1-22-2008

Burns Holdings v. Madison County Bd. Respondent's Brief Dckt. 33753

IN THE SUPREME COURT OF THE STATE OF IDAHO

BURNS HOLDINGS, LLC, an Idaho Limited Liability Company, Appellant, v. MADISON COUNTY BOARD OF COUNTY COMMISSIONERS, a political subdivision of the State of Idaho, Respondent.	Supreme Court Docket No.: 33753 Madison County District Court Case No.: CV-05-255 RESPONDENT'S BRIEF

RESPONDENT'S BRIEF

Appeal from the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Madison

Honorable Brent J. Moss, District Judge Presiding.

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A. Nature of the Case.

1. First Attempt to Change Comprehensive Plan Designation on Property.

The property involved in this suit is owned by Burns Holdings, LLC ("Burns"), where three attempts to change Madison County's comprehensive plan designation on the property has been made, requesting a change from an agriculture designation to a commercial and/or light industrial designation. This began in 1979 when the original property owner, Bruce Shirley, sold property located near the north Rexburg interchange to Gayle and Grant Taylor of Rexburg, Idaho.[1] On April 10, 2003, a public hearing was held with the Madison County Planning and Zoning Commission ("Commission") wherein the owner asked that this property's comprehensive plan designation be changed from agricultural to commercial.[2] The Commission was concerned with "safety issues of the overpass, the traffic, infrastructure and the development."[3] The Commission then unanimously denied the request because of safety problems.[4] On April 14, 2003, the comprehensive plan change then went before the Board of Madison County Commissioners ("Board") where Ms. Taylor indicated she owned 46.8 acres on the north interchange and was requesting approval of the comprehensive plan change to commercial use.[5] Among other opposition, the City of Rexburg appeared and requested that it be denied because it did not conform to the present general principals for change at the north area of the county.[6] Board member Passey noted that although he believed this area would become commercial in the future,

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[1] R. Vol. 4 Burns Tab 4 at 2-3.
[2] R. Vol. 4 Burns Tab 1 at 3.
[3] R. Vol. 4 Burns Tab 1 at 4.
[4] *Id.*
[5] R. Vol. 4 Burns Tab 2 at 3.
[6] R. Vol. 4 Burns Tab 2 at 3.

he was against it because of safety issues.[7] Board member Muir stated his "main concerns were access, adequate vision, safety and [the] number of accidents in this area."[8] The Board then unanimously denied the proposed comprehensive plan change because "it was not in harmony with Comprehensive Plan and Zoning Ordinance [.]"[9]

2. Second Attempt to Change Comprehensive Plan Designation on Property.

On January 22, 2004, a public hearing was again held for the property at issue here, wherein Gayle and Grant Taylor again requested a comprehensive plan change designation on their property from agricultural to light industrial zoning.[10] The Commission voted to allow the comprehensive plan change to light industrial by a vote of four in favor and three against.[11] Concerns of the two Commission members who voted against it were traffic, and dangers of the road.[12] Another Commission member was not convinced that a light industrial zoning is needed on the north interchange of Rexburg. The zoning hearing was held right after the above mentioned first hearing, where the Taylors requested the land next be re-zoned from agricultural to light industrial.[13] The Commission recommended to allow for a light industrial zoning, with four voting for it and three against it, for the same reasons stated above.[14]

On February 17, 2004, the Board held a public hearing on the Taylor property comprehensive zone change.[15] After hearing public testimony on the matter and after deliberations, the Board unanimously denied Taylors' application for proposed amendment of the Madison

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[7] R. Vol. 4 Burns Tab 2 at 4.
[8] R. Vol. 4 Burns Tab 2 at 4.
[9] R. Vol. 4 Burns Tab 2 at 4. Note, that the third Board member, Commissioner Sommer, was excused due to illness in his family (R. Vol. 4 Burns Tab 2 at 1).
[10] R. Vol. 4 Burns Tab 4 at 2.
[11] R. Vol. 4 Burns Tab 4 at 7.
[12] R. Vol. 4 Burns Tab 4 at 6.
[13] R. Vol. 4 Burns Tab 4 at 7.
[14] R. Vol. 4 Burns Tab 4 at 9.
[15] R. Vol. 4 Burns Tab 8 at p.4, LL.1 through p.5, LL.5.

County comprehensive plan, which attempted to add an industrial zone near the north Rexburg interchange on October 20, 2004.[16] The reasons for the denial were: the negative impact on property rights; the negative impact on adjacent residential neighborhoods; barriers to commercial usage; access difficulties regarding transportation; negative impact on surrounding housing; improper spot zoning; the zoning is not harmonious with the comprehensive plan in that the objective in Madison County is to preserve agricultural lands; and, it was not in the best interest of the people of Madison County.[17]

On April 16, 2004, Burns executed a Warranty Deed on the Taylor property, and on September 27, 2004, Burns executed another Warranty Deed on the Newman property, buying the property at issue in this case.[18]

3. Third Attempt to Change Comprehensive Plan Designation on Property.

On November 22, 2004, Burns first appeared and filed a request for a comprehensive plan designation change on the property they now own—the same property subject to the prior two attempts—from transitional agricultural to commercial and industrial.[19] Burns further requested a zone change from agricultural to commercial, with an imbedded industrial zone.[20] The property was described as approximately 50 acres located on the northwest corner of the intersection of Highway 20 and Salem Highway, located in Madison County, Idaho.[21] The proposed use for the industrial property by Burns was to establish a new concrete production facility.[22] The concrete production facility proposed for the property would consist of a concrete batch plant, a small truck

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[16] R. Vol. 4 Burns Tab 7 at 29.
[17] R. Vol. 4 Burn Tab 7 at 26-28.
[18] R. Vol. 4 Burns Tab 12, attachment #5 and #6.
[19] R. Vol. 4 Burns Tab 12, Madison County Zone Change Application.
[20] *Id.*
[21] Vol. 4 Burns Tab 12, Letter to Madison County Planning & Zoning from Burns dated November 19, 2004.
[22] *Id.*

shop, and an office building.[23] The concrete batch plant would mix aggregates, cement, and water together to produce a concrete product that is delivered to jobsites in concrete mixer trucks.[24]

On December 16, 2004, a public hearing was held before the Commission regarding Burns' comprehensive plan change and zone change requests on their property.[25] That same night, Walters Concrete was also asking for a comprehensive plan and zone change on property they owned in Rexburg.[26] Burns' request was to change the comprehensive plan's designation and zoning designation from transitional agricultural to commercial with light industrial.[27] After review of Burns' application, the Commission recommended approval by a nine to one vote for the comprehensive plan change, and tabled the zone change for a later date.[28] On January 13, 2005, a public hearing was held regarding the zone change, wherein after reviewing the Burns' application, the zone change was recommended for approval by the Commission by a six to one vote.[29]

The recommendation then went to the Board wherein a public hearing on the Burns' comprehensive plan and zone change was held on February 28, 2005.[30] After discussion, the decision was tabled by the Board until March 7, 2005.[31] On March 7, 2005, the Board voted two to one to deny the Burns comprehensive plan change, thus, there was no need to decide the proposed Burns' zone change.[32] The Board issued its Findings of Fact and Conclusions of Law on April 11, 2005, confirming the denial to change the designation of the comprehensive plan on Burns'

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[23] *Id.*
[24] *Id.*
[25] R. Vol. 4 Burns Tab 14.
[26] R. Vol. 4 Walters Tab 10.
[27] R. Vol. 4 Burns Tab 14.
[28] R. Vol. 4 Burns Tab 17; R. Vol. 4 Burns Tab 14 at 18.
[29] R. Vol. 4 Burns Tab 22.
[30] R. Vol. 4 Burns Tab 26 at 1; R. Vol. 4 Burns Tab 27 at 1.
[31] R. Vol. 4 Burns Tab 26 at 13; R. Vol. 4 Burns Tab 27 at 34.
[32] R. Vol. 4 Burns Tab 28.

property from agricultural to commercial and light industrial.[33] The reasons the Board gave for its denial were: the negative impact on property rights, particularly property values; the close proximity to several substantial residential neighborhoods and the negative impact on them; serious access difficulties regarding transportation especially where "a substantial portion of proposed new traffic to the site will include heavily laden cement and delivery vehicles"; impact on recreation regarding the site's location on a "major access route to the St. Anthony sand dunes [;]" impact on the neighborhood residential uses; the plan would require "piecemeal zoning" which "does not allow the County to comply with its State mandated responsibility to plan comprehensively, particularly in the area of community design. The County should continue to group industrial uses, and aim them toward areas where city services are available [;]" implementation of the proposed amendment would require a "substantial rewrite" of the existing comprehensive plan; the zoning is not harmonious with the comprehensive plan in the areas of "agricultural lands, industrial uses, economic development, transportation and community design [;]" and, it is not in the best interest of the people of Madison County.[34]

4. Burns' First Petition for Judicial Review.

Prior to the Board's April 11, 2005 decision denying Burns' application for comprehensive plan change, Burns preemptively filed its first Petition For Judicial Review on April 1, 2005.[35] Burns argued the Board's actions were "in violation of Constitutional and Statutory provisions, or in excess of the Board's statutory authority, were made upon unlawful procedure, were not supported by substantial evidence on the record as a whole, and were arbitrary, capricious, and an

[33] R. Vol. 4 Burns Tab 29 at 42.
[34] R. Vol. 4 Burns Tab 29 at 38-41.
[35] R. Vol. 1 at 1-4.

abuse of discretion."[36] After the Board's written findings were issued on April 11, 2005, Burns again filed another Petition for Judicial Review on May 4, 2005,[37] arguing the Board's actions were made upon unlawful procedure, the Board did not issue written decisions with respect to the zone change, Burns' rights under the due process clause of the Constitution were violated, and one of the Board members had a conflict of interest in this matter.[38]

Madison County's Deputy Prosecutor, Penny J. Stanford, answered with affirmative defenses and counterclaims on May 12, 2005, alleging no violations of procedure or law occurred as outlined by Burns.[39] Burns then filed a Memorandum in Support of Motion for Summary Judgment on October 4, 2005.[40] The County replied by way of its Respondent's Reply Brief on November 30, 2005.[41] Burns then filed Burns' Response to the County's Reply Brief dated January 17, 2006.[42]

The parties set the date of March 13, 2006, for oral arguments to be heard before the district court.[43] Before oral arguments however, the district court judge, the Honorable Brent Moss, met with both attorneys in chambers, wherein "the parties agreed and stipulated that this matter is properly remanded back to the Board of County Commissioners (Board)."[44] The Court's Order also noted the parties agreed that the Board may re-address any specific issues or the entire

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[36] R. Vol. 1 at 3.
[37] The first Petition For Judicial Review, dated April 1, 2005, was in Case No.: CV-05-255 (R. Vol. 1 at 1); the second, dated May 3, 2005, was in Case No.: CV-05-340 (R. Vol. 1 at 10). These were later consolidated by Order into CV-05-255, on June 9, 2005 (R. Vol. 1 at 96-98).
[38] R. Vol. 1 at 10-15.
[39] R. Vol. 1 at 10-29.
[40] R. Vol. 1 at 104.
[41] R. Vol. 1 at 152.
[42] R. Vol. 2 at 273.
[43] R. Vol. 2 at 328-329.
[44] R. Vol. 2 at 331-333. Significantly, the Order and record are absent of any statements raised by Burns in its Appellant's Opening Brief, dated December 3, 2007, pp. 6-9, as to what Judge Moss said or did not say while in chambers. The Order and record just state both parties simply stipulated to a remand back to the Board (R. Vol. 2 at 330).

matter.[45] The district court also preserved the issue of attorney's fees to be addressed at a later time.[46]

On April 13, 2006, the Board met for the purpose to again completely review the Burns hearing (as well as Walters) from February 28, 2005, and to make another decision regarding the proposed comprehensive plan change and, if accepted, then decide the proposed zone change.[47] There, the Board again considered all transportation plans and safety analyses submitted, collision data from the Idaho Transportation Department, aerial maps, Commission's Findings of Fact, copies of the appeal record submitted to the district court, the minutes submitted at the February 28, 2005 public hearing, all letters and petitions from the citizens who submitted information at that hearing, and the written findings the Board issued on August 11, 2005.[48] The Board also reviewed the Walters matter they heard before the Burns matter on February 28, 2005, re-listened to the CD of Mr. Pline's presentation, and re-reviewed copies of the Madison County zoning ordinance and Madison County comprehensive plan.[49] The Board also reviewed the component analysis as required by state law, going through each individual component outlined in Idaho Code § 67-6508.[50]

After reviewing all the transcripts, exhibits, presentations, documents and video presented again, the Board voted two to one to deny Burns' proposed comprehensive plan change, making a decision on the proposed zone change unnecessary.[51] The Board issued its written Findings of

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[45] *Id.*
[46] R. Vol. 2 at 332.
[47] R. Vol. entitled "Binder with Augmentations from Order of December 24, 2007", item number 5, April 13, 2006 (initially inadvertently dated February 13, 2006), Public Hearing transcript, at p.1, LL.1-13.
[48] *Id.* at p.3, LL.8-25; p.4, LL.1-25; p.5, LL.1.
[49] *Id.*
[50] *Id.* at p.12, LL.1-20; p.14, LL.4 through p.53, LL.6.
[51] *Id.* at p.69, LL.22 through p.72, LL.9.

Fact and Conclusions of Law on June 1, 2006.[52] The reasons outlined by the Board for the denial include, in pertinent part, the following:[53]

- Property rights. The negative impact on property rights because approval would require inserting "an island of industrial zoning into the middle of residential and agricultural properties [;]" and is improper per Idaho Code § 67-6508(a);

- Population. The close proximity to several substantial residential neighborhoods and the negative impact on them. Further, residential trends in the area by the site would be negatively altered;

- Land Use. A cement batch plant is not compatible next to housing, and the proposed amendment is "merely reactive" and would be "improper spot zoning [;]"

- Public Services, Facilities and Utilities. The comprehensive plan requires industrial uses be located where they can be "supplied with public services such as cities can provide" and Burns' facility has no services available to it;

- Transportation. The north highway interchange near the proposed site has "sight and other inadequacies" which worsen where a substantial portion of the new traffic using the access would be heavy cement and delivery vehicles;

- Recreation. Impact from the site's location on a "major access route to the St. Anthony Sand Dunes [;]"

- Housing. The proposed amendment would have a negative overall impact on the neighborhood residential uses, and if the property is no longer used, it should be used as residential;

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[52] R. Vol. 3 at 394; 437; R. Vol. entitled "Binder with Augmentations from Order of December 24, 2007", item number 6, Findings of Fact, Conclusions of Law and Decision of the Board of County Commissioners of Madison County, Idaho, dated June 1, 2006.

• Community Design. The proposed plan would require "improper spot zoning" and not allow for the grouping of industrial areas nor aim them towards city services. Further, variations from the comprehensive plan would not allow for the beautification of the community where this location is a major doorway into Madison County, per Idaho Code § 67-6508(m);

• Implementation. Implementation of the proposed amendment would require a "substantial rewrite" of the existing comprehensive plan;

• The proposed amendment is not harmonious with the comprehensive plan in the areas of "property rights, population, land use, public services, facilities and utilities, transportation, community design and implementation, and should be denied [;]" and,

• It is not in the best interest of the people of Madison County.

5. Burns' Second Petition for Judicial Review.

Burns then filed an Amended Petition for Judicial Review on approximately July 3, 2006.[54] After both parties fully briefed the issues, Judge Moss issued his Decision On Review dated October 17, 2006, affirming the Board's June 1, 2006 decision.[55] In the court's Decision On Review, the district court specifically held that the Board did not violate any constitutional or statutory provisions, nor did the Board exceed its statutory authority.[56] The court held that the Board's decision was not made upon unlawful procedure and was supported by substantial evidence after reviewing the record as a whole and the component analysis required by Idaho Code § 67-6508.[57] Finally, the court held the Board's decision was not arbitrary, capricious, or an abuse of discretion.[58] Notwithstanding, the district court held that Burns was entitled to an award of

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[53] *Id.*, at pp.20-23.
[54] R. Vol. 2 at 341-342.
[55] R. Vol. 3 at 488-506.
[56] *Id.*
[57] *Id.*
[58] *Id.*

partial attorney's fees under Idaho Code § 12-121, due to a misinterpretation of evidence and a possible conflict of interest on the Board's part.[59] Therefore the court held that Burns was a prevailing party only as of March 13, 2006.[60]

Burns filed a Notice of Appeal to the Idaho Supreme Court dated November 28, 2006.[61] Upon Madison County motioning the district court to reconsider the attorney's fees issue, and after hearing argument on the same, the district court made its Memorandum Decision Re: Motion to Reconsider Attorney's Fee Award on January 23, 2007, wherein the district court held the Board had in fact prevailed on all issues and the record did not in fact support any finding that the actions taken by the Board were pursued frivolously, unreasonably, or without foundation, per Idaho Rule of Civil Procedure 54(e)(1) and Idaho Code § 12-121.[62] Hence, the court's prior decision to award attorney's fees to Burns was erroneously made and the court denied Burns' Motion for Fees.[63]

The district court made its Order Affirming Decision of County Board of County Commissioners and Denying Request for Attorney's Fees on January 23, 2007.[64] After Burns' Motion for Reconsideration, the district court again reaffirmed itself by Order dated May 3, 2007, maintaining its position outlined in its previous January 23, 2007 Order, and further stated that "Idaho Code § 12-121 sets out a rigorous standard that Burns fails to establish."[65]

Burns filed an Amended Notice of Appeal to this Court dated June 7, 2007, additionally arguing whether it is entitled to attorney's fees on appeal pursuant to Idaho Code § 12-117.[66]

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[59] *Id.* at 505-506.
[60] *Id.*
[61] R. Vol. 3 at 576-579.
[62] R. Vol. 3 at 585-586.
[63] *Id.*
[64] R. Vol. 3 at 588.
[65] R. Vol. 3 at 625.
[66] R. Vol. 3 at 629-631.

II. ISSUES ON APPEAL[67]

1. Was the Commission's decision on the Burns application results-oriented in light of the Commission's decision on the Walters, which was decided at the same time?

2. Should the decision in *Evans v. Board of Commissioners of Cassia County*, 137 Idaho 428, 50 P.3d 443 (2002) be extended to require that oral testimony of lay witnesses in opposition to official and expert reports be supported by other credible evidence before such lay testimony can be adopted?

3. Was the Commission's decision arbitrary and capricious and not supported by substantial evidence on the record as a whole?

4. Has a substantial right of Burns been prejudiced?

5. Is Burns entitled to an award of attorney's fees on appeal to the district court pursuant to Idaho Code § 12-117, and/or an award of attorney's fees on appeal to this court?

III. ADDITIONAL ISSUE PRESENTED ON APPEAL

1. Would granting Burns' request for a comprehensive plan change amount to invalid spot zoning?

IV. ARGUMENT

A. General Standard of Review on Appeal from District Courts to Appellate Courts.

The following statutes and court rules govern judicial review in Idaho. In 1975, the Idaho legislature adopted an extensive recodification of the laws in this State relating to planning and zoning, in the Local Planning Act of 1975.[68] This Local Land Use Planning Act of 1975 ("LLUPA") allows for judicial review under the provisions of the Idaho Administrative Procedures Act ("APA").[69] The APA applies to judicial review of "an agency," which it defines as a "state board, commission, department or officer authorized by law to make rules or to determine

[67] As presented in Appellant's Opening Brief, dated December 3, 2007, pp.10-11.
[68] *Gumprecht v. City of Coeur d' Alene*, 104 Idaho 615, 617, 661 P.2d 1214, 1216 (Idaho 1983).
[69] Idaho Code §§ 67-6519(4), 67-6521(1)(d).

contested cases . . . ."[70] In addition to LLUPA and the APA,[71] judicial review is also governed by Rule 84 of the Idaho Rules of Civil Procedure.[72] Amendments to the comprehensive plan done by the Board are "quasi-judicial" actions and are subject to review under LLUPA and the APA.[73]

Since LLUPA adopts the judicial review provisions of the APA for review of these quasi-judicial actions, we must turn to the standards set out by the APA for judicial review, found in Idaho Code § 67-5279. Section 67-5279(3) sets forth the standard of review for this Court. It states as follows:

. . .

> (3) When the agency was required by the provisions of this chapter or by other provisions of law to issue an order, the court shall affirm the agency action unless the court finds that the agency's findings, inferences, conclusions, or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) not supported by substantial evidence on the record as a whole; or
> (e) arbitrary, capricious, or an abuse of discretion.
>
> If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for other proceedings as necessary.[74]

. . .

If this Court finds the underlying decision was in violation of any provision of Idaho Code § 67-5279(3)(a)-(e), Burns must then show that a "substantial right" has been prejudiced per Idaho Code § 67-5279(4).

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[70] Idaho Code § 67-5201(2); *Petersen v. Franklin County*, 130 Idaho 176, 182, 938 P.2d 1214, 1220 (Idaho 1997).
[71] The APA is codified in Idaho Code §§ 67-5201 to 67-5292, as first enacted in 1965 and subsequently amended in 1992.
[72] Which rules largely outline timeframes to follow unless otherwise prescribed by statute. *See* I.R.C.P. 84(b)(1).
[73] *See generally Cooper v. Ada County Commissioners*, 101 Idaho 407, 410-411, 614 P.2d 947, 950-951 (Idaho 1980).
[74] Idaho Code § 67-5279(3).

"In a subsequent appeal from a district court's decision in which the district court was acting in its appellate capacity under the Administrative Procedure's Act (APA), the Supreme Court reviews the agency record independently of the district court's decision."[75] As to the facts, this Court reviews them in the same manner as the district court, in that "[t]he standards governing judicial review in a case involving the LLUPA provide that this Court does not substitute its judgment for that of the agency as to the weight of the evidence presented."[76] Indeed, "[i]t is not the role of the reviewing court to weigh the evidence."[77] "[T]his Court defers to the agency's findings of fact unless they are clearly erroneous."[78] "A strong presumption of validity favors an agency's actions."[79]

B. The Board's decision on the Burns' application was not results-oriented in light of the Board's decision on the Walters' application, which was decided at the same time.[80]

Burns begins by arguing the Board's decision was "results-oriented" when compared to another Board decision in Walters.[81] Burns aims this at the arbitrary and capricious standard set forth in the APA.[82] This Court has held, "there is a strong presumption favoring the validity of the action of zoning boards and we have upheld the validity of their actions whenever they are free from capriciousness, arbitrariness, or discrimination."[83] This standard applies to the exercise of discretion by the Board and was summed up as follows:

> This standard is often phrased in the negative: an agency decision would be arbitrary, capricious, or an abuse of discretion if it were not based on those factors

[75] *Eacret v. Bonner County*, 139 Idaho 780, 784, 86 P.3d 494, 498 (Idaho 2004).
[76] *Fischer v. City of Ketchum*, 141 Idaho 349, 352, 109 P.3d 1091, 1094 (Idaho 2005).
[77] *Davisco Foods Int'l Inc. v. Gooding County*, 141 Idaho 784, 790, 118 P.3d 116, 122 (Idaho 2005).
[78] *Fischer v. City of Ketchum*, 141 Idaho 349, 352, 109 P.3d 1091, 1094 (Idaho 2005) (internal citations omitted).
[79] *Young Electric Sign Co. v. State ex rel. Winder*, 135 Idaho 804, 807, 25 P.3d 117, 120 (Idaho 2001).
[80] The Madison County Board of County Commissioners is regarded as the "Board" herein; the Madison County Planning and Zoning Commission is regarded as the "Commission" herein.
[81] R. Appellant's Opening Brief, dated December 3, 2007, p.14.
[82] *Id.*
[83] *South Fork Coalition v. Board of Commissioner's of Bonneville County*, 117 Idaho 857, 860, 792 P.2d 882, 885 (Idaho 1990).

> that the legislature though relevant, ignored an important aspect of the problem, provided an explanation that ran counter to the evidence before the agency, or involved a clear error of judgment. The focus of this inquiry is on the methods by which the agency arrived at its decision: for example, did the agency not only consider all the right questions, did it consider some wrong ones? Does the relationship between the facts found and the conclusion reached reveal gaps in the logic of the reasoning process? Again, the question of judicial review largely devolves into question of whether the agency was reasonable.[84]

In Madison County, a comprehensive plan change and a zone change begins with the Commission. The Commission's duty is to recommend findings to the Board, who then may accept, deny, or hold a public hearing on the proposed amendment to the comprehensive plan or zone change.[85] A comprehensive plan, although not being a legally controlling zoning law, serves as a guide to the Commission and Board charged with making zoning decisions.[86] The Board cannot ignore the Madison County comprehensive plan when adopting or amending zoning ordinances.[87] Burns spends some time outlining its application and comparing it to the Walters application, heard the same evening by the Board.[88] In Walters' case, their application was made on October 4, 2004.[89] The street address of the property is 4626 South 2860 West and consists of approximately 119 acres.[90] This property was transitional two/agriculture and the northwest corner of the property is zoned industrial and adjoins existing industrial zoning.[91] Access to and from the property would be using the first of three main entrances and exits to Rexburg, known as the south exit located approximately one-half a mile away.[92] Also, this property's north side

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[84] *Michael S. Gillmore & Dale D. Goble, The Idaho Administrative Procedures Act: a Primer for the Practitioner*, 30 Idaho L. Rev. 273 365 (1993).
[85] Idaho Code § 67-6511(b).
[86] *Bone v. City of Lewiston*, 107 Idaho 844, 850, 693 P.2d 1046, 1052 (Idaho 1984).
[87] *Id.*
[88] R. Appellant's Opening Brief, dated December 3, 2007, pp.14-19.
[89] R. Vol. 4 at Walters Tab 1.
[90] *Id.*
[91] *Id.*
[92] *Id.*

borders industrial, bark plants and transitional two farming.[93] The property across the roadway to the west is zoned commercial.[94] The Walters' site was to be used for the operation of a gravel pit with no buildings placed on the property.[95]

In comparison, Burns' application was dated November 19, 2004,[96] and is located at approximately 3000 North.[97] This would place the two properties approximately six miles and three overpasses (as noted below) apart from each other. Burns' property consisted of approximately 50 acres and is not surrounded or bordered by commercial property.[98]

There are three interchanges that are commonly used in the City of Rexburg: the south interchange, the middle interchange and the north interchange.[99] Of them, the south and middle interchanges have commercial/industrial uses around them; the north does not.[100] The fact is, seeing as the applicants' locations are drastically different, as are the proposed uses, the comprehensive plan treats them differently. From Appellant's Opening Brief, Appendixes A-C show there are no industrial or commercial uses near the north interchange where Burns proposed its site. It was argued correctly by Madison County in front of the district court that this area remains pristine.[101]

The dissimilarities continue between the two applicants, and are best contrasted as set out by the Board in their Findings of Fact, Conclusions of Law and Decision in each case. For example, with Walters, the Board found:[102]

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[93] *Id.* at pp. 10-11.
[94] *Id.* at p.13.
[95] R. Vol. 4 Walters Tab 4.
[96] R. Vol. 4 Burns Tab 12.
[97] R. Vol. 4 Burns Tab 14.
[98] R. Vol. 4 Burns Tab 12.
[99] R. Transcript from August 11, 2006, hearing before Judge Moss, Case No. CV-2005-255, p.22, LL.11-15.
[100] *Id.*, p.22, LL.15-23.
[101] *Id.*, p.24, LL.2-8.
[102] The Walters Findings of Fact and Conclusions of Law by the Board could not be found in the record, so a reference is made to the Respondent's Reply Brief instead (R. Vol. 1 at 189).

> The proposed amendment seeks the addition of a commercial and light industrial zone near State Highway 191 where it intersects with 4700 South. The property sought to be rezoned is bounded on the south by 4700 South and on the east by State Highway 191, U. S. Highway 20, and by the rail lines of the Eastern Idaho Railroad. Six industrial areas exist within the surrounding area: Mountain West Bark, commonly referred to as "The Bark Plant," is in an industrial zone located to the north of the site; Western Fence, Inc., is a non-conforming use located west of the site; Benchmark Potato is a non-conforming use located west by southwest of the site; Mr. Driveline is a non-conforming use located south of the site; Edstrom Gravel Pit is a non-conforming use located east by northeast of the site. (Findings pp. 13-14).

For Burns, the Board found:[103]

> The project site currently is planned and zoned as agricultural and historically has been and still is used as agricultural ground. Existing surrounding uses include agricultural and residential uses. There are no other commercial or industrial areas located close to the project site. The proposed commercial area would be located adjacent to U.S. Highway 20, while the proposed industrial area would abut property owned by Alice Hegstead which is currently designated and actually in use as agricultural.

Regarding Walters, no concerns were voiced regarding the location of the Walters access due to traffic volume, sight restrictions or vehicle speed, all of which were major issues in the Burns' hearing.[104] Those testifying at the Walters' hearing were primarily concerned with property values, buffering, potential pollution from the gravel pit, and more gravel trucks traveling county roads.[105] However, six other industrial properties already existed in the neighborhood area, including one already working gravel pit.[106] As stated in the Madison County comprehensive plan, industrial uses are to be grouped.[107] Approval of the Walters project in an area within city limits,

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[103] R. Vol. entitled "Binder with Augmentations from Order of December 24, 2007", item number 6, Findings of Fact and Conclusions of Law, dated June 1, 2008, at pp.5-6.
[104] *Id.*, item number 3, Public Hearing transcript on Walter's Concrete Comprehensive Plan Change, dated February 28, 2005, at p.17, LL.8 through p.45, LL.4.
[105] R. Vol. entitled "Binder with Augmentations from Order of December 24, 2007", item number 3, Public Hearing Re: Walter's Concrete dated February 28, 2005, at p.17 through p.49, LL.2.
[106] R. Vol. 4 Walters Tab 1.
[107] R. Vol. entitled "Binder with Augmentations from Order of December 24, 2007", item number 6, Findings of Fact and Conclusions of Law, dated June 1, 2006, pp.14-16.

bounded by railroad line, where six other industrial sites, including one gravel pit already are in existence, is in full compliance with the comprehensive plan.

In comparison, the Burns property has no commercial property located near it, while the Walters property has a number of both commercial and industrial properties located nearby. Burns also proposed the construction of a cement batch plant and provided a number of plans as to the location and design of the plant and buildings. Whereas Walters only proposed to dig a gravel pit.

Decisions by the Board must be "based on the applicable provisions of the comprehensive plan."[108] The Board has to make its decision on a case by case determination. As stated in *Southfork Coalition v. Board of Comm'rs of Bonneville County*, "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. . . . [T]he determination of whether a zoning ordinance is 'in accordance with' the comprehensive plan is one of fact. As a question of fact, the determination is for the governing body charged with zoning . . . ."[109]

In this case, the Board undertook a factual inquiry as to the relationship between what Burns wanted and what the comprehensive plan stated. The Board found the zoning action was not in accordance with the comprehensive plan.[110] The Findings of Fact and Conclusions of Law itself is evidence that the Board balanced competing interests and reviewed the applicable statutes, comprehensive plan, zoning ordinances, and did the appropriate component analysis as required by law.[111] The problem with the residents and the Board was largely Burns' location.[112]

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[108] Idaho Code § 67-6535(b).
[109] *Southfork Coalition v. Board of Comm'rs of Bonneville County*, 117 Idaho 857, 863, 792 P.2d 882, 888 (Idaho 1990) (quotations and citations omitted).
[110] *See, e.g., Urrutia v. Blaine County*, 134 Idaho 353, 2 P.3d 738 (Idaho 2000); R. Binder with Augmentations from Order of December 24, 2007, item 6, pp.19-23.
[111] R. Binder with Augmentations from Order of December 24, 2007, item number 6, Findings of Fact and Conclusions of Law, dated June 1, 2006, pp.5-24.
[112] R. Transcript from August 11, 2006, hearing before Judge Moss, Case No. CV-2005-255, p.20, LL.4-6; R. Vol. 4

In conclusion, the Walters and Burns projects were so vastly different in type, scope, impact, neighboring uses, and distance, that differing decisions on the projects were entirely appropriate. The Board made the correct decision in that no violation of law occurred. As such, the Board's decision should be upheld.

Burns further argues the Board should have articulated why the Burns decision was different than Walters.[113] LLUPA only requires the Board make a written "reasoned statement" as to each application, per Idaho Code § 67-6535(a)-(b). This statute provides:

> (a) The approval or denial of any application provided for in this chapter shall be based upon standards and criteria which shall set forth in the comprehensive plan, zoning ordinance or other appropriate ordinance or regulation of the city or county.
>
> (b) The approval or denial of any application provided for in this chapter shall be in writing and accompanied by reasoned statement that explains the criteria and standards considered relevant, states the relevant contested facts relied upon, and explains the rationale for the decision based on the applicable provisions of the comprehensive plan, relevant ordinance and statutory provisions, pertinent constitutional principles and factual information contained in the record.[114]
>
> . . .
>
> Idaho Code § 67-6519(4) also states:
>
> (4) Whenever a governing board or zoning or planning and zoning commission grants or denies a permit, it shall specify:
>
> (a) The ordinance and standards used in evaluating the application;
> (b) The reasons for approval or denial; and
> (c) The actions, if any, that the applicant could take to obtain a permit.
>
> . . .

Burns Tab 14.
[113] Appellant's Opening Brief, dated December 3, 2007, p.19.
[114] Idaho Code § 67-6535(a)-(b).

Here, the Board made a reasoned statement as to Burns' application and did not have to compare it to Walters' or any other applicant's application for that matter. For these reasons, the Board's finding must be further upheld.

C. *Evans v. Board of Commissioners of Cassia County*, 137 Idaho 428, 50 P.3d 443 (2002) should not be extended to require that oral testimony of lay witnesses be supported by other credible evidence before such lay testimony can be adopted.

In essence, Burns states that if the Board allegedly failed to follow the *Evans v. Board of Commissioners of Cassia County* case, it would be a procedural error under Idaho Code § 67-5279(3)(c).

In *Evans v. Board of Com'rs of Cassia County*, this Court held that "[i]t would not be feasible to require those conducting this type of hearing, who frequently are not trained in the law, to accept only the evidence which would be admissible in a court proceeding. Here, the Board properly considered substantial evidence and heard testimony of those individuals who had an interest in the proceedings."[115] This Court is to "consider the proceedings as a whole and to evaluate the adequacy of procedures and resultant decisions in light of practical considerations with an emphasis on fundamental fairness and the essentials of reason decision-making."[116] The Board's factual findings are not clearly erroneous in this case because it is supported by substantial, competent, although conflicting evidence.[117]

In this case, the credibility of the witnesses and evidence was assessed first hand by the Board, both at the February 28, 2005 comprehensive plan public hearing,[118] as well as the review of the record once again on April 13, 2006.[119] This Court will not substitute its judgment for that

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[115] *Evans*, 137 Idaho 428, 447, 50 P.3d 443, 432 (Idaho 2002).
[116] Idaho Code § 67-6535.
[117] *See e.g., Friends of Farm to Market*, 137 Idaho 192, 196, 46 P.3d 9, 13 (Idaho 2002).
[118] R. Vol. 4 Burns Tab 26.
[119] R. Vol. entitled "Binder with Augmentations from Order of December 24, 2007", item number 5, Public Hearing dated April 13, 2006, at p.1, LL.1-13.

of the zoning agency as to the weight of the evidence on questions of fact.[120] "[A] local zoning agency's interpretation of its own ordinances, even if questionable, without more, does not necessarily amount to a violation [.]"[121]

Burns argues to this Court that the Board's reliance on oral claims and testimony was improper without further evidence.[122] Idaho Code requires the Board to "provide an opportunity for all effected persons to present and rebut evidence."[123] Further, the APA sets out exactly what is supposed to be included in an agency record found in Idaho Code § 67-5249. This includes in part, evidence received or considered, notices, memorandum and transcripts of the record.

The Idaho Rules of Evidence also set out the framework for determining when witnesses may testify and to what they may testify. Once a witness has been qualified to testify in a given issue, the weight ultimately assigned to that witness' testimony is left completely to the trier of fact. Neither the Rules of Evidence, nor case law, requires a trier of fact to assign more weight to the testimony of an expert as opposed to a lay person. Indeed, Idaho Rules of Evidence 701 and 702 states as follows:

> Rule 701. Opinion Testimony by Lay Witnesses.
>
> If the witness is not testifying as an expert, the testimony of the witness in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.
>
> Rule 702. Testimony by Experts.
>
> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an

[119] *Id.* at p. 3, LL. 8-25; p.4, LL.1-25; p.5, LL.1.
[120] *Lamar Corp. v. City of Twin Falls*, 133 Idaho 36, 39, 981 P.2d 1146, 1149 (1999); Idaho Code § 67-5279(1).
[121] *Evans v. Board of Com'rs of Cassia County*, 137 Idaho 428, 447, 50 P.3d 443, 432 (Idaho 2002).
[122] Appellant's Opening Brief dated December 3, 2007, p.19.
[123] Idaho Code § 67-6534.

> expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In this case, the record is full of experiences from life-long residents of Madison County and citizens who had done their research before testifying. Examples of this include Val Ball, living across the road from Burns' proposed site who testified that he can only get his truck up to 15 miles per hour before he hits the top of the overpass and a turning lane would not help the traffic.[124] The record is also full of people that thoroughly reviewed the comprehensive plan and zoning ordinances.[125] The same matter was repeated at the February 28, 2005 public hearing in front of the Board.[126] Also included were documents from the public regarding their review of industrial zones, Madison County zoning ordinances, and the number of homes surrounding the proposed site.[127]

Hence, the standard, if one even exists from *Evans v. Board of Comm'rs of Cassia County*, has been met in that the Board had the opportunity to hear numerous comments from the audience, surrounding cities, as well as statements from various local attorneys and from Burns. Additionally, there were numerous exhibits, written documents, and tapes entered into evidence for the Board's review, and the witnesses appeared so the Board could assess their credibility firsthand. The evidence heard by the Board was substantial and competent, although it was not un-contradicted; but the evidence does not need to lead to a certain conclusion, it need only be of sufficient quantity and probative value that reasonable minds could reach the same conclusion as the fact finder.[128] For these reasons, the Board's decision must also be upheld.

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[124] R. Vol. 4 Burns Tab 14; *Planning and Zoning Minutes* December 16, 2004, p.10.
[125] *Id.*, at pp.11-18.
[126] R. Vol. 4 Burns Tab 26 at 4-13.
[127] R. Vol. 4 Burns Tab 9; R. Vol. 4 Burns Tab 10.
[128] *Mann v. Safeway Stores, Inc.*, 95 Idaho 732, 736, 518 P.2d 1194, 1998 (Idaho 1974).

D. The Board's decision was neither arbitrary nor capricious and was supported by substantial evidence on the record as a whole.

"To hold that a finding is not clearly erroneous, there must be substantial evidence in the record to support the finding."[129] "The 'substantial evidence rule' is said to be a 'middle position' which precludes a *de novo* hearing but which nonetheless requires a serious review which goes beyond the mere ascertainment of procedural regularity."[130] Even under the APA, "[t]he court shall not substitute its judgment for that of the agency as to the evidence on questions of fact."[131]

Substantial has been further described as follows:

> By substantial, it is not meant that the evidence need be un-contradicted. All that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds could conclude that the verdict of the jury was proper. It is not necessary that the evidence be of such quantity or quality that reasonable minds must conclude, only that they could conclude.[132]

Even where there is conflicting evidence before the agency, an agency's factual determinations are binding on the reviewing court so long as the determinations are supported by substantial competent evidence in the record.[133]

Substantial and competent evidence is less than a preponderance of evidence, but more than a mere scintilla.[134] This Court wrote, "the substantial [competent] evidence rule requires a court to determine 'whether [the agency's] findings of fact are reasonable.'"[135]

"The governing body charged with making zoning decisions 'in accordance with' the Comprehensive Plan must 'make a factual inquiry into whether requested zoning ordinance or

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[129] *Pace v. Hymas*, 111 Idaho 581, 588, 726 P.2d 693, 700 (Idaho 1986).
[130] *Id.* (internal citations omitted.)
[131] Idaho Code § 67-5279(1).
[132] *Mann v. Safeway Stores, Inc.*, 95 Idaho 732, 736, 518 P.2d 1194, 1998 (Idaho 1974) (a case dealing with substantial evidence in a motion for judgment notwithstanding the verdict, but equally applicable in actions for judicial review of the Board action in this case).
[133] *Lane Ranch Partnership v. City of Sun Valley*, 144 Idaho 584, 166 P.3d 374, 378 (Idaho 2007).
[134] *Evans v. Hara's, Inc.*, 123 Idaho 473, 478, 849 P.2d 934, 939 (Idaho 1993).
[135] *Pace v. Hymas*, 111 Idaho 581, 589, 726 P.2d 693, 701 (Idaho 1986) (internal citations omitted).

amendment reflects the goals of, and takes into account those factors in, the Comprehensive Plan in light of the present factual circumstances surrounding the request.'"[136] In looking at the totality of the record, considering the proceedings as a whole, and evaluating the adequacy of the procedures and resulting decision in light of practical considerations according to Idaho Code § 67-6535(c), the Board's decision should be upheld.

As stated in the Appellant's Opening Brief,[137] Burns spends a lot of time discussing the transportation, traffic and safety of the north interchange of Highway 20 and the Salem Road.

James Pline gave a written report that was included in the Burns presentation, and the audio-visual report, which was played for the Board during the hearing.[138] Mr. Pline based portions of his report on the 2003 *Traffic Analysis* performed by the Dyer Group, and the 2004 *Safety Analysis* performed by John W. Becker of the Idaho Transportation Department. [139] Both are included in the Appendixes of his written report.[140] Burns also relied on parts of the *Madison County Transportation Plan*, also known as the *Keller Report*,[141] and on portions of the report from the Idaho Transportation Department.[142]

Mr. Pline stated in his audio-visual report that he had spent approximately two to three hours actually viewing the intersection at issue prior to issuing his report.[143] It is unknown what time of day or year he reviewed the intersection. He said that the sideline from the westbound US

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[136] *Evans v. Teton County*, 139 Idaho 71, 76, 73 P.3d 84, 89 (Idaho 2003); *citing Bone v. City of Lewiston*, 107 Idaho 844, 850, 693 P.2d 1046, 1052 (Idaho 1984).
[137] R. Appellant's Opening Brief, dated December 3, 2007, p.21.
[138] R. Exhibit 11 and 14 (James L. Pline, *Traffic Analysis*, Burns Holdings, LLC, Salem Road, North of US 20 Interchange, December 9, 2004).
[139] *Id.* at Exhibit 11.
[140] *Id.*
[141] R. Exhibit 10, Keller Associates, *Madison County Transportation Plan*, June 2004.
[142] R. Exhibit 4-5, Idaho Transportation Department, *Crashes by Year and Severity US 20 IC 337 (Salem IC) 2000-2003.*
[143] R. Exhibit 14 (James L. Pline, Audio Visual Report for Burns Holdings, LLC).

Highway 20 off ramp to the Burns property access was 373 feet.[144] He also said the Salem Road traffic north of the interchange north ramp intersection traveling both directions was 4,190 vehicles per day.[145] He said the collision summary for the north interchange since 2003 was 15 collisions, none of which occurred north of the interchange north ramp terminal intersection.[146] Mr. Pline's reports, however, gave little credibility to the concerns regarding safety voiced by those actually using the roadway routinely, if not daily, as testified at the hearings held on the Taylor application, the hearings before the Commission, and the Board's hearing. Mr. Pline's report also appears to have been prepared prior to the decision of Burns to add commercial businesses to the site, since the report indicated that, "future development of the remaining property at the site is undetermined at this time. The future development of the remaining property, type of development, traffic generation and roadway impacts will have to be addressed at a later time when that development request is submitted."[147] As a result, the proposed commercial usage and vehicle impact of combined commercial and industrial uses at the site were never addressed by Mr. Pline.

Mr. Pline also suggests the existing 45 mile per hour speed limit south of the interchange on the Salem Road be extended to the north on Salem Road to "mitigate the ramp terminal concerns and address the public perceptions."[148] In fact, we learn that the real speed limit on the Salem Road is 50 miles per hour throughout the interchange area and a traffic study performed

[144] R. Exhibit 11, Tab 3, p. 2 (James L. Pline, *Traffic Analysis*, Burns Holdings, LLC, Salem Road, North of US 20 Interchange, December 9, 2004).
[145] *Id.* at p.3.
[146] *Id.* at p.4.
[147] *Id.* at p.2.
[148] *Id.*

later by the County indicated a higher actual average vehicle speed on the roadway at 57 miles per hour.[149]

The *Traffic Analysis* prepared by the Dyer Group in 2003, was included in the appendix to Mr. Pline's written report.[150] However, Mr. Pline chose to ignore the warnings of Mr. Dyer as made on Page 2 of that analysis, which said:

> From a safety perspective, everyone is aware that the North interchange has a sight distance problem. The bridge structure is on a vertical curve and the off ramp is located such that it is difficult to see oncoming traffic, most of which is traveling at a high rate of speed. There have been several incidents and numerous near-misses at this location, and thus it will be wise to assure that the proposed approach into the Salem Highway is separated as far as possible from the U.S. 20 interchange/off ramp area to keep from aggravating the situation. Although the recommended northbound left turning lane will keep vehicles out of the main traffic stream on the Salem Highway, it also presents a potential for visible barrier obscuring the south-bound traffic if not properly separated from the off ramp location, further justifying keeping the approach to the north.[151]

The Dyer Group included as part of its *Traffic Analysis*, a 2003 report from the Idaho Transportation Department which indicated average daily traffic on the Salem Highway to be 6,600 vehicles.[152]

The *Safety Analysis* prepared by John W. Becker of the Idaho Transportation Department, indicated average daily traffic volume on the Salem Road at 6,000 vehicles for 2002.[153] Mr. Becker's analysis also indicated that for 2000-2002, there had been four accidents at the interchange, three on the westbound off ramp, and one on the eastbound off ramp.[154] Both Mr.

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[149] R. Vol. entitled "Binder with Augmentations from Order of December 24, 2007", item number 1, Public Hearing Re: Burns Holding, LLC, dated February 18, 2005, at p.88, LL.23 through p.90, at LL.10.
[150] *Id.*, Tab 3.
[151] Id., Dyer Group Traffic Analysis.
[152] *Id.*
[153] R. Exhibit 5, John W. Becker, *Safety Analysis of the Salem Road at the North Rexburg Interchange*, January 2004; *See also* R. Burns Tab 5 at 4, 8.
[154] *Id.*

Becker and Mr. Pline disagreed with the Dyer Group as to the sight distance problem at the interchange, but no reference to this disagreement was made in Mr. Pline's reports.

Dusty Cureton, the Madison County Road and Bridge Supervisor, testified as a participant at the hearing before the Board on the Burns application.[155] Mr. Cureton had been requested to perform a traffic study on the site and report his findings at the hearing.[156] He said he had figures on a study done in 2001, which indicated that 3,300 vehicles used the Salem Highway in a day, of which 236 were commercial vehicles or trucks.[157] No direction of traffic was listed for the vehicles. The average speed of those vehicles was 42 miles per hour, with the highest speed being 66 miles per hour.[158] He also reported that in his current study, he found that 8,300 vehicles used the Salem Highway from the overpass going south, and 3,919 vehicles traveled the Salem Highway from the overpass going north.[159] Of the northbound vehicles, 197 were commercial.[160] The average speed of these vehicles going north was 57 miles per hour and the highest speed was 84 miles per hour.[161]

During the hearing, a number of county residents also testified against the proposal and directly to these points.[162] Of these, several testified specifically about the dangerous condition of the north Rexburg interchange, based upon their personal observations and use of this interchange. Those testifying specifically about safety concerns at the interchange were Dale Thomson, Courtney Ferguson, Harold Harris, Winston Larson, Tammie Ostermiller, Gerald Lusk, Jared

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[155] R. Vol. entitled "Binder with Augmentations from Order of December 24, 2007", item number 1, Public Hearing Re: Burns Holdings, LLC dated February 28, 2005, at p.88, LL.19-25 through p.90, LL.21.
[156] *Id.*, p.88, LL.12-14.
[157] *Id.*, p.88, LL.23 through p.89, LL.19.
[158] *Id.*
[159] *Id.*, p.89, LL.20 through p.90, LL.14.
[160] *Id.*, p.90, LL.13-14.
[161] *Id.*, p.90, LL.8-11.
[162] *Id.*, p.17, LL.4 through p.88, LL.5.

Ostermiller, Ben Romney, Ken Sakota, Rich Leuwellen, Vonda Smith, Lawrence Coates, Colleen Coates, Layne Ball, Garth Hillman, Val Ball, and Layle Bagley.[163]

Though Burns argues the residents' concerns should not be given much weight by the county if any weight at all, the fact is these people testified they personally drive the Salem Highway and travel over the north interchange on a regular, if not daily basis, and some had specific knowledge of accidents and injuries and other safety concerns. These include Harold Harris' testimony from the comprehensive plan hearing,[164] Gerald Lusk's testimony regarding what he has seen as a school bus driver,[165] Rich Leuwellen, who lives right on that corner,[166] Lane Ball, who testified in the last eleven months there had been 15 accidents and over 50 speeding tickets at this location,[167] and Val Ball who witnessed six major accidents and one or two minor ones in the last four months.[168] Mr. Ball, who lives on the northeast corner, observed that during the majority of the summer the traffic nearly doubles with people going to and from the sand dunes.[169] Layle Bagley also sees the traffic every morning from 7:00 to 8:30 a.m. and believes that no one is going to get a long truck over the hill without backing up traffic clear back to the next corner.[170]

The practical concerns and actual experiences and observations of those living near and traveling daily over the road and interchange at issue carried significant weight with the Board.[171]

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[163] *Id.*
[164] *Id.*, p.35, LL.18 through p.37, LL.25.
[165] *Id.*, p.49, LL.20 through p.50, LL.16.
[166] *Id.*, p.65, LL.13 through p.67, LL.13.
[167] *Id.*, p.75, LL.1-23.
[168] *Id.*, p.81, LL.1 through p.82, LL.19.
[169] *Id.*
[170] *Id.*, p.85, LL.18 through p.87, LL.15.
[171] R. Vol. entitled "Binder with Augmentations from Order of December 24, 2007", item number 5, Public Hearing Re: Burns Holdings, LLC, dated April 13, 2006, at p.53, LL.13 through p.67, LL.6.

In this case, the Board found the testimony of the lay witnesses and the Road and Bridge supervisor, Mr. Cureton, more compelling in making a determination as to the safety of the roadway and intersection at issue. The difference in traffic volume numbers as reported by each expert and the use of reports from prior years, led the Board to rely on the current traffic volume count made by Mr. Cureton.[172]

These lay witnesses did not form their opinions based on a few observations at the intersection, but on frequent, if not daily usage of the roadway and intersection at all times of the day, night and year. The amount of traffic actually using the roadway and number of accidents occurring, varied from expert to expert, made it doubly reasonable for the Board to rely on its own actual count of vehicles and on the personal observations of those actually and regularly using the roadway. While the advent of large cement trucks using the interchange may not increase the number of accidents, they would increase the risk of accidents being more serious, and that was significant to the Board. Thus, in looking at the documentary evidence and testimony about the sight restrictions existing at the interchange, the testimony of those actually driving the interchange and living nearby as to its dangers, the testimony regarding the potential increase in regular vehicle and heavy truck traffic coming from the proposed cement batch plant, and the potential increase in heavy commercial traffic coming from the proposed commercial property, all support and justify the Board's decision regarding traffic and safety at the proposed project site.

The Board's decision relating to traffic and safety is based on substantial evidence, and was not arbitrary, capricious or an abuse of discretion.

As to the other items listed in the component analysis brought up by Burns,[173] these too were thoroughly discussed in the initial hearing,[174] the rehearing,[175] and analyzed in the Board's

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[172] *Id.*

Findings of Fact and Conclusions of Law.[176] These documents speak for themselves and will not be reproduced here, but these too were based upon substantial evidence, and were not arbitrary, capricious or an abuse of discretion. Finally, the district court agreed with the Board, specifically holding that the Board did not violate any constitutional or statutory provisions nor exceed its statutory authority; the Board's decision was not made upon unlawful procedure; the Board's decision was supported by substantial evidence, and in looking at the entire record, the Board's decision was not arbitrary, capricious or an abuse of discretion.[177] As such, the Board's decision should be upheld.

E. Burns has not shown a substantial right prejudiced.

The APA, as stated above, has two requirements for the type of relief outlined in Idaho Code § 67-5279. Burns must first show a specific violation of § 67-5279(3), and then must show that "substantial rights of the appellant have been prejudiced."[178] This statute is applied instead of Idaho Code § 67-6535(c) because the APA standard is more specific.[179] Idaho Code § 67-6535(c) is helpful, however, in understanding the standards as this Court held in *Evans v. Teton County*, that "I.C. § 67-6535(c) requires a demonstration of actual harm or violation of a fundamental right in order to be entitled to a remedy in cases disputing a LLUPA decision."[180] Further, this Court noted in *Friends of Farm to Market*, that "due process applies to quasi judicial proceedings like

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[173] R. Appellant's Opening Brief, dated December 3, 2007, at pp.35-42.
[174] R. Vol. 4 Burns Tab 28.
[175] R. Vol. entitled "Binder with Augmentations from Order of December 24, 2007", item number 5, Public Hearing dated April 13, 2006, at p.6, LL.14 through p.71, LL.23.
[176] R. Vol. entitled "Binder with Augmentations from Order of December 24, 2007", item number 6, Findings of Fact and Conclusions of Law, dated June 1, 2006, at pp. 5-23.
[177] R. Vol. 3 at 492-505.
[178] Idaho Code § 67-5279(4).
[179] *Blaha v. Board of Ada County Comm'rs*, 134 Idaho 770, 774, 9 P.3d 1236, 1240 (Idaho 2000).
[180] *Evans*, 139 Idaho 71, 76, 73 P.3d 84, 89 (Idaho 2003).

those conducted by zoning boards, and such due process requires notice of the proceedings, specific written findings of fact, and an opportunity to be present and rebut evidence."[181]

Burns' assertion that it has been deprived of a substantial right is based entirely upon the Board's interpretation of the facts. Burns does not challenge procedural defects with LLUPA. In fact, the Board's findings and conclusion are supported by substantial and competent evidence and Burns had ample opportunity to present and rebut evidence, were notified of all the proceedings, and were provided a copy of specific findings of fact, in compliance with Idaho Code § 67-5279(4). Though there was conflicting evidence before the Board, the Board's factual determinations are binding on the reviewing court so long as they are supported by substantial competent evidence in the record.[182]

This Court in the past has weighed in on what a substantial right is. In *Sanders Orchard v. Gen County*, this Court found that a county basing its decisions upon findings that were not supported by any evidence in the record was sufficient to prejudice substantial rights of the applicant.[183] Also, in 2002, this Court held that the county commissioners viewing the applicant's property did not violate a substantial right of the applicant.[184]

There is also similarity in "takings" cases, where a regulation denies an owner of all economically viable use of land. "Takings" would be violative of a substantial right.[185] The Federal Courts have held that a historical use of land is presumed to be economically viable.[186] In

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[181] *Friends of Farm to Market*, 137 Idaho 192, 198, 46 P.3d 9, 15 (Idaho 2002).
[182] *See, e.g., Friends of Farm to Market*, 137 Idaho at 196, 46 P.3d at 13.
[183] *Sanders Orchard v. Gem County*, 137 Idaho 695, 702, 52 P.3d 840, 847 (Idaho 2002).
[184] *Evans v. Board of Comm'rs of Cassia County*, 137 Idaho 428, 433, 50 P.3d 443, 448 (Idaho 2002).
[185] *See, e.g., C&G, Inc. v. Canyon Highway Dist. No. 4*, 139 Idaho 140, 146, 75 P.3d 194, 200 (Idaho 2003) (holding that a "takings" implicates the Constitution which in turn was designed to protect substantial rights).
[186] *MacLeod v. Santa Clara County*, 749 F.2d 541, 545-547 (9th Cir. 1984).

MacLeod, the Ninth Circuit Court of Appeals held that the denial of a proposed commercial development was not a taking where the historical agriculture use was permitted to continue.[187]

In this case, Burns knew the property's use and purchased it after prior requests to change the comprehensive plan designation of the property had been denied. His speculative purchase of the ground in the hopes that its zoning would be allowed does not mean the Board denied Burns any economic use of the property. Burns is left with the same use the property historically had, and the Board's refusal to grant any speculative adventure or re-zone of the property does not constitute prejudicing of any substantial right.

Burns' case is distinguishable from *Sanders Orchard v. Gem County*,[188] because concerning Burns, the Board relied upon numerous written documents and oral testimony regarding the placement of the plant and concerns over the proposed zone change. The Board also made extensive findings regarding the same. Though the Board did not agree with Burns' ultimate desire for the use of the property, it cannot be said that in so doing, violating the substantial right of Burns.

Even if this Court were to conclude the Board's decision was not based upon substantial evidence, was arbitrary, capricious or an abuse of discretion under Idaho Code § 67-5279, there still must be a showing of a substantial right of Burns being prejudice, and Burns cannot make such a showing, so their appeal must be denied.

F. Burns is not entitled to an award of attorney's fees on appeal to the district court pursuant to Idaho Code § 12-117, nor to this Court, whereas Madison County is.

Where the district court properly applied the law and understood the discretionary nature of its action in making or declining the award of fees, this Court will overturn that decision only upon

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[187] *Id.*

[188] *Sanders Orchard v. Gem County ex rel. Bd. of County Com'rs*, 137 Idaho 695, 52 P.3d 840 (Idaho 2002).

a showing of abuse of discretion.[189] "The appellate court exercises free review over the decision of the district court in applying I.C. § 12-117."[190] This Court summed up this statute as follows:

> The purpose of Idaho Code § 12-117 is two-fold: First it serves "as a deterrent to groundless or arbitrary agency action; and [second, it provides] a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies never should have made." An award of attorney fees under I.C. § 12-117 has been distilled into a two-part test. Attorney fees must be awarded if (1) the Court finds in favor of the person, and (2) the City or County acted without a reasonable basis in fact or law.

Reardon v. Magic Valley Sand and Gravel, Inc., 140 Idaho 115, 118, 90 P.3d 340, 343 (Idaho 2004).

The core of this provision then is, "without a reasonable basis in fact or law." As shown herein and also as stated by the district court, the Board acted with a reasonable basis in both fact and law. Hence, Burns' request for attorney fees and costs should be denied under Idaho Code § 12-117.

Burns also seeks reversal of the district court's decision to not award attorney fees under Idaho Code § 12-121. This section is limited to cases initiated by complaint, and does not apply in cases of administrative actions and land use decisions initiated by petition.[191] Assuming *arguendo* it does apply, the Board prevailed at the district court below, and it cannot be said the Board acted frivolously, unreasonably or without foundation.[192]

Madison County also seeks attorney's fees and costs under Idaho Code § 12-117, which provides for an award of attorney's fees and costs to the prevailing party if the other party acted without a reasonable basis and fact or law. *Cowan v. Board of Com'rs of Fremont County*, 143 Idaho 501, 148 P.3d 1247, 1266 (Idaho 2007). In this case, Burns is rearguing facts that have been

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[189] *Fox v. Board of County Com'rs*, 121 Idaho 684, 685, 827 P.2d 697, 698 (Idaho 1992).
[190] *Fischer v. City of Ketchum*, 141 Idaho 349, 355-356, 109 P.3d 1091, 1097-1098 (Idaho 2005).
[191] *Lowery v. Board of County Com'rs for Ada County*, 117 Idaho 1079, 1081-82, 793 P.2d 1251, 1253-254 (Idaho

carefully considered by the Board more than once in this case, and consequently, acted without a basis in law or fact.

As stated above, it is unclear if attorney fees and costs are applicable under Idaho Code § 12-121 to this action. *Cowan*, above, cites *Nat'l Union Fire Ins. Co. of Pittsburgh, P.A. v. Dixon,* 141 Idaho 537, 542, 112 P.3d 825, 830 (Idaho 2005) holding "[a]n award under this statute is appropriate if the Court is left with the abiding belief that the appeal was brought or defended frivolously, unreasonably or without foundation."[193] If proper, Madison County requests the same. This appeal was brought so this Court could attempt to second guess the Board's findings of fact. Consequently, this appeal is made frivolously, unreasonably or without foundation.

An award of attorney fees and costs pursuant to Idaho Code §§ 12-117 and 12-121 is thus warranted to Madison County.

G. Granting Burns' request for a comprehensive plan change would amount to invalid spot zoning.

Burns' request, if granted, would require invalid type two spot zoning in Madison County. As stated in *Evans v. Teton County*:

> A claim of "spot zoning" is essentially an argument the change in zoning is not in accord with the Comprehensive Plan. There are two types of "spot zoning." Type One may simply refer to a re-zoning of property for a use prohibited by the original zoning classification. The test for whether such a zone re-classification is valid is whether the zone is in accord with the Comprehensive Plan. Type Two spot zoning refers to a zone change that singles out a parcel of land for use inconsistent with the permitted use in the rest of the zoning district for the benefit of an individual property owner. This latter type of spot zoning is invalid.[194]

As stated above, the Burns property has been designated both by the comprehensive plan and zoning ordinance as transitional/agriculture. The property surrounding Burns' property is also

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1990); *Knight v. Dep't of Insurance*, 119 Idaho 591, 593, 808 P.2d 1336, 1338 (Ct. App. 1991).
[192] *See* I.R.C.P. 54(e)(1); *Chisholm v. Twin Falls County*, 139 Idaho 131, 136, 75 P.3d 185, 190 (Idaho 2003).
[193] *Cowan v. Board of Com'rs of Fremont County*, 143 Idaho 501, 148 P.3d 1247, 1266 (Idaho 2007).

designated in the comprehensive plan as transitional/agriculture, and in the zoning ordinance is designated as either agriculture or transitional agricultural two. The actual use of the Burns property has always been agricultural. The actual use of the property surrounding the Burns property has also either been agricultural or residential. There are no commercial zones or grandfathered uses in the county within some miles of the Burns property. There are also no light industrial zones.

The Madison comprehensive plan lists as a goal, at p. 22, "it shall be the responsibility of Madison County to protect the agricultural industry from inappropriate and uncontrolled residential or non-agricultural growth, given that this industry is the economic mainstream of the County."[195] To further this goal, the comprehensive plan lists the following objectives, also from p. 22 as: "1) to keep urban-type (high traffic commercial, non-agricultural industrial, high-density residential) growth within the areas of city impact, as established by mutual agreement between the cities and the county."

In addition, the Madison County comprehensive plan, at p. 17, states:[196]

> It is the policy of the citizens to allow and encourage such development in the appropriate industrial zones. The citizens will encourage the recruitment of clean industries that will complement their county. The majority of industrial uses shall be located within area of impacts where city services are more likely to be available. Exceptions to this might include mining, farm services, and the initial processing of commodities including grain elevators and "fresh pack" potato plants.
>
> . . .
>
> The County will encourage the grouping of industrial uses in land developed as an industrial park.

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[194] *Evans v. Teton County*, 139 Idaho 71, 76-77, 73 P.3d 84, 89-90 (Idaho 2003) (internal citations omitted).
[195] R. Binder with Augmentations from Order of December 24, 2007, item number 6, Findings of Fact and Conclusions of Law, dated June 1, 2006, p.7.
[196] *Id.* at p.14.

Burns' own appendixes attached to the Appellant's Opening Brief show that the parcel of land is surrounded by farm land as also testified to by Alice Hegstead, an elderly widow, who was concerned about the impact the project will have on the value of her ground.[197] Directly east of the Burns property, across the Salem Highway, is the home of Val Ball, including his outbuildings and agricultural land.[198] On the west, the Burns property is bordered by more farm ground. On the southwest corner of the Burns property, the neighboring use is a former gravel pit, now reclaimed as a pond, and then still more farm ground. Burns' demand to amend the zoning of this property from transitional/agricultural to commercial with light industrial, is a demand for the Board to improperly "spot zone" its property. This property is not within an area of city impact, nor are there any light industrial or commercial areas anywhere in the vicinity of the Burns property. The surrounding ground is all classified in the comprehensive plan as transitional/agricultural, and the uses of the surrounding properties are limited to agricultural or residential uses.

As a result, it is impossible to comply with the Madison County comprehensive plan by placing an industrial use and commercial zone dropped right in the middle of a transitional/agricultural zone. As such, re-zoning the Burns property would single out "a parcel of land for use inconsistent with the permitted use in the rest of the zoning district for the benefit of an individual property owner."[199] Hence, this Court should not allow a re-designation of the Madison County comprehensive plan for the benefit of the Burns' property as requested.

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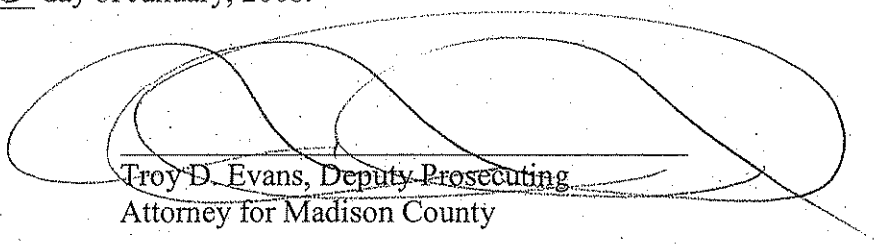
[197] R. Vol. entitled "Binder with Augmentations from Order of December 24, 2007", item number 1, Public Hearing Re: Burns Holdings, LLC dated February 28, 2005, at p.41.
[198] *Id.*, at p.81.
[199] *Evans v. Teton County*, 139 Idaho 71, 76-77, P.3d 84, 89-90 (Idaho 2003).

V. CONCLUSION

For the reasons set forth above, this Court should affirm the district court's decision denying Burns' request for a comprehensive plan designation change. In addition, Madison County should receive an award of its reasonable attorney's fees and costs.

Respectfully submitted this 18th day of January, 2008.



Troy D. Evans, Deputy Prosecuting
Attorney for Madison County

CERTIFICATE OF MAILING

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Rexburg, Idaho, that I served a true and correct copy of the following described pleading or document on the attorney listed below by hand delivering, mailing or by facsimile, as indicated below, with the correct postage thereon, on this 18th day of January, 2008.

DOCUMENT SERVED: RESPONDENT'S BRIEF

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