impact.** The subject property is not located within any Area of City Impact.

- 2.30 **Physical Characteristics.** The *Soil Survey of Kootenai County Area, Idaho* identifies the soil in the area to generally be Avonville fine gravelly silt loam. This is a very deep, well drained soil that is mainly used for pasture, hay and small grain production. Permeability is moderate, runoff is slow, and the hazard of erosion is slight. *Vegetation:* The entire site is vegetated with grass and weeds. *Topography:* The entire site could be considered very flat. (Exhibit A-5, Photographs)
- 2.31 **Water and Sewage Disposal.** The Applicant did not state whether water or sewage disposal will be provided. The Panhandle Health District was asked to comment on this request but has not done so at this time.
- 2.32 **Access.** The Applicant stated that the lots re-zoned to Mining will utilize the access that serves the existing mining operation. This access is off Highway 53, a road maintained by the Idaho Transportation Department (ITD). In a letter dated February 20, 2008, Planner Donald Davis stated that since there will no change in acreage of mining area or change in haul routes on to Highway 53, ITD sees no reasons for any additional conditions regarding access. (Exhibit PA-4, Letter) In a letter dated May 7, 2008, Lakes Highway District Supervisor Joe Wuest stated that the District is in favor of this request because any heavy truck traffic associated with mining activity will access Highway 53. Other roads in the vicinity are either privately maintained or maintained by the District but are not built to accommodate the heavy truck traffic associated with mining activity. (Exhibit PA-5, Letter)
- 2.33 **Fire Protection.** The subject property is within the boundaries of the Northern Lakes Fire District. In a letter dated February 3, 2008, Fire Chief Dean Marcus stated that the District approves this request and further stated that future development will require Fire Code and Fire District compliance. (Exhibit PA-1, Letter)
- 2.34 **Department of Environmental Quality (DEQ).** In a letter dated January 25, 2008, Acting Regional Air Program Manager Mark Boyle stated fugitive dust issues could likely be an area of concern. However, Mr. Boyle further states that the diligent following of dust control measures and BMPs should adequately address these concerns. In a final note, Mr. Boyle outlines that an air quality permit must be obtained for the operation of a rock crushing facility. It is unclear whether the Mining to Agricultural portion of this request would require any further DEQ requirements for air quality. (Exhibit PA-2, Letter)
- 2.35 **Noxious Weeds.** In a Memorandum dated February 11, 2008, Weed Specialist Bill Hargrave stated that the site contains leafy spurge. As such, the Noxious Weeds Department requires that no soil can be removed from the property and that all equipment used for construction or excavation activities must be steamed cleaned or power washed prior to leaving the site. (Exhibit PA-3, Memorandum)
- 2.36 **Amendments to Zoning.** Idaho Code Title 67 Chapter 65-11(d) states that if a governing board adopts a zoning classification pursuant to a request by a property owner based upon a valid, existing Comprehensive Plan and Zoning Ordinance, the governing board shall not subsequently reverse its action or otherwise change the zoning classification of said property without the consent in writing of the current property owner for a period of four (4) years from the date the governing board adopted said individual property owner's request for a zoning classification change.

2.37 **Application Requirements.** Section 9-21-4 of the Kootenai County Zoning Ordinance states that an application for a change of zone must show the following:

- h. The date the existing zoning became effective (January 3, 1973).
- i. The changed conditions which are alleged to warrant other or additional zoning.
- j. Facts to justify the change on the basis of advancing the public health, safety, and general welfare.
- k. The effect the zone change will have on the value and character of adjacent property.
- l. The effect on the property owner if the request is not granted.
- m. Such other information the Hearing Body shall require.
- n. The effect the zone change will have on the Comprehensive Plan.

The Applicant's narrative includes responses to these items.
(Exhibit A-4, Narrative)

Idaho Code requires that in the course of deciding zone change request, "particular consideration shall be given to the effects of any proposed zone change upon the delivery of services by any political subdivision providing public services, including school districts, within the planning jurisdiction.

2.38 **Public Comment.** The Building and Planning Department received two (2) comments in support of this request, two (2) neutral comments and five (5) comments opposed.
(Exhibit P-1 through P-9, Comments)

III APPLICABLE LEGAL STANDARDS

3.01 Kootenai County Zoning Ordinance No. 401 Chapter 21, Amendments.

Chapter 21 of the Zoning Ordinance outlines the application requirements, process and review standards for zone amendments. It requires that the request be considered by the hearing body for their recommendation. The hearing body recommendation goes to the Board of Commissioners, who must hold a public hearing prior to making a final decision and signing the associated ordinance amendment. This article requires that the Applicants show that a proposed amendment is reasonably necessary, is in the best interest of the public, and is in accordance with the Comprehensive Plan. Notice must meet the requirements of *Idaho Code*, or for larger zone amendments, those given in the Ordinance.

3.02 Kootenai County Ordinance No. 355.

This Ordinance establishes Hearing Examiners and a Planning and Zoning Commission, and outlines procedures for the conduct of hearings.

3.03 1994 Kootenai County Comprehensive Plan.

The Comprehensive Plan establishes long range plans for growth, development, land use, and environmental protection in Kootenai County. The plan outlines goals, objectives and policies that provide fundamental decision-making guidance for other County ordinances and for future development. Included in the Comprehensive Plan is a Future Land Use Map that provides a general outline of areas of suitable projected land uses, with approximately ¼ mile wide transition areas between designations.

- 3.04 *Idaho Code* §67-6502, Local Land Use Planning; §67-6509, notice and Hearing Procedures; §67-6511, Zoning Ordinance; §67-6519-§6520, Permit Process; §67-6521, Actions by Affected Persons; §67-6535, Approval/Denial Requirements; §67-2343, Notices of Meetings.

Idaho Code §67-6502 outlines the purpose of local land use planning in promoting the health, safety and general welfare of the people of the state in the following ways: a) protect property rights while making accommodations for other necessary types of development such as low cost housing and mobile home parks; b) ensure that adequate public facilities and services are provided at reasonable costs; c) protect the economy of the state and localities; d) protect the important environmental features of the state and localities; e) encourage the protection of prime agricultural, forestry and mining lands; f) encourage urban and urban-type development within incorporated cities; g) avoid undue concentration of population and overcrowding of land; h) ensure that the development on land is commensurate with the physical characteristics of the land; i) protect life and property in areas subject to natural hazards and disasters; j) protect fish, wildlife and recreation resources; k) avoid undue water and air pollution; l) allow local school districts to participate in the community planning and development process so as to address public school needs and impacts on an ongoing basis.

Idaho Code §67-6511 requires that notice and hearing procedures be in accordance with *Idaho Code* §67-6509 requires a public hearing before the Planning Commission or Hearing Examiner. At least 15 days prior to the hearing, notice must be published in the newspaper and be provided to all political subdivisions providing services. A public service notice must also be made available to other papers and radio/TV stations. If the Board holds a second public hearing, notice and hearing procedures are the same, except the notice must include the recommendation of the Hearing Body.

Idaho Code §67-6511 requires that the proposed zone change be in accordance with the Comprehensive Plan and that it not have a negative effect on the delivery of public services by political subdivisions. A public hearing must be held before the Planning Commission or Hearing Examiner prior to consideration by the Board. In addition to the notice procedures outlined in *Idaho Code* §67-6509, notice must be mailed to property owners or purchasers of record within the land being considered, within 300 feet of the external boundaries of the land, and to any additional area that may be impacted by the proposed zone change. Notice must be posted on the premises not less than one week prior to the hearing.

Idaho Code §67-6519-§6520 outlines the permit and the decision specifications. The application must first go to the Planning Commission or Hearing Examiner for their recommendation. Recommendation and/or decisions must specify the ordinance and standards used in evaluating the application, the reasons for the approval or denial, and, if the decision is a denial, the actions, if any, the Applicants could take to obtain a permit.

Idaho Code §67-6521 defines an "affected person" states that an affected person may request a hearing on any permit authorized under Chapter 65, outlines the actions the Board may take, and provides for judicial review, if requested, within 28 days after all remedies have been exhausted under local ordinances.

Idaho Code §67-6535 requires that the approval or denial be in writing and be accompanied by a reasoned statement that explains the criteria and standards considered relevant, the relevant contested facts, and the rationale for the decision based on the factual information contained in the record, applicable provisions of the Comprehensive Plan, relevant ordinances and laws.

Idaho Code §67-2343 provides general requirements for meeting notices such as the Commissioner's weekly deliberations.

Amendments to Zoning. Idaho Code Title 67 Chapter 6511(d) states that if a governing board adopts a zoning classification pursuant to a request by a property owner based upon a valid, existing Comprehensive Plan and Zoning Ordinance, the governing board shall not subsequently reverse its action or otherwise change the zoning classification of said property without the consent in writing of the current property owner for a period of four (4) years from the date the governing board adopted said individual property owner's request for a zoning classification change.

IV COMPREHENSIVE PLAN ANALYSIS

Mining zone – to – Agricultural zone Request

4.01 Natural Resources—land, air, water, vegetation, wildlife

- GOAL 1: Maintain and improve air quality.
- GOAL 2: Maintain the existing high quality of ground waters in Kootenai County.
- GOAL 3: Ensure that demand of groundwater resources does not exceed sustainable yield.
- GOAL 4: Preserve, protect, and enhance the water quality and quantity of lakes, streams, rivers and wetlands in Kootenai County.
- GOAL 5: Encourage the preservation, protection, and enhancement of native vegetation.
- GOAL 6: Encourage the preservation, protection, and enhancement of fish and wildlife habitats.

This portion of the request should not have an impact on these goals..

4.02 Hazardous Areas

- GOAL 7: Prevent or limit development activity in hazardous areas.
- GOAL 8: Recognize the heavy metals contamination problem in the Coeur d'Alene River Basin.

The project is not located in a hazardous area, or within the Coeur d'Alene River Basin.

4.03 Private Property Rights, Land Use

- GOAL 9: Develop land use regulations that protect property rights, maintain quality of life, provide adequate land for development, buffer non-compatible land uses, and protect the environment.

The Kootenai County Zoning Ordinance provides regulations intended to protect property rights, protect natural resources, and buffer non-compatible uses. The Zoning Ordinance also provides a means to amend those regulations and land use classifications if found to be reasonably necessary and in the public interest

4.04 Population

GOAL 10: Guide population growth to allow for inevitable expansion without sacrificing the environment or the quality of life which currently characterizes Kootenai County.

This portion of the request should have a minimal impact on population growth.

4.05 Housing

GOAL 11: Provide safe, adequate, and affordable housing for people of all income levels.

This portion of the request should have a minimal impact on housing..

4.06 Economic Development

GOAL 12: Promote a diversified, safe, and stable economic base in an environmentally responsible manner.

GOAL 13: Maintain viable agriculture, forestry, and mining land uses.

Because the proposal will have no net increase or decrease in lands zoned for agricultural, the application is unlikely to have a significant impact on this issue.

4.07 Transportation

GOAL 14: Provide for the efficient, safe, and cost-effective movement of people and goods.

GOAL 15: Assist in the operation and orderly expansion of the Coeur d'Alene Airport.

This portion of the request should have a very minimal impact to the transportation network and well continue to provide for the efficient, safe and cost-effective movement of people. The proposal will have no impact on operations at the Coeur d'Alene Airport.

4.08 Public Services and Utilities

GOAL 16: Provide efficient, convenient, and effective government services.

GOAL 17: Ensure efficient and effective police, fire, and emergency services.

GOAL 18: Assist in the efficient and orderly expansion and improvement of public utilities and services.

GOAL 19: Ensure availability and affordability of energy-related services while protecting the environment.

GOAL 20: Protect water quality to ensure adequate quantity and quality of drinking water to meet the current and future needs in the County.

GOAL 21: Provide environmentally sound, efficient, and cost-effective management of wastes.

The proposed project will have no effect on provision of public services and utilities. Ground water quality should be adequately protected, provided the applicant complies with all permitting requirements and condition, as may be imposed by the County and Panhandle Health District..

4.09 Education

GOAL 22: Provide for school representatives to participate in the community planning.

The project will have no impact on the school district, and the school district has not provided comments regarding this application.

4.10 Recreation and Special Sites

- GOAL 23: Develop quality County parks, greenbelts, and recreation facilities to meet the diverse needs of a growing population.
- GOAL 24: Secure waterfront and near-shore areas for beneficial public uses and enhance public enjoyment of a growing population.
- GOAL 25: Encourage the preservation, protection, and enhancement of areas that are historically and culturally significant.

This project is not expected to enhance recreational needs in the area. No impacts to any historically or culturally significant areas are evident.

4.11 Community Design

- GOAL 26: Foster growth in a manner which does not compromise the visual qualities of Kootenai County.
- GOAL 27: Preserve, protect, and enhance natural landmarks and areas of scenic beauty, such as waterways and unique landscapes.

This portion of the project should have minimal impacts on these goals.

Agricultural zone – to – Mining zone Request

4.12 Natural Resources—land, air, water, vegetation, wildlife

- GOAL 1: Maintain and improve air quality.
- GOAL 2: Maintain the existing high quality of ground waters in Kootenai County.
- GOAL 3: Ensure that demand of groundwater resources does not exceed sustainable yield.
- GOAL 4: Preserve, protect, and enhance the water quality and quantity of lakes, streams, rivers and wetlands in Kootenai County.
- GOAL 5: Encourage the preservation, protection, and enhancement of native vegetation.
- GOAL 6: Encourage the preservation, protection, and enhancement of fish and wildlife habitats.

DEQ has indicated that fugitive dust will likely be an area of concern, though that issue can be mitigated through diligent adherence to dust control measure. The operation will require an air quality permit issued by DEQ. Compliance with Kootenai County Site Disturbance Ordinance, and compliance with DEQ permit requirements, and IDL post-mining reclamation requirements on the site, are intended to preserve and protect surface water quality.

4.13 Hazardous Areas

- GOAL 7: Prevent or limit development activity in hazardous areas.

GOAL 8: Recognize the heavy metals contamination problem in the Coeur d'Alene River Basin.

The project is not located in a hazardous area, or within the Coeur d'Alene River Basin.

4.14 Private Property Rights, Land Use

GOAL 9: Develop land use regulations that protect property rights, maintain quality of life, provide adequate land for development, buffer non-compatible land uses, and protect the environment.

The Kootenai County Zoning Ordinance provides regulations intended to protect property rights, protect natural resources, and buffer non-compatible uses. The Zoning Ordinance also provides a means to amend those regulations and land use classifications if found to be reasonably necessary and in the public interest

4.15 Population

GOAL 10: Guide population growth to allow for inevitable expansion without sacrificing the environment or the quality of life which currently characterizes Kootenai County.

This project has no effect on population growth.

4.16 Housing

GOAL 11: Provide safe, adequate, and affordable housing for people of all income levels.

The project will have no effect on housing.

4.17 Economic Development

GOAL 12: Promote a diversified, safe, and stable economic base in an environmentally responsible manner.

GOAL 13: Maintain viable agriculture, forestry, and mining land uses.

Because the proposal will have no net increase or decrease in lands zoned for mining, the application is unlikely to have a significant impact on this issue. Further it could be argued that Agricultural and Mining are compatible zoning classifications.

4.18 Transportation

GOAL 14: Provide for the efficient, safe, and cost-effective movement of people and goods.

GOAL 15: Assist in the operation and orderly expansion of the Coeur d'Alene Airport.

Based upon the applicant's testimony, it appears that approval of this application will minimize impacts to the local road system if scale operations remain at their current location. The Applicant testified that the scale operations would continue to be located at its current location just north of Highway 53. The proposal will have no impact on operations at the Coeur d'Alene Airport.

4.19 Public Services and Utilities

- GOAL 16: Provide efficient, convenient, and effective government services.
GOAL 17: Ensure efficient and effective police, fire, and emergency services.
GOAL 18: Assist in the efficient and orderly expansion and improvement of public utilities and services.
GOAL 19: Ensure availability and affordability of energy-related services while protecting the environment.
GOAL 20: Protect water quality to ensure adequate quantity and quality of drinking water to meet the current and future needs in the County.
GOAL 21: Provide environmentally sound, efficient, and cost-effective management of wastes.

The proposed project will have no effect on provision of public services and utilities. Ground water quality should be adequately protected, provided the applicant complies with all permitting requirements and condition, as may be imposed by the County, Panhandle Health District, DEQ, and IDL.

4.20 Education

- GOAL 22: Provide for school representatives to participate in the community planning.

The project will have no impact on the school district, and the school district has not provided comments regarding this application.

4.21 Recreation and Special Sites

- GOAL 23: Develop quality County parks, greenbelts, and recreation facilities to meet the diverse needs of a growing population.
GOAL 24: Secure waterfront and near-shore areas for beneficial public uses and enhance public enjoyment of a growing population.
GOAL 25: Encourage the preservation, protection, and enhancement of areas that are historically and culturally significant.

This project is not expected to enhance recreational needs in the area. No impacts to any historically or culturally significant areas are evident.

4.22 Community Design

- GOAL 26: Foster growth in a manner which does not compromise the visual qualities of Kootenai County.
GOAL 27: Preserve, protect, and enhance natural landmarks and areas of scenic beauty, such as waterways and unique landscapes.

Upon completion of mining operations and site reclamation, the project is not anticipated to have any impact on the visual character of this area.

V BOARD ANALYSIS

As a whole, the Board understands that the mining zone was established in this area prior to the recordation of the Stepping Stones plat. In addition, there was mining activity in this area some years before the current zoning was established. And, although perhaps more intense, the Board feels that Mining zone appears to be compatible with Agricultural zone. The Board does recognize that it is unfortunate that traditional agricultural activities and practices have given way to more intense residential uses. However, because the Applicant is not requesting additional property zoned Mining, but rather two distinct areas for zone change that result in no net change in the overall acres zoned in either category, when taken in full perspective the request appears to be reasonably necessary and in the best interest of the public.

The Board respectfully disagrees with the Hearing Examiner's findings that the request appears to only benefit the property owner at the expense of others. The request for zone change on both sites appears to allow for a natural progression of current area uses and activities, including both mining activities and agricultural activities, respectively. And, with the installation of the berm which the Applicant testified will be in place when the mining activity continues south, the adjacent property owners in particular and the area residents in general will be minimally impacted when the mining activity moves onto the property subject to this request. On the other hand, if this request was denied, the Applicant would commence mining activities on the 20 acres to the southwest of the current mining site which would adversely affect a bigger area with greater impacts to a larger group of land owners as it is bordered on three sides by agriculturally zoned properties. Therefore, the Board feels that this request is reasonably necessary and appropriate.

Further, the Board feels confident that the mining activity will continue to comply with the requirements of additional agencies with greater expertise in terms of air quality, ground water quality, reclamation and traffic. Therefore, it is the Board's understanding that the existing activity will be: 1) allowed to progress naturally to the south and continue to utilize the existing access onto Highway 53; and 2) the Applicant will be required to continue to comply with the requirements of other agencies; and 3) the Applicant has testified that there will be a berm installed to buffer the future mining activities from the adjacent residential use if this request is approved. As such, the Board feels that the overall area will benefit by confining the operation to a smaller area by not providing for the potential for future mining activities to be spread out in a larger area.

Finally, the Board feels that this request is consistent with the overall goals and policies of the Comprehensive Plan. Moreover, the proposal is not necessarily inconsistent with the future land use plan as suggested in the Hearing Examiner recommendation. The Mining zone was established in this area prior to the adoption of the current Comprehensive Plan. The future land use component did not recognize either the historic mining activities in the area or the traditional agricultural activities as well. Because the Board feels that Mining zone is compatible with Agricultural zone and for the additional reasons stated above, this request is consistent with Goal 9 of the Comprehensive Plan because the request is reasonably necessary and in the best interest of the public.

VI CONCLUSIONS OF LAW

Mining zone -to- Agricultural zone Request

- 6.01 This request is reasonably necessary given the fact that public testimony revealed that the Mining zoned property to the north is in the process of being reclaimed and it appears that the mining activity will cease.

- 6.02 This request is in the best interest of the public because this will allow for the this property to be developed in a more residential fashion, reducing the potential traffic either on the existing private road system of the Stepping Stones subdivision or by the easement through adjacent properties on to Atlas Road. Further, the public interest is better served by removing the Mining zone from this property so that the existing mining activities can be consolidated.
- 6.03 The Applicant has shown that there have been changes in the conditions of this area that warrants approval of this request. Testimony revealed that the mining activities to the north of this property have ceased and that this area has gained increased popularity in residential development.
- 6.04 The Applicant has shown that approval of this request would advance the public health, safety and welfare by not allowing mining activities to commence on this property. The heavy traffic impacts associated with mining activities will not utilize the local roads in this area, but instead will be directed to the existing access on to Highway 53. The area residents will not be subject to the potential environmental or visual impacts of mining activities on the property. Finally, approval will allow for the natural progression of residential development to the north.
- 6.05 The Applicant has shown that the area proposed to be changed from Mining to Agriculture is currently bordered on three sides, approximately 75%, by other lands zoned Agriculture.
- 6.06 The Applicant has shown that the value and character of adjacent property will improve with the absence of Mining zoned property. The character of the area will continue to be large lot residential development with the potential of small scale agricultural activities such as the keeping of livestock. In addition, the Applicant has shown that the value of the property will improve because the area will not be subject to the heavy truck traffic associated with mining activities.
- 6.07 The Applicant has shown that denying this request will have a negative and adverse impact on the property owners because mining activities will be required to commence in the future. Traffic in the area will increase, the visual effects of mining activity will generate a high degree of animosity with the existing residents and the current mining activities will be required to spread out in a larger area.
- 6.08 The Applicant has shown that there will be no effect on the Comprehensive Plan because Mining and Agricultural zoning appear to be compatible.
- 6.09 The proposed zone change will not have a negative effect on the delivery of public services by political subdivisions.
- Agricultural zone -to- Mining zone Request**
- 6.10 This request is reasonably necessary because it will allow for the natural progression of the existing mining activity to the north.
- 6.11 This request is in the best interest of the public because it will allow for the heavy traffic associated with mining activity to utilize the existing access on Highway 53.

- 6.12 The Applicant has shown that there have been changes in the area that warrant approval of this request. The need for the kind of basic materials generated by mining activities has steadily increased in the County. In addition, there will be an increased need for these materials as the Highway 95 improvements progress.
- 6.13 The Applicant has shown that approval should advance the public health, safety and welfare by directing the heavy traffic to the existing access on Highway 53, by continuing to comply with the requirements of other agencies in terms of air quality and ground water quality.
- 6.14 The Applicant has shown that the area proposed to be changed from Agriculture to Mining is currently bordered on two sides, approximately 50%, by other lands zoned Mining.
- 6.15 The Applicant has shown that the value and character of adjacent properties will not be adversely affected because the Applicant testified that a landscaped berm will be installed to buffer the mining use for adjacent residential uses.
- 6.16 The Applicant has shown that denying this request will have a negative and adverse impact on the property owners because mining activities will be required to commence in the future in an area that is geographically removed from the current mining activities. Traffic in the area will increase, the visual effects of mining activity will generate a high degree of animosity with the existing residents and the current mining activities will be required to spread out in a larger area.
- 6.17 The Applicant has shown that there will be no effect on the Comprehensive Plan because Mining and Agricultural zoning appear to be compatible.
- 6.18 The proposed zone change will not have a negative effect on the delivery of public services by political subdivisions.

VII ORDER OF DECISION

Based on the Findings of Fact and Conclusions of Law set forth in this document, the Kootenai County Board of Commissioners orders that the application for Case No. ZON08-0001, a request by Coeur d'Alene Paving to change the zoning classification from Agricultural to Mining on 20 acres, and from Mining to Agricultural on approximately 20 acres, be **APPROVED**.

Dated this 7th day of August, 2008 by the following vote:

BY ORDER OF THE KOOTENAI COUNTY BOARD OF COMMISSIONERS

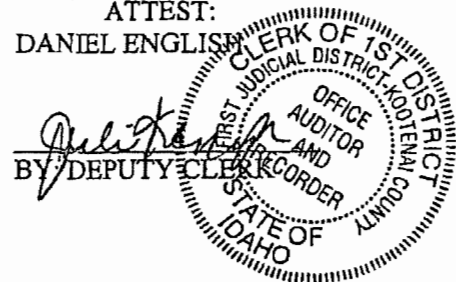
Yea Nay

Elmer R. Currie, Chairman

Richard A. Piazza, Commissioner

W. Todd Tondee, Commissioner

ATTEST:
DANIEL ENGLISH



ORDINANCE NO. 417
CASE NO. ZON08-0001 Coeur d'Alene Paving

AN ORDINANCE AMENDING THE OFFICIAL ZONING MAP OF KOOTENAI COUNTY BY CHANGING THE ZONING CLASSIFICATION OF CERTAIN PROPERTY WITHIN THE UNINCORPORATED AREA OF KOOTENAI COUNTY, IDAHO; REPEALING ALL ZONING MAP PROVISIONS IN CONFLICT HEREWITH; AND PROVIDING AN EFFECTIVE DATE.

WHEREAS, the Kootenai County Hearing Examiner held a duly-noticed public hearing on March 6, 2008 for Case No. ZON08-0001 and made a recommendation of denial on said application; and

WHEREAS, the Kootenai County Board of Commissioners held public hearings on May 8, 2008 and June 26, 2008 for the same request after receiving the recommendation of denial from the Hearing Examiner and issuing an Order evidencing the reasons for approval;

NOW, THEREFORE, BE IT ORDAINED by the Board of County Commissioners of Kootenai County, Idaho:

SECTION 1. AMENDMENT OF ZONING MAP

Case No. ZON08-0001, a request by Coeur d'Alene Paving to change the zoning classification on approximately 20 acres from Mining to Agricultural and approximately 20 acres from Agricultural to Mining. The sites are located south of Highway 53 and north of Boeke! Road between Atlas and Ramsey Roads. The sites are described as Lots 1 and 2, Block 2 and Lots 3 and 4, Block 4 of Stepping Stones Subdivision in Section 34, Township 52 North, Range 4 West, B.M., Kootenai County, Idaho.

SECTION 2. REPEAL OF CONFLICTING PROVISIONS

Any previous zoning classification for lands described in Section 1 of this Ordinance is hereby repealed.

SECTION 3. PROVIDING AN EFFECTIVE DATE

This Ordinance shall take effect and be in full force upon its passage, approval, and publication in one (1) issue of the *Coeur d'Alene Press*.

Dated this 7th day of August 2008 by the following vote:

BY ORDER OF THE KOOTENAI COUNTY
BOARD OF COMMISSIONERS

Yea Nay

Elmer R. Currie, Chairman

Richard A. Piazza, Commissioner

W. Todd Tondee, Commissioner

ATTEST:
DANIEL ENGLISH

BY: DEPUTY CLERK

Publish: August 13, 2008

Kootenai County Department of Legal Services
Jethelyn H. Harrington, ISB #7471
451 N. Government Way
P.O. Box 9000
Coeur d'Alene, ID 83816-9000
Phone: (208) 446-1620
Fax: (208) 446-1621

Attorney for Defendants

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2008 SEP 24 PM 2:47

CLERK DISTRICT COURT
[Signature]
DEPUTY

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

LINDA CISZEK, *et al.*,

Plaintiff,

vs.

THE KOOTENAI COUNTY BOARD OF
COMMISSIONERS,

Defendant.

Case No. **CV-08-7074**

MOTION TO DISMISS

COME NOW the Defendants, the Kootenai County Board of Commissioners, a political subdivision of the State of Idaho, by and through its attorney, Jethelyn H. Harrington, of the Kootenai County Department of Legal Services, and move this honorable Court, pursuant to I.R.C.P. 12(b)(1), to dismiss this case for lack of jurisdiction over the subject matter. The basis for this motion is that the Plaintiffs have failed to exhaust all administrative remedies and the Plaintiffs have failed to follow I.R.C.P. 84(g) and (n) before filing their Declaratory Judgment Action on September 4, 2008. Alternatively, to the extent that the above-referenced Declaratory Judgment Action may be construed to state claims

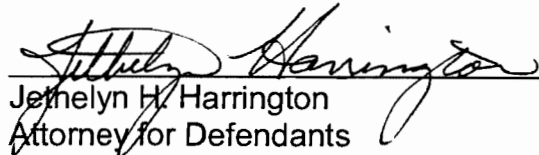


against Defendants, this honorable court does not have subject matter jurisdiction over such claims.

Pursuant to I.R.C.P. 7(b)(3)(E), Defendants have provided authority and argument in support of this motion in a separate memorandum filed herewith. Defendants also hereby request oral argument on this motion.

Dated this 24th day of September, 2008.

Kootenai County Department of Legal
Services

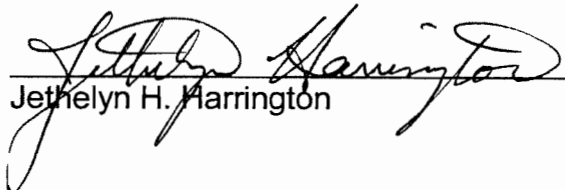


Jethelyn H. Harrington
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of September, 2008, I caused to be sent a true and correct copy of the foregoing via first class mail to:

Steven C. Wetzel
Kevin P. Holt
Wetzel & Wetzel, P.L.L.C.
1322 Kathleen Ave., Suite 2
Coeur d'Alene, Idaho 83815
Fax: (208) 664-6741



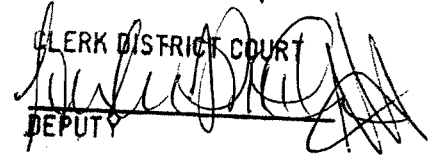
Jethelyn H. Harrington

Kootenai County Department of Legal Services
Jethelyn H. Harrington, ISB #7471
451 N. Government Way
P.O. Box 9000
Coeur d'Alene, ID 83816-9000
Phone: (208) 446-1620
Fax: (208) 446-1621

Attorney for Defendants

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2008 SEP 24 PM 2: 17

CLERK DISTRICT COURT

DEPUTY

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

LINDA CISZEK, *et al.*,

Plaintiff,

vs.

THE KOOTENAI COUNTY BOARD OF
COMMISSIONERS,

Defendant.

Case No. **CV-08-7074**

**MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS UNDER
I.R.C.P. 12(b)(1)**

COMES NOW the Defendant, The Kootenai County Board of Commissioners, by and through their attorney, Jethelyn H. Harrington, of the Kootenai County Department of Legal Services, and hereby presents this Memorandum in Support of its Motion to Dismiss under Idaho Rule of Civil Procedure 12(b)(1).

I. SUMMARY OF FACTUAL ALLEGATIONS

The factual allegations set forth in the Plaintiffs' Complaint, which, for purposes of this motion only, are to be taken as true, are summarized as follows:

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028 ORIGINAL

1. On January 16, 2008, a complete application was submitted to the Kootenai County Building and Planning Department regarding the application of Coeur d'Alene Paving, Inc., to change the zoning classification on approximately 20 acres of land from Mining to Agricultural, and to change the zoning classification on another 20 acre piece of land from Agricultural to Mining. See, attached exhibit "A" *Findings of Fact, Applicable Legal Standards, Comprehensive Plan Analysis, Conclusions of Law and Order of Decision Case ZON08-0001, 1.*
2. On March 6, 2008, a public hearing concerning the application was held before the Kootenai County Hearing Examiner. *Id.*
3. At the March 6, 2008, hearing the applicant's witnesses testified that the two zoning changes were necessary for the applicant to expand its mining operation in a contiguous manner with their current mining operation. Applicant's witnesses testified, *inter alia*, that the zoning changes would allow them to utilize their existing approach to Highway 53, and such an expansion of their mining operations into the agricultural zone rather than the mining zone would decrease heavy truck traffic on residential roads. Applicants also believed that fewer adjoining property owners would experience negative impacts if the zoning changes were allowed. *Id.*

4. At the March 6, 2008, hearing two neighbors spoke in opposition to the application citing concerns, *inter alia*, of negative impacts and nuisances regarding mining activities. A competitor of Coeur d'Alene Paving, Inc. also spoke stating that if the applicants were to expand their mining operation into the land currently zoned mining they would only be able to dig down 20 or 30 feet, and that he thought mining in the area should be phased out considering the growth of residential neighborhoods in the vicinity. *Id.* at 2.
5. After hearing testimony both for and against the two zoning changes the Hearing Examiner recommended that the application be denied. *Id.*
6. On May 8, 2008, after proper notice was posted, published and provided to adjacent property owners, a hearing concerning the application was held before the Kootenai County Board of County Commissioners (BOCC). After hearing testimony both for and against the zoning changes two members of the BOCC expressed disagreement with the Hearing Examiner's recommendation. Because the BOCC indicated that they would make a substantial change to the Hearing Examiner's recommendation, the BOCC passed a motion to schedule an additional public hearing as required by I.C. §§ 67-6511 and 67-6509. *Id.* at 2-3.
7. On June 26, 2008, after proper notice was posted, published and provided to adjacent property owners, a second hearing concerning

- the application was held before the Kootenai County Board of County Commissioners. After hearing testimony both in favor of and against the zoning changes the BOCC closed the public hearing. *Id.* at 3.
8. At their deliberations on July 10, 2008, the BOCC discussed the request. *Id.* at 4,
 9. On August 7, 2008, the BOCC signed the order approving the request and passed an ordinance approving the two zone changes. *Id.* at 17.
 10. Plaintiffs filed a Petition for Declaratory Judgment, Petition for Judicial Review and Complaint on September 4, 2008. Process was served on the Kootenai County Board of Commissioners that same day. (*Summons*, Case No. CV-08-7074.)
 11. While serving the summons upon the BOCC on September 4, 2008, a check for \$100.00 was delivered to the clerk of the board of county commissioners by the Plaintiffs' attorney, ostensibly for transcript preparation fees. This check was then delivered to the Kootenai County Building and Planning Department by the Clerk of the Board. *Affidavit of Sandi Gilbertson*, 3 and exhibit "D".
 12. After the summons was served upon the BOCC the Plaintiffs' attorney sent an e-mail to Sandi Gilbertson of the Kootenai County Building and Planning Department requesting an estimate of transcript fees. *Id.* at 2, and exhibit "A".

13. On September 5, 2008, Ms. Gilbertson faxed an estimate of transcript fees for Case No. ZON08-0001 at \$911.05. *Id.* and exhibit "B".
14. On September 9, 2008, having not received the transcript preparation fees, Ms. Gilbertson called Plaintiffs' attorney and then also e-mailed the estimate to Plaintiffs' attorney. *Id.* and exhibit "D".
15. To date the estimated fees have not been paid. *Id.* at 3.

II. APPLICABLE LAW: MOTION TO DISMISS

A. Standard

Idaho Rule of Civil Procedure 12(b) provides, in pertinent part, as follows:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses shall be made by motion:
(1) lack of jurisdiction over the subject matter...

"There is a distinction between 12(b)(1) facial challenges and 12(b)(1) factual challenges." *Owsley v. Idaho Industrial Commission*, 142 Idaho 129, 133, 106 P.3d 455, 459, (2005), citing *Osborn v. United States*, 918 F.2d 724, 729. (1990). "In the first instance the court restricts itself to the face of the pleadings, and the non-moving party receives the same protections as it would defending against a motion brought under Rule 12(b)(6)." *Osborn* at 729. In a factual attack, the court considers matters outside the pleadings, and the non-moving party does not have the benefit of 12(b)(6) safeguards. *Id.*

[A]t issue in a factual 12(b)(1) motion is the trial court's jurisdiction - its very power to hear the case - there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist.

Id. at 730.

This motion raises factual issues concerning the case at bar, including the exhaustion of administrative remedies and procedure. Specifically whether the Plaintiff's filings are proper and whether transcript fees were paid in a timely manner. Because this motion looks to facts outside the pleadings, no presumptive truthfulness attaches to the Plaintiffs' allegations, and the Plaintiff must bear the burden of proof to show that jurisdiction exists.

B. Exhaustion

Until all statutory administrative remedies are exhausted, the court lacks subject matter jurisdiction. "Failure to exhaust administrative remedies is a subset of errors of 'subject matter jurisdiction,' and can also be brought under a 12(b)(1) motion." *Owsley* at 133, 459. Pursuit of statutory administrative remedies is a condition precedent to judicial review. Fairway Dev. Co. v. Bannock County, 119 Idaho 121, 124, 804 P.2d 294, 297 (1990). "[T]he doctrine of exhaustion generally requires that the case run the full gamut of administrative proceedings before an application for judicial relief may be considered." Regan v. Kootenai County, 140 Idaho 721, 724, 100 P.3d 615, 618 (2004).

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III. ARGUMENT

A. The Plaintiffs have failed to exhaust administrative remedies by filing this Declaratory Judgment Action.

Idaho Code Section 67-6521(d) of the Local Land Use Planning Act states;

An affected person aggrieved by a [land use] decision may within twenty-eight (28) days after *all remedies have been exhausted* under local ordinances seek *judicial review* as provided by chapter 52, title 67, Idaho Code.

Id. (emphasis added).

Meanwhile Idaho Code Section 67-5270(1) and (3) state;

(1) Judicial review of agency action shall be governed by the provisions of this chapter unless another provision of law is applicable to the particular matter.

(3) A party aggrieved by a final order in a contested case decided by an agency other than the industrial commissioner or the public utilities commission is entitled to *judicial review* under this chapter if the person complies with the requirements of sections 67-5271 through 67-5370, Idaho Code.

Id. (emphasis added).

Finally Idaho Code Section 67-5271(1) states;

A person is not entitled to judicial review of an agency action until that person has exhausted all administrative remedies in this chapter.

Id.

In this case the Plaintiffs have filed an action for declaratory judgment, not for judicial review. Idaho code does not allow for declaratory judgment actions concerning administrative agency decisions unless the petitioner is seeking judgment concerning the validity or applicability of an agency rule, and then only if the implementation of that agency rule threatens to interfere with the legal rights or privileges of the petitioner. See, I.C. § 67-5278.

The Idaho Supreme Court has ruled that “[a]ctions for declaratory judgment are not intended as a substitute for a statutory procedure and such administrative remedies must be exhausted.” *Regan v. Kootenai County*, 140 Idaho 721, 725, 100 P.3d 615, 619 (2004). In addition, the Court has also declared that they are “loath to interfere prematurely with administrative proceedings and thus they will not, as a rule, assume jurisdiction of declaratory judgment proceedings until administrative remedies have been exhausted...” *Id.* quoting 22A AM.JUR 2d Declaratory Judgments § 83 (2003).

In *Regan*, the petitioners received a letter from the then Kootenai County planning director informing them that the current use of their property, as a non-commercial airstrip, was in violation of county ordinance. Rather than filing an appeal of the director's decision with the county hearing examiner, the administrative remedy under Kootenai County Ordinance, the petitioners filed a declaratory judgment action directly to district court to obtain an interpretation of the ordinance. *Id.* Upon appeal, the Idaho Supreme Court held that the Regans had failed to exhaust their administrative remedies by bypassing the County Hearing Examiner and Board of Commissioners, and that their complaint for

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declaratory relief should be dismissed for lack of subject matter jurisdiction. *Id* at 726,100 P.3d at 620.

The Idaho Supreme Court has also ruled that even when a petitioner begins the administrative remedy process, but later appeals to the courts for declaratory relief, rather than judicial review of an agency decision, as in the case at bar, the petitioner has failed to exhaust administrative remedies. *Bone v. City of Lewiston*, 107 Idaho 844, 849, 693 P.2d 1046, 1051 (1984).

In *Bone*, the petitioner sought declaratory judgment and a writ of mandamus against an adverse zoning decision by the City of Lewiston. *Id.* at 846, 693 P.2d 1046 at 1046. Upon the City's appeal to the Supreme Court, Bone argued that he could seek declaratory relief rather than filing for appeal under the Administrative Procedures Act, I.C. § 67-5215 (now repealed) because he was seeking an interpretation of the statute rather than appealing the zoning decision. *Id.* The Supreme Court ruled that "[s]uch an argument exalts form over substance" and that proper administrative procedures applied and remanded the case back to the district court, with orders for remand back to the Lewiston City Council. *Id.* at 849. 693 P.2d 1046, 1051.

In this case the Petitioners have filed a Petition for Declaratory Judgment, Petition for Judicial Review and Complaint, and have therefore failed to exhaust administrative remedies by seeking forms of relief not outlined in the Administrative Procedures Act. Idaho Code and case law are very clear upon this point. In Idaho, no person may file a petition for declaratory judgment of an administrative proceeding without first exhausting administrative remedies, these

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include petitions for judicial review. Moreover, no person in Idaho may file a complaint or declaratory action of an administrative decision when it is clear that judicial review is the only option available under Idaho Code.

B. Because the Plaintiffs have failed to exhaust their administrative remedies this court lacks subject matter jurisdiction.

Failure to exhaust administrative remedies deprives trial courts of jurisdiction. *Owsley v. Idaho Industrial Commission*, 141 Idaho 129, 106 P.3d 455 (2005), *Park v. Banbury*, 143 Idaho 576, 149 P.3d 851 (2006). In *Owsley*, a group of Plaintiffs filed suit against the Idaho Industrial Commission (Commission) for the Commission's rejection of a settlement agreement between the Plaintiffs and the Industrial Special Indemnity Fund. *Id.* The *Owsley* Petitioners filed directly to the District Court rather than completing the remaining steps of the Commission's administrative process by requesting a hearing on the Commission's refusal. *Id.* at 136, 106 P.3d at 462. Upon a motion argued by the Commission under I.R.C.P. 12(b)(1), (2), (3) and (6) the District Court dismissed the action for lack of subject matter jurisdiction. *Id.* at 133, 106 P.3d at 459. The Court held, "generally the exhaustion doctrine implicates subject matter jurisdiction because a district court does not acquire subject matter jurisdiction until all the administrative remedies have been exhausted." *Id.* at 136, 106 P.3d at 462.

This holding in *Owsley* was confirmed in the 2006 Idaho Supreme Court case *Park v. Banbury*. *Park*, 143 Idaho 576, 149 P.3d 851. In *Park*, a group of Petitioners filed a declaratory judgment action against the Valley County

Assessor without first appealing their assessments to the Valley County Board of Equalization. Each of the Petitioners argued that their properties had been improperly assessed for *ad valorem* tax purposes. *Id.* Once again, the Court held that due to the Plaintiffs' failure to exhaust administrative remedies the district court lacked subject matter jurisdiction and reversed the district court. *Id.* at 582, 149 P.3d at 857.

By electing to petition the court for declaratory relief and filing a complaint the Plaintiffs in this case have failed to follow the statutory provisions of the Local Land Use Planning Act, and the Idaho Administrative Procedures Act. Due to this error the Plaintiffs have failed to exhaust administrative remedies. Although the Plaintiffs did file an "all-in-one" declaratory judgment, petition for judicial review and complaint, the action on its face is for declaratory judgment, and therefore the Court cannot overcome its lack of subject matter jurisdiction on the declaratory action to address the petition for judicial review. As such, the court lacks subject matter jurisdiction over this matter and should dismiss this case in its entirety pursuant to I.R.C.P. 12(b)(1).

C. Even if the Court has subject matter jurisdiction the Petitioner did not pay the estimated transcript fees before filing the petition and therefore the petition should be dismissed for failure comply with the Idaho Rules of Civil Procedure.

As quoted earlier Idaho Code Section 67-6521(d) states that a person aggrieved by a decision of a governing board under the Local Land Use Planning Act may file for judicial review after all administrative remedies have been

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exhausted within twenty-eight (28) days after the decision is rendered. This code section is mirrored in the Idaho Administrative Procedures Act I.C. § 67-5273 and in I.R.C.P. 84(b).

Furthermore I.R.C.P. 84(g) states in pertinent part that;

(1)(A) Unless otherwise ordered by the district court, the petitioner shall pay the estimated fee for preparing of the transcript, as determined by the transcriber *prior to filing* of the petition for judicial review, and the petitioner shall pay the balance of the petition fee for the transcript upon competition.

Id. (emphasis added).

Idaho Rule of Civil Procedure 84(d) also states in pertinent part that;

...a petition for judicial review from an agency to the district court filed pursuant to this rule shall contain the following information and statement:

...

(6) A designation as to whether a transcript is requested.

(7) A certification of the attorney of the petitioner, or affidavit of the petitioner representing himself or herself;

(A) The service of the petition has been made upon the state agency or local government rendering the decision; and

(B) That the clerk of the agency has been paid the estimated fee for preparation of the transcript if one has been requested.

(C) That the clerk of the agency had been paid the estimated fee for preparation of the record.

Id.

And finally, I.R.C.P. 84(n) states in pertinent part that;

The failure to physically file a petition for judicial review...with the district court within the time limits prescribed by statute and these rules shall be jurisdictional and shall cause automatic dismissal of

the petition for judicial review upon motion of any party, or upon the initiative of the district court.

Id.

In the *Regan* case (see above) the Idaho Supreme Court confirmed the importance of the administrative record for purposes of judicial review stating “the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.” *Regan*, 140 Idaho at 725, 100 P.3d at 619, quoting, *Camp v. Pitts*, 411 U.S. 138, 142 (1973). These records and transcripts provide the court with the background of the case, and any factual determinations made. Without them the court is not free to conduct a de novo hearing in order to determine whether the agency action was “unwarranted by the facts.” See, *Camp*, 411 U.S. at 140.

In Compliance with I.R.C.P. 84(d)(6), section 2.4 of the Petitioners filing states that, “[a] limited transcript of the proceedings before the Kootenai County Commissioners and the proceedings before the Kootenai County Planning and Zoning Commissioner in Case NO. ZON08-0001 has been requested, as set forth by Stipulation filed even date herewith.” However, the County refused to sign the stipulation to limit the record, and the Stipulation was never filed.

Moreover, rather than requesting an estimate of transcript preparation fees from the agency before filing, the Petitioners themselves estimated that a limited transcript would cost approximately \$100.00, and paid this sum to the Clerk of the Kootenai County Board of Commissioners. It was only after the Petitioners filed their declaratory action/petition/complaint that they requested an estimate of transcript costs. *Affidavit of Sandi Gilbertson*, 2, exhibit “A”. The

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filing is also certified by the Petitioners' attorney stating that the estimate of transcription costs had been received by the Clerk of the Board of County Commissioners. *Petition for Declaratory Judgment, Petition for Judicial Review and Complaint*, Case No. CV-08-7074, 6.

On September 4, 2008, after serving the County with the suit petitioners' attorney made a request of Sandi Gilbertson, of the Kootenai County Building and Planning Department, for an estimate of transcript and record preparation fees. *Affidavit of Sandi Gilbertson*, 2, exhibit "A". On September 5, 2008, Ms. Gilbertson faxed the estimated cost of the transcript and record preparation of \$911.05 to the Petitioners' attorneys. *Affidavit of Sandi Gilbertson*, 2, exhibit "B". As of today's date these fees have not been received by Kootenai County.

Idaho Rule of Civil Procedure 84(g) is very clear that the fees estimated for transcript preparation shall be received prior to filing for judicial review. Without such transcripts the court has no record of the administrative agency proceedings, and therefore, is unable to review such record. Moreover, the Board of Kootenai County Commissioners signed the order of decision approving the two zoning changes at issue here on August 7, 2008. See, attached exhibit "A", *Findings of Fact, Applicable Legal Standards, Comprehensive Plan Analysis, Conclusions of Law and Order of Decision*, Case ZON08-0001, 17. The petition in this case was filed on September 4, 2008, exactly twenty-eight days after the ordinance passed. In addition, the Petitioners still had not paid the estimated fee on September 10, 2008, twenty-eight days after the publication of the ordinance. Because the Petitioners did not comply with I.R.C.P. 84(g) in paying the

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fee on or before the twenty-eight day time limit and have not paid that fee at this time their petition should be dismissed in its entirety under I.R.C.P. 84 (g) and (n) for failure to timely file their declaratory judgment/petition/complaint within the time limits as set forth in statute.

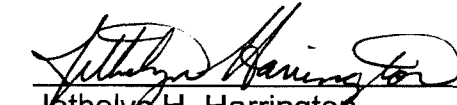
Furthermore, the second part of I.R.C.P. 84(n) which reads; "Failure of a party to timely take any other step in the process for judicial review shall not be deemed jurisdictional, but may be grounds only for such other action or sanction as the district court deems appropriate, which may include dismissal of the petition for review" does not apply here unless such sanction includes dismissal. By ignoring I.R.C.P. 84(g) which states that record and transcript fees must be paid prior to filing, the Petitioners did not even meet the first step in filing a petition for judicial review. In other words, the paying of transcript fees is not just "any other" step in the process for judicial review. It is in fact a primary step as the Idaho Rules of Civil Procedure demand that the transcript fees be paid in advance of filing.

IV. CONCLUSION

For the reasons stated above, the allegations in Plaintiffs' Complaint fail to fall under this Court's jurisdiction and the Defendants respectfully request that this case be dismissed in its entirety pursuant to Idaho Rule of Civil Procedure 12(b)(1) and/or failure to comply with I.R.C.P. 84(g) and (n).

Dated this 24th day of September, 2008.

Kootenai County Department of
Legal Services




Jethelyn H. Harrington
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of September, 2008, I caused to be sent a true and correct copy of the foregoing via first class mail to:

Steven C. Wetzel
Kevin P. Holt
Wetzel &Wetzel, P.L.L.C.
1322 Kathleen Ave., Suite 2
Coeur d'Alene, Idaho 83815
Fax: (208) 664-6741



Jethelyn H. Harrington

BEFORE THE BOARD OF COMMISSIONERS OF KOOTENAI COUNTY, IDAHO

IN THE MATTER OF THE APPLICATION OF)	CASE NO. ZON08-0001
COEUR D'ALENE PAVING, INC. A REQUEST)	FINDINGS OF FACT,
TO CHANGE THE ZONING CLASSIFICATION)	APPLICABLE LEGAL
ON APPROXIMATELY 20 ACRES FROM)	STANDARDS, COMPREHENSIVE
MINING TO AGRICULTURAL AND)	PLAN ANALYSIS, CONCLUSIONS
APPROXIMATELY 20 ACRES FROM)	OF LAW AND ORDER OF
AGRICULTURAL TO MINING)	DECISION

I COURSE OF PROCEEDINGS

- 1.01 On or about January 6, 2008, a pre-application conference was held to discuss this request.
- 1.02 On January 16, 2008, a complete application was submitted to the Kootenai County Building and Planning Department.
- 1.03 The Building and Planning Department issued a Notice of Public Hearing on this application, Case No. ZON08-0001, with the hearing held March 6, 2008. On February 5, 2008, notice was published in the *Coeur d'Alene Press*. On January 31, 2008, notice was provided to adjacent property owners within 300 feet of the project site. On February 5, 2008, notice was posted on the site. Based on signed affidavits in the file, the requirements for public notification have been met.
- 1.04 On March 6, 2008, a public hearing was held before the Kootenai County Hearing Examiner. Mark Mussman introduced the case. He testified that an affidavit of notice had been received from the applicants. He testified that the applicants were seeking a zone change from Mining to Agricultural on 20 acres of land, and requesting at the same time that 20 acres of land zoned Agricultural be re-zoned to Mining. He testified that the Comprehensive Plan identified the future land use in the area to be rural residential. Phil Weist, applicant's representative, testified that they applicants were trying to essentially trade zoning designations so that an expansion of their mining operation could remain contiguous with the existing operation, and allow them to utilize their existing driveway access to Highway 53. He introduced into the record an easement demonstrating that there is a valid access easement through Stepping Stones Subdivision for gravel and mining operations, with said easement dedicated to the subject properties that are being requested to be re-zoned from Mining to Agricultural (**Exhibit HE-1000**). He testified that 11 properties will be negatively effected if the applicants expand their mining operations on the twenty acres currently requested to be re-zoned Agricultural, while only 2 property owner will be impact if the zone change is approved, thus allowing them to expand their mining operation to the area that is requested to be rezoned from Agricultural to Mining. Mr. Weist introduced into the record a letter from Don Davis, Transportation Planner for Idaho Department of Transportation, indicating that ITD had no concerns related to traffic operations, given that their was no net change in the area zoned for mining (**Exhibit HE-1001**). Mr. Weist also testified that rezoning the property as requested to allow for relocation of the mining operation expansion would ultimately improve the final elevations and the overall "lay of the land" upon restorations. He noted that their operation was adjacent to an Interstate Concrete & Asphalt mining operation that had been in this location since the 1970's. He introduced into the record an aerial photo of the vicinity of the rezone and their current operation to demonstrate how a contiguous pit would result in preferable ultimate elevations than two pits, as would be the outcome if the rezone was not approved (**Exhibit HE-1002**). He also submitted into the record documentation of

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reclamation plan approval by Idaho Department of Lands, noting that the approval required that the operations mine to no closer than 30 feet of the existing water table (**Exhibit HE-1003**). Craig Conrad, applicant's representative, also testified that the applicant's proposal would keep the mining operations closer to Highway 53, and generally keep the mining operations in a more concentric area, thus minimizing impacts. He also testified that if the mining expansion occurred in the area currently zoned Mining (that was being requested to be re-zoned as Ag), it would require excavation to begin at the level of the existing homes in the immediate vicinity. He noted that since the current operation was bought by Coeur d'Alene Paving, they have cleaned up operations at the pit. Todd Kauffman, applicant's representative, testified that expansion into the area currently zoned for mining would result in significantly amounts of excavated materials being transported around Atlas Road to Highway 53, to the existing mining operation in order to weigh the materials prior to shipment.

One member of the public spoke in favor of the requested re-zone, indicating that he felt the proposal made common sense, and was better for the community. He noted that the Atlas Road and Highway 53 intersection was a blind intersection, thus making transport via Atlas to Highway 53 to the existing scale a bad option. Two other people indicated they were in favor, but did not wish to speak. Two people with neighboring residences spoke in opposition, citing concerns related to negative impacts and nuisances from the proposed mining operation, and testifying that it will cost significantly more for the applicant to develop the existing mining lands, as opposed to the lands proposed to be rezoned. They testified that they purchased their property with the knowledge that adjacent lands were agricultural, and that the applicant was aware of the zoning of their land and the conditions associated with those lands at the time they bought the mining operation. Paul Franz, representative of Interstate Concrete and Asphalt, which owns an adjacent mining operation, also spoke in opposition to the request. He testified that if the applicants were to expand their operation in the area that is currently zoned for mining, they would only be able to mine down 20 to 30 feet from existing ground levels. He noted that the surrounding land use is large lot residential, with average lot sizes of approximately 10 acres in the vicinity, even though the applicant is requesting that a portion of the land be zone AG. He suggested that mining in this area should be phased out, due to the growth of residential in the vicinity, and that this proposal would serve to prolong mining in the area. He proposed the need for conditional zoning, at a minimum, to provide buffering for adjacent residential uses, and limits on the land use. He submitted his comments into the record as **Exhibit HE-1005**. One other person indicated he was opposed, but did not wish to speak.

Phil Weist provided rebuttal testimony. He testified that their proposal provided less opportunity for vehicles to effect public roads if approved. He also testified that the home of one of the people who testified in opposition would be 205 feet from the toe of the proposed berm. He also testified that concerns from the neighbors regarding impacts such as dust and noise are unfounded, because the wind blows from the SW to NE. He also noted that their mining permit limits them to excavations no closer than 30 feet from the aquifer. Craig Conrad, applicant's representative, also testified in rebuttal. He stated if they don't get the zone change approved, they will expand their operation in the area currently zone Mining, which will impact more people, and be closer to neighboring houses. No other testimony was heard, and the hearing was closed.

- 1.05 The Building and Planning Department issued a Notice of Public Hearing on this application, Case No. ZON08-0001, with the hearing held May 8, 2008. On April 8, 2008, notice was published in the *Coeur d'Alene Press*. On April 1, 2008, notice was provided to adjacent property owners within 300 feet of the project site. On April 4, 2008, notice was posted on the

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- site. Based on signed affidavits in the file, the requirements for public notification have been met.
- 1.06 On May 8, 2008, a hearing was held before the Board of County Commissioners. Mark Mussman introduced the case, stating the Hearing Examiner recommended denial. The Applicant's representative, Sandy Young, testified that the 20 acres requested to change from Agricultural to Mining is a natural progression of the existing mining activity and the 20 acres requested to change from Mining to Agricultural would prevent adverse impacts to the surrounding property owners. Because the existing mining operation is below the grade of Highway 53 and the adjacent properties, Ms Young stated that continuing the operation to the 20 acres adjacent to the south would not have an adverse impact on the surrounding property owners. Ms. Young further stated that by consolidating the mining operation, traffic associated with the mining operation will be restricted to the existing access on Highway 53. There was further testimony from individuals supporting this request mainly centered on keeping the traffic associated with the mining activity away from the residential uses on the surrounding properties. There was considerable testimony in opposition to this request. The opposition centered on the adverse affect additional mining zoned property would have on the value of the surrounding properties. In addition, those opposed were concerned with potential environmental issues associated with mining activities. Finally, testimony revealed concerns with a water line running through the 20 acres requested to be re-zoned to Mining. This water line is part of the Stepping Stones subdivision water system. In rebuttal, the Applicants testified that dust mitigation and other environmental concerns are addressed in the required reclamation plan filed with the State of Idaho. Also, the Applicants assured Stepping Stones residents that the water line will be appropriately relocated without interruption of water service.
- 1.07 When all testimony was received, the Board of County Commissioners closed the public hearing. Commissioners Piazza and Tondee expressed disagreement with the Hearing Examiner's recommendation while Chairman Currie agreed with the Hearing Examiner. Because the Board indicated that they would make a substantial change to the Hearing Examiner's recommendation, the Board passed a motion to schedule an additional public hearing.
- 1.08 The Building and Planning Department issued a Notice of Public Hearing on this application, Case No. ZON08-0001, with the hearing held June 26, 2008. On May 27, 2008, notice was published in the *Coeur d'Alene Press*. On May 22, 2008, notice was provided to adjacent property owners within 300 feet of the project site. On May 28, 2008, notice was posted on the site. Based on signed affidavits in the file, the requirements for public notification have been met.
- 1.09 The Board of County Commissioners held a public hearing on June 26, 2008. Mark Mussman introduced the case. The Applicant's representative, Sandy Young, briefly reminded the Board of the particulars of this request. Ms. Young also submitted a site disturbance agreement form, including the amount of the required financial guarantee and plans for a berm around the perimeter of the proposed Mining zone (**Exhibit B-2000**). Ms. Young also reiterated that continuing the existing mining to the south into the 20 acres currently zoned Agricultural would have far less impact than mining the 20 acres that the Applicants proposed to re-zone to Agricultural. There was additional testimony in favor of this request centering on supporting the traffic associated with the existing mining activity to access Highway 53. The opposition testimony again centered on environmental concerns, aquifer protection, traffic on Highway 53, adverse affect on property values, zone "swapping" is illegal and this request does not comply with the Comprehensive Plan. In rebuttal, Ms Young stated that this request does not include

- increasing the Mining zone in the area, only to relocate property zoned Mining so that it is contiguous to existing mining activities.
- 1.10 After all testimony was taken, the Board of County Commissioners closed the public hearing and moved to take this request under advisement and scheduled this request for deliberations on July 10, 2008.
- 1.11 At their deliberations July 10, 2008, the Board of County Commissioners discussed this request. Commissioner Tondee stated that the Applicant has shown the need for this zone change

II FINDINGS OF FACT

Mining zone – to – Agricultural zone Request

- 2.01 **Applicant.** Coeur d'Alene Paving, Inc., 120 E. Anton Avenue, Coeur d'Alene, ID 83814. (Exhibit A-1, Application)
- 2.02 **Owner.** Beacon West, LLC, P.O. Box 1402, Hayden, ID 83835.
- 2.03 **Proposal.** The Applicant is requesting to change the zoning classification on approximately 20 acres from Mining to Agricultural. The Applicant's narrative states that they are requesting the zone change to allow current Mining that is removed from the current mining activities performed by the Applicant to be able to be development residentially. (Exhibit A-4, Narrative)
- 2.04 **Location and Legal Description.** The site is located south of Highway 53 and north of Boekel Road between Ramsey Road and Atlas Road. The site is described as Lots 3 and 4, Block 4, Stepping Stones Subdivision. The parcel numbers are 0-7635-004-003-0 and 0-7635-004-004-0, and the serial numbers are 178543 and 178544.
- 2.05 **Surrounding Zoning.** The subject property is adjacent to Mining zoned property on the north and by Agricultural zoned property on the south, east and west. There is other property zoned Mining to the north and also to the southeast as well as property zoned Rural to the north, south and west. In addition, there is property zoned Commercial in close proximity to the north. (Exhibit S-1, Zone Map)
- 2.06 **Surrounding Land Use.** The surrounding land use in the area consists of single family residences with accessory buildings on lots and parcels five acres and larger in size. There is mining activity adjacent to the north.
- 2.07 **Comprehensive Plan Designation.** The Kootenai County Future Land Use Map designates this area as Rural Residential. Rural Residential designations are given to areas that border rural areas and may actually be rural in appearance. Distinguishing these areas from those designated Rural is the size of the existing parcels and the level of police and fire protection.
- 2.08 **Existing Land Use.** All of the property subject to this request is currently undeveloped.
- 2.09 **Flood Zone and Wetlands.** According to the Flood Insurance Rate Map panel number 160076-0100D, the property is not located within an area of special flood hazard. There are no wetlands on the site.
- 2.10 **Area of City Impact.** The subject property is not located within any Area of City Impact.

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- 2.11 **Physical Characteristics.** The *Soil Survey of Kootenai County Area, Idaho* identifies the soil in the area to generally be Avonville fine gravelly silt loam. This is a very deep, well drained soil that is mainly used for pasture, hay and small grain production. Permeability is moderate, runoff is slow, and the hazard of erosion is slight. *Vegetation:* The entire site is vegetated with grass and weeds. *Topography:* The entire site could be considered very flat.
(Exhibit A-5, Photographs)
- 2.12 **Water and Sewage Disposal.** The Applicant did not state whether water or sewage disposal will be provided. The Panhandle Health District was asked to comment on this request but has not done so at this time.
- 2.13 **Access.** Access to these two lots will be provide by O'Connell Road, a privately maintained within the Stepping Stones Subdivision.
- 2.14 **Fire Protection.** The subject property is within the boundaries of the Northern Lakes Fire District. In a letter dated February 3, 2008, Fire Chief Dean Marcus stated that the District approves this request and further stated that future development will require Fire Code and Fire District compliance. **(Exhibit PA-1, Letter)**
- 2.15 **Department of Environmental Quality (DEQ).** It does not appear that DEQ had any comments regarding the Mining to Agricultural portion of this request.
- 2.16 **Noxious Weeds.** In a Memorandum dated February 11, 2008, Weed Specialist Bill Hargrave stated that the site contains leafy spurge. As such, the Noxious Weeds Department requires that no soil can be removed from the property and that all equipment used for construction or excavation activities must be steamed cleaned or power washed prior to leaving the site.
(Exhibit PA-3, Memorandum)
- 2.17 **Amendments to Zoning.** Idaho Code Title 67 Chapter 65-11(d) states that if a governing board adopts a zoning classification pursuant to a request by a property owner based upon a valid, existing Comprehensive Plan and Zoning Ordinance, the governing board shall not subsequently reverse its action or otherwise change the zoning classification of said property without the consent in writing of the current property owner for a period of four (4) years from the date the governing board adopted said individual property owner's request for a zoning classification change.
- 2.18 **Application Requirements.** Section 9-21-4 of the Kootenai County Zoning Ordinance states that an application for a change of zone must show the following:
- The date the existing zoning became effective (January 3, 1973).
 - The changed conditions which are alleged to warrant other or additional zoning.
 - Facts to justify the change on the basis of advancing the public health, safety, and general welfare.
 - The effect the zone change will have on the value and character of adjacent property.
 - The effect on the property owner if the request is not granted.
 - Such other information the Hearing Body shall require.
 - The effect the zone change will have on the Comprehensive Plan.

The Applicant's narrative includes responses to these items.
(Exhibit A-4, Narrative)

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Idaho Code requires that in the course of deciding zone change request, "particular consideration shall be given to the effects of any proposed zone change upon the delivery of services by any political subdivision providing public services, including school districts, within the planning jurisdiction.

- 2.19 **Public Comment.** The Building and Planning Department received two (2) comments in support of this request, two (2) neutral comments and five (5) comments opposed.
(Exhibit P-1 through P-9, Comments)

Agricultural zone – to – Mining zone Request

- 2.20 **Applicant.** Coeur d'Alene Paving, Inc., 120 E. Anton Avenue, Coeur d'Alene, ID 83814.
(Exhibit A-1, Application)
- 2.21 **Owner.** Beacon West, LLC, P.O. Box 1402, Hayden, ID 83835.
- 2.22 **Proposal.** The Applicant is requesting to change the zoning classification on approximately 20 acres from Agricultural to Mining. The Applicant's narrative states that they are requesting the zone changes so that the Mining zoned property will be closer to the existing mining operations in the area.. Further, the Applicant stated the mining operations will continue to utilize the current access and not impact the private roads in the area. (Exhibit A-4, Narrative)
- 2.23 **Location and Legal Description.** The site is located south of Highway 53 and north of Boekel Road between Ramsey Road and Atlas Road. The site is described as Lots 1 and 2, Block 3, Stepping Stones Subdivision all in Section 34, Township 52 North, Range 4 West, B.M., Kootenai County, Idaho. The parcel numbers are 0-7635-002-001-0 and 0-7635-002-002-0, and the serial numbers are 178536 and 178537.
- 2.24 **Surrounding Zoning.** The subject property is adjacent to Mining zoned property on the north and west and by Agricultural zoned property on the south, east. There is other property zoned Mining to the north and also to the southeast as well as property zoned Rural to the north, south and west. In addition, there is property zoned Commercial in close proximity to the north.
(Exhibit S-1, Zone Map)
- 2.25 **Surrounding Land Use.** The surrounding land use in the area consists of single family residences with accessory buildings on lots and parcels five acres and larger in size. There is mining activity adjacent to the north.
- 2.26 **Comprehensive Plan Designation.** The Kootenai County Future Land Use Map designates this area as Rural Residential. Rural Residential designations are given to areas that border rural areas and may actually be rural in appearance. Distinguishing these areas from those designated Rural is the size of the existing parcels and the level of police and fire protection.
- 2.27 **Existing Land Use.** All of the property subject to this request is currently undeveloped.
- 2.28 **Flood Zone and Wetlands.** According to the Flood Insurance Rate Map panel number 160076-0100D, the property is not located within an area of special flood hazard. There are no wetlands on the site.
- 2.29 **Area of City Impact.** The subject property is not located within any Area of City Impact.

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- 2.30 **Physical Characteristics.** The *Soil Survey of Kootenai County Area, Idaho* identifies the soil in the area to generally be Avonville fine gravelly silt loam. This is a very deep, well drained soil that is mainly used for pasture, hay and small grain production. Permeability is moderate, runoff is slow, and the hazard of erosion is slight. *Vegetation:* The entire site is vegetated with grass and weeds. *Topography:* The entire site could be considered very flat.
(Exhibit A-5, Photographs)
- 2.31 **Water and Sewage Disposal.** The Applicant did not state whether water or sewage disposal will be provided. The Panhandle Health District was asked to comment on this request but has not done so at this time.
- 2.32 **Access.** The Applicant stated that the lots re-zoned to Mining will utilize the access that serves the existing mining operation. This access is off Highway 53, a road maintained by the Idaho Transportation Department (ITD). In a letter dated February 20, 2008, Planner Donald Davis stated that since there will no change in acreage of mining area or change in haul routes on to Highway 53, ITD sees no reasons for any additional conditions regarding access. **(Exhibit PA-4, Letter)** In a letter dated May 7, 2008, Lakes Highway District Supervisor Joe Wuest stated that the District is in favor of this request because any heavy truck traffic associated with mining activity will access Highway 53. Other roads in the vicinity are either privately maintained or maintained by the District but are not built to accommodate the heavy truck traffic associated with mining activity. **(Exhibit PA-5, Letter)**
- 2.33 **Fire Protection.** The subject property is within the boundaries of the Northern Lakes Fire District. In a letter dated February 3, 2008, Fire Chief Dean Marcus stated that the District approves this request and further stated that future development will require Fire Code and Fire District compliance. **(Exhibit PA-1, Letter)**
- 2.34 **Department of Environmental Quality (DEQ).** In a letter dated January 25, 2008, Acting Regional Air Program Manager Mark Boyle stated fugitive dust issues could likely be an area of concern. However, Mr. Boyle further states that the diligent following of dust control measures and BMPs should adequately address these concerns. In a final note, Mr. Boyle outlines that an air quality permit must be obtained for the operation of a rock crushing facility. It is unclear whether the Mining to Agricultural portion of this request would require any further DEQ requirements for air quality. **(Exhibit PA-2, Letter)**
- 2.35 **Noxious Weeds.** In a Memorandum dated February 11, 2008, Weed Specialist Bill Hargrave stated that the site contains leafy spurge. As such, the Noxious Weeds Department requires that no soil can be removed from the property and that all equipment used for construction or excavation activities must be steamed cleaned or power washed prior to leaving the site.
(Exhibit PA-3, Memorandum)
- 2.36 **Amendments to Zoning.** Idaho Code Title 67 Chapter 65-11(d) states that if a governing board adopts a zoning classification pursuant to a request by a property owner based upon a valid, existing Comprehensive Plan and Zoning Ordinance, the governing board shall not subsequently reverse its action or otherwise change the zoning classification of said property without the consent in writing of the current property owner for a period of four (4) years from the date the governing board adopted said individual property owner's request for a zoning classification change.

2.37 **Application Requirements.** Section 9-21-4 of the Kootenai County Zoning Ordinance states that an application for a change of zone must show the following:

- h. The date the existing zoning became effective (January 3, 1973).
- i. The changed conditions which are alleged to warrant other or additional zoning.
- j. Facts to justify the change on the basis of advancing the public health, safety, and general welfare.
- k. The effect the zone change will have on the value and character of adjacent property.
- l. The effect on the property owner if the request is not granted.
- m. Such other information the Hearing Body shall require.
- n. The effect the zone change will have on the Comprehensive Plan.

The Applicant's narrative includes responses to these items.
(Exhibit A-4, Narrative)

Idaho Code requires that in the course of deciding zone change request, "particular consideration shall be given to the effects of any proposed zone change upon the delivery of services by any political subdivision providing public services, including school districts, within the planning jurisdiction.

2.38 **Public Comment.** The Building and Planning Department received two (2) comments in support of this request, two (2) neutral comments and five (5) comments opposed.
(Exhibit P-1 through P-9, Comments)

III APPLICABLE LEGAL STANDARDS

3.01 Kootenai County Zoning Ordinance No. 401 Chapter 21, Amendments.

Chapter 21 of the Zoning Ordinance outlines the application requirements, process and review standards for zone amendments. It requires that the request be considered by the hearing body for their recommendation. The hearing body recommendation goes to the Board of Commissioners, who must hold a public hearing prior to making a final decision and signing the associated ordinance amendment. This article requires that the Applicants show that a proposed amendment is reasonably necessary, is in the best interest of the public, and is in accordance with the Comprehensive Plan. Notice must meet the requirements of *Idaho Code*, or for larger zone amendments, those given in the Ordinance.

3.02 Kootenai County Ordinance No. 355.

This Ordinance establishes Hearing Examiners and a Planning and Zoning Commission, and outlines procedures for the conduct of hearings.

3.03 1994 Kootenai County Comprehensive Plan.

The Comprehensive Plan establishes long range plans for growth, development, land use, and environmental protection in Kootenai County. The plan outlines goals, objectives and policies that provide fundamental decision-making guidance for other County ordinances and for future development. Included in the Comprehensive Plan is a Future Land Use Map that provides a general outline of areas of suitable projected land uses, with approximately ¼ mile wide transition areas between designations.

- 3.04 *Idaho Code* §67-6502, Local Land Use Planning; §67-6509, notice and Hearing Procedures; §67-6511, Zoning Ordinance; §67-6519-§6520, Permit Process; §67-6521, Actions by Affected Persons; §67-6535, Approval/Denial Requirements; §67-2343, Notices of Meetings.

Idaho Code §67-6502 outlines the purpose of local land use planning in promoting the health, safety and general welfare of the people of the state in the following ways: a) protect property rights while making accommodations for other necessary types of development such as low cost housing and mobile home parks; b) ensure that adequate public facilities and services are provided at reasonable costs; c) protect the economy of the state and localities; d) protect the important environmental features of the state and localities; e) encourage the protection of prime agricultural, forestry and mining lands; f) encourage urban and urban-type development within incorporated cities; g) avoid undue concentration of population and overcrowding of land; h) ensure that the development on land is commensurate with the physical characteristics of the land; i) protect life and property in areas subject to natural hazards and disasters; j) protect fish, wildlife and recreation resources; k) avoid undue water and air pollution; l) allow local school districts to participate in the community planning and development process so as to address public school needs and impacts on an ongoing basis.

Idaho Code §67-6511 requires that notice and hearing procedures be in accordance with *Idaho Code* §67-6509 requires a public hearing before the Planning Commission or Hearing Examiner. At least 15 days prior to the hearing, notice must be published in the newspaper and be provided to all political subdivisions providing services. A public service notice must also be made available to other papers and radio/TV stations. If the Board holds a second public hearing, notice and hearing procedures are the same, except the notice must include the recommendation of the Hearing Body.

Idaho Code §67-6511 requires that the proposed zone change be in accordance with the Comprehensive Plan and that it not have a negative effect on the delivery of public services by political subdivisions. A public hearing must be held before the Planning Commission or Hearing Examiner prior to consideration by the Board. In addition to the notice procedures outlined in *Idaho Code* §67-6509, notice must be mailed to property owners or purchasers of record within the land being considered, within 300 feet of the external boundaries of the land, and to any additional area that may be impacted by the proposed zone change. Notice must be posted on the premises not less than one week prior to the hearing.

Idaho Code §67-6519-§6520 outlines the permit and the decision specifications. The application must first go to the Planning Commission or Hearing Examiner for their recommendation. Recommendation and/or decisions must specify the ordinance and standards used in evaluating the application, the reasons for the approval or denial, and, if the decision is a denial, the actions, if any, the Applicants could take to obtain a permit.

Idaho Code §67-6521 defines an "affected person" states that an affected person may request a hearing on any permit authorized under Chapter 65, outlines the actions the Board may take, and provides for judicial review, if requested, within 28 days after all remedies have been exhausted under local ordinances.

Idaho Code §67-6535 requires that the approval or denial be in writing and be accompanied by a reasoned statement that explains the criteria and standards considered relevant, the relevant contested facts, and the rationale for the decision based on the factual information contained in the record, applicable provisions of the Comprehensive Plan, relevant ordinances and laws.

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Idaho Code §67-2343 provides general requirements for meeting notices such as the Commissioner's weekly deliberations.

Amendments to Zoning. Idaho Code Title 67 Chapter 6511(d) states that if a governing board adopts a zoning classification pursuant to a request by a property owner based upon a valid, existing Comprehensive Plan and Zoning Ordinance, the governing board shall not subsequently reverse its action or otherwise change the zoning classification of said property without the consent in writing of the current property owner for a period of four (4) years from the date the governing board adopted said individual property owner's request for a zoning classification change.

IV COMPREHENSIVE PLAN ANALYSIS

Mining zone – to – Agricultural zone Request

4.01 Natural Resources—land, air, water, vegetation, wildlife

- GOAL 1: Maintain and improve air quality.
- GOAL 2: Maintain the existing high quality of ground waters in Kootenai County.
- GOAL 3: Ensure that demand of groundwater resources does not exceed sustainable yield.
- GOAL 4: Preserve, protect, and enhance the water quality and quantity of lakes, streams, rivers and wetlands in Kootenai County.
- GOAL 5: Encourage the preservation, protection, and enhancement of native vegetation.
- GOAL 6: Encourage the preservation, protection, and enhancement of fish and wildlife habitats.

This portion of the request should not have an impact on these goals..

4.02 Hazardous Areas

- GOAL 7: Prevent or limit development activity in hazardous areas.
- GOAL 8: Recognize the heavy metals contamination problem in the Coeur d'Alene River Basin.

The project is not located in a hazardous area, or within the Coeur d'Alene River Basin.

4.03 Private Property Rights, Land Use

- GOAL 9: Develop land use regulations that protect property rights, maintain quality of life, provide adequate land for development, buffer non-compatible land uses, and protect the environment.

The Kootenai County Zoning Ordinance provides regulations intended to protect property rights, protect natural resources, and buffer non-compatible uses. The Zoning Ordinance also provides a means to amend those regulations and land use classifications if found to be reasonably necessary and in the public interest

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4.04 Population

GOAL 10: Guide population growth to allow for inevitable expansion without sacrificing the environment or the quality of life which currently characterizes Kootenai County.

This portion of the request should have a minimal impact on population growth.

4.05 Housing

GOAL 11: Provide safe, adequate, and affordable housing for people of all income levels.

This portion of the request should have a minimal impact on housing..

4.06 Economic Development

GOAL 12: Promote a diversified, safe, and stable economic base in an environmentally responsible manner.

GOAL 13: Maintain viable agriculture, forestry, and mining land uses.

Because the proposal will have no net increase or decrease in lands zoned for agricultural, the application is unlikely to have a significant impact on this issue.

4.07 Transportation

GOAL 14: Provide for the efficient, safe, and cost-effective movement of people and goods.

GOAL 15: Assist in the operation and orderly expansion of the Coeur d'Alene Airport.

This portion of the request should have a very minimal impact to the transportation network and well continue to provide for the efficient, safe and cost-effective movement of people. The proposal will have no impact on operations at the Coeur d'Alene Airport.

4.08 Public Services and Utilities

GOAL 16: Provide efficient, convenient, and effective government services.

GOAL 17: Ensure efficient and effective police, fire, and emergency services.

GOAL 18: Assist in the efficient and orderly expansion and improvement of public utilities and services.

GOAL 19: Ensure availability and affordability of energy-related services while protecting the environment.

GOAL 20: Protect water quality to ensure adequate quantity and quality of drinking water to meet the current and future needs in the County.

GOAL 21: Provide environmentally sound, efficient, and cost-effective management of wastes.

The proposed project will have no effect on provision of public services and utilities. Ground water quality should be adequately protected, provided the applicant complies with all permitting requirements and condition, as may be imposed by the County and Panhandle Health District..

4.09 Education

GOAL 22: Provide for school representatives to participate in the community planning.

The project will have no impact on the school district, and the school district has not provided comments regarding this application.

4.10 Recreation and Special Sites

GOAL 23: Develop quality County parks, greenbelts, and recreation facilities to meet the diverse needs of a growing population.

GOAL 24: Secure waterfront and near-shore areas for beneficial public uses and enhance public enjoyment of a growing population.

GOAL 25: Encourage the preservation, protection, and enhancement of areas that are historically and culturally significant.

This project is not expected to enhance recreational needs in the area. No impacts to any historically or culturally significant areas are evident.

4.11 Community Design

GOAL 26: Foster growth in a manner which does not compromise the visual qualities of Kootenai County.

GOAL 27: Preserve, protect, and enhance natural landmarks and areas of scenic beauty, such as waterways and unique landscapes.

This portion of the project should have minimal impacts on these goals.

Agricultural zone – to – Mining zone Request

4.12 Natural Resources—land, air, water, vegetation, wildlife

GOAL 1: Maintain and improve air quality.

GOAL 2: Maintain the existing high quality of ground waters in Kootenai County.

GOAL 3: Ensure that demand of groundwater resources does not exceed sustainable yield.

GOAL 4: Preserve, protect, and enhance the water quality and quantity of lakes, streams, rivers and wetlands in Kootenai County.

GOAL 5: Encourage the preservation, protection, and enhancement of native vegetation.

GOAL 6: Encourage the preservation, protection, and enhancement of fish and wildlife habitats.

DEQ has indicated that fugitive dust will likely be an area of concern, though that issue can be mitigated through diligent adherence to dust control measure. The operation will require an air quality permit issued by DEQ. Compliance with Kootenai County Site Disturbance Ordinance, and compliance with DEQ permit requirements, and IDL post-mining reclamation requirements on the site, are intended to preserve and protect surface water quality.

4.13 Hazardous Areas

GOAL 7: Prevent or limit development activity in hazardous areas.

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GOAL 8: Recognize the heavy metals contamination problem in the Coeur d'Alene River Basin.

The project is not located in a hazardous area, or within the Coeur d'Alene River Basin.

4.14 Private Property Rights, Land Use

GOAL 9: Develop land use regulations that protect property rights, maintain quality of life, provide adequate land for development, buffer non-compatible land uses, and protect the environment.

The Kootenai County Zoning Ordinance provides regulations intended to protect property rights, protect natural resources, and buffer non-compatible uses. The Zoning Ordinance also provides a means to amend those regulations and land use classifications if found to be reasonably necessary and in the public interest

4.15 Population

GOAL 10: Guide population growth to allow for inevitable expansion without sacrificing the environment or the quality of life which currently characterizes Kootenai County.

This project has no effect on population growth.

4.16 Housing

GOAL 11: Provide safe, adequate, and affordable housing for people of all income levels.

The project will have no effect on housing.

4.17 Economic Development

GOAL 12: Promote a diversified, safe, and stable economic base in an environmentally responsible manner.

GOAL 13: Maintain viable agriculture, forestry, and mining land uses.

Because the proposal will have no net increase or decrease in lands zoned for mining, the application is unlikely to have a significant impact on this issue. Further it could be argued that Agricultural and Mining are compatible zoning classifications.

4.18 Transportation

GOAL 14: Provide for the efficient, safe, and cost-effective movement of people and goods.

GOAL 15: Assist in the operation and orderly expansion of the Coeur d'Alene Airport.

Based upon the applicant's testimony, it appears that approval of this application will minimize impacts to the local road system if scale operations remain at their current location. The Applicant testified that the scale operations would continue to be located at its current location just north of Highway 53. The proposal will have no impact on operations at the Coeur d'Alene Airport.

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4.19 Public Services and Utilities

- GOAL 16: Provide efficient, convenient, and effective government services.
- GOAL 17: Ensure efficient and effective police, fire, and emergency services.
- GOAL 18: Assist in the efficient and orderly expansion and improvement of public utilities and services.
- GOAL 19: Ensure availability and affordability of energy-related services while protecting the environment.
- GOAL 20: Protect water quality to ensure adequate quantity and quality of drinking water to meet the current and future needs in the County.
- GOAL 21: Provide environmentally sound, efficient, and cost-effective management of wastes.

The proposed project will have no effect on provision of public services and utilities. Ground water quality should be adequately protected, provided the applicant complies with all permitting requirements and condition, as may be imposed by the County, Panhandle Health District, DEQ, and IDL.

4.20 Education

- GOAL 22: Provide for school representatives to participate in the community planning.

The project will have no impact on the school district, and the school district has not provided comments regarding this application.

4.21 Recreation and Special Sites

- GOAL 23: Develop quality County parks, greenbelts, and recreation facilities to meet the diverse needs of a growing population.
- GOAL 24: Secure waterfront and near-shore areas for beneficial public uses and enhance public enjoyment of a growing population.
- GOAL 25: Encourage the preservation, protection, and enhancement of areas that are historically and culturally significant.

This project is not expected to enhance recreational needs in the area. No impacts to any historically or culturally significant areas are evident.

4.22 Community Design

- GOAL 26: Foster growth in a manner which does not compromise the visual qualities of Kootenai County.
- GOAL 27: Preserve, protect, and enhance natural landmarks and areas of scenic beauty, such as waterways and unique landscapes.

Upon completion of mining operations and site reclamation, the project is not anticipated to have any impact on the visual character of this area.

V BOARD ANALYSIS

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As a whole, the Board understands that the mining zone was established in this area prior to the recordation of the Stepping Stones plat. In addition, there was mining activity in this area some years before the current zoning was established. And, although perhaps more intense, the Board feels that Mining zone appears to be compatible with Agricultural zone. The Board does recognize that it is unfortunate that traditional agricultural activities and practices have given way to more intense residential uses. However, because the Applicant is not requesting additional property zoned Mining, but rather two distinct areas for zone change that result in no net change in the overall acres zoned in either category, when taken in full perspective the request appears to be reasonably necessary and in the best interest of the public.

The Board respectfully disagrees with the Hearing Examiner's findings that the request appears to only benefit the property owner at the expense of others. The request for zone change on both sites appears to allow for a natural progression of current area uses and activities, including both mining activities and agricultural activities, respectively. And, with the installation of the berm which the Applicant testified will be in place when the mining activity continues south, the adjacent property owners in particular and the area residents in general will be minimally impacted when the mining activity moves onto the property subject to this request. On the other hand, if this request was denied, the Applicant would commence mining activities on the 20 acres to the southwest of the current mining site which would adversely affect a bigger area with greater impacts to a larger group of land owners as it is bordered on three sides by agriculturally zoned properties. Therefore, the Board feels that this request is reasonably necessary and appropriate.

Further, the Board feels confident that the mining activity will continue to comply with the requirements of additional agencies with greater expertise in terms of air quality, ground water quality, reclamation and traffic. Therefore, it is the Board's understanding that the existing activity will be: 1) allowed to progress naturally to the south and continue to utilize the existing access onto Highway 53; and 2) the Applicant will be required to continue to comply with the requirements of other agencies; and 3) the Applicant has testified that there will be a berm installed to buffer the future mining activities from the adjacent residential use if this request is approved. As such, the Board feels that the overall area will benefit by confining the operation to a smaller area by not providing for the potential for future mining activities to be spread out in a larger area.

Finally, the Board feels that this request is consistent with the overall goals and policies of the Comprehensive Plan. Moreover, the proposal is not necessarily inconsistent with the future land use plan as suggested in the Hearing Examiner recommendation. The Mining zone was established in this area prior to the adoption of the current Comprehensive Plan. The future land use component did not recognize either the historic mining activities in the area or the traditional agricultural activities as well. Because the Board feels that Mining zone is compatible with Agricultural zone and for the additional reasons stated above, this request is consistent with Goal 9 of the Comprehensive Plan because the request is reasonably necessary and in the best interest of the public.

VI CONCLUSIONS OF LAW

Mining zone –to- Agricultural zone Request

- 6.01 This request is reasonably necessary given the fact that public testimony revealed that the Mining zoned property to the north is in the process of being reclaimed and it appears that the mining activity will cease.

- 6.02 This request is in the best interest of the public because this will allow for the this property to be developed in a more residential fashion, reducing the potential traffic either on the existing private road system of the Stepping Stones subdivision or by the easement through adjacent properties on to Atlas Road. Further, the public interest is better served by removing the Mining zone from this property so that the existing mining activities can be consolidated.
- 6.03 The Applicant has shown that there have been changes in the conditions of this area that warrants approval of this request. Testimony revealed that the mining activities to the north of this property have ceased and that this area has gained increased popularity in residential development.
- 6.04 The Applicant has shown that approval of this request would advance the public health, safety and welfare by not allowing mining activities to commence on this property. The heavy traffic impacts associated with mining activities will not utilize the local roads in this area, but instead will be directed to the existing access on to Highway 53. The area residents will not be subject to the potential environmental or visual impacts of mining activities on the property. Finally, approval will allow for the natural progression of residential development to the north.
- 6.05 The Applicant has shown that the area proposed to be changed from Mining to Agriculture is currently bordered on three sides, approximately 75%, by other lands zoned Agriculture.
- 6.06 The Applicant has shown that the value and character of adjacent property will improve with the absence of Mining zoned property. The character of the area will continue to be large lot residential development with the potential of small scale agricultural activities such as the keeping of livestock. In addition, the Applicant has shown that the value of the property will improve because the area will not be subject to the heavy truck traffic associated with mining activities.
- 6.07 The Applicant has shown that denying this request will have a negative and adverse impact on the property owners because mining activities will be required to commence in the future. Traffic in the area will increase, the visual effects of mining activity will generate a high degree of animosity with the existing residents and the current mining activities will be required to spread out in a larger area.
- 6.08 The Applicant has shown that there will be no effect on the Comprehensive Plan because Mining and Agricultural zoning appear to be compatible.
- 6.09 The proposed zone change will not have a negative effect on the delivery of public services by political subdivisions.

Agricultural zone –to- Mining zone Request

- 6.10 This request is reasonably necessary because it will allow for the natural progression of the existing mining activity to the north.
- 6.11 This request is in the best interest of the public because it will allow for the heavy traffic associated with mining activity to utilize the existing access on Highway 53.

- 6.12 The Applicant has shown that there have been changes in the area that warrant approval of this request. The need for the kind of basic materials generated by mining activities has steadily increased in the County. In addition, there will be an increased need for these materials as the Highway 95 improvements progress.
- 6.13 The Applicant has shown that approval should advance the public health, safety and welfare by directing the heavy traffic to the existing access on Highway 53, by continuing to comply with the requirements of other agencies in terms of air quality and ground water quality.
- 6.14 The Applicant has shown that the area proposed to be changed from Agriculture to Mining is currently bordered on two sides, approximately 50%, by other lands zoned Mining.
- 6.15 The Applicant has shown that the value and character of adjacent properties will not be adversely affected because the Applicant testified that a landscaped berm will be installed to buffer the mining use for adjacent residential uses.
- 6.16 The Applicant has shown that denying this request will have a negative and adverse impact on the property owners because mining activities will be required to commence in the future in an area that is geographically removed from the current mining activities. Traffic in the area will increase, the visual effects of mining activity will generate a high degree of animosity with the existing residents and the current mining activities will be required to spread out in a larger area.
- 6.17 The Applicant has shown that there will be no effect on the Comprehensive Plan because Mining and Agricultural zoning appear to be compatible.
- 6.18 The proposed zone change will not have a negative effect on the delivery of public services by political subdivisions.

VII ORDER OF DECISION

Based on the Findings of Fact and Conclusions of Law set forth in this document, the Kootenai County Board of Commissioners orders that the application for **Case No. ZON08-0001**, a request by Coeur d'Alene Paving to change the zoning classification from Agricultural to Mining on 20 acres, and from Mining to Agricultural on approximately 20 acres, be **APPROVED**.

Dated this 7th day of August, 2008 by the following vote:

BY ORDER OF THE KOOTENAI COUNTY BOARD OF COMMISSIONERS

Yea Nay

Elmer R. Currie, Chairman

Richard A. Piazza
Richard A. Piazza, Commissioner

W. Todd Tondee
W. Todd Tondee, Commissioner

ATTEST:
DANIEL ENGLISH

Juli K...
BY DEPUTY CLERK

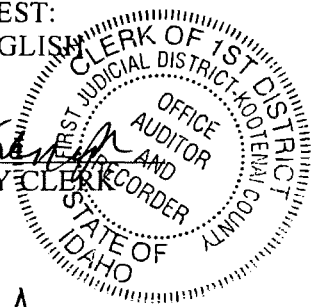


EXHIBIT A

Kootenai County Department of Legal Services
Jethelyn H. Harrington, ISB #7471
451 N. Government Way
P.O. Box 9000
Coeur d'Alene, ID 83816-9000
Phone: (208) 446-1620
Fax: (208) 446-1621

Attorney for Defendants

STATE OF IDAHO }
COUNTY OF KOOTENAI } ss
FILED: 9-24-08
AT 2:17 O'CLOCK P M
CLERK, DISTRICT COURT
Shari K
DEPUTY

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

LINDA CISZEK, *et al.*,
Plaintiff,

vs.

THE KOOTENAI COUNTY BOARD OF
COMMISSIONERS,
Defendant.

Case No. **CV-08-7074**

**AFFIDAVIT OF SANDI
GILBERTSON IN SUPPORT OF
MOTION TO DISMISS UNDER
I.R.C.P. 12(b)(1)**

STATE OF IDAHO)
County of Kootenai)

ss.

Sandi Gilbertson, being first duly sworn on oath, deposes and states as follows:

1. I make this affidavit based upon my own personal knowledge; I am competent to testify to the matters set forth herein and am over the age of eighteen.

AFFIDAVIT OF SANDI GILBERTSON IN SUPPORT OF MOTION TO DISMISS
UNDER I.R.C.P. 12(b)(1) - 1

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2. On Thursday, September 4, 2008, I was contacted by Dana Wetzel who asked me for an estimate of a limited transcript for case no. ZON08-0001. I informed Ms. Wetzel that the zone change had a separate hearing and case file from any other cases filed by Coeur d'Alene Paving, Inc. and the transcript and record was already limited to that case. I also asked Ms. Wetzel to put her request for a transcript estimate in writing.

3. On Thursday, September 4, 2008, I received an e-mail for Dana Wetzel requesting an estimate preparation for the transcript and record in case no. ZON08-0001. A true and correct copy of this e-mail is attached as exhibit "A" and incorporated herein.

4. On Friday, September 5, 2008, I prepared an estimate of preparation for the transcript and record in case no ZON08-0001 and faxed it to Ms. Wetzel's place of business. A true and correct copy of this fax and the fax report are attached as exhibit "B" and incorporated herein.

5. On Tuesday, September 9, 2008, I had not yet received word from Ms. Wetzel as to the payment of the transcript and record estimate. I then placed a telephone call to Ms. Wetzel to ascertain that she had received my faxed estimate on September 5, 2008. Ms. Wetzel stated that the fax was probably with her husband and law partner Steven Wetzel. I then e-mailed Ms. Wetzel a copy of the cost estimate that day. I attached a copy of the estimate to the e-mail. A true and correct copy of this e-mail is attached as exhibit "C" and incorporated herein.

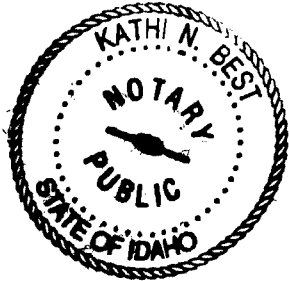
6. My office received a copy of a check from the Ms. Wetzel's law firm dated September 4, 2008, which was forwarded to us by the Clerk of the Kootenai County Board of Commissioners for \$100.00. As of today's date this check has not been cashed and is in my records. A true and correct copy of this check is attached as exhibit "D" and incorporated herein.

7. As of today's date my office has not received the estimated transcript and record preparation fee as noted on attached exhibit "B".

FURTHER YOUR AFFIANT SAITH NOT

Sandi Gilbertson
Sandi Gilbertson

SUBSCRIBED AND SWORN TO BEFORE ME this 19th day of September, 2008.



Kathi N. Best
Notary Public for Idaho
Residing at Hayden
Commission Expires: 2-17-10

AFFIDAVIT OF SANDI GILBERTSON IN SUPPORT OF MOTION TO DISMISS
UNDER I.R.C.P. 12(b)(1) - 3

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Sandi Gilbertson

From: Dana Wetzel [dwetzel@wetzeljuris.com]
Sent: Thursday, September 04, 2008 2:48 PM
To: Sandi Gilbertson
Cc: John Cafferty
Subject: Estimated Fees for transcript and record for Case No. ZON08-0001

Sandy, at your request we hereby request in writing an estimate of the costs involved in producing a transcript and record for the Coeur d'Alene Asphalt application for rezoning two parcels of property in Case No. ZON08-0001. Because 90% of the testimony and documents presented at the hearings before the Hearing Examiner and the Board of County Commissioners addressed another issue, we believed that we could file the appeal with a stipulation limiting the record to the testimony and documents which addressed only the zoning issue. Based upon that belief, I filed the appeal today with \$100.00 established by stipulation as the estimated fee. Unfortunately, I did not receive the message from Mr. Cafferty that he would not stipulate to the limited record until after I had filed the appeal. Therefore, belatedly, I am requesting that you provide an estimated cost and we will immediately pay the difference between the \$100.00 that we paid today and the actual estimated cost that you will shortly provide.

I apologize for the confusion and any inconvenience that I might have caused.

EXHIBIT A
Page 1 of 1

*** TX REPORT ***

TRANSMISSION OK

TX/RX NO 0933
CONNECTION TEL 96646741
SUBADDRESS
CONNECTION ID
ST. TIME 09/05 12:21
USAGE T 00'32
PGS. SENT 2
RESULT OK



**KOOTENAI COUNTY
BUILDING & PLANNING
DEPARTMENT**

FAX COVER SHEET

DATE: 09/05/08
TO: Dana Wetzel
FAX #: 208-664-6741
FROM: Kootenai County Planning
FAX # (208) 446-1071
RE: Estimated Cost for Coeur d'Alene Paving ZON08-0001
NUMBER OF PAGES: Coversheet plus 1

CONFIDENTIAL AND PRIVILEGED INFORMATION

EXHIBIT B

5-43

Page 1 of 2

Sandi Gilbertson
Administrative Supervisor
Kootenai County
Building and Planning Department

005



**KOOTENAI COUNTY
BUILDING & PLANNING
DEPARTMENT**

Memo

To: Dana Wetzel
Wetzel, Wetzel, Bredeson & Holt, P.L.L.C.
Sandi

From: Sandi Gilbertson, Administrative Supervisor

Re: Cost Estimate - Preparation of Record
Case No. ZON08-0001 Coeur d'Alene Paving

Date: September 5, 2008

Following is an estimated cost for preparation of the Transcript and Record pertaining to Case No. ZON08-0001:

The above case was heard on the following dates:

March 6, 2008	Hearing Examiner hearing
May 8, 2008	BOCC Public Hearing
June 26, 2008	BOCC Public Hearing
July 10, 2008	BOCC Deliberations
August 7, 2008	BOCC Signing

Estimated length of transcript = (150) pages @ \$4.50 per page	\$ 675.00	
Two additional copies @ \$0.05/page	\$ 15.00	
TRANSCRIPT TOTAL (3 SETS)		\$690.00

Estimation for copy of Case File:		
512 black & white, 8 1/2 X 11 pages @ \$0.05/page	\$ 25.60	
43 color, 8 1/2 X 11 @ \$0.25/page	\$ 10.75	
2 oversized maps approximately \$2.00 each	\$ 4.00	
1 large color map approximately \$25.00	\$ 25.00	
	\$ 65.35	
CASE FILE TOTAL (3 SETS)		\$196.05

Time spent on Estimate	
1.0 hours @ \$25.00/hour	\$ 25.00
	\$911.05

ESTIMATED TOTAL RECORD & PREPARATION COSTS = \$911.05

cc: Pat Braden
Kootenai County Legal Counsel

EXHIBIT B
Page 2 of 2

Sandi Gilbertson

From: Sandi Gilbertson
Sent: Tuesday, September 09, 2008 9:50 AM
To: 'Dana Wetzel'
Subject: Cost Estimate for ZON08-0001

*Sandi Gilbertson
Administrative Supervisor
Kootenai County
Building and Planning Department
P.O. Box 9000
Coeur d'Alene, ID 83816-9000
(208) 446-1073*

EXHIBIT C
Page 1 of 2



**KOOTENAI COUNTY
BUILDING & PLANNING
DEPARTMENT**

Memo

To: Dana Wetzel
Wetzel, Wetzel, Bredeson & Holt, P.L.L.C.

From: Sandi Gilbertson, Administrative Supervisor

Re: Cost Estimate - Preparation of Record
Case No. ZON08-0001 Coeur d'Alene Paving

Date: September 5, 2008

Following is an estimated cost for preparation of the Transcript and Record pertaining to Case No. ZON08-0001:

The above case was heard on the following dates:

March 6, 2008	Hearing Examiner hearing
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43 color, 8 1/2 X 11 @ \$0.25/page	\$ 10.75	
2 oversized maps approximately \$2.00 each	\$ 4.00	
1 large color map approximately \$25.00	\$ 25.00	
	\$ 65.35	
CASE FILE TOTAL (3 SETS)		\$196.05

Time spent on Estimate	
1.0 hours @ \$25.00/hour	\$ 25.00
	\$911.05

ESTIMATED TOTAL RECORD & PREPARATION COSTS = \$911.05

cc: John Cafferty
Kootenai County Legal Counsel

EXHIBIT C
Page 2 of 2

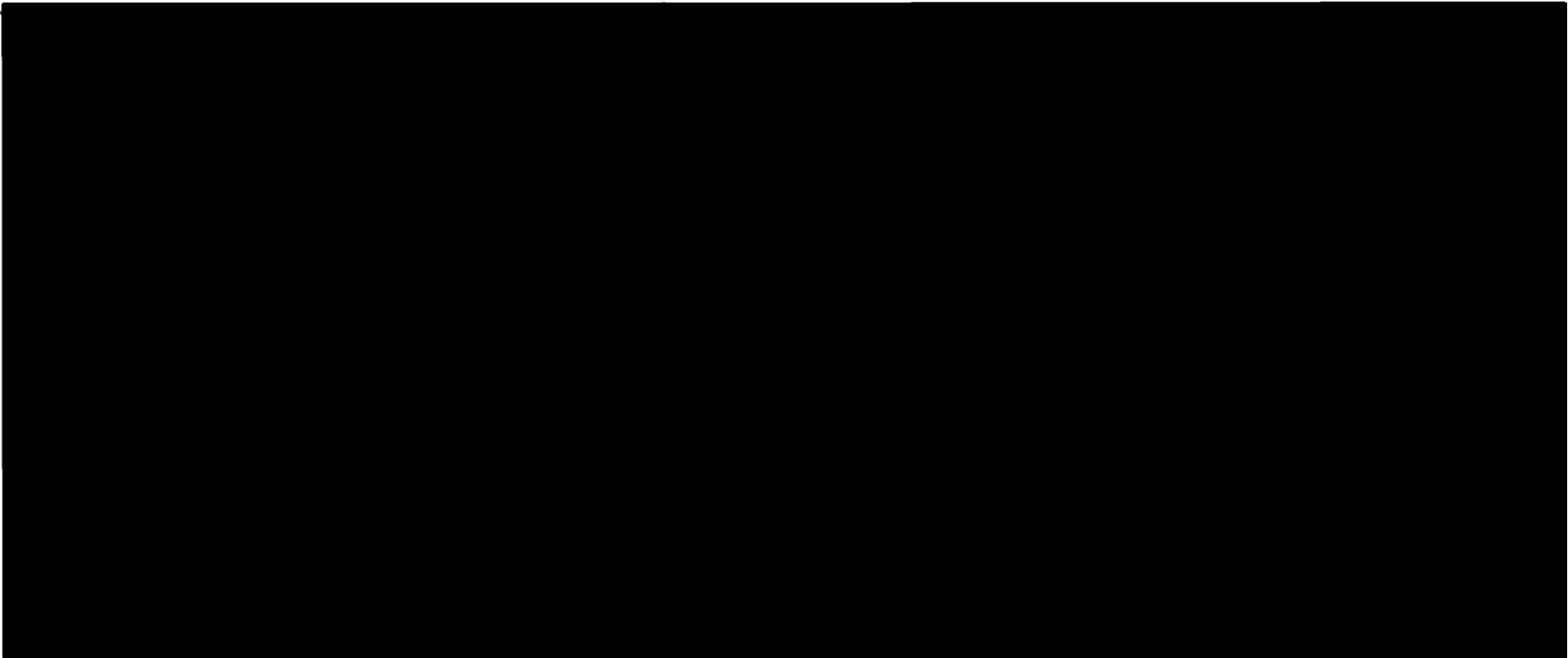


EXHIBIT D
Page 1 of 1

690

COMES NOW, Petitioners/Plaintiffs, LINDA CISZEK, et al (collectively "CISZEK") by and through their attorneys, Wetzel, Wetzel, Bredeson & Holt, P.L.L.C., and petitions this Court as set forth below:

COUNT ONE
PETITION FOR DECLARATORY JUDGMENT

1.1 CISZEK petitions this Court, pursuant to the Uniform Declaratory Judgment Act, Idaho Code § 10-1201, *et seq.*, for a judicial examination and determination that the Kootenai County Board of Commissioners ("BOARD") acted without authority on August 7, 2008, when the BOARD approved FINDINGS OF FACT, APPLICABLE LEGAL STANDARDS, COMPREHENSIVE PLAN ANALYSIS, CONCLUSIONS OF LAW AND ORDER OF DECISION in Case NO. ZON08-0001, and enacted Ordinance No. 417 ("DECISION"), true and correct copies of which are attached hereto collectively as Exhibit "A."

1.2 CISZEK owns property located at 15950 N. Knudson Road, Rathdrum, Idaho, which property is located within 300 feet of the property rezoned by the DECISION and is, therefore, an interested person as defined in Idaho Code § 10-1202.

1.3 A true judiciable controversy exists which will be terminated by the Court's judgment or decree, pursuant to Idaho Code §§ 10-1205 and 10-1206.

1.4 The property owned by CISZEK lies within Kootenai County, the DECISION was rendered in Kootenai County, and the Kootenai County Board of Commissioners have been made a party to this action. Therefore, this Court has jurisdiction and authority to consider this Petition under Idaho Code §§ 1-705, 5-401-403, and 10-1201.

1.5 The BOARD, on August 6, 2008, approved the DECISION authorizing the rezoning of two separate parcels as a "swap zone." There exists no authority under the Constitution of the State of Idaho, under the general laws of the State of Idaho, the general laws

affecting Counties or the Local Land Use Planning Act that authorizes the BOARD to change the zoning of two parcels of property by a procedure which simply swaps the zone for each parcel.

COUNT TWO
PETITION FOR JUDICIAL REVIEW

2.1 The above-named Petitioners/Plaintiffs, CISZEK, realleges and repeats as if again set forth at length each and every allegation contained in Paragraphs 1.1 through 1.5, and further alleges the following:

2.2. CISZEK appeals the DECISION to swap the zones on two separate parcels of property approved by the BOARD and enacted as Ordinance No. 417 on August 7, 2008, as an affected person under the Local Land Use Planning Act, Idaho Code Title 67, Chapter 65, specifically Idaho Code § 67-6521.

2.3. CISZEK has a right to appeal to the District Court as an affected person pursuant to Idaho Code § 67-6521 because the zoning action by the Kootenai County Commissioners is quasi-judicial by nature and a zoning permit within the meaning of said section.

2.4. A transcript of the proceedings before the Kootenai County Commissioners and the proceedings before the Kootenai County Planning and Zoning Commission in Case NO. ZON08-0001 has been requested. The estimated total record and preparation costs was paid by CISZEK in the amount of \$100.00 on September 4, 2008, and \$811.05 on September 24, 2008.

2.5. CISZEK requests the opportunity to present additional evidence to the Court as allowed under Idaho Code. § 67-5276 due to irregularities in the procedure before the Board, including that the Commissioners had ex-parte communication with individuals promoting the application of Coeur d'Alene Paving, Inc.'s request to change the zoning classification of the properties at issue in the DECISION.

2.6. The action of the BOARD to swap-zone the two parcels at issue is in violation of constitutional or statutory provisions.

2.7. The action of the BOARD to swap-zone the two parcels at issue is in excess of the statutory authority of Kootenai County.

2.8. The action of the BOARD to swap-zone the two parcels at issue is made upon unlawful procedures.

2.9. The action of the BOARD to swap-zone the two parcels at issue is not supported by substantial evidence on the record as a whole.

2.10. The action of the BOARD to swap-zone the two parcels at issue is arbitrary, capricious, or an abuse of discretion.

2.11. Substantial rights of CISZEK have been affected.

COUNT THREE
COMPLAINT

3.1 In the alternative, the above-named Petitioners/Plaintiffs, CISZEK, realleges and repeats as if again set forth at length each and every allegation contained in Paragraphs 1.1 through 1.5, Paragraphs 2.1 through 2.12, and further alleges the following:

3.2. CISZEK has a right to bring an action to the District Court as a civil action commenced by the filing of a complaint as allowed under Rule 3(a) of the Idaho Rules of Civil Procedure.

3.3 Defendant Kootenai County is a body politic and corporate; a political subdivision of the state with the power to sue and be sued as set forth in Idaho Code § 31-604. and is a person subject to the jurisdiction of Courts of this state pursuant to Idaho Code § 5-514.

3.4 Venue is proper pursuant to Idaho Code § 5-403.

3.5 The DECISION of the BOARD which rezoned two separate parcels of property through a procedure which swapped the zones of each parcel was an ultra vires act.

3.6 The resulting rezone resulted in a decrease in value of the property owned by CISZEK without due process of law.

3.7 That service of this Petition/Appeal/Complaint has been made upon all parties required to be served pursuant to Rule 4(d)(5), Idaho Rules of Civil Procedure.

WHEREFORE, Petitioners/Plaintiffs prays for judgment against Respondent/Defendant, as follows:

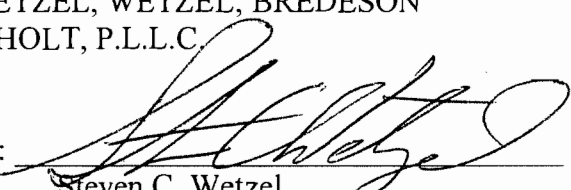
1. For an order vacating the DECISION.
2. For an amount equal to the amount that Plaintiff's property has been devalued by the DECISION, such amount to be proven at trial, to be not less than \$10,000.00.
3. For reasonable costs and attorney's fees incurred in pursuing this claim pursuant to Idaho Code §§ 10-1210, 12-117 and 12-121. In the event of default the amount of such attorney fees shall equal \$8,000.00.
5. For such other and further relief as the Court deems just and reasonable.

Petitioners/Plaintiffs request a court trial.

DATED this 25th day of September, 2008.

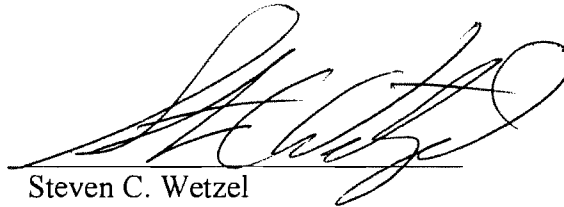
WETZEL, WETZEL, BREDESON
& HOLT, P.L.L.C.

By:


Steven C. Wetzel
Attorneys for CISZEK

CERTIFICATION

I, Steven C. Wetzel, attorney for the Petitioners/Plaintiffs in the above entitled matter, hereby certify that service of this Petition has been made upon the Board of County Commissioners, and that the clerk of such Board has been paid the estimated fee for preparation of the transcript.



Steven C. Wetzel

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COMES NOW, Petitioners/Plaintiffs, LINDA CISZEK, et al (collectively "CISZEK") by and through their attorneys, Wetzel, Wetzel, Bredeson & Holt, P.L.L.C., pursuant to Idaho Rules of Civil Procedure 84(g) and moves the Court for an Order limiting the transcript in the above referenced matter. The issue brought before the Court is whether Kootenai County has the authority to "swap-zones." This issue arises out of the request by Coeur d'Alene Paving Company to have two separate parcels re-zoned by swapping the zones for each parcel. The zoning for each parcel was combined into one zoning case identified in the Kootenai County Planning Department as Case No. ZON08-001.

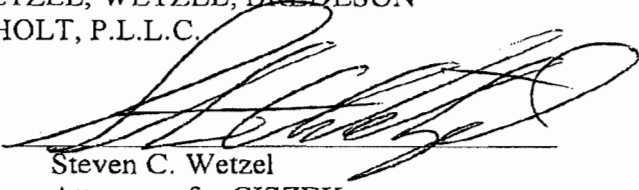
Three public hearings were held to accept public comment and deliberations on the requested zoning. A public hearing was held on March 6, 2008, before a Hearing Examiner. As stated in the Affidavit of Steven C. Wetzel, filed on even date herewith and attached hereto for convenience of the Court, the Hearing Examiner received no testimony concerning the authority of the County to "swap-zones" as a method of re-zoning property and made no deliberations regarding this issue. A public hearing was held before the Board of Kootenai County Commissioners on May 8, 2008. As stated in the Affidavit of Steven C. Wetzel, the only testimony presented during the hearing regarding "swap-zoning" occurred in the last 15 minutes of public testimony at the hearing. The public hearing before the Board of Kootenai County Commissioners on June 26, 2008, contained no additional testimony or deliberations, as stated in the Affidavit of Steven C. Wetzel.

CISZEK, respectfully requests that the preparation of a transcript in this case be limited to the application, staff report, the testimony of Steven C. Wetzel, the testimony of Freeman Duncan, applicant's rebuttal at the hearing held on May 8, 2008, the deliberations of the Board of Commissioners of July 10, 2008, that relate to "swap zoning" and any portion of the

discussion of the Board of Commissioners on August 7, 2008, that relates to "swap zoning." An Order is attached for the Court's consideration.

DATED this 6th day of November, 2008.

WETZEL, WETZEL, BREDESON
& HOLT, P.L.L.C.

By: 
Steven C. Wetzel
Attorneys for CISZEK

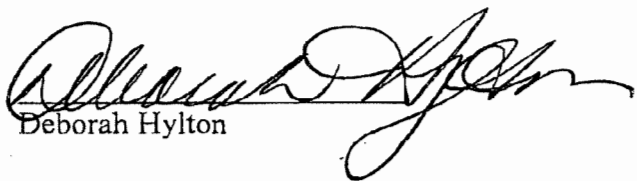
CERTIFICATE OF MAILING AND/OR DELIVERY

I hereby certify that on the 6th day of November, 2008, I served the foregoing document upon:

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Facsimile 446-1621


Jethelyn H. Harrington
Kootenai County Department of Legal
Services
P.O. Box 9000
Coeur d'Alene, Idaho 83816-9000

Attorney for Defendant


Deborah Hylton

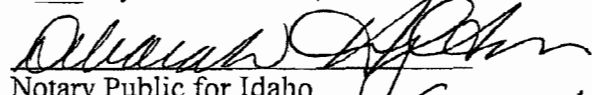
s:\files\ciszek, linda\appeal to district court\pleadings\motion to limit transcript.doc

FURTHER YOUR AFFIANT SAITH NOT


Steven C. Wetzel

SUBSCRIBED AND SWORN TO BEFORE ME this 6th day of November, 2008




Notary Public for Idaho
Residing at Kootenai County
Commission Expires: 10-16-2012

CERTIFICATE OF MAILING AND/OR DELIVERY

I hereby certify that on the 6th day of November, 2008, I served the foregoing document upon:

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Facsimile 446-1621

Jethelyn H. Harrington
Kootenai County Department of Legal
Services
P.O. Box 9000
Coeur d'Alene, Idaho 83816-9000

Attorney for Defendant


Deborah Hylton

s:\files\ciszek, linda\appeal to district court\pleadings\affidavit of steve re limit transcript.doc

AFFIDAVIT OF STEVEN C. WETZEL
IN SUPPORT OF MOTION TO LIMIT TRANSCRIPT -3

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED

2006 NOV 10 PM 3:29

CLERK DISTRICT COURT

DEPUTY

Sherry Hubbsma

Steven C. Wetzel ISB # 2988
Kevin P Holt ISB # 7196
WETZEL & WETZEL, P.L.L.C.
1322 Kathleen Ave., Suite 2
Coeur d'Alene, Idaho 83815
Telephone: (208) 667-3400
Facsimile: (208) 664-6741

Attorneys for CISZEK

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

LINDA CISZEK, individually; RONALD G.
WILSON and LINDA A. WILSON, husband
and wife; BILL DOLE and MARIAN DOLE,
husband and wife; MIKE ANDERSON and
RAYELLE ANDERSON, husband and wife;
JOE CULBRTH and SHARON
CULBRTH, husband and wife; KIRK
HOBSON and KIMBERLY HOBSON,
husband and wife; SETH MOULDING and
JENNIFER MOULDING, husband and wife;
CASY NEAL and KRISTIN NEAL, husband
and wife; and WILLIAM GIRTON and
DOLLY GIRTON, husband and wife,

Petitioners/Plaintiffs,

vs.

BOARD OF COMMISSIONERS,
KOOTENAI COUNTY, STATE OF IDAHO,

Respondent/Defendant.

Case No. CV-08-7074

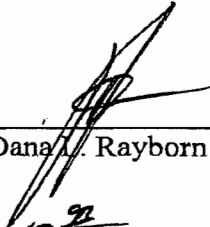
AFFIDAVIT OF DANA L. RAYBORN
WETZEL IN SUPPORT OF
MEMORANDUM OPPOSING MOTION
TO DISMISS

AFFIDAVIT OF DANA L. RAYBORN WETZEL IN SUPPORT OF MEMORANDUM
OPPOSING MOTION TO DISMISS -1

6. At 10:05 am September 26, 2008 our office received a faxed copy of a NOTICE OF HEARING ON MOTION TO DISMISS from the Kootenai County Department of Legal Services.

7. The MEMORANDUM IN SUPPORT OF MOTION TO DISMISS explaining the grounds for the MOTION TO DISMISS was received in our office with delivery of the United States mail on September 26, 2008.

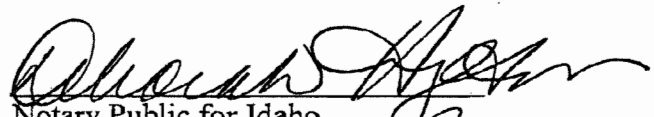
FURTHER YOUR AFFIANT SAITH NOT



Dana L. Rayborn Wetzel

SUBSCRIBED AND SWORN TO BEFORE ME this 10th day of November, 2008




Notary Public for Idaho
Residing at KOOTENAI COUNTY
Commission Expires: 10-16-2012

AFFIDAVIT OF DANA L. RAYBORN WETZEL IN SUPPORT OF MEMORANDUM
OPPOSING MOTION TO DISMISS -3

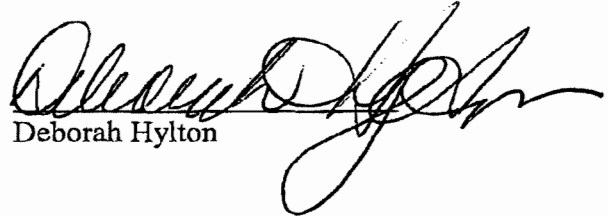
CERTIFICATE OF MAILING AND/OR DELIVERY

I hereby certify that on the 10 day of November, 2008, I served the foregoing document upon:

U.S. Mail
 Hand Delivered
 Overnight Mail
 Facsimile 446-1621

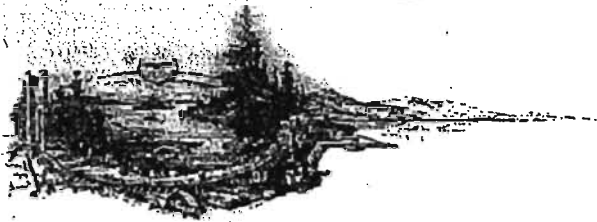
Jethelyn H. Harrington
Kootenai County Department of Legal
Services
P.O. Box 9000
Coeur d'Alene, Idaho 83816-9000

Attorney for Defendant


Deborah Hylton

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AFFIDAVIT OF DANA L. RAYBORN WETZEL IN SUPPORT OF MEMORANDUM
OPPOSING MOTION TO DISMISS -4



KOOTENAI COUNTY BUILDING & PLANNING DEPARTMENT

Memo

To: Dana Wetzel
Wetzel, Wetzel, Bradeson & Holt, P.L.L.C.
Sandi

From: Sandi Gilbertson, Administrative Supervisor

Re: Cost Estimate - Preparation of Record
Case No. ZON08-0001 Coeur d'Alene Paving

Date: September 5, 2008

DANA
(copy in file)

Following is an estimated cost for preparation of the Transcript and Record pertaining to Case No. ZON08-0001:

The above case was heard on the following dates:

March 6, 2008	Hearing Examiner hearing
May 8, 2008	BOCC Public Hearing
June 26, 2008	BOCC Public Hearing
July 10, 2008	BOCC Deliberations
August 7, 2008	BOCC Signing

Estimated length of transcript = (150) pages @ \$4.50 per page	\$ 675.00	
Two additional copies @ \$0.05/page	\$ 15.00	
TRANSCRIPT TOTAL (3 SETS)		\$690.00

Estimation for copy of Case File:		
512 black & white, 8 1/2 X 11 pages @ \$0.05/page	\$ 25.60	
43 color, 8 1/2 X 11 @ \$0.25/page	\$ 10.75	
2 oversized maps approximately \$2.00 each	\$ 4.00	
1 large color map approximately \$25.00	\$ 25.00	
	\$ 65.35	
CASE FILE TOTAL (3 SETS)		\$196.05

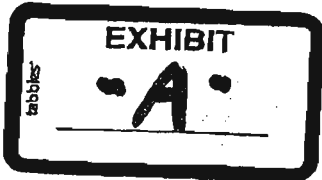
Time spent on Estimate		
1.0 hours @ \$25.00/hour		\$ 25.00

811.05
9-24-08 paid
OK # 18369

ESTIMATED TOTAL RECORD & PREPARATION COSTS = \$911.05

cc: Pat Braden
Kootenai County Legal Counsel

Phone (208) 446-1070 • Fax (208) 446-1071
451 Government Way • P.O. Box 9000 • Coeur d'Alene, ID 83816-9000



STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2008 SEP 25 AM 11:37

CLERK DISTRICT COURT

DEPUTY

Steven C. Wetzel ISB # 2988
Kevin P Holt ISB # 7196
WETZEL & WETZEL, P.L.L.C.
1322 Kathleen Ave., Suite 2
Coeur d'Alene, Idaho 83815
Telephone: (208) 667-3400
Facsimile: (208) 664-6741

Attorneys for LINDA CISZEK

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

LINDA CISZEK, individually; RONALD G.)	
WILSON and LINDA A. WILSON, husband	)	Case No. CV-08-7074
and wife; BILL DOLE and MARIAN DOLE,)	
husband and wife; MIKE ANDERSON and	)	AFFIDAVIT OF SERVICE
RAYELLE ANDERSON, husband and wife;)	
JOE CULBRTH and SHARON)	
CULBRTH, husband and wife; KIRK)	
HOBSON and KIMBERLY HOBSON,)	
husband and wife; SETH MOULDING and)	
JENNIFER MOULDING, husband and wife;)	
CASY NEAL and KRISTIN NEAL, husband)	
and wife; and WILLIAM GIRTON and)	
DOLLY GIRTON, husband and wife,)	
)	
Petitioners/Plaintiffs,)	
)	
vs.)	
)	
BOARD OF COMMISSIONERS,)	
KOOTENAI COUNTY, STATE OF IDAHO,)	
)	
Respondent/Defendant.)	



COMES NOW, Petitioners/Plaintiffs, LINDA CISZEK, et al (collectively "CISZEK") by and through their attorneys, Wetzel, Wetzel, Bredeson & Holt, P.L.L.C., and hereby presents this MEMORANDUM IN OPPOSITION OF DEFENDANT/RESPONDENT'S MOTION TO DISMISS.

1. STANDARD OF REVIEW (Jurisdiction under I.R.C.P. 12(b))

The only facts in the record, presented by defendants (BOCC) through the affidavit of Sandi Gilbertson, do not address the issue of jurisdiction. Although the BOCC presents its MOTION TO DISMISS as a factual challenge regarding jurisdiction under Rule 12(b)(1), only the four corners of the complaint are needed to reach the legal conclusion requested by the BOCC. The tests are, does this court have jurisdiction: a) to issue a declaratory judgment; b) to consider an appeal of the zoning decision as a petition for judicial review pursuant to the Administrative Procedures Act or; c) to conduct a trial de novo under a takings claim. Because no facts are at issue under any of the three tests for jurisdiction, the motion to dismiss should be treated as one for summary judgment and disposed of as provided in IRCP Rule 56.¹ On a motion to dismiss, the court should look only at the pleadings and view all inferences in favor of the non-moving party.² No record has yet been produced in this case. Only the pleadings are at issue.

¹ *Owsley v. Idaho Industrial Commission*, 141 Idaho 129, 133 (2005) citing *Osborn v. United States*, 918 F.2d 724. In a footnote on page 123 of the decision the Idaho Supreme Court points out that while facial challenges provides the non-movant the same protections as under a 12(b)(6) motion, factual challenges, on the other hand allow the court to go outside of the pleadings without converting the motion into one for summary judgment. However, contrary to the position taken by the BOCC, the Court held that only the legal conclusion reached within the four corners of the complaint were necessary to determine the constitutional challenge presented in that case. *Owsley* therefore supports CISZEK'S position that only the legal conclusions reached within the four corners of CISZEK'S complaint are necessary to determine the BOCC MOTION TO DISMISS.

² *Owsley Id.*; *Mitchell v. Siqueiros*, 99 Idaho 396, 582 P.2d 1074 (1978); *Young v. City of Ketchum*, 137 Idaho 102, 44 P.3d 1157 (2002); *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 987 P.2d 300 (1999); *U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P3d 600 (2007).

2. PAYMENT OF FEES AND COSTS

The BOCC also supports its motion to dismiss by establishing through affidavit of Sandi Gilbertson that as of September 19, 2008, only \$100.00 of estimated fees for preparation of the transcript and record in case no ZON08-001 had been paid. CISZEK filed a PETITION FOR DECLARATORY JUDGMENT, PETITION FOR JUDICIAL REVIEW AND COMPLAINT on September 4, 2008 and paid an estimated fee for a limited transcript and record in the amount of \$100.00. An AMENDED PETITION FOR DECLARATORY JUDGMENT, PETITION FOR JUDICIAL REVIEW AND COMPLAINT was filed at 9:20 am on September 25, 2008. As stated in the AMENDED PETITION FOR DECLARATORY JUDGMENT, PETITION FOR JUDICIAL REVIEW AND COMPLAINT and in the Affidavit of Dana L. Rayborn Wetzel, filed on even date herewith, the remaining fees for preparation of the transcript and record were paid to the Kootenai County Planning Department at 9:10 am on September 25, 2008. The AMENDED PETITION FOR DECLARATORY JUDGMENT, PETITION FOR JUDICIAL REVIEW AND COMPLAINT was served on the Kootenai County Board of Commissioners at 9:30 am on September 25, 2008. The remaining fees were paid and the BOCC was served with notice that the fees were paid the day before the BOCC filed its MOTION TO DISMISS. No delay or prejudice was suffered by the BOCC in the 20 days separating the payment of \$100.00 and payment of an additional \$811.20 for the estimated fees of preparing the full transcript and record.

When ruling on a motion to dismiss, a judge should consider the length of delay occasioned by the failure to prosecute, the justification, if any, for such delay, and the resultant prejudice to the defendant. *Grant v. City of Twin Falls*, 113 Idaho 604, 746 P.2d 1063 (Ct. App. 1987). The Idaho Supreme Court has made it clear that the moving party must identify prejudice

occasioned by the delay in a plaintiff's payment of fees for preparation of the transcript and record before a dismissal is proper. *Aho v. Idaho Transportation Department*, ___ Idaho ___, 177 P.3rd 406 (2008). It is an abuse of discretion according to the Supreme Court to use the power of dismissal to punish a period of delay which no longer exists if the defendant has not established prejudice resulting from the delay; this rule places key emphasis upon demonstrated prejudice to the defendant's ability to present a defense rather than upon the length of the period of delay per se. *Systems Assocs. v. Motorola Communications & Elecs., Inc.*, 116 Idaho 615, 778 P.2d 737 (1989). There must be actual, demonstrated prejudice to the moving party. *Gerstner v. Washington Water Power Co.*, 122 Idaho 673, 837 P.2d 799 (1992). The Supreme Court has held that there is no error in the dismissal of a motion to dismiss where the defendants made no showing of prejudice caused by the delay in the case except for general concerns about the passage of time. *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 982 P.2d 917 (1999). The prejudice at issue should be the substantial inconvenience and effort required of this court to review, hear and determine a frivolous motion.³

CISZEK challenges the process followed by the BOCC to rezone two separate parcels of property. There is no "swap-zoning" process in the Land Use Planning Act, or the zoning and related ordinances of Kootenai County or the Constitution of the State of Idaho. In the Motion to Limit Transcript and supporting affidavits filed on even date herewith, CISZEK brings to the attention of this court that little of the record and testimony in Case No. ZON08-001 addressed the process followed by the BOCC to swap-zone the parcels at issue. Should this court grant CISZEK'S motion, CISZEK will have over-paid the estimated fees to produce the transcript and record in this case. As a result, the only inconvenience suffered by the BOCC will be the time

³ It should be noted for purposes of clarification that a record and transcript are only required to be produced if the case at bar goes forward as a Judicial Review of a land use planning decision under the Administrative Procedures Act.

required to return funds to CISZEK. However, the inconvenience and cost to CISZEK to respond to the BOCC'S MOTION TO DISMISS is substantial and a request for attorney's fees and costs is set forth herein.

3. THERE MAY NO LONGER BE A RIGHT TO APPEAL
A ZONING DECISION AS A PETITION FOR JUDICIAL REVIEW

CIZEK'S second cause of action, a request for Judicial Review under the Administrative Procedures Act may be moot. Before the opinion issued by Idaho Supreme Court in *Highlands Development Corporation v. City of Boise* 08.14 ISCR 722, ___ Idaho ___, ___ P3rd ___ (2008), appeals from zoning decisions made by a governing board such as the Kootenai County Board of Commissioners (the "BOCC") were considered an action by an "affected person" under the Local Land Use Planning Act (LLUPA), Idaho Code Section 67-6521 *et. seq.* As an affected person, after all remedies had been exhausted under local ordinances, the appellant could seek judicial review as provided by chapter 52, title 67, Idaho Code.⁴ In fact, specific decisions of the Idaho Supreme Court determined that for purposes of judicial review of decisions made under LLUPA, such decisions were to be treated as decisions made by a government agency under Idaho Code section 67-6501 *et seq.*⁵ Although the facts in *Highlands* involve a review of a zoning decision made in conjunction with a request for annexation, the opinion appears to have broader ramifications concerning the application of 67-6521 to all decisions by the BOCC concerning zoning of property. If this analysis and application of *Highlands* is correct, CISZEK no longer enjoys a right to appeal a zoning decision under Idaho

⁴ *Price v. Payette County Bd. Of County Com'rs*, 131 Idaho 426, 958 P.2d 583 (1998); *Evans v. Teton County*, 139 Idaho 71, 73 P3d 84 (2003); *Grubb & Associates, Inc. v. City of Hailey*, 127 Idaho 576, 903 P.2d 741 (1995); *Ferguson v. Board of County Com'rs for Ada County*, 110 Idaho 785, 718 P2d 1223 (1986); *Balser v. Kootenai County Bd. Of Com'rs*, 110 Idaho 37, 714 P2d 6 (1986); *Love v. Board of County Com'rs of Bingham County*, 105 Idaho 558, 671 P.2d 471 (1983).

⁵ *Evans v. Teton County*, 139 Idaho 71, 73 P.3d 84 (2003); *Workman Family Partnership v. City of Twin Falls*, 104 Idaho 32, 655 P.2d 926 (1982).

Code Section 67-6521 nor seek judicial review of such decision under chapter 67 title 52, Idaho Code.

The appellant in *Highlands* was denied the right of appeal under Idaho Code section 67-5273. The Court first determined that section 67-5273, as part of the Idaho Administrative Procedures Act (IAPA), does not grant the right to review decisions made by counties or cities.⁶ The zoning determination made in *Highlands*, according to this new decision is not a permit authorizing development or any other type of permit described under LLUPA⁷ and therefore the appellant had no right to an appeal under LLUPA.

In the facts at bar, the zoning decision is not part of a request for annexation. However, there is no reference in LLUPA to the act of zoning being a "permit authorizing development". To qualify for the right to appeal under section 67-6521, the applicant must be appealing a permit authorizing development.

Actions by affected persons

(1)(a) As used herein, an affected person shall mean one having an interest in real property which may be adversely affected by the issuance or denial of a permit authorizing the development.
I.C. section 67-6521.

To support our conclusion that under the application of *Highlands*, CISZEK is precluded from seeking appeal under Idaho Code sections 67-6521 and 67-5201 *et. seq.* we bring to the court's attention the dissenting opinion in *Highlands*. There, Justice Jim Jones points out that the opinion effectively forecloses review of quasi-judicial zoning decisions under Idaho Code sections 67-5201 *et. seq.*

⁶ *Highlands* at 3.

⁷ *Highlands* at 4 "LLUPA grants the right of judicial review to persons who have applied for a permit required or authorized under LLUPA and were denied the permit or aggrieved by the decision on the application for the permit""As we said in *Giltner*, "Idaho Code section 67-6519 applies to applications for a permit required or authorized under Chapter 65 of Title 67, Idaho Code." ___ Idaho ___, 181 P.3d at 1241" (2008).

The opinion will prevent property owners from obtaining judicial review of decisions downzoning their property and preclude unhappy neighbors from challenging decisions to upzone adjacent property. Historically, this Court has extended review to quasi-judicial zoning decisions. (citations omitted)

Highlands at 7.

To this dissent the majority responds:

The dissent also argues that this opinion “will prevent property owners from obtaining judicial review of decisions downzoning their property.” It will not. As we recognized in *McCuskey v. Canyon County Commissioners*, 128 Idaho 213, 912 P.2d 100 (1996), such landowners can seek relief in an independent action.

Highlands at 6-7.

We conclude from this inter-court dialog that aggrieved persons seeking redress of a zoning decision should no longer look to LLUPA and IDAPA for a statutory right for appeal. The independent actions available to CISZEK are based in declaratory action or a civil action alleging takings/inverse condemnation. The action filed by CISZEK on September 4, 2008, therefore, contained two independent actions, one for a declaratory judgment and one for damages based upon a takings claim.

The legal document bringing CISZEC’S grievance before this court is entitled PETITION FOR DECLARATORY JUDGMENT, PETITION FOR JUDICIAL REVIEW AND COMPLAINT. Each cause of action and claim for relief is pled in the alternative. The BOCC cites no cases to support its statement that “the Court cannot overcome its lack of subject matter jurisdiction on the declaratory action to address the petition for judicial review⁸” because there are none. Rule 8(e)(2) of the I.R.C.P. specifically provides for pleadings in the alternative. The

⁸ BOCC MEMORANDUM IN SUPPORT OF MOTION TO DISMISS UNDER I.R.C.P. 12(B)(1), p. 11.

ultimate election of the appropriate statement of claim is left to the court.⁹ If the Court finds that it does not have subject matter jurisdiction in one of the alternative claims for relief, the court may proceed with the alternate claims.

One more interesting wrinkle in the law should be discussed at this point. After CISZEK filed the PETITION FOR DECLARATORY JUDGMENT, PETITION FOR JUDICIAL REVIEW AND COMPLAINT the Idaho Supreme Court filed a new decision, *Euclid Avenue Trust v. City of Boise*, 08.20 ISCR 1015 (September 23, 2008), apparently holding that a request for judicial review should be filed separately from any other civil cause of action. Should this court determine that a zoning decision can be challenged as a petition for judicial review through the appeal procedure set forth in LLUPA, then CISZEK requests this court to consider CISZEK'S MOTION TO BIFURCATE CLAIM, filed on even date herewith, so that the Petition for Judicial Review can be heard separately from the remaining civil actions. Ultimately, CISZEK's grievance springs from the diminution of value to the surrounding residential properties cause by the *ultra vires* "swap-zone" decision of the BOCC. CISZEK has stated three separate claims upon which relief can be granted and respectfully requests this court to deny the BOCC motion to dismiss.

4. ATTORNEY'S FEES UNDER I.C. SECTIONS 12-117 AND 12-121

A judge may award reasonable attorney's fees to the prevailing party when an action is brought frivolously.¹⁰ The motion brought by the BOCC is groundless post *Highlands*. It is an unfair and unjustified burden for CISZEK to bring a new case to the attention of the BOCC through response to a motion to dismiss.

⁹ *M.K. Transp., Inc. v. Grover*, 101 Idaho 345, 612 P.2d 1192 (1980); *Evans v. Jensen*, 103 Idaho 937, 655 P.2d 454 (1982).

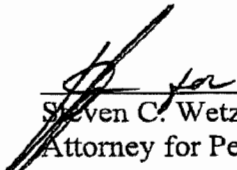
¹⁰ I.C. Section 12-121; *Hooper v. State*, 127 Idaho 945, 908 P.2d 1252 (1995); *Bogner v. State Department of Revenue and Taxation*, State Tax Com's 107 Idaho 854, 693 P.2d 1056 (1984); *Hughes v. Fisher*, 142 Idaho 474, 129 P.3d 1223 (2005).

A judge may award attorney's fees against a county if the court finds that the county acted without a reasonable basis in fact or law¹¹ to serve as a deterrent to groundless or arbitrary actions.¹² Again, the motion brought by the BOCC is groundless post *Highlands*. Although the BOCC also supports its motion by complaining that the estimated fees had not been paid, the BOCC provided no evidence of delay or prejudice as required in a motion to dismiss¹³ and, before the MOTION TO DISMISS had been filed, the fees were paid. Had the Kootenai County Department of Legal Services simply checked with the Clerk of the Court, the Kootenai County Planning Department or the Board of County Commissioners, they would have been informed that the fees had been paid.

In responding to this motion, not only has the court been inconvenienced, CISZEK has incurred unnecessary costs and attorney's fees. CISZEK respectfully requests that these costs and fees be reimbursed.

DATED this 10th day of November, 2008.

WETZEL, WETZEL, BREDESON
& HOLT, P.L.L.C.



Steven C. Wetzel
Attorney for Petitioners/Plaintiffs

¹¹ I.C. Section 12-117

¹² *Action Committee v. City of Boise*, 136 Idaho 666, 39 P.3d 606 (2001); *Excell v. Department of Commerce and Labor*, 2008-ID-R0606-004.

¹³ *Aho v. Idaho Transportation Department*, ___ Idaho ___, 177 P.3rd 406 (2008); *Systems Assocs. v. Motorola Communications & Elecs., Inc.*, 116 Idaho 615, 778 P.2d 737 (1989); *Gerstner v. Washington Water Power Co.*, 122 Idaho 673, 837 P.2d 799 (1992); *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 982 P.2d 917 (1999).

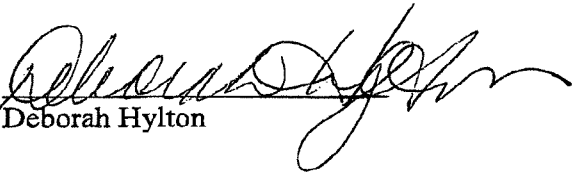
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Jethelyn H. Harrington
Kootenai County Department of Legal
Services
P.O. Box 9000
Coeur d'Alene, Idaho 83816-9000

Attorney for Defendant


Deborah Hylton

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COMES NOW, Petitioners/Plaintiffs, LINDA CISZEK, et al (collectively "CISZEK") by and through their attorneys, Wetzel, Wetzel, Bredeson & Holt, P.L.L.C., pursuant to Idaho Rules of Civil Procedure 42(b) and moves the Court for an Order bifurcating the claims for relief presented in CISZEK'S AMENDED PETITION FOR DECLARATORY JUDGMENT, PETITION FOR JUDICIAL REVIEW AND COMPLAINT. Although the transcript and record produced in the zoning decision by the Kootenai County Board of Commissioners in Case No. ZON08-001 is relevant in each cause of action pled by CISZEK, it appears from our reading of a new case filed on September 23, 2008, from the Idaho Supreme Court¹ that a plaintiff may no longer combine a prayer for judicial review with a prayer for any other civil relief. CISZEK has pled her case in the alternative recognizing that she has the right to seek relief under different theories of law. CISZEK chose to present a consolidated pleading because all claims arise out of the same state of facts, and one court review of the facts would avoid unnecessary costs or delay. However, in order to act in accordance with *Euclid*, this court may determine that bifurcating the judicial review of the issue of "swap zoning" from the request for declaratory action on the same issue and the takings claim on the same issue is now required.

CISZEK, respectfully requests that the AMENDED PETITION FOR DECLARATORY JUDGMENT, PETITION FOR JUDICIAL REVIEW AND COMPLAINT filed herein be bifurcated into one action titled AMENDED PETITION FOR DECLARATORY JUDGMENT, AND COMPLAINT and into one other action titled PETITION FOR JUDICIAL REVIEW.

¹ *Euclid Avenue Trust, Trustee Services, Inc., Trustee v. City of Boise*, 08.20 ISCR 1015 (2008)

DATED this 10th day of November, 2008.

WETZEL, WETZEL, BREDESON
& HOLT, P.L.L.C.

By: 

Steven C. Wetzel
Attorneys for CISZEK

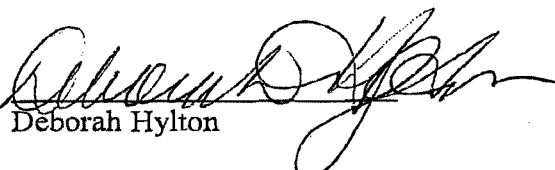
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Jethelyn H. Harrington
Kootenai County Department of Legal
Services
P.O. Box 9000
Coeur d'Alene, Idaho 83816-9000

Attorney for Defendant


Deborah Hylton

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Kootenai County Department of Legal Services
Jethelyn H. Harrington, ISB #7471
451 N. Government Way
P.O. Box 9000
Coeur d'Alene, ID 83816-9000
Phone: (208) 446-1620
Fax: (208) 446-1621

Attorney for Defendants

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2008 NOV 12 PM 12:20

CLERK DISTRICT COURT
Barb Crump
DEPUTY

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

LINDA CISZEK, *et al.*,

Plaintiff,

vs.

THE KOOTENAI COUNTY BOARD OF
COMMISSIONERS,

Defendant.

Case No. **CV-08-7074**

**SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF MOTION TO
DISMISS**

COMES NOW the Defendant, The Kootenai County Board of Commissioners, by and through their attorney, Jethelyn H. Harrington, of the Kootenai County Department of Legal Services, and hereby presents this Supplemental Memorandum in Support of its Motion to Dismiss under Idaho Rule of Civil Procedure 12(b)(1).

- I. **A Petitioner may not combine an administrative appeal and an original action in one proceeding.**

Actions seeking civil damages or declaratory relief may not be combined



ORIGINAL

with petitions for judicial review under the Idaho Administrative Procedures Act (I.D.A.P.A.). *Euclid Avenue Trust, Trustee Services Inc., Trustee v. City of Boise*, 08.20 ISCR 1015, (2008). (Although the Defendant realizes that *Euclid* has not yet been published in the Idaho Court Reporter and is therefore not controlling, the Defendant would still put this very recent Idaho Supreme Court case forward for the Court's consideration.) In *Euclid*, the Plaintiffs filed a combined Complaint, Petition for Judicial Review and Request for Jury Trial, against the City of Boise. Prior to filing, the City of Boise had declared three of the Plaintiff's building projects nuisances when the Plaintiff commenced the moving of houses onto lots without building permits. *Id.* at 1015. The Plaintiff filed his action under the A1 (civil complaint) fee category, and asked for monetary damages, a writ of mandamus, declaratory relief and judicial review. *Id.*

The Idaho Supreme Court held that the Idaho Administrative Procedures Act (Chapter 67, Title 52, Idaho Code) provides the scope of review and the type of relief available for administrative appeals as found in Idaho Code § 67-5279, which states "If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary." *Id.* at 1016. The Court held that because I.C. § 67-5279 failed to mention "any further remedial measures, it [was] reasonable to conclude that combining a claim for civil damages with a petition for judicial review [was] not a permissible course of action." *Id.*

The Court also looked to the Idaho Rules of Civil Procedure for help in determining whether administrative appeals and original actions could be

combined. *Id.* While reviewing I.R.C.P. 84(a)(1) the Court found that the aforementioned rule “specifically allows one to combine a petition for judicial review with a request for common law or equitable writ, but says nothing about seeking declaratory or monetary relief in a judicial review proceeding.” The Court then concluded that when combinations of distinct types of proceedings are permitted, they are “done pursuant to statute or court rule,” and since there was no statute or rule that provided for the inclusion of civil complaints or declaratory actions with administrative appeals such combinations were not lawful. *Id.* *Expressio unius est exclusion alterius.*

The Court also held that judicial policy precluded the combining of administrative appeals and original actions stating:

The separation of civil actions and administrative appeals is supported by good policy underpinnings. After all, one proceeding is appellate in nature and the other is an original action. They are processed differently by our courts. Discovery is rarely available in a judicial review. The review is to be conducted on the record, absent specific authorization. I.C. § 67-5276. The standards for determining an outcome are specified by statute (I.C. § 67-5279), whereas this is not the case with actions seeking declaratory or monetary relief.

Id.

Finally, the Court found that confusion stemmed from the fee category under which the Petition/Complaint in *Euclid* was filed. Because *Euclid* filed the Petition/Complaint under the A1 fee category, the court would consider the entire appeal as an appeal of a civil action rather than an administrative appeal. *Id.*

In this case, the fact pattern is remarkably similar to the one in *Euclid*. Here the Court is being asked to handle a Petition for Declaratory Judgment, a

Petition for Judicial Review and a Complaint; two original actions and one appeal. The Declaratory Judgment/Petition for Judicial Review/Complaint (Complaint) in this matter prays for an order vacating the decision of the Kootenai County Board of Commissioners, and also asks for an amount of monetary damages not less than \$10,000.00. Furthermore, the Complaint was also filed under the fee categories A1 and G3 (Respondent was not able to locate a G3 category in the Idaho Rules of Civil Procedure), not the R2 category of an administrative appeal.

In other words, the Plaintiffs have bitten off more than they can chew. If the Plaintiff's were merely appealing an administrative decision they would be precluded from seeking any other form of relief other than those outlined in I.C. § 67-5279; either having the decision affirmed or set aside and remanded for further proceedings. Idaho Rule of Civil Procedure 84(a)(1) also prevents the filing of administrative appeals combined with anything other than an equitable or common law writ. Moreover, the Plaintiff's filed this action under the fee category for an original complaint and not under the fee category of administrative appeal.

For all intents and purposes the Plaintiff's have filed an original action which happens to make a mention of an administrative appeal. Due to this choice made by the Plaintiffs, their Petition for Declaratory Judgment, Petition for Judicial Review and Complaint, must be considered an original action. The Plaintiffs may only file for judicial review of an administrative decision. They have failed to exhaust administrative remedies under the Local Land Use Planning Act and the Idaho Administrative Procedures Act. I.C. §§ 67-6521(d) and 67-5270(1)

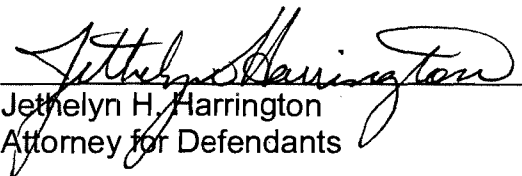
and (3). Moreover, because the Plaintiffs have failed to exhaust administrative remedies this court does not have subject matter jurisdiction and should dismiss this action under I.R.C.P. 12(b)(1). For further evidence in support of this argument, the Respondent would refer the Court to its original Memorandum in Support of Motion to Dismiss under I.R.C.P. 12(b)(1).

CONCLUSION

Given the reasons cited by the Idaho Supreme Court in *Euclid* the Plaintiff's action must be considered original in nature. Furthermore, by filing an original action which seeks to overturn an administrative decision the Plaintiff's have failed to exhaust their administrative remedies under the Local Land Use Planning Act and the Idaho Administrative Procedures Act. Therefore, this Court lacks subject matter jurisdiction under I.R.C.P. 12(b)(1) and must dismiss this case.

Dated this 12th day of November, 2008.


Kootenai County Department of
Legal Services


Jethelyn H. Harrington
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of November, 2008, I caused to be sent a true and correct copy of the foregoing via first class mail to:

Steven C. Wetzel
Kevin P. Holt
Dana Rayborn Wetzel
Wetzel &Wetzel, P.L.L.C.
1322 Kathleen Ave., Suite 2
Coeur d'Alene, Idaho 83815
Fax: (208) 664-6741


Jethelyn H. Harrington

Kootenai County Department of Legal Services
Jethelyn H. Harrington, ISB #7471
451 N. Government Way
P.O. Box 9000
Coeur d'Alene, ID 83816-9000
Phone: (208) 446-1620
Fax: (208) 446-1621

Attorney for Defendants

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2008 NOV 19 PM 3:50

DISTRICT COURT
Patty Bailey
DEPUTY

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

LINDA CISZEK, *et al.*,

Plaintiff,

vs.

THE KOOTENAI COUNTY BOARD OF
COMMISSIONERS,

Defendant.

Case No. **CV-08-7074**

**REPLY MEMORANDUM IN SUPPORT
OF MOTION TO DISMISS**

COME NOW the Defendants, the Kootenai County Board of Commissioners, by and through their attorney, Jethelyn H. Harrington, of the Kootenai County Department of Legal Services, and present this Reply Memorandum in Support of their Motion to Dismiss.

ARGUMENT

1. The Plaintiffs' memorandum has mischaracterized the applicable standard of review.

The Plaintiffs are seeking to have Defendant's 12(b)(1) motion



characterized as a facial motion based only upon the “four corners” of the pleadings stating that the Affidavit of Sandi Gilbertson does not address the issue of jurisdiction. However, the Plaintiffs are clearly mischaracterizing the applicable standard of review as the Defendants are looking to facts outside the pleadings.

The Plaintiffs failed to request a transcript estimate, and pay the requisite transcript estimate fees, before filing as clearly required under I.R.C.P. 84(g). This factual issue is outside the pleadings, especially since the Plaintiffs first set of pleadings affirm that such transcript fees had been paid. The affidavit of Ms. Gilbertson speaks precisely to this issue. These facts, which lay outside the pleadings, show that the Defendant’s 12(b)(1) motion should be deemed a factual challenge to this Court’s jurisdiction. *Owsley v. Idaho Industrial Commission*, 141 Idaho 129, 106 P.3d 455, (2005). Although it is true that the Idaho Supreme Court found the 12(b)(1) motion in *Owsley* to be a facial challenge, there the Defendant did not dispute any facts outside of the pleadings.

2. By not paying their transcript fees before or at filing the Plaintiff has violated I.R.C.P. 84(g) and (n) which is unrelated to the case law cited by the Plaintiff concerning I.R.C.P. 41(b) delays and subsequent prejudice to the Defendant.

The Plaintiffs filed their motion for judicial review on September 4, 2008, exactly 28 days after the after the Board of County Commissioners signed the final ordinance granting the zoning changes to Coeur d’Alene Paving, Inc. on

August 7, 2008. See, I.C. § 67-6521(d). Furthermore I.R.C.P. 84(g) states that the payment of transcript fees shall be paid prior to filing a petition to judicial review. In other words, the Plaintiffs are trying to fudge the rules of the Local Land Use Planning Act, the Idaho Administrative Procedures Act and the Idaho Rules of Civil Procedure. The Plaintiffs waited until the last possible day to file, and did not even ask for an estimate of transcript fees until the day of filing. See, *Affidavit of Sandi Gilbertson in Support of Motion to Dismiss*, 2. Instead, the Plaintiffs issued a \$100.00 check to the Kootenai County Building and Planning Department in an attempt to make it appear that they followed the mandate of I.R.C.P. 84(g). However, the Plaintiffs were \$811.05 short of their estimated transcript fees on the day of filing. Moreover, the Plaintiffs certified their original complaint stating that they had paid the transcript fees on the date of filing as required under I.R.C.P 84(d)(7). These statements were untrue as admitted in the Plaintiffs' Amended Petition for Declaratory Judgment, Petition for Judicial Review and Complaint as filed on September 25, 2008, and the Affidavit of Dana L. Rayborn Wetzel in Support of Memorandum Opposing Motion to Dismiss filed November 10, 2008.

By failing to pay the transcript estimation fees on or before the 28th day after the Board signed the ordinance approving the zoning changes (in effect the day in which all remedies had been exhausted under local ordinances) the Plaintiff's initial filing is invalid under I.R.C.P. 84(n) which in effect means that the Plaintiffs did not comply with the statute of limitations. I.C. § 67-6521(d). Therefore, their action for judicial review should be dismissed as stated under the

rule. The Plaintiffs' arguments and cases concerning delay and failure to prosecute under I.R.C.P. 41(b) do not apply to the facts at bar. The Defendant's are not moving to dismiss based on a simple delay in the prosecution of this case or the lateness of a brief, but on a conscious failure by the Plaintiffs to comply with I.R.C.P. 84(g) and (n).

Moreover, the only case cited by the Defendant which would have any bearing on this issue, *Aho v. Idaho Transportation Department*, is clearly distinguishable. In *Aho* the District Court dismissed a petition for review of an ITD order suspending the Petitioner's driver's license under I.R.C.P. 84(n) after the Petitioner failed to file a brief within the time limit specified by the court's scheduling order. *Aho v. Idaho Transportation Department*, 145 Idaho 192, 177 P.3d 406, (Ct. App. 2008). On appeal the Idaho Court of Appeals affirmed that "it is an abuse of discretion to punish a period of delay where the defendant has not established prejudice stemming from the delay." *Id.* at 409. However, on the preceding page of the opinion the Court also makes this statement concerning I.R.C.P. 84(n);

Rule 84(n) provides that a party's failure to comply with a time limit in the process of judicial review, **except** for the failure to timely file a petition or cross-petition for judicial review, is not jurisdictional, but may be grounds for a sanction as the district court deems appropriate, which may include dismissal of the petition.

Id. at 408, emphasis added.

In other words, failure to timely file a petition for judicial review, as happened in this case, is jurisdictional and should cause the automatic dismissal

of the petition as stated under I.R.C.P. 84(n). Everything else, including simple delay, is merely sanctionable and cannot be dismissed unless the aggrieved party can establish prejudice. *Id.*

3. The Highland's decision applies only to legislative annexation and associated zoning acts and not to quazi-judicial zoning decisions.

In their Memorandum in Opposition the Plaintiffs' argue that the recent Idaho Supreme Court Case, *Highlands Development Corporation v. City of Boise*, no longer enables a person affected by a decision under the Local Land Use Planning Act to initiate a petition for judicial review. *Highlands Development Corporation v. City of Boise*, 08.14 ISCR 722, (2008). The Plaintiffs' reading of this decision is overbroad, as Highlands only applies to legislative annexation and the associated zoning. *Id.* Such legislative acts do not include applications for zoning changes which are quazi-judicial in nature and can only be appealed under the Local Land Use Planning Act (LLUPA) and the Idaho Administrative Procedures Act (IDAPA).

The Plaintiffs point to an interesting quote in the *Highland's* case on which they hang the crux of their argument, that being:

The dissent argues that this opinion "will prevent property owners from obtaining judicial review of decisions downzoning their property." It will not. As we recognized in *McCuskey v. Canyon County Commissioners*, 128 Idaho 213, 912 P.2d 100 (1996), such landowners can seek relief in an independent action.

Highlands at 6-7. What the Plaintiffs fail to point out is that *McCuskey* was a two

part case which did not address quazi-judicial zoning decisions or applications for zoning changes in any way.

In *Highlands* the Idaho Supreme Court cites back to *McCuskey II*. *Highlands* at 6-7. *McCuskey II* is a case which involves an appeal for inverse condemnation which the Court determined was barred by the statute of limitations, and should have been brought forward by the Plaintiff in *McCuskey I*. *McCuskey* at 218, 912 P.2d at 105. However, *McCuskey II* refers back to *McCuskey I*, and *McCuskey I* is a case which involves legislative zoning decisions and independent actions as opposed to quasi-judicial zoning decisions and judicial review. *McCuskey v. Canyon County Commissioners*, 128 Idaho 213, 912 P.2d 100 (1996), and *McCuskey v. Canyon County*, 123 Idaho 657, 851 P.2d 953 (1993).

In *McCuskey I* the Plaintiff filed for declaratory relief from a newly enacted and implemented a Canyon County zoning ordinance. *McCuskey* at 657, 851 P.2d at 953. There the Idaho Supreme Court allowed the Plaintiff to file a declaratory judgment action because he was not challenging a zoning decision of the board made after application for a zoning change, but rather he was challenging the validity of a county-wide zoning ordinance. *Id.* at 660, 851 P.2d at 956. This meant that the Plaintiff could file an independent action outside of LLUPA and IDAPA because the zoning ordinance he was fighting was "legislative" and not subject to "direct judicial review." *Id.* at 660 - 661, 851 P.2d at 956 - 957. The *McCuskey I* Court confirmed that zoning ordinances as passed a board of county commissioners are legislative and not subject to judicial

review, but that the granting or denying of zoning applications is quasi-judicial and therefore subject to judicial review. *Id.* See also, *Jerome County v. Holloway*, 118 Idaho 681, 799 P.2d 969 (1990). Eventually the Court found that the Canyon County zoning ordinance was invalid, because the County had not complied with the notice requirements of I.C. § 67-6511(b). *McCuskey* at 663, 851 P.2d at 959.

By citing to *McCuskey* in the *Highland's* decision the Idaho Supreme Court was saying that property owners affected by legislative zoning decisions, like that in *Highland's*, have the right to bring independent actions outside of LLUPA and IDAPA. However, those petitioner's simply fighting a quazi-judicial zoning decision, like the decision in this case, must file for judicial review and do not have the right of independent action.

This line of reasoning goes hand in hand with *Bone v. City of Lewiston*, 107 Idaho 844, 693 P.2d 1046, (1984), which was used the by Defendant in its Memorandum in Support of Dismissal. In *Bone*, the petitioner sought declaratory judgment and a writ of mandamus against an adverse zoning decision by the City of Lewiston. *Id.* at 846, 693 P.2d 1046 at 1046. It is important to note that Bone made an application for a zoning change to the City of Lewiston which was denied. *Id.* at 846, 693 P.2d 1046 at 1048. Bone was not seeking an interpretation of existing Lewiston zoning ordinances. *Id.* The Court found that Bone did not have the right to declaratory judgment or a writ of mandamus. *Id.* at 849, 693 P.2d 1051. Instead it found that Bone should have filed for judicial review under I.C. § 67-5215(b-g) (now repealed), and that he had not exhausted

his administrative remedies. *Id.*

In this case the Plaintiffs are seeking relief from a quazi-judicial zoning decision which was made after an application to Kootenai County. Therefore, the Plaintiffs are not seeking an interpretation of Kootenai County zoning legislation and the remarks of the Idaho Supreme Court in *Highland's* concerning *McCuskey* do not apply. Not only are the Plaintiffs not barred from seeking relief under LLUPA and IDAPA, it is the only form of relief they may seek.

4. A Board of County Commissioners may combine related permits for the convenience of the applicants and the interest of "quazi-judicial" economy.

Idaho Code Section 67-6522 of the Local Land Use Planning Act reads in pertinent part as follows:

Where practical, the governing board or zoning or planning and zoning commission may combine related permits for the convenience of applicants. State and federal agencies should make every effort to combine or coordinate related permits with the local governing board or commission.

I.C. § 67-6522.

In this matter, the Kootenai County Board of Commissioners approved two separate zone changes on behalf of the applicant Coeur d'Alene Paving, Inc. In effect these two zoning changes switched the zoning designations on two pieces of adjoining property belonging to the applicant. Therefore one parcel was changed from agricultural to mining and one from mining to agricultural. In their

Complaint the Plaintiffs state several times over that the Kootenai County Commissioners were without authority either in the Constitution of the State of Idaho, the laws of the State of Idaho or Kootenai County Ordinance to approve a “zoning swap.” While it is true that the words “zoning swap” do not appear in Idaho Code or the Kootenai County Ordinances, Idaho Code § 67-6522 does give the Board of Commissioners the right to combine petitions or to hear related petitions at the same time, much like a court of law.

In this case, Kootenai County saw two petitions which were related, heard them together and decided to grant both. By combining these petitions under I.C. § 67-6522 time was saved for the Commissioners in not having to hear two separate petitions at different times. The overworked Kootenai County Building and Planning Department was able to submit one presentation to the Board of Commissioners. And both the applicants and the opposition were able to meet in one place, at one time and present all the issues and opinions for both of these related petitions. Valuable time and money were saved for all the parties involved.

5. The Defendant filed its Motion to Dismiss before the Plaintiff paid said fees.

Page three of the Plaintiffs’ Memorandum in Opposition states that the Defendant filed its Motion to Dismiss after it had notice that the Plaintiff paid its remaining transcript fees. This is untrue. The Affidavit of Danna L. Rayborn Wetzel states that she paid the transcript fees on September 25, 2008. See,

Affidavit of Danna L. Rayborn Wetzel, 2. The Defendant however filed its Motion and Memorandum in Support of Dismissal on September 24, 2008, as evidenced by the file stamp on the front page of the document. The Certificate of Service on the final page of the Defendant's Motion and Memorandum (which is signed and dated September 24, 2008) states that the documents would be served by first class mail which they were. The Defendant did not fax the afore-mentioned documents to the Plaintiffs' attorney, because the Defendant's fax machine was old and the documents were many pages long. Moreover, Defendant's counsel did check with the Kootenai County Planning Department on the 24th of September to see if the Plaintiffs had paid the transcript fees late. Defendant's counsel was informed that the fees had not been paid.

ATTORNEY'S FEES

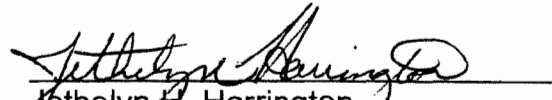
Although it is true that a judge may order attorney's fees to a prevailing party when an action is brought frivolously, it is clear that the Defendant's motion is not groundless post the *Highland's* decision. Even if the Court were to find in favor of the Plaintiff on the basis of *Highlands* it is quite obvious that reasonable minds may disagree on the decision, and that the Defendant was aware of the decision it filed its motion but did not think that it applied.

In addition, the Plaintiffs had not paid their transcript fees before the Defendant's motion was filed as is claimed by the Plaintiffs, and the cases concerning prejudice and delay to not apply to the issue at bar.

Therefore the Plaintiff's did not file their Motion to Dismiss frivolously and the Plaintiffs request for costs and attorney's fees should be denied.

Dated this 19th day of November, 2008.

Kootenai County Department of
Legal Services


Jethelyn H. Harrington
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of November, 2008, I caused to be sent a true and correct copy of the foregoing via facsimile to:

Steven C. Wetzel
Kevin P. Holt
Wetzel &Wetzel, P.L.L.C.
1322 Kathleen Ave., Suite 2
Coeur d'Alene, Idaho 83815
Fax: (208) 664-6741


Jethelyn H. Harrington

STATE OF IDAHO }
County of Kootenai } ss
FILED 12-22-08

At 1:30 O'clock P.M.
CLERK OF THE DISTRICT COURT
Wm Reed
Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

LINDA CISZEK, et al.,
Plaintiffs/Petitioners,

vs.

**THE KOOTENAI COUNTY BOARD OF
COMMISSIONERS,**
Defendant/Respondents.

Case No. CV-08-7074

**MEMORANDUM DECISION
AND ORDER IN RE:
DEFENDANT'S MOTION TO
DISMISS, PETITIONERS
MOTION TO BIFURCATE AND
LIMIT TRANSCRIPT**

This matter concerns a petition for judicial review, petition for declaratory relief, and civil complaint filed together against the Board of County Commissioners (BOCC) in Kootenai County. The claims asserted in the petitions and civil complaint stem from a zoning action taken by the BOCC on August 7, 2008 in response to a rezoning application. The BOCC argues that the petition for judicial review may not be filed in the same document as the petition for declaratory relief or complaint for civil damages, and that the civil complaint must be dismissed. The BOCC further alleges that the Petitioners failed to exhaust administrative remedies as to the declaratory action and that the declaratory action be dismissed. Because Petitioners failed to properly pay the court reporting fees prior to filing the petition for judicial review, the BOCC seeks dismissal of the petition for judicial review based on lack of subject matter jurisdiction. Petitioners allege that the rezone was a legislative action, therefore declaratory relief is proper. In the alternative, if the BOCC action is found to be quasi-judicial, the petition for judicial review is proper and the court has subject matter jurisdiction. Additionally, the Petitioners filed a motion to bifurcate and a motion to limit the transcript of the BOCC proceedings. After reviewing the filings by both parties and hearing oral argument, BOCC's motion to dismiss is granted as to the complaint for civil damages and denied as to the petition for judicial review and declaratory action. The Petitioners' motion to bifurcate the declaratory action is granted. The declaratory action is hereby stayed. Petitioners' motion to limit the transcript is also granted.

Steven C. Wetzel, Dana Rayborn Wetzel, Keving P. Holt, WETZEL & WETZEL, PLLC,
for Plaintiffs/Petitioners.

Jethelyn H. Harrington, Kootenai County Department of Legal Services, for BOCC.

I.

FACTUAL OVERVIEW

On January 16, 2008, Coeur d' Alene Paving, Inc. submitted a complete application to the Kootenai County Building and Planning Department seeking to change the zoning classification on two separate 20 acre parcels of land. (BOCC Findings of Fact ¶ 1.02) The application requested that the zoning classification on one 20 acre parcel be changed from agricultural to mining and the other 20 acre parcel to be changed from mining to agricultural. (BOCC Findings of Fact ¶ 1.04) A public hearing on the application was held before the Kootenai County Hearing Examiner on March 6, 2008. *Id.* After hearing testimony from witnesses in support of the application as well as witnesses opposed to the application, the Hearing Examiner recommended that the application be denied. *Id.* On May 8, 2008, a hearing concerning the application was held before the Kootenai County BOCC. *Id.* at ¶ 1.06. Once again, testimony was heard for and against the application. *Id.* After hearing this testimony, the BOCC indicated that it was going to make a substantial change to the Hearing Examiner's recommendation and therefore moved to schedule another public hearing. *Id.* at ¶ 1.07. On June 26, 2008 a second hearing was held where further testimony was presented. *Id.* at ¶ 1.09. The BOCC deliberated on July 10, 2008 and issued an order approving the application and two zone changes on August 7, 2008. *Id.* at ¶ 7.

Thereafter, Petitioners in this action filed a Petition for Declaratory relief, petition for Judicial Review, and Complaint under one filing on September 4, 2008. (See Petitioners Petition

for Judicial Review/ Petition for Declaratory Judgment/ Complaint for Civil Damages). At the time process was served on the BOCC, a check for \$100.00 was delivered to the clerk of the BOCC for transcript preparation fees by the Petitioners' attorney. In turn this check was given to the Kootenai County Building and Planning Department. After the summons was served, an email was sent from Petitioners' attorney to the administrative supervisor of the Building and Planning Department, Sandi Gilbertson, requesting an estimate of transcript fees. On September 5, 2008, Ms. Gilbertson faxed an estimate of transcript fees of \$911.05, to Petitioners' attorney. On September 8, 2008, since the fees had yet to be paid, Ms. Gilbertson called Petitioners' attorney and emailed the estimate of preparation fees. The remaining balance of \$811.05 was paid on September 25, 2008. (Aff. of Dana Wetzel ¶ 2).

II.

PROCEDURAL HISTORY

Petitioners filed a complaint/petition for judicial review/petition for declaratory relief on September 4, 2008. The BOCC brought this motion to dismiss under IRCP 12(b)(1) for lack of subject matter jurisdiction based on Petitioners failure to exhaust all administrative remedies for purposes of the declaratory action as well as failure to pay court reporting fees prior to filing a petition for judicial review. Based on the failure to pay court reporting fees prior to filing, BOCC argues that the petition should be dismissed under IRCP 84(n), for failure to physically file a petition for judicial review within the time limits prescribed by statute.

The Petitioners filed a motion to limit the transcript of the BOCC hearings to the last 15 minutes pursuant to IRCP 84(g). Additionally, Petitioners have filed a motion to bifurcate the proceedings. A hearing on the motions was held on November 24, 2008. The parties fully briefed and argued the issues raised, and have submitted this matter for disposition.

III.

DISCUSSION

A. Judicial Review is the appropriate relief in the instant case, and the Court properly has subject matter jurisdiction over the BOCC final action on the rezone application.

Very recent Idaho Supreme Court decisions directly address issues raised herein. In deciding the BOCC's motion to dismiss Petitioners' petition for judicial review, it is first necessary to decide whether the Board's action was legislative or quasi judicial, and thus whether judicial review is authorized. If judicial review is appropriate, then this Court must determine whether all requirements for proper filing of a petition for judicial review have been met.

1. The Board's decision to grant the rezone application and adopt new zoning ordinances was quasi-judicial in nature, because it applied general rules to specific individuals, interests or situations.

It has been a long standing rule in Idaho that purely legislative zoning actions are not typically afforded full judicial review, while actions which are quasi-judicial in nature are subject to judicial review. *Burt v. City of Idaho Falls*, 105 Idaho 65, 665 P.2d 1075 (1983); *McCuskey v. Canyon County*, 123 Idaho 657, 851 P.2d 953 (1993). Although not subject to full judicial review, legislative acts may be scrutinized through collateral actions such as petitions for declaratory relief and inverse condemnation. *Id.* An action of a zoning body is quasi-judicial in nature and not legislative when that body is applying general rules or policies to specific individuals, interests, or situations. *Cooper v. Board of County Commissioners of Ada County*, 101 Idaho 407, 410, 614 P.2d 947, 950 (1980).

In *Cooper*, holders of an option to purchase land in Ada County filed with the county an application to rezone the property. *Cooper*, 101 Idaho at 407. After the application was heard by

the planning and zoning commission and after public hearing in front of the Board of Commissioners, the application was denied. *Id.* at 408. Thereafter, the holders of the option brought suit in district court seeking judicial review of the decision. *Id.* The district court characterized the action as legislative and limited the review to an arbitrary and capricious standard. *Id.* The Supreme Court overturned the district court and held the action to be quasi-judicial in nature and not legislative, warranting a broader standard of review. *Id.* at 410-411. In drawing the distinction the Court relied on cases from other jurisdictions. Quoting the Oregon Supreme Court from *Fasano v. Board of Cm'rs*, the Idaho Supreme Court stated,

“Ordinances laying down general policies without regard to a specific piece of property are usually an exercise of legislative authority, are subject to limited review, and may only be attacked upon constitutional grounds for an arbitrary abuse of authority. On the other hand a determination whether the permissible use of a specific piece of property should be changed is usually an exercise of judicial authority and its propriety is subject to an altogether different test.”

Cooper, at 410, 614 P.2d at 950 (quoting *Fasano v. Board of County Cm'rs*, 264 Or. 574, 507 P.2d 23, 26-27 (1973)). The Idaho Supreme Court further stated that the purpose for the great deference given to legislative actions, and the limited judicial review thereof, stems from its high visibility and widely felt impact. *Id.* The appropriate remedy is through the election process of those who make the rule. *Cooper*, at 410, 614 P.2d at 950 (citing *Bi-Metallic Investment Co. v. Board of Equalization*, 239 U.S. 441 (1915)). The Supreme Court, however, found this rationale not fitting when applied to local government decisions on zoning applications, where the affected parties are readily identifiable and where such a decision would essentially constitute an adjudication of the rights of those parties. *Id.* at 411.

Quasi-judicial decisions on rezoning applications have historically been afforded judicial review under the procedures set forth in the Idaho Administrative Procedures Act (IDAPA). *See Bone v. City of Lewiston*, 107 Idaho 844, 693 P.2d 1046 (1984); *See also Workman Family*

Partnership v. City of Twin Falls, 104 Idaho 32, 655 P.2d 926 (1982); *Hill v. Board of County Commissioners*, 101 Idaho 850, 623 P.2d 462 (1981); *Walker-Schmidt Ranch v. Blaine County*, 101 Idaho 420, 614 P.2d 960 (1980); *Cooper v. Board of County Commissioners*, 101 Idaho 407, 614 P.2d 947 (1980).

A case which illustrates this application of IDAPA procedures to rezoning decisions is *Bone v. City of Lewiston*, 107 Idaho 844, 693 P.2d 1046 (1984). There the issue was whether judicial review under IDAPA was the exclusive remedy to appeal a quasi-judicial zoning decision by a local governing body. *Id.* 107 Idaho at 844. *Bone* involved the denial by the city council of a landowner's application to have his land rezoned from residential to commercial. *Id.* In response to this denial, the landowner filed an action requesting declaratory relief and a writ of mandamus. *Id.* at 846. The Court in *Bone* specifically held:

We find [IDAPA] to be a complete, detailed, and exhaustive remedy upon which an aggrieved party can appeal an adverse zoning decision. We also find that the legislature's intent in outlining the scope of review and the bases upon which a court may reverse a governing body's zoning decision to be clear. We find no evidence that the legislature intended other avenues of appeal to be available or that bases for reversal or the scope of review should be broader than that found in [IDAPA]. Thus, we hold that [IDAPA] is the exclusive source of appeal for adverse zoning decisions. To hold otherwise would render the mandate of [IDAPA] meaningless, for it would allow an applicant to bypass [IDAPA] by seeking different avenues of appeal with different levels of judicial scrutiny.

Bone, 107 Idaho at 847-48, 693 P.2d 1046, 1049-50.¹ The Court in *Bone* found that the authority to review an adverse zoning application decision under the procedures of IDAPA stemmed from Idaho's Local Land Use Planning Act (LLUPA). *Id.* at 847. The Court found that review was authorized under the language in I.C. § 67-6519, which stated: "An applicant denied a permit or aggrieved by a decision may within sixty (60) days after all avenues have

¹ [IDAPA] specifically references IC §67-5215(b-g). Although that statute has since been repealed, sections b-g have been reincorporated among the other provisions of chapter 52, title 67 of the Idaho Code.

been exhausted under the local ordinance seek judicial review under the procedures provided by sections 67-5215(b) through (g) and 67-5216, Idaho Code.”² *Bone*, 107 Idaho at 847, 693 P.2d at 1049.

Notwithstanding the clear holding and reasoning in *Bone*, the Petitioners argue that the recent decisions of *Giltner Dairy v. Jerome County*, 145 Idaho 630, 181 P.3d 1238 (2008) and *Highlands Development v. City of Boise*, 145 Idaho 958, 188 P.3d 900 (2008) may contain language that at first glance appears contradictory. However, this Court concludes that the reasoning of the Idaho Supreme Court in those cases is consistent with the prior holding in *Bone*.

In *Giltner* the issue was whether a party may file a petition for judicial review of an amendment to a county’s comprehensive plan. *Giltner*, 145 Idaho at 632. The Court held that a local governing body is not an “agency” for purposes of IDAPA, thus that statute does not alone authorize judicial review. *Id.* The Court further held that review was not authorized by way of LLUPA, specifically provision I.C. 67-6519, because that provision only applied to applications for “permits”, and a request to change the comprehensive plan is not an enumerated “permit”. *Id.* at 633. *Giltner* notes the fundamental difference between planning and zoning. *Id.* The Planning is a long range act of local bodies, with no immediate affect on property rights. *Id.* Zoning is a static exercise of police power to further the policies set by the comprehensive plan, which immediately impacts property owners. *Id.*

In *Highlands*, the Idaho Supreme Court wrestled with whether a decision of a city council to annex and zone land was subject to judicial review. *Highlands*, 145 Idaho at 960. Ultimately, the Supreme Court held that the city’s actions were not subject to judicial review. *Id.* at 962. The

² IC § 67-6519 has been amended since the decision in *Bone*. The current IC § 67-6519 reads “An applicant denied a permit or aggrieved by a decision may within twenty-eight (28) days after all remedies have been exhausted under local ordinance seek judicial review under the procedures provided by chapter 52, title 67, Idaho Code.”

Supreme Court reasoned, that not only had the specific statute³ authorizing judicial review of a city council's decision to annex and zone land not yet been enacted when the action was taken, but also, under the reasoning of *Giltner*, an application to annex and zone land was not a "permit" for purposes of LLUPA. *Id.* at 961. The dissent in *Highlands* argued that the majority opinion was not limited to precluding judicial review of decisions to annex and zone land under LLUPA, but, more broadly, would preclude landowners from seeking a remedy for adverse decisions on rezone applications. *Id.* at 962 (Jones, J., dissenting). The majority opinion rejected this argument and stated "as we recognized in *McCuskey v. Canyon County Commissioners*, 128 Idaho 213, 912 P.2d 100 (1996), such landowners can seek relief in an independent action." *Id.* at 962. Further, the majority opinion stated that stretching the word "permit" under LLUPA to include zoning applications would effectively amend IC § 50-222. *Id.*

Petitioners argue that both *Giltner* and *Highlands* preclude judicial review of a decision concerning an application for rezone, because it is not an enumerated "permit" under the provisions of LLUPA. Petitioners argue that the BOCC's action in rezoning the property is legislative. However, neither case actually involved an application for rezone. *Giltner* involved an application to amend a comprehensive plan, and *Highlands* involved an application to annex and initially zone the annexed land. A decision on an application for rezone is a quasi-judicial act. Decisions on an application to amend a comprehensive plan and to annex and initially zone property are legislative actions.

This distinction was articulated in *Burt v. City of Idaho Falls*, 105 Idaho 65, 665 P.2d 1075 (1983). *Burt* involved review of a city's actions concerning annexation, amendment of comprehensive plan and zoning of the annexed land. *Burt*, 105 Idaho at 66. The Court, citing the *Cooper* test, held that the annexation of land, the subsequent amendment of the comprehensive

³ IC § 50-222 permits judicial review of "the decision of a city council to annex and zone lands".

plan, and the zoning of the annexed land were legislative acts and not subject to judicial review. *Id.* at 68. The Court reasoned that the annexed land was not “rezoned” but rather “initially zoned”. *Id.* at 67 (citing *Ben Lomond, Inc. v. City of Idaho Falls*, 92 Idaho 595, 599, 448 P.2d 209, 213 (1968)).

An initial zoning action is mandatory. A rezoning act is discretionary. *Id.*; *See Highlands*, 145 Idaho at 961 n.3 (when a city annexes property, it must zone the property also). An initial zoning action involves property never before considered in the comprehensive plan or zoned by the city to effectuate that plan. *Burt*, 145 Idaho at 68. It is more analogous to the initial zoning of a newly incorporated city. *Id.* It necessarily affects the interests of all persons in the city in some manner and thus does not involve applying general policies to specific individuals, interests or situations. *Id.*

Likewise, an amendment to a comprehensive plan by its very nature cannot be a quasi-judicial act, regardless of whether it was done in response to an application or on the city’s own initiative. As stated in *Bone*, “comprehensive plans do not themselves operate as legally controlling zoning law, but rather serve to guide and advise the various governing bodies responsible for making zoning decisions.” *Bone*, 107 Idaho at 850. An amendment to a comprehensive plan which creates no present property right for landowners, cannot therefore be an adjudication of those rights.

The case at bar, like *Cooper* and *Bone*, involves a decision by the BOCC in response to an application for rezone. The Board here applied general policies to specific individuals, interests and situations by specifically deciding whether to change the zoning of two 20-acre parcels of land on which the applicants have significant commercial mining interests. The opponents to the application are mostly private citizens who reside adjacent to the 20-acre parcel

rezoned from agricultural to mining. They expressed concerns about the negative impact mining operations would have on the use and enjoyment of their land. While the Board in its findings of fact and conclusions of law points to general goals under the comprehensive plan, the reality remains that they are *applying* these existing general goals to the interests of the particular parties rather than *enacting* new general zoning legislation. *See Burt*, 105 Idaho at 68. What results is an adjudication of the applicant's and opposing landowners' rights. The decision of the Board constitutes quintessentially a quasi-judicial act under the rule in *Cooper*.

While the language in *Giltner* and *Highlands* can be argued as broad, *Cooper*, *Bone* and *Burt* were not expressly overruled.⁴ The *Giltner* and *Highlands* decisions are limited to the preclusion of judicial review for an amendment to a comprehensive plan and for judicial review of the initial zoning of annexed land, respectively. Both cases involved legislative rather than quasi-judicial acts of the local governing board. Moreover, the Court's reliance on *McCuskey* in *Highlands* for the proposition that landowners whose property has been down zoned may seek independent actions is likewise limited.

Like *Giltner* and *Highlands*, the challenged action which was the gravamen of the case in *McCuskey* was legislative in nature. It involved the propriety of the general enactment of a zoning ordinance, not taken in response to a rezone application, but rather merely on the initiative of the local governing body. *McCuskey v. Canyon County Com'rs*, 123 Idaho 657, 851 P.2d 953 (1993). In fact, the Supreme Court in *McCuskey*, in deciding whether *McCuskey* could pursue an "independent action" rather than petition for judicial review, distinguished *Bone* by stating, "In this case, *McCuskey* is challenging the *enactment* of the 1975 comprehensive plan and the 1979 zoning ordinance. Thus, he is not arguing that the authorities made the wrong

⁴ In fact neither *Giltner* nor *Highlands* discusses the holdings in *Bone*, *Cooper*, or *Burt*. *Giltner* cites to *Bone*, but only in a cursory manner, and only for the proposition that "a landowner was not entitled to have his property rezoned to conform to the city's comprehensive plan map".

zoning decision, but rather he challenges the validity of the zoning ordinance.” *McCuskey*, 123 Idaho at 660. The Court goes on to further distinguish *Bone* by stating that “Bone applied for a rezone while McCuskey has no pending rezone application before the P & Z or the Commission. All McCuskey applied for was a building permit. Thus, there was no zoning decision for McCuskey to appeal.” *Id.* at 660-61. Since the challenged action in *McCuskey* was legislative in nature the appropriate relief in that case was not judicial review, but was declaratory relief or inverse condemnation. *See also McCuskey v. Canyon County Com’rs*, 128 Idaho 213, 912 P.2d 100 (1996).

Since the action taken by the Board in the instant case was a quasi-judicial act in response to a rezoning application, the rule in *Bone* applies. Judicial review of the Board’s actions under the procedures set forth in IDAPA and as applied through LLUPA is the exclusive source of appeal for the adverse zoning decision. Since judicial review is appropriate, it is then necessary to determine whether the Petitioners in this case have complied with all the requirements and thus whether the Court has subject matter jurisdiction over the suit.

2. The Petitioners’ failure to pay the full estimate of transcript fees did not constitute a failure to “physically file” requiring automatic dismissal.

Rule 84 of the Idaho Rules of Civil Procedure states, “When judicial review of an action of a state agency or local government is expressly provided by statute but no stated procedure or standard of review is provided in that statute, then Rule 84 provides the procedure for the district Court’s judicial review.” Specifically, with regard to transcript fees, Rule 84 provides, “Unless otherwise ordered by the district court, the petitioner shall pay the estimated fee for preparation of the transcript as *determined by the transcriber* prior to filing of the petition for judicial review, and the petitioner shall pay the balance of the fee for the transcript upon its completion.”

(emphasis added) IRCP 84(g)(1)(A). Under Idaho Appellate Rule 24(b) “Upon conclusion of

any trial in the district court, or *proceeding in an administrative agency*, the reporter shall estimate the cost of preparing a transcript of the trial or proceeding.... In the event the reporter fails to so estimate the fees for a transcript within two (2) days from the conclusion of the trial or proceeding, the estimated fees for preparation of the transcript shall be deemed the sum of \$200.00.”⁵ (emphasis added) IAR 24(b). The only provision in IRCP 84 which mandates automatic dismissal of a petition for judicial review is IRCP 84(n), which states, “the failure to *physically* file a petition for judicial review or cross-petition for judicial review with the district court within the time limits prescribed by statute and these rules shall be jurisdictional and shall cause automatic dismissal of the petition for judicial review.” (emphasis added).

In the instant case, the Petitioners paid \$100.00 as an estimate of transcript fees at the time they filed their petition for judicial review. There is no evidence in the record that an estimate had been filed by the transcriber as required by IAR 24(b). There is no doubt that under the previous IAR 24(b), Petitioners payment would have been satisfactory. However, under the current version, the estimated preparation fee was \$200.00 rather than \$100.00. BOCC argues that under IRCP 84(d), a petition must contain a certification by the attorney for the petitioner that the estimated fee for preparation of the transcript has been paid to the clerk of the agency. Since the entire \$200.00 estimated fee had not been paid prior to filing the petition, Petitioners argue the certification was false and the petition was defective. Moreover, they argue, since the petition was defective, a valid petition was never “physically filed” and dismissal is mandatory under IRCP 84(n).

What the BOCC is asking this Court to do, would essentially be to amend the language in IRCP 84(n) from “physically file” to “constructively file”. It is a peculiar argument that the

⁵ IAR 24, was amended in February of 2008. The estimated fee in the prior version of IAR 24 was \$100.00 rather than \$200.00.

drafters would choose to put the word “physically” in the rule, but really mean “constructively”. The Petitioners in this case did not fail to “physically” file their petition under IRCP 84(n), therefore mandatory dismissal is inappropriate. To hold otherwise would be applying form over substance.

Moreover, discretionary dismissal or sanctions is not warranted under IRCP 84(n). Failure to timely take any other step in the process for judicial review may be grounds for sanction as the district court deems fit, which may include dismissal of the petition for review. IRCP 84(n). However, discretionary dismissal under IRCP 84(n) requires a showing of prejudice by the moving party. *Aho v. Idaho Transp. Dept.*, 145 Idaho 192, 196, 177 P.3d 406 (Ct. App. 2008).

Taking into consideration that IAR 24(b) had only recently been amended from \$100.00 to \$200.00, the Petitioners failure to pay the full \$200.00 fee can be considered nothing more than harmless error. The fact remains that there was no estimate by the transcriber on record and the Petitioners paid what they thought to be the estimated fee under the prior version of IAR 24(b). (Aff. of Dana Wetzel ¶ 3). The certification by the attorney for the petitioner was valid and the BOCC cannot show prejudice. Thus, any sanction or discretionary dismissal by this Court is not justified.

Therefore, based on the forgoing, the petition for judicial review is appropriate and properly filed. The BOCC’s motion to dismiss the petition is denied.

B. Petitioners’ motion to bifurcate the declaratory action and the petition for judicial review is granted.

Under this Court’s view of the holding in *Regan v. Kootenai County*, 140 Idaho 721 (2004), the landowners would be required to exhaust their administrative remedies; therefore the declaratory action should be dismissed. However, as a matter of procedure, the motion to

dismiss the declaratory action is denied. The motion to bifurcate the declaratory action is granted, and this Court stays the declaratory action, pending the final adjudication of the judicial review proceeding.

Given the Petitioners' arguments as to the broad language of *Highlands* and *Giltner*, this Court recognizes that its interpretation, holding that the BOCC's action on a rezone application is quasi-judicial, may be incorrect. If decisions on rezone applications are no longer afforded judicial review under LLUPA, then Petitioners' declaratory action would presumably be the proper remedy. If this Court's decision that the Petitioners' claims may be determined under a petition for judicial review becomes final, and the issues are resolved by the process of judicial review of a final action by the BOCC, then the declaratory judgment action will become moot and will be dismissed. If the judicial review is dismissed as improper, then the declaratory relief can proceed, having been timely filed, (if I.C. § 67-6521(1)(d), requiring an affected person to seek relief within 28 days of the final action is found to be applicable).

C. The Petitioners may not file a complaint for civil damages and a petition for judicial review in the same action, therefore the complaint for civil damages is dismissed.

The next issue is whether the Petitioners here may combine a petition for judicial review with a complaint for civil damages and declaratory relief in the same action. Recently, the Idaho Supreme Court addressed this issue in *Euclid v. City of Boise*, 08.20 ISCR 1015. In that case the plaintiff/petitioner filed a complaint, petition for judicial review and request for jury trial. *Euclid*, at 1015. The pleading sought judicial review of the City's land use actions, a declaration of invalidity, a writ of mandamus, and civil damages. *Id. Euclid* specifically held that an administrative appeal and a civil action may not be combined in one proceeding. *Id.* The Idaho Supreme Court reasoned that IDAPA and LLUPA only speak to judicial review, and fail to mention any further remedial measures, stating that "where a statute specifies certain things, the

designation of such things excludes all others”.⁶ *Id.* at 1016 (citing *Local 1494 of the Int’l Ass’n of Firefighters v. City of Coeur d’Alene*, 99 Idaho 630, 639, 586 P.2d 1346, 1355 (1978)).

Further, the Supreme Court looked at IRCP 84(a)(1), which specifically allows combining a petition for judicial review with a request for common law or equitable writs, but is silent as to combining it with a complaint for civil damages. *Euclid*, at 1016. The Supreme Court also determined that in a combined action, the filing fee category determines what type of action to consider. *Id.* In *Euclid*, the plaintiffs filed under fee category A1 for a civil action instead of R2 for an administrative appeal. The Supreme Court took the plaintiffs at their “word”, and considered the action as a complaint for civil damages. *Id.*

In the instant case, the fee category which the action was filed under is category A.1/G.3. A.1 is the fee category for a civil complaint for damages, while G.3 is not a category listed on the 2008 filing fee schedule.⁷ R.2 is the fee category used for petitions for judicial review. Under the reasoning of *Euclid*, this Court could treat this action as only an action for civil damages and not as one for judicial review, because the Petitioners did not list R.2 as the filing category. However, since the category G.3 is listed in addition to A.1, it is unclear what the Petitioners intended by their “word”. Since the filing fee for both a civil complaint and a petition for judicial review is \$88.00, this further provides no basis for determining the type of action. What is more persuasive as to the Petitioners’ “word” is the fact that the action was filed within 28 days of the zoning decision. If this Court were to consider this action only as a complaint for damages and dismiss the petition for judicial review, the Petitioners would be prejudiced, because the time for filing a petition for judicial review has now passed. The time for filing a complaint for civil

⁶ Although IC §67-6521(2) contemplates a situation where an affected person could “seek judicial review through an inverse condemnation action”. The Court did not find this language persuasive in determining whether the legislature intended to allow a party to combine the two into one action.

⁷ In the 2006 fee schedule, G.3 was a general category used for filing “all other actions or petitions (not demanding dollar amounts)”.

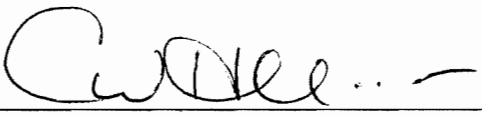
damages, however, has not run. Therefore, in the interest of justice, this Court will dismiss the complaint for civil damages without prejudice, and categorize this action as a petition for judicial review.

IV.

CONCLUSION AND ORDER

Having reviewed the record in its entirety, and for the foregoing reasons, BOCC's motion to dismiss is granted as to the complaint for damages and denied as to the petition for review and the declaratory action. Petitioners' motion to bifurcate is granted as to the declaratory action, and any further proceedings in the declaratory action are hereby stayed until further notice. Since the matter will now proceed pursuant to the petition for judicial review, Petitioners' motion to limit the transcript of the BOCC proceedings to the last fifteen (15) minutes is likewise granted.

DATED this 22 day of December 2008.



Charles W. Hosack, District Judge

CERTIFICATE OF MAILING/DELIVERY

On this 22 day of December 2008, a true and correct copy of the foregoing was mailed in the U.S. Mail, postage prepaid, or sent via facsimile as indicated below to the following counsel:

Jethelyn H. Harrington
KOOTENAI COUNTY DEPARTMENT OF LEGAL SERVICES
451 N. Government Way
P.O. Box 9000
Coeur d'Alene, ID 83816
Fax: 208-446-1621 *Fax*

Steven C. Wetzel
Kevin P. Holt
Dana Rayborn Wetzel
WETZEL & WETZEL, P.L.L.C
1322 Kathleen Ave., Suite 2
Coeur d' Alene, ID 83815
Fax: 208-664-6741 *Fax*

DANIEL ENGLISH
CLERK OF THE COURT

By *Shari Ror*
(Deputy Clerk)

STATE OF IDAHO } SS
 COUNTY OF KOOTENAI }
 FILED: 03/09/09
 AT 4:00 O'CLOCK P.M.
 CLERK, DISTRICT COURT
[Signature]
 DEPUTY

Steven C. Wetzel ISB # 2988
 Kevin P Holt ISB # 7196
 WETZEL & WETZEL, P.L.L.C.
 1322 Kathleen Ave., Suite 2
 Coeur d'Alene, Idaho 83815
 Telephone: (208) 667-3400
 Facsimile: (208) 664-6741

Attorneys for CISZEK

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

 LINDA CISZEK, individually; RONALD G.)
 WILSON and LINDA A. WILSON, husband)
 and wife; BILL DOLE and MARIAN DOLE,)
 husband and wife; MIKE ANDERSON and)
 RAYELLE ANDERSON, husband and wife;)
 JOE CULBRTH and SHARON)
 CULBRTH, husband and wife; KIRK)
 HOBSON and KIMBERLY HOBSON,)
 husband and wife; SETH MOULDING and)
 JENNIFER MOULDING, husband and wife;)
 CASY NEAL and KRISTIN NEAL, husband)
 and wife; and WILLIAM GIRTON and)
 DOLLY GIRTON, husband and wife,)
)
 Petitioners/Plaintiffs,)
)
 vs.)
)
 BOARD OF COMMISSIONERS,)
 KOOTENAI COUNTY, STATE OF IDAHO,)
)
 Respondent/Defendant.)

Case No. CV-08-7074
 AFFIDAVIT OF KEVIN P. HOLT
 IN SUPPORT OF MOTION TO
 AUGMENT TRANSCRIPT

AFFIDAVIT OF KEVIN P. HOLT
 IN SUPPORT OF MOTION TO AUGMENT TRANSCRIPT -1

STATE OF IDAHO)
) ss.
County of Kootenai)

Kevin P. Holt, being first duly sworn on oath, depose and state as follows:

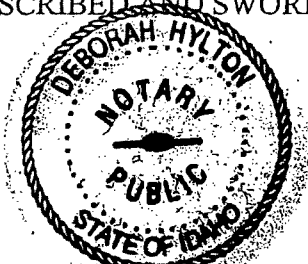
1. I am one of the attorneys for Petitioners/Plaintiffs above named and make this affidavit based upon my own personal knowledge. I am competent to testify to the matters set forth herein and am over the age of eighteen.

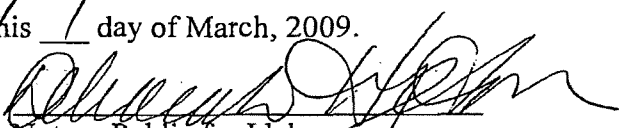
2. Earlier in this case, counsel for Petitioners set forth his recollection that discussions regarding "Swap-Zoning" occurred only in the last hearing. Since that time, Petitioners and their counsel believe that there may have been other statements in previous hearings that, either directly or indirectly, related to the swap-zoning that Petitioners have objected to. Consequently, as a full complete record will serve to resolve any question of discussion about swap-zoning, and because Petitioners shall pay the additional costs of providing the entire record, and because Respondent will not be prejudiced by a full and complete record being presented to the court, Petitioner's motion to augment the record to include all related hearings, should be granted.

FURTHER YOUR AFFIANT SAITH NOT


Kevin P. Holt

SUBSCRIBED AND SWORN TO BEFORE ME this 9 day of March, 2009.




Notary Public for Idaho
Commission Expires: 10-16-2012

AFFIDAVIT OF KEVIN P. HOLT
IN SUPPORT OF MOTION TO AUGMENT TRANSCRIPT -2

CERTIFICATE OF MAILING AND/OR DELIVERY

I hereby certify that on the 9 day of March, 2009, I served the foregoing document upon:

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Facsimile 446-1621

Jethelyn H. Harrington
Kootenai County Department of Legal
Services
P.O. Box 9000
Coeur d'Alene, Idaho 83816-9000

Attorney for Defendant


Deborah Hylton

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AFFIDAVIT OF KEVIN P. HOLT
IN SUPPORT OF MOTION TO AUGMENT TRANSCRIPT -3

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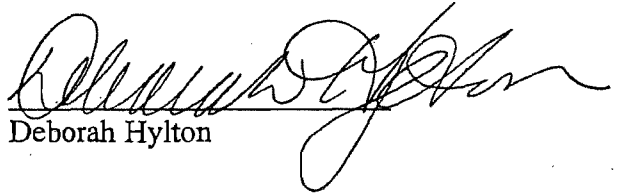
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Kootenai County Department of Legal
Services
P.O. Box 9000
Coeur d'Alene, Idaho 83816-9000

Attorney for Defendant


Deborah Hylton

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AFFIDAVIT OF KEVIN P. HOLT
IN SUPPORT OF MOTION TO AUGMENT TRANSCRIPT -3

STATE OF IDAHO } SS
 COUNTY OF KOOTENAI }
 FILED: 03/09/09
 AT 4:00 O'CLOCK P.M.
 CLERK, DISTRICT COURT
[Signature]
 DEPUTY

Steven C. Wetzel ISB # 2988
 Kevin P Holt ISB # 7196
 WETZEL & WETZEL, P.L.L.C.
 1322 Kathleen Ave., Suite 2
 Coeur d'Alene, Idaho 83815
 Telephone: (208) 667-3400
 Facsimile: (208) 664-6741

Attorneys for CISZEK

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

 LINDA CISZEK, individually; RONALD G.)
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 RAYELLE ANDERSON, husband and wife;)
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 JENNIFER MOULDING, husband and wife;)
 CASY NEAL and KRISTIN NEAL, husband)
 and wife; and WILLIAM GIRTON and)
 DOLLY GIRTON, husband and wife,)
)
 Petitioners/Plaintiffs,)
)
 vs.)
)
 BOARD OF COMMISSIONERS,)
 KOOTENAI COUNTY, STATE OF IDAHO,)
)
 Respondent/Defendant.)

Case No. CV-08-7074
 MOTION TO AUGMENT TRANSCRIPT

COMES NOW, Petitioners/Plaintiffs, LINDA CISZEK, et al (collectively "CISZEK") by and through their attorneys, Wetzel, Wetzel, Bredeson & Holt, P.L.L.C., pursuant to Idaho Rules of Civil Procedure 84(1) and moves the Court for an Order augmenting the record in the above referenced matter by including the transcripts of all hearings concerning this matter.

Previously, CISZEK had sought to limit the cost of preparing a full transcript of all related hearings because of the narrow issues being addressed as to "Swap-Zoning."

Three public hearings were held to accept public comment and deliberations on the requested zoning. A public hearing was held on March 6, 2008, before a Hearing Examiner. Public hearings were held before the Board of Kootenai County Commissioners on May 8, 2008 and June 26, 2008

Based on the December 22, 2008 Memorandum Decision and Order in re Defendant's Motion to Dismiss, Petitioners' Motion to Bifurcate and Limit Transcript, it is more appropriate that the complete record be included, rather than the limited record. See Affidavit of Kevin P. Holt filed on even date herewith and attached hereto for convenience of the Court.

CISZEK, respectfully requests that the preparation of the transcript in this case be augmented to include the complete transcript of the public hearing held on March 6, 2008 before a Hearing Examiner and the public hearings before the Board of Kootenai County Commissioners on May 8, 2008 and June 26, 2008.

A proposed Order is attached for the Court's consideration.

DATED this 9th day of March, 2009.

WETZEL, WETZEL, BREDESON
& HOLT, P.L.L.C.

By: 

Steven C. Wetzel
Attorneys for CISZEK

MOTION TO AUGMENT TRANSCRIPT -2

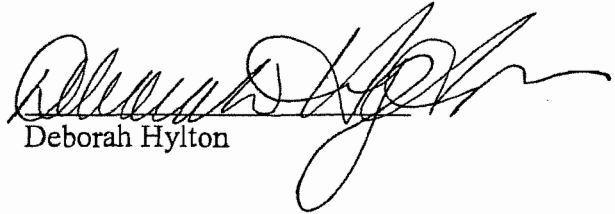
CERTIFICATE OF MAILING AND/OR DELIVERY

I hereby certify that on the 9 day of March, 2009, I served the foregoing document upon:

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 Facsimile 446-1621

Jethelyn H. Harrington
Kootenai County Department of Legal
Services
P.O. Box 9000
Coeur d'Alene, Idaho 83816-9000

Attorney for Defendant


Deborah Hylton

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MOTION TO AUGMENT TRANSCRIPT -3

Received Time Mar. 9. 2009 3:43PM No. 9624

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LINDA CISZEK, et al (collectively "CISZEK") filed a motion to augment the transcript to the complete

A hearing was held in open court on March 24, 2009. Jethelyn H. Harrington appeared for Kootenai County, and Kevin P. Holt appeared for CISZEK. Based upon the foregoing motion and the argument of counsel,

IT IS HEREBY ORDERED that the transcript prepared herein shall be augmented to include the complete transcript of the public hearing held on March 6, 2008 before a Hearing Examiner and the public hearings before the Board of Kootenai County Commissioners on May 8, 2008 and June 26, 2008, *with the cost of the transcript to be paid prior to the preparation of the transcript.*

DATED this 24 day of March, 2009.



Charles W. Hosack, District Judge

CLERK'S CERTIFICATE OF MAILING AND/OR DELIVERY

I hereby certify that on the 26 day of March, 2009, I served the foregoing document upon:

05

- U.S. Mail
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- Overnight Mail
- Facsimile 446-1621

Jethelyn H. Harrington
Kootenai County Department of Legal
Services
P.O. Box 9000
Coeur d'Alene, Idaho 83816-9000

Attorney for Defendant

06

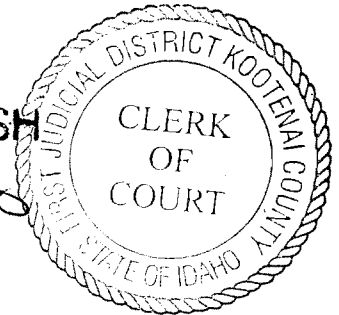
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- Facsimile 664-6741

Steven C. Wetzel
WETZEL, WETZEL, BREDESON &
HOLT, PLLC
1322 Kathleen Ave., Suite 2
Coeur d'Alene, Idaho 83815-8339

Attorney for CISZEK

DANIEL J. ENGLISH

Cathy Victoria
Clerk

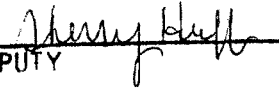


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Barry McHugh, Kootenai County Prosecuting Attorney
Jethelyn H. Harrington, Civil Deputy
451 N. Government Way
P.O. Box 9000
Coeur d'Alene, ID 83816-9000
Telephone: (208) 446-1620
Fax: (208) 446-1621
ISB #7471

2009 APR 15 PM 3: 10

CLERK DISTRICT COURT


DEPUTY

Attorney for Defendant/Respondent

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

LINDA CISZEK, *et al.*,

Plaintiff/Petitioners,

vs.

THE KOOTENAI COUNTY BOARD OF
COMMISSIONERS,

Defendant/Respondent.

Case No. **CV-08-7074**

**STIPULATION FOR EXTENSION
OF TIME TO LODGE AGENCY
RECORD AND TRANSCRIPT**

COMES NOW, Respondents Kootenai County and the Kootenai County Board of County Commissioners, by and through its counsel of record, Jethelyn H. Harrington of the Civil Division of the Kootenai County Prosecuting Attorney, and Petitioners, Linda Ciszek, *et al.*, by and through their counsel of record, Kevin P. Holt, and hereby stipulate and agree to extend the time for preparation and lodging of the agency record and transcript with the Board of County Commissioners from April 21, 2009, to April 28, 2009, pursuant to Idaho Code §67-5275 and I.R.C.P. 84(g)(1)(B). The parties agree that the agency record and transcript shall be prepared and submitted to the Board of

County Commissioners for distribution to Petitioner no later than April 28, 2009, unless otherwise agreed by the parties or ordered by the Court.

Dated this 15th day of April, 2009.

Kootenai County Prosecuting Attorney,
Civil Division

By Jethelyn Harrington
Jethelyn H. Harrington
Attorney for Respondents

Dated this 15th day of April, 2009.

[Signature]
Kevin P. Holt
Attorney for Petitioners

CERTIFICATE OF SERVICE

I, Jethelyn H. Harrington, hereby certify that on the 15th day of April, 2009, I caused to be sent via facsimile a true and correct copy of the foregoing to:

- U.S. Mail
- HAND DELIVERED
- OVERNIGHT MAIL
- TELEFAX (FAX)

Kevin P. Holt
Wetzel, Wetzel, Bredson & Holt, PLLC
1322 Kathleen Ave, Suite 2
Coeur d'Alene, ID 83815
Fax: (208) 664-6741

BY Jethelyn Harrington
Jethelyn H. Harrington



ORIGINAL

STATE OF IDAHO } SS
COUNTY OF KOOTENAI } 1728
FILED:

Barry McHugh, Kootenai County Prosecuting Attorney
Jethelyn H. Harrington, Civil Deputy
451 N. Government Way
P.O. Box 9000
Coeur d'Alene, ID 83816-9000
Telephone: (208) 446-1620
Fax: (208) 446-1621
ISB #7471

2009 APR 17 AM 11:04 *bl*

CLERK DISTRICT COURT
Katharine
DEPUTY

Attorney for Defendant/Respondent

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

LINDA CISZEK, *et al.*,

Plaintiff/Petitioners,

vs.

THE KOOTENAI COUNTY BOARD OF
COMMISSIONERS,

Defendant/Respondent.

Case No. CV-08-7074

**ORDER FOR EXTENSION OF TIME
TO LODGE AGENCY RECORD
AND TRANSCRIPT**

Based on the Stipulation for Extension of Time to Lodge Agency Record and Transcript entered into by the parties, and good cause appearing, now, therefore, IT IS HEREBY ORDERED that the time for preparation and lodging of the agency record and transcript by Respondents shall be extended from April 21, 2009, to April 28, 2009.

Dated this 14 day of April, 2009.

HONORABLE CHARLES HOSACK
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 17 day of April, 2009, I caused to be sent via facsimile a true and correct copy of the foregoing Order to:

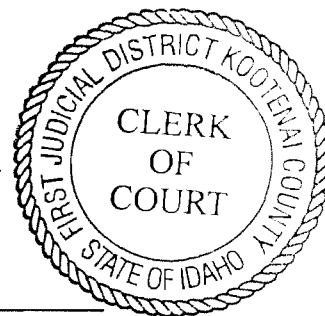
- U.S. Mail
- HAND DELIVERED
- OVERNIGHT MAIL
- TELEFAX (FAX)

Kevin P. Holt
Wetzel, Wetzel, Bredson & Holt, PLLC
1322 Kathleen Ave, Suite 2
Coeur d'Alene, ID 83815
Fax: (208) 664-6741

- U.S. Mail
- HAND DELIVERED
- OVERNIGHT MAIL
- TELEFAX (FAX)

Jethelyn Harrington
Kootenai County Prosecuting Attorney, Civil Division
P.O. Box 9000
Coeur d'Alene, ID 83814
Fax: (208) 446-1621

DANIEL ENGLISH
CLERK OF THE DISTRICT COURT



BY Sherry Huff
Deputy Clerk

STATE OF IDAHO)
County of Kootenai) SS

FILED 05/08/09
AT 2:15 O'clock P M
CLERK, DISTRICT COURT

[Handwritten Signature]
Deputy Clerk

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

LINDA CISZEK, et al.,)
)
Petitioner,)
vs.)
)
THE KOOTENAI COUNTY BOARD OF)
COMMISSIONERS,)
)
Respondent.)
)

CASE NO. CV-08-7074
BRIEFING SCHEDULE

The above matter consists of a request for judicial review of certain actions of the Respondent. ICRP 84. Pursuant to IRCP 84(p) and IAR 34(c) and good cause appearing;

IT IS ORDERED that Petitioner shall file and serve its opening brief on or before June 11, 2009.

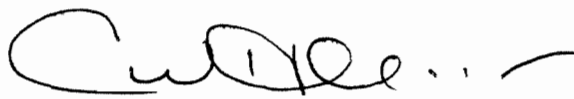
IT IS FURTHER ORDERED that Respondent shall file and serve its response brief on or before July 9, 2009.

IT IS FURTHER ORDERED that Petitioner shall file and serve its reply brief on or before July 30, 2009.

IT IS FURTHER ORDERED that in addition to any original brief or memorandum lodged with the Clerk of Court, counsel shall also provide the Court with a copy that is labeled the Court's copy. To the extent counsel rely on legal authorities not contained in the *Idaho Reports*, a copy of each case cited shall be attached to the Court's copy of the brief or memorandum.

IT IS FURTHER ORDERED that upon completion of all briefing, this matter shall be set for hearing at a time convenient to both the Court and counsel.

DATED this 8 day of May, 2009.



CHARLES W. HOSACK
DISTRICT JUDGE

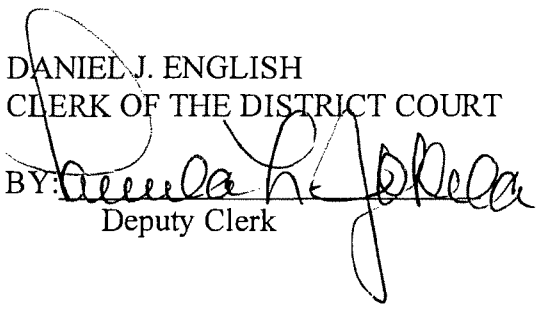
Clerk's Certificate of Mailing

I hereby certify that on the 8 day of May, 2009, that a true and correct copy of the foregoing was mailed/delivered by regular U.S. Mail, postage prepaid, interoffice mail, hand delivered or faxed as indicated below:

Dana Wetzel, Attorney for Petitioner, (fax 208-665-6741)

Jethelyn Harrington, Attorney for Respondent (fax 208-446-1621)

DANIEL J. ENGLISH
CLERK OF THE DISTRICT COURT

BY: 
Deputy Clerk

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2009 JUN -1 PM 2:46

CLERK DISTRICT COURT

Cathy Victoria
DEPUTY

CV 08-7074

Steven C. Wetzel ISB # 2988
Kevin P Holt ISB # 7196
WETZEL & WETZEL, P.L.L.C.
1322 Kathleen Ave., Suite 2
Coeur d'Alene, Idaho 83815
Telephone: (208) 667-3400
Facsimile: (208) 664-6741

Attorneys for LINDA CISZEK

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

)	
LINDA CISZEK, individually; RONALD G.)	
WILSON and LINDA A. WILSON, husband	)	Case No. CV-08-7074
and wife; BILL DOLE and MARIAN DOLE,)	
husband and wife; MIKE ANDERSON and	)	MOTION TO DISMISS ZONING
RAYELLE ANDERSON, husband and wife;	)	APPEAL
JOE CULBRTH and SHARON)	
CULBRTH, husband and wife; KIRK)	
HOBSON and KIMBERLY HOBSON,)	
husband and wife; SETH MOULDING and)	
JENNIFER MOULDING, husband and wife;)	
CASY NEAL and KRISTIN NEAL, husband)	
and wife; and WILLIAM GIRTON and)	
DOLLY GIRTON, husband and wife,)	
)	
Petitioners/Plaintiffs,)	
)	
vs.)	
)	
BOARD OF COMMISSIONERS,)	
KOOTENAI COUNTY, STATE OF IDAHO,)	
)	
Respondent/Defendant.)	
)	

Comes now, LINDA CISZEK, et al. by and through their attorneys of record WETZEL, WETZEL & HOLT, PLLC and moves this Court, pursuant to Idaho Rule of Civil Procedure 41(a)(2), for an order dismissing the zoning appeal portion of the above-entitled action against Respondent/Defendant THE KOOTENAI COUNTY BOARD OF COMMISSIONERS with prejudice, each party to bear their own costs and attorney's fees.

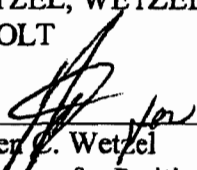
This motion is made for the reason that a recent Idaho Supreme Court decision *Burns Holdings, LLC v. Madison County Board of County Commissioners*, 2009 Opinion No 65, filed May 1, 2009 has determined that there is no statute authorizing judicial review of a rezone application and both parties having stipulated to the dismissal of the zoning appeal portion of the above entitled action.

The Petitioners/Plaintiffs and Respondent/Defendant fully acknowledge that this motion does not affect Petitioners/Plaintiffs right to maintain and pursue its Petition for Declaratory Action which had heretofore been stayed pursuant to the MEMORANDUM DECISION AND ORDER IN RE: DEFENDANT'S MOTION TO DISMISS dated December 22, 2008.

Oral argument is requested.

DATED this 1st day of June, 2009.

WETZEL, WETZEL
& HOLT

By: 
Steven C. Wetzel
Attorneys for Petitioners/Plaintiffs

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED.

2009 JUN 12 PM 2:37

CLERK DISTRICT COURT

Cathy Victoria
DEPUTY

Steven C. Wetzel ISB # 2988
Kevin P Holt ISB # 7196
WETZEL & WETZEL, P.L.L.C.
1322 Kathleen Ave., Suite 2
Coeur d'Alene, Idaho 83815
Telephone: (208) 667-3400
Facsimile: (208) 664-6741

Attorneys for LINDA CISZEK

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

LINDA CISZEK, individually; RONALD G.
WILSON and LINDA A. WILSON, husband
and wife; BILL DOLE and MARIAN DOLE,
husband and wife; MIKE ANDERSON and
RAYELLE ANDERSON, husband and wife;
JOE CULBRTH and SHARON
CULBRTH, husband and wife; KIRK
HOBSON and KIMBERLY HOBSON,
husband and wife; SETH MOULDING and
JENNIFER MOULDING, husband and wife;
CASY NEAL and KRISTIN NEAL, husband
and wife; and WILLIAM GIRTON and
DOLLY GIRTON, husband and wife,

Petitioners/Plaintiffs,

vs.

BOARD OF COMMISSIONERS,
KOOTENAI COUNTY, STATE OF IDAHO,

Respondent/Defendant.

Case No. CV-08-7074

STIPULATION TO DISMISS ZONING
APPEAL

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED

SS
315
48

2009 JUN 17 PM 2:48

CLERK DISTRICT COURT

DEPUTY

Sherry Hobbins

Steven C. Wetzel ISB # 2988
Kevin P Holt ISB # 7196
WETZEL, WETZEL & HOLT P.L.L.C.
1322 Kathleen Ave., Suite 2
Coeur d'Alene, Idaho 83815
Telephone: (208) 667-3400
Facsimile: (208) 664-6741

Attorneys for CISZEK

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

LINDA CISZEK, individually; RONALD
G. WILSON and LINDA A. WILSON,
husband and wife; BILL DOLE and
MARIAN DOLE, husband and wife; MIKE
ANDERSON and RAYELLE
ANDERSON, husband and wife; JOE
CULBRTTH and SHARON CULBRTTH,
husband and wife; KIRK HOBSON and
KIMBERLY HOBSON, husband and wife;
SETH MOULDING and JENNIFER
MOULDING, husband and wife; CASY
NEAL and KRISTIN NEAL, husband and
wife; and WILLIAM GIRTON and DOLLY
GIRTON, husband and wife,

Petitioners/Plaintiffs,

vs.

BOARD OF COMMISSIONERS,
KOOTENAI COUNTY, STATE OF
IDAHO,

Respondent/Defendant.

Case No. CV-08-7074

MOTION FOR LEAVE TO JOIN REAL
PARTY IN INTEREST

COMES NOW, CISZEK et. al., by and through her attorney of record, Wetzel, Wetzel, & Holt, P.L.L.C., and move this Court, pursuant to I.C. § 10-1211, Rule 17(a) and Rule 19(a)(1) of the Idaho Rules of Civil Procedure, for an Order granting leave to join Coeur d'Alene Paving, Inc., an Idaho corporation, as an indispensable party in the above-captioned case.

When declaratory relief is sought I.C. § 10-1211 requires that all persons be made parties to the action who have or claim any interest which would be affected by the declaration. Coeur d'Alene Paving, Inc. as the applicant granted the zone changes in the FINDINGS OF FACT, APPLICABLE LEGAL STANDARDS, COMPREHENSIVE PLAN ANALYSIS, CONCLUSIONS OF LAW AND ORDER OF DECISION in Case NO. ZON08-0001, and enacted Ordinance No. 417. The declaratory relief sought in this appeal will determine if the zone changes granted to Coeur d'Alene Paving, Inc. will stand. Coeur d'Alene Paving, Inc. is a party who has a claim or interest which would be affected by the declaration.

Coeur d'Alene Paving, Inc. is an Idaho corporation subject to service of process.

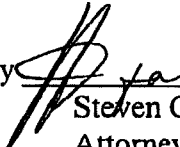
Coeur d'Alene Paving has an interest in maintaining the zoning designations approved by the Respondents/Defendants for the properties subject to this action and is so situated that the disposition of the action may as a practical matter impair or impede Coeur d'Alene Paving, Inc.'s ability to protect the zoning designations of the properties.

This motion is supported by the pleadings previously filed in this matter.

Oral argument is requested.

DATED this 17th day of June, 2009.

WETZEL, WETZEL & HOLT, P.L.L.C.

By  _____
Steven C. Wetzel
Attorneys for CISZEK

CERTIFICATE OF MAILING AND/OR DELIVERY

I hereby certify that on the 17th day of June, 2009, I served the foregoing upon:

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Facsimile 446-1621

Jethelyn H. Harrington
Kootenai County Department of Legal
Services
P.O. Box 9000
Coeur d'Alene, Idaho 83816-9000
Fax (208) 446-1621
Attorney for Respondent/Defendant

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Facsimile 667-7625

Michael Ryan Chapman
Chapman Law Office, PLLC Services
P.O. Box 1600
Coeur d'Alene, Idaho 83816


Deborah Hylton

cl\cis\ef\zoning\appeal\pleadings\motion to join CDA Paving

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

#114 dib

2009 JUN 29 AM 11:29

CLERK DISTRICT COURT
Paula [Signature]
DEPUTY

Steven C. Wetzel ISB # 2988
Kevin P Holt ISB # 7196
WETZEL, WETZEL & HOLT, P.L.L.C.
1322 Kathleen Ave., Suite 2
Coeur d'Alene, Idaho 83815
Telephone: (208) 667-3400
Facsimile: (208) 664-6741

Attorneys for LINDA CISZEK

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

LINDA CISZEK, individually; RONALD G. WILSON and LINDA A. WILSON, husband and wife; BILL DOLE and MARIAN DOLE, husband and wife; MIKE ANDERSON and RAYELLE ANDERSON, husband and wife; JOE CULBRTH and SHARON CULBRTH, husband and wife; KIRK HOBSON and KIMBERLY HOBSON, husband and wife; SETH MOULDING and JENNIFER MOULDING, husband and wife; CASY NEAL and KRISTIN NEAL, husband and wife; and WILLIAM GIRTON and DOLLY GIRTON, husband and wife,)	
Petitioners/Plaintiffs,)	
vs.	)	Case No. CV-08-7074
BOARD OF COMMISSIONERS, KOOTENAI COUNTY, STATE OF IDAHO,	)	STIPULATION TO JOIN COEUR D'ALENE PAVING, INC.
Respondent/Defendant.)	

IT IS HEREBY STIPULATED AND AGREED by and between Petitioners/Plaintiffs, LINDA CISZEK, et al., Respondent/Defendant, KOOTENAI COUNTY BOARD OF COMMISSIONERS, and Coeur d'Alene Paving Inc. through their respective undersigned attorneys, that Coeur d'Alene Paving, Inc., an Idaho Corporation be made a party, as co-defendant, to the above entitled action between said Petitioners/Plaintiffs and Respondent/Defendant without cost to any party.

DATED this 24th day of June, 2009.

KOOTENAI COUNTY BOARD OF COMMISSIONERS

By: Jethelyn H. Harrington
Jethelyn H. Harrington
Attorneys for Respondent/Defendant

WETZEL, WETZEL & HOLT, PLLC

By: Steven C. Wetzel
Steven C. Wetzel
Attorneys for Petitioners/Plaintiffs

COEUR D'ALENE PAVING, INC.

By: Michael Ryan Chapman
Michael Ryan Chapman

\\fs1\ciscak\linda\work\appal to district court\paved inc stipulation to join Coeur d'Alene Paving.doc

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED: 12-30-09
AT 10:15 O'CLOCK A M
CLERK, DISTRICT COURT
Shari Rose
DEPUTY

Steven C. Wetzel ISB # 2988
Kevin P Holt ISB # 7196
WETZEL & WETZEL, P.L.L.C.
1322 Kathleen Ave., Suite 2
Coeur d'Alene, Idaho 83815
Telephone: (208) 667-3400
Facsimile: (208) 664-6741

Attorneys for LINDA CISZEK


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

)	
LINDA CISZEK, individually; RONALD G.)	
WILSON and LINDA A. WILSON, husband	)	Case No. CV-08-7074
and wife; BILL DOLE and MARIAN DOLE,)	
husband and wife; MIKE ANDERSON and	)	ORDER OF DISMISSAL ZONING
RAYELLE ANDERSON, husband and wife;	)	APPEAL
JOE CULBRTH and SHARON)	
CULBRTH, husband and wife; KIRK)	
HOBSON and KIMBERLY HOBSON,)	
husband and wife; SETH MOULDING and)	
JENNIFER MOULDING, husband and wife;)	
CASY NEAL and KRISTIN NEAL, husband)	
and wife; and WILLIAM GIRTON and)	
DOLLY GIRTON, husband and wife,)	
)	
Petitioners/Plaintiffs,)	
)	
vs.)	
)	
BOARD OF COMMISSIONERS,)	
KOOTENAI COUNTY, STATE OF IDAHO,)	
)	
Respondent/Defendant.)	

THIS MATTER having come regularly for hearing on June 30, 2009, in open court on motion of Plaintiffs/Petitioners, LINDA CISZEK, et al., to dismiss zoning appeal portion of the above-entitled action, and it appearing to the Court that the matters in controversy relating to the appeal of the zoning should be dismissed and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that the zoning appeal portion of this action be and the same is hereby dismissed without costs to Plaintiffs/Petitioners or Defendant/ Respondent and the Petition for Declaratory Action shall hereafter proceed.

DATED this 30 day of June, 2009.



Charles W. Hosack, District Judge

CLERK'S CERTIFICATE OF MAILING AND/OR DELIVERY

I hereby certify that on the 30 day of June, 2009 I served the foregoing document upon:

- U.S. Mail
- Hand Delivered
- Overnight Mail
- 724 Facsimile 446-1621

Jethelyn H. Harrington
 Kootenai County Department of Legal
 Services
 P.O. Box 9000
 Coeur d'Alene, Idaho 83816-9000

Attorney for Defendant

- U.S. Mail
- Hand Delivered
- Overnight Mail
- 724 Facsimile 664-6741

Steven C. Wetzel
 WETZEL, WETZEL & HOLT, PLLC
 1322 Kathleen Ave., Suite 2
 Coeur d'Alene, Idaho 83815-8339

Attorney for CISZEK

724: 667-7625

Michael Chapman

Shari Row

Clerk

c:\isack\zoning appeal\pleadings\order to dismiss zoning appeal

THIS MATTER having come regularly for hearing on June 30, 2009, in open court on motion of Plaintiffs, LINDA CISZEK, et al., to join Coeur d' Alene Paving, Inc. as a party who has a claim or interest in the above-entitled action that would be affected by the declaration, and it appearing to the Court that Coeur d' Alene Paving, Inc is a real party in interest as to the matters in controversy relating to the zoning of certain properties at issue.

Coeur d' Alene Paving, Inc. is an Idaho corporation subject to service of process.

Coeur d' Alene Paving has an interest in maintaining the zoning designations approved by the Respondents/Defendants for the properties subject to this action and is so situated that the disposition of the action may as a practical matter impair or impede Coeur d' Alene Paving's ability to protect the zoning designations of the properties.

The Court being fully advised in the premises,

IT IS HEREBY ORDERED that Coeur d' Alene Paving Inc. be joined in the above entitled action as a co-defendant without costs to Plaintiffs/Petitioners or Defendant/Respondent and the Petition for Declaratory Action shall hereafter proceed.

DATED this 30 day of June, 2009.



Charles W. Hosack, District Judge

CLERK'S CERTIFICATE OF MAILING AND/OR DELIVERY

I hereby certify that on the 30 day of June, 2009 I served the foregoing document upon:

___ U.S. Mail
___ Hand Delivered
___ Overnight Mail
Fax Facsimile 446-1621

Jethelyn H. Harrington
Kootenai County Department of Legal
Services
P.O. Box 9000
Coeur d'Alene, Idaho 83816-9000

Attorney for Defendant

___ U.S. Mail
___ Hand Delivered
___ Overnight Mail
Fax Facsimile 664-6741

Steven C. Wetzel
WETZEL, WETZEL & HOLT, PLLC
1322 Kathleen Ave., Suite 2
Coeur d'Alene, Idaho 83815-8339

Attorney for CISZEK

___ U.S. Mail
___ Hand Delivered
___ Overnight Mail
Fax Facsimile 667-7625

Michael Ryan Chapman
Chapman Law Office, PLLC Services
P.O. Box 1600
Coeur d'Alene, Idaho 83816

Suani Ker
Clerk

c:\cisaack\zoning appeal\pleadings\order joining Coeur d'Alene Paving.

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED: 7-1-09
AT 9:35 O'CLOCK A M
CLERK, DISTRICT COURT
Shari Kur
DEPUTY

Steven C. Wetzel ISB # 2988
Kevin P Holt ISB # 7196
WETZEL, WETZEL & HOLT, P.L.L.C.
1322 Kathleen Ave., Suite 2
Coeur d'Alene, Idaho 83815
Telephone: (208) 667-3400
Facsimile: (208) 664-6741

Attorneys for LINDA CISZEK

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

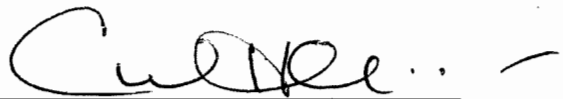
)	
LINDA CISZEK, individually; RONALD G.)	
WILSON and LINDA A. WILSON, husband	)	Case No. CV-08-7074
and wife; BILL DOLE and MARIAN DOLE,)	
husband and wife; MIKE ANDERSON and	)	ORDER JOINING COEUR D' ALENE
RAYELLE ANDERSON, husband and wife;	)	PAVING, INC.
JOE CULBRTH and SHARON)	
CULBRTH, husband and wife; KIRK)	
HOBSON and KIMBERLY HOBSON,)	
husband and wife; SETH MOULDING and)	
JENNIFER MOULDING, husband and wife;)	
CASY NEAL and KRISTIN NEAL, husband)	
and wife; and WILLIAM GIRTON and)	
DOLLY GIRTON, husband and wife,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
BOARD OF COMMISSIONERS,)	
KOOTENAI COUNTY, STATE OF IDAHO,)	
)	
Defendant.)	

06/29/2009 MON 12:00 PM 100 001 0111

WHEREAS, the parties having filed a Stipulation to Join Coeur d'Alene Paving, Inc. as co-defendant in the above-entitled action, and the Court having reviewed said stipulation, as well as the existing court file, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that Coeur d'Alene Paving Inc. be joined in the above entitled action as a co-defendant without costs to Plaintiffs/Petitioners or Defendant/Respondent and the Petition for Declaratory Action shall hereafter proceed.

DATED this 30 day of June, 2009.



Charles W. Hosack, District Judge

CLERK'S CERTIFICATE OF MAILING AND/OR DELIVERY

I hereby certify that on the 1 day of July, 2009 I served the foregoing document upon:

<input type="checkbox"/>	U.S. Mail	Jethelyn H. Harrington
<input type="checkbox"/>	Hand Delivered	Kootenai County Department of Legal Services
<input type="checkbox"/>	Overnight Mail	P.O. Box 9000
<u>Fax</u>	Facsimile 446-1621	Coeur d'Alene, Idaho 83816-9000
		<i>Attorney for Defendant</i>

<input type="checkbox"/>	U.S. Mail	Steven C. Wetzel
<input type="checkbox"/>	Hand Delivered	WETZEL, WETZEL & HOLT, PLLC
<input type="checkbox"/>	Overnight Mail	1322 Kathleen Ave., Suite 2
<u>Fax</u>	Facsimile 664-6741	Coeur d'Alene, Idaho 83815-8339
		<i>Attorney for CISZEK</i>

<input type="checkbox"/>	U.S. Mail	Michael Ryan Chapman
<input type="checkbox"/>	Hand Delivered	Chapman Law Office, PLLC Services
<input type="checkbox"/>	Overnight Mail	P.O. Box 1600
<u>Fax</u>	Facsimile 667-7625	Coeur d'Alene, Idaho 83816
		1508

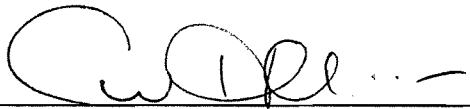
Shawn Re
Clerk

clisack/zoning appeal/pleadings/order joining Coeur d'Alene Paving.

IT IS FURTHER ORDERED that in addition to any original brief or memorandum lodged with the Clerk of Court, counsel shall also provide the Court with a copy that is labeled the Court's copy. To the extent counsel rely on legal authorities not contained in the *Idaho reports*, a copy of each case cited shall be attached to the Court's copy of the brief or memorandum.

IT IS FURTHER ORDERED that upon completion of all briefing, this matter shall be set for hearing at a time convenient to both the Court and counsel.

DATED this 30 day of June ~~30~~, 2009.



Charles W. Hosack, District Judge

Clerk's Certificate of Mailing

I hereby certify that on the / day of ~~June~~^{July}, 2009, that a true and correct copy of the foregoing was mailed/delivered by regular U.S. Mail, postage prepaid, Interoffice Mail, Hand Delivered or Faxed to:

~~For~~ Steven Wetzel (fax: 208-664-6741)

~~For~~ Michael Chapman (fax: 208-667-7625)

~~For~~ Kootenai County Department of Legal Services (fax: 208-446-1621)

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DANIEL J. ENGLISH
CLERK OF THE DISTRICT COURT

BY: 
Deputy Clerk