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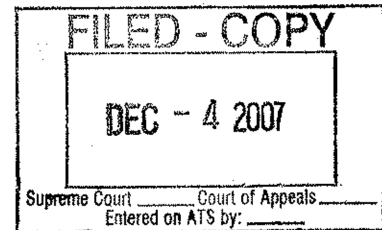
IN THE SUPREME COURT OF THE STATE OF IDAHO

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 APPELLANT'S OPENING BRIEF



APPELLANT'S OPENING 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, Presiding

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COPY

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I. INTRODUCTION

The straightforward question facing this Court is whether the Madison County Board of County Commissioners (the "County" or "Commission") issued a clearly erroneous and fundamentally unfair results-oriented land use decision against Burns Holdings, LLC ("Burns"). The Commission made its contested decision even though the Madison County Planning and Zoning Commission favorably recommended the proposed change with a 6-1 vote.

Even more remarkable, the Commission denied Burns' proposed change at the same time it unanimously approved a similar proposed land use change for Walters Ready Mix, Inc. ("Walters"), the only company with a concrete facility already in Madison County. Burns is the only direct competition to Walters in the Upper Snake River Valley. During the hearing process before the Commission, it became very clear to Burns that a majority of the Commission was biased against Burns in an effort to protect Walters. Accordingly, counsel for Burns specifically requested that the entire Walters record be made part of the Burns record in the event the Commission's decision relative to Burns was appealed. The records of the two concurrent applications establishes the Commission's decision against Burns to have apparently been predetermined in order to protect Walters, an established Madison County business, and not based upon the merits of the application. This type of decision-making violates Idaho law and notions of fundamental fairness.

In appealing to this Court, Burns recognizes that"a strong presumption of validity favors an agency's actions,"[1] including "the zoning body's application and interpretation of its own zoning

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1 *Young Electric Sign Co. v. State*, 135 Idaho 804, 25 P.3d 117 (2001); See also *Cooper v. Bd. of Prof'l Discipline*, 134 Idaho 449, 454, 4 P.3d 561, 566 (2000).

ordinances."[2] Nevertheless, this presumption can be overcome, and this case presents a unique instance where the record demonstrates the Commission's results-oriented motives. Despite the identical nature of the Burns and Walters applications, which were submitted and decided at the same time, the Commission issued opposite decisions, with the Walters application being approved with a unanimous 3-0 vote and the Burns application being denied by a 2-1 vote.

Given the timing and similarity of these two applications, there is no legitimate distinction between the Burns and Walters applications to justify such disparate treatment. With both records before this Court for review, it can be shown that the Burns decision was results-oriented and violative of Idaho law.

II. STATEMENT OF THE CASE

A. Nature of the Case.

This case arises under the Local Land Use Planning Act (the "LLUPA") and the Idaho Administrative Procedures Act as a judicial review of the action of Madison County in denying the issuance of a comprehensive plan amendment and concurrent zone change requested by Burns. This denial was made despite (i) proposals made by Burns to answer safety concerns from a previous appearance before the Commission, (ii) Burns' amendments to its applications to provide for only 12 acres of light industrial zoned land embedded within 37 acres of commercial zoned land as previously recommended by the Madison County Planning and Zoning Commission [hereinafter "Planning and Zoning"], (iii) a favorable detailed study from a nationally known safety expert, (iv) approval from the Idaho Transportation Department, (v) the project's location near the North

2 *Crown Point Development, Inc. v. City of Sun Valley*, 144 Idaho 72, __, 156 P.3d 573, 576 (2007).

Rexburg Interchange of Highway 20, (vi) Burns' purchase of additional property in order to improve the access to the Burns parcel, (vii) the absence of any structures bordering the property, (viii) the fact that the property is bordered by waste ground, sub-ground, pasture, a gravel pit, two small farmed pieces, Highway 20, and the Salem Highway, and (ix) a 6-1 favorable recommendation from Planning and Zoning recommending amendment to the comprehensive plan and further recommending a related concurrent zone change.

Burns seeks an order providing that the County's decision was arbitrary, capricious, and an abuse of discretion, and not based on substantial evidence, thereby reversing the Commission's decision in this matter.

B. Course of the Proceedings Below.

(1) Round One.

The Burns property is a 49-acre parcel located at the northwestern section of the North Rexburg Interchange on Highway 20 (hereinafter, "North Interchange") in Madison County, Idaho.[3] Directly southwest of the Burns parcel is a gravel pit known as the Cornelisen gravel pit,[4] which the County considers to be an industrial use.[5] In 1979, 46.8 of the 49 acres were purchased by Robert

3 *See, e.g.*, R. Exhibits 8-9, R. Exhibit 12, Tab 1, Photo 2. Copies of all three photographs are attached to this brief for ease of reference as Appendices A, B, and C, respectively.

4 R. Vol. 4 Burns 7 at 4; *See also* Appendices A through C attached hereto.

5 R. Exhibit, *Findings of Fact and Conclusions of Law and Decision of the Board of County Commissioners of Madison County, Idaho, RE: Comprehensive Plan Zone Change to Add a Commercial and a Light Industrial Zone Near State Highway 191*, at 13-14 (This letter is part of the material that is the subject of the Motion to Augment the Record filed on November 29, 2007. It is found in the folder entitled "Augmented Record Volume 2" at Tab 4). In this decision involving Walters, the County concluded that a gravel pit neighboring the Walters site was an industrial use.

and Gayle Taylor from Bruce Shirley.[6] The remaining approximate two-acre portion of the 49-acre piece was retained by Mr. Shirley.

In 2003, Mrs. Taylor, now widowed, submitted applications to amend the comprehensive plan and to request a zone change from Transitional Agriculture-2 (trans-ag 2) to industrial for her 46.8-acre parcel. Mrs. Taylor made the request while she still owned the property in order to sell the parcel to Burns for its use in order to construct an enclosed concrete batch plant. It was necessary to make such a request because there was no other industrially-zoned land in Madison County.[7] Planning and Zoning Commission favorably recommended the requested change to the comprehensive plan and the zone change requested by Mrs. Taylor with a 4-3 vote.[8] Planning and Zoning relied upon the testimony of traffic experts to conclude that the access to the Burns parcel and the North Interchange itself were safe.[9]

Despite the favorable recommendations, on February 17, 2004, the Commission issued its oral decision denying Ms. Taylor's requested changes. The written decision on this matter was not issued until October 20, 2004, over eight months after the oral decision was rendered.[10]

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6 R. Vol. 4 Burns 4 at 1.

7 R. Vol. 4 Burns 8 at p. 11, LL. 10 through p. 13, LL. 2; See also R. Exhibit, *Public Hearing, RE: Burns Holdings, LLC, Request for Zone Change*, at p. 35 LL. 3-4 (Commissioner Passey testimony that Madison County "[does not] have enough industrial zoning available, . . .").

8 R. Vol. 4 Burns 4 at 7, 9.

9 R. Vol. 4 Burns 6.

10 R. Vol. 4 Burns 7 at 29.

(2) Round Two.

(a) Commission Decision.

Between the time the Commission issued its oral decision on Mrs. Taylor's application and subsequent written decision, Burns acquired Mrs. Taylor's property and the neighboring two-acre parcel formerly owned by Bruce Shirley.[11] Acting in accordance with County suggestions given after the Taylor application was denied, Burns requested a zone change for the property from Transitional-Ag 2 to a combined industrial/commercial parcel of 12 acres of light industrial zoned land to construct a concrete batch plant, which was buffered by 37 acres of commercial property. Burns filed its application for zone change on November 22, 2004.[12] The County treated the zone change application as both an application for a zone change and as an application for amendment to the comprehensive plan.

After Burns submitted its requested zone change to include a commercial buffer, Walters amended its pending application before the County to include a commercial buffer of its own.[13] The only material difference between the two applications was that the commercial buffer would surround a gravel pit on Walter's property, instead of a concrete batch plant as proposed by Burns. Both the Burns application and the Walters application were reviewed and decided at the same time by the County.

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11 R. Exhibit 11 at Tab 3. Burns acquired the property from a land developer who had previously purchased the two-acre parcel from Mr. Bruce Shirley.

12 R. Burns 12.

13 R. Vol. 4 Walters 5.

After reviewing the Burns application, it was recommended for approval by Planning and Zoning with a 6-1 vote.[14] The only vote for nonapproval was made by Millie Andrus, the wife and mother of two members of the law firm representing Walters.[15]

A public hearing before the Commission on both the Burns and Walters applications was held on February 28, 2005, with Walters' hearing occurring first and Burns' following immediately thereafter. The Walters application was approved with a 3-0 vote of the Commission.[16] The Burns application was denied by a 2-1 vote.[17]

(b) First Petition for Judicial Review.

After the Commission's decision, Burns filed its first petition for judicial review, which alleged unlawful reasoning and decision-making on issues of traffic and safety. Burns also challenged the participation of Commissioner Brooke Passey, who had economic ties to Walters.[18]

On the day of the hearing for the first petition for judicial review, before the scheduled hearing was to take place, District Judge Brent Moss requested that both parties and their counsel meet with him in chambers where he expressed his decision to remand the matter back to the Commission because of his concerns for the two major issues raised by Burns.

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14 R. Vol. 4 Burns 17; R. Vol. 4 Burns 22.

15 The law firm representing Walters was Rigby, Thatcher, Andrus, Rigby, and Moeller, Chtd. Ms. Andrus's husband, Rich, and her son, Reed, are both members of the firm. The question of whether Ms. Andrus had a conflict as to the Walters decision was addressed in a letter from then-County attorney Penny Stanford. *See* R. Vol. 4 Walters 7. Ms. Andrus was excused from voting in the planning and zoning meeting because of this conflict (*see* R. Vol. 4 Burns 21 at 8), but she did not exclude herself from voting in the Burns matter. *See* R. Vol. 4 Burns 21 at 7.

16 R. Vol. 4 Walters 12.

17 R. Vol. 4 Burns 28 at 4.

18 See R. Exhibit *Letter from Penny Stanford to Roger Muir, RE: Conflict of Interest*, March 23, 2005 (This letter is part of the material that is the subject of the Motion to Augment the Record filed on November 29, 2007. It is found in the folder entitled "Augmented Record Volume 2" at Tab 3).

As to Judge Moss's concern with traffic and safety, the Judge seemed to be most concerned with a substantial error made by the Commission in its analysis of traffic and safety, and the County's reliance on a traffic count–not a traffic study–performed by the County's employee, Dusty Cureton. The main basis for the denial of the Burns application was traffic and safety, and the errors in the Commission's traffic analysis concerned the court most.

The substantial error on traffic and safety related to the misreading and misunderstanding of part of an expert report from Mr. James Pline, an expert hired by Burns to analyze traffic and safety issues at the North Interchange.[19] Because of this error, the Commission went on to erroneously discredit Mr. Pline's analysis and the numbers he used in his analysis, which he had obtained from the Idaho Transportation Department ("ITD").

After discrediting Mr. Pline's report, the County had relied upon their own traffic count performed by Dusty Cureton, which actually produced numbers similar–but even less than–the numbers produced by Mr. Pline, as shown by the following chart:[20]

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19 This error can best be explained by examining Figure 1 of Mr. Pline's Traffic Analysis found at R. Exhibit 12, Tab 3 p. 6. This Figure contains traffic volume numbers obtained from the ITD for 2002 and projected traffic volumes for 2025. The Commission apparently viewed the information contained in the lower right hand corner as being an average of the ITD traffic volume numbers for each road stretch around the Highway 20 Interchange. However, the information in the lower right hand corner of Figure 1 is illustrative only, wherein Mr. Pline attempted to demonstrate that the 2002 figures from the ITD were written on Figure 1 without parentheses and that the projected traffic volume for 2025 was written within parentheses. The actual traffic volume numbers for each stretch of road are written up next to the individual stretches. For example, for the road stretch north of the North Interchange on/off ramps, the traffic volume for 2002 was 4,190 (the number not in parentheses) and the projected number for 2025 is 13,000 (number is in parentheses).

20 R. Exhibit *Public Hearing Transcript, RE: Burns Holdings, LLC Request for Comprehensive Plan Change*, February 28, 2005, at p. 88 LL. 20 through p. 90 LL. 17. (This transcript is part of the material that is the subject of the Motion to Augment the Record filed on November 29, 2007).

Road section	Mr. Pline's Figures (taken from 2002 AADT)	Mr. Cureton's Figures (results of 2005 traffic count)
North of the North Interchange (both directions)	4,190	3,919
South of the North Interchange (both directions)	8,910	8,300
Between the north and south on/off ramps at the North Interchange (both directions)	6,560	None

The Commission thereafter used Mr. Cureton's numbers incorrectly in performing traffic volume projections, all of which were contrary to ITD projected numbers, and determined that Mr. Cureton's current traffic numbers were "23% higher than the figure forecasted for the year 2025,"[21] which led to the following clearly erroneous conclusion:

> Where the Salem Highway is already receiving such a large volume of traffic, already exceeding the state's predictions for that roadway for the year 2025, the added pressure of the highway of numerous heavy vehicles such as the applicant proposes is manifestly unsafe.[22]

Obviously, however, the Salem Highway was not then exceeding the state's predictions for traffic volume on the highway in 2025, some 20 years in the future.

The participation of Commissioner Passey likewise concerned Judge Moss. Commissioner Passey had performed painting work for Walters[23] and Judge Moss was concerned that Commissioner Passey's participation with the Burns proposal could be compromised because of the competition Burns posed to Walters. Because, however, Judge Moss was aware that Commissioner Passey had resigned from the Commission a few months previous to the meeting in Judge Moss's

21 R. Vol. 4 Burns 29 at 28.

22 *Id.* at 30.

23 See R. Exhibit *Letter from Penny Stanford to Roger Muir, RE: Conflict of Interest*, March 23, 2005, at 1 (This letter is part of the material that is the subject of the Motion to Augment the Record filed on November 29, 2007. It is found in the folder entitled "Augmented Record Volume 2" at Tab 3).

chambers, he concluded that a remand to the Commission without Commissioner Passey would resolve any conflict issues that may have been present during the Commission's first hearing.

In chambers, Judge Moss informed the parties that he would remand the case back to the Commission to fix the alleged deficiencies he identified. Judge Moss suggested that Burns could go ahead with oral argument, but he also indicated it would not be time well spent to argue the issue because he had already made his decision. Both parties stipulated to the remand.[24]

(3) Round Three.

(a) Commission Decision.

On remand, the Commission held a work meeting on April 13, 2006, where it not only again reviewed the traffic and safety issues that were the basis for the remand, but in addition, reviewed all other issues relative to the project outlined in Madison County's Comprehensive Plan. After a discussion of these newly conceived concerns, and without the submission or hearing of any new evidence, the Commission once again denied Burns' application on June 1, 2006.

Incredibly, even after having had the opportunity to correctly review Pline's traffic report, the Commission once again concluded that the North Interchange was unsafe without explaining why the Commission did not believe the information contained in Pline's report, the Keller Report, the traffic counts provided by ITD, and the County's own records. The Commission also introduced a number of new claims relative to this issue, including a claim that the interchange design was unsafe, an issue that had not be raised previously by the Commission and not addressed with an expert report of any kind. Burns' only recourse was to file a second petition for judicial review.

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24 R. Vol. 1 at 331-32.

(b) Second Petition for Judicial Review and District Court Decision.

The second petition for judicial review was similar to the first, except for the conflict issue raised in the first petition for judicial review. After a hearing on the second petition for judicial review, the district court issued a written decision on October 17, 2006 upholding the Commission's decision to deny the Burns application. The district court essentially concluded that the lodestar factor of any land use decision in Madison County is not the standards applied in reaching a land use decision, but the location of the property, a characteristic no two properties can share.

Nevertheless, the district court determined that Burns was entitled to a partial award of attorney's fees because "of the Board's obvious misinterpretation of evidence in the record . . . and a possible conflict of interest issue that one of the Board members may have had."[25] As a result, the district court awarded fees incurred by Burns up to and including March 13, 2006 because of the "unique procedural facts of this case."[26]

Shortly after the decision on attorney's fees, the County filed a motion for reconsideration requesting the district court to reverse its decision on attorney's fees. The district court obliged, and reversed its earlier decision awarding Burns its attorney's fees.

III. ISSUES ON APPEAL

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

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25 R. Vol. 1 at 505.
26 *Id.* at 506.

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?

IV. STANDARD OF REVIEW

A. Judicial Review.

The LLUPA stresses fundamental fairness in land use decision-making:

> It is the intent of the legislature that decisions made pursuant to [the LLUPA] should be founded upon sound reason and practical application of recognized principles of law. In reviewing such decisions, the courts of the state are directed 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 reasoned decision-making.[27]

The LLUPA "allows an affected person to seek judicial review of an approval or denial of a land use application, as provided for in the Idaho Administrative Procedure Act ("IDAPA").[28] When judicial review of LLUPA decisions is undertaken, "a local agency making a land use decision, such as the Board of Commissioners, is treated as a government agency under IDAPA."[29]

Judicial review is a two-step process, wherein "[t]he party appealing the Board of Commissioners' decision must first show the Board of Commissioners erred in a manner specified

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27 IDAHO CODE § 67-6535(c) (emphasis added).
28 *Crown Point Development, Inc. v. City of Sun Valley*, 144 Idaho 72, __, 156 P.3d 573, 575 (2007).
29 *Evans v. Teton County*, 139 Idaho 71, 74, 73 P.3d 84, 87 (2003).

under I.C. § 67-5279(3), and second, that a substantial right has been prejudiced."[30] If both are demonstrated, then this court may "reverse or modify the decision if substantial rights of the appellant have been prejudiced."[31] When there is a subsequent appeal from a district court's decision to the Idaho Supreme Court where the district court was acting in an appellate capacity under IDAPA, "the Supreme Court reviews the agency record independently of the district court's decision."[32]

In reviewing an agency decision, the reviewing court will determine if the agency decision is supported by substantial evidence. In reviewing decisions in which an agency differed from an administrative law judge, the agency is obligated to explain why the agency differed from the administrative law judge.[33] The same principle should apply in a land use proceeding because a land-use decision is reviewed with the same standard of review of an administrative decision. When a commission's decision is different from the recommendation of the planning and zoning board, the commission is obligated to explain why the it differed from the planning and zoning decision.[34]

For the reasons set forth below, the County's decision on the Burns application was neither reasonable nor lawful, and should therefore be reversed.

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30 *Id.* at 75-76, 73 P.3d at 74-75; *See also* IDAHO CODE § 67-5279(4).

31 *Homestead Farms, Inc. v. Board of Commissioners of Teton County*, 141 Idaho 855, 858, 119 P.3d 630, 633 (2005).

32 *Crown Point Development*, 144 Idaho at __, 156 P.3d at 576.

33 As stated in the case of *Pearl v. Board of Professional Discipline*, 137 Idaho 107, 112, 44 P.3d 1162, 1167 (2002): "Where the agency's findings disagree with those of the hearing panel, this Court will scrutinize the agency's findings more critically. *Woodfield v. Board of Professional Discipline,* 127 Idaho 738, 746, 905 P.2d 1047, 1053 (Ct.App.1995). As the Court of Appeals noted in *Woodfield,* there is authority for courts to impose on the agency an obligation of reasoned decision making that includes a duty to explain why the agency differed from the administrative law judge. *Woodfield,* 127 Idaho at 746, 747 n. 3, 905 P.2d at 1053 n. 3."

34 See *Davisco Foods Int'l, Inc. v. Gooding County*, 141 Idaho 784, 794-95, 118 P.3d 116, 126-27 (2005) (Jones, J., dissenting).

B. Arbitrary and Capricious Standard.

The arbitrary and capricious standard applies to the exercise of discretion undertaken by the Commission. Generally, decisions from the Idaho Supreme Court and the Idaho Court of Appeals have quoted the standards articulated in Idaho Code § 67-5279(3) without offering further explanation of this standard, which appears to be a "know-it-when-we-see-it" type approach when reviewing alleged arbitrary and capricious actions.

This lack of clarity was noted by the district court: "'arbitrary and capricious' is 'oft used but infrequently defined by the courts. This is largely because the term and its application do not need explanation beyond its definition.'"[35] In essence, "arbitrary" actions are "founded on prejudice or preference rather than reason or fact", and "capricious" actions are "characterized by or guided by unpredictable or impulsive behavior" or are "contrary to the evidence or established rules of law." In reviewing alleged arbitrary and capricious actions, "the focus of this inquiry is on the methods by which the agency arrived at its decision . . . ."[36]

For the reasons set forth below, the County's decision and treatment of Burns' application was arbitrary and capricious, and should therefore be reversed.

C. Substantial Evidence Standard.

The substantial evidence standard applies when a court reviews an agency's fact-finding. A court "defers to the Board of Commissioners' findings of fact unless the findings of fact are clearly

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35 R. Vol. 1 at 15.

36 Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 IDAHO L. REV. 273, 365 (1993/1994) [hereinafter "Gilmore & Goble"] (citing to *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971)).

erroneous. The Board of Commissioners' factual findings are not clearly erroneous so long as they are supported by substantial, competent, although conflicting evidence."[37] Put another way, "the standard requires the reviewing court to consider all of the record and to determine on the basis of that record whether the agency's factfinding was reasonable."[38]

As set forth below, the Commission's fact-finding was not reasonable and was not supported by substantial evidence on the record as a whole.

V. ARGUMENT

A. The Commission's Decision on the Burns Application Was Results-Oriented, as Established by the Commission's Decision on the Walters Application.

The Burns and Walters applications were virtually identical, except that Walters proposed a gravel pit to be located upon its light industrial property, while Burns instead proposed an enclosed pollution-free concrete batch facility.[39] Both Burns and Walters made their proposals because there was no zoned industrial property in Madison County, except for a small parcel located within the City of Rexburg.[40]

Nevertheless, despite the similar nature of the Burns and Walters applications, which were submitted and decided at the exact same time, the Commission issued polar opposite decisions, with the Walters application being approved by a unanimous 3-0 vote and the Burns application being denied by a 2-1 vote. This case thus presents this court with the opportunity to provide much needed direction on the arbitrary and capricious standard described in IDAPA.

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37 *Evans v. Teton County*, 139 Idaho 71, 75, 73 P.3d 84, 88 (2003).

38 Gilmore & Goble, 30 IDAHO L. REV. at 363.

39 A rendering of the proposed facility is found at R. Exhibit 11 at Tab 1.

40 R. Vol. 4 Burns 8 at p. 62 LL. 1-6.

The Burns proposal sought the rezone of 49 acres of land located on the northwest corner of the North Interchange of Highway 20. The proposal sought a 12-acre light industrial parcel to be surrounded by 37 acres of commercial property.[41] The land is marginal farm ground that was bisected when Highway 20 was constructed in the late 1970s. The landowner at the time was compensated not only for the property purchased by the State of Idaho to build Highway 20, but was also compensated for the resulting odd shaped bisected parcels of property that resulted.[42] The only two homes adjacent to the Burns site is located on the same property across Salem Road on the northeast corner of the North Interchange.[43]

The Walters proposal sought to rezone 130 acres[44] of farmland located in southern Madison County in order to mine gravel from the site. The gravel pit site was proposed to be approximately 80 acres, with an approximate 50-acre commercial and trans-ag 2 buffer.[45] The property is not near any major interchange, and is several miles from a proposed (but presently nonexisting) interchange near Thornton. The Walters property is a large tract of land, is surrounded by other large tracts of farmland, and is bordered by the road 4700 South, which has a residential subdivision located on its south side. Incidentally, the Walters proposal would not eventually provide an increase in industrial land available for future industrial uses because the end result will be a mined gravel site.

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41 R. Burns 12.

42 R. Exhibit 12 at Tab 2 p. 2-3.

43 *See* Appendices A, B, and C, attached hereto.

44 For some reason, there was contradictory testimony as to the exact acreage involved with the Walters parcel. The application stated that it involved development of 119.6 acres. R. Vol. 4 Walters 1. However, Walters later stated that the parcel was approximately 131 acres. R. Exhibit *Public Hearing RE: Walter's Concrete Comprehensive Plan Change*, February 28, 2005, at p. 12, LL. 20-25 (This transcript is part of the material that is the subject of the Motion to Augment the Record filed on November 29, 2007).

45 R. Exhibit *Public Hearing RE: Walter's Concrete Comprehensive Plan Change*, February 28, 2005, at p.13, LL. 4-8.

The record on appeal, which contains both the Burns and Walters records, is voluminous. It is nevertheless crucial to review the actual language from the record in reviewing the Commission's actions. To assist this court in seeing how differently Burns and Walters were treated, we have prepared the following table comparing the Commission's actions on a number of issues *relative to each application. Exhibit D contains a much more detailed version of these tables,* complete with quotations from the record and citations to these quotes. We strongly encourage this court to review the actual language from the record contained in Exhibit D to get a flavor for how the Commission analyzed each application. For the court's convenience and for brevity, however, we have provided the following summary tables:

TABLE I.

ISSUE	APPLICATIONS	
	BURNS	WALTERS
APPLICATION DESCRIPTION	Both Burns and Walters applied for amendments to the comprehensive plan and zoning ordinance, to rezone agricultural or transitional agricultural property to a mix of light industrial and commercial.	
WAS A TRAFFIC STUDY REQUESTED BY AND SUBMITTED TO THE COMMISSION?	Yes.	No.
CONCERNS VOICED BY RESIDENTS ABOUT TRAFFIC AND SAFETY?	Yes.	Yes.
EXISTING INTERCHANGE ON HIGHWAY 20 LOCATED NEARBY?	Yes.	No.

ISSUE	APPLICATIONS	
	BURNS	WALTERS
INGRESS AND EGRESS SPECIFIED AND PLANNED FOR?	Yes.	No.
AGREED TO PROVIDE AND PAY FOR INFRASTRUCTURE IMPROVEMENTS?	Yes.	No.
COMMERCIAL BUFFER DESIGN SUGGESTED TO APPLICANT BY THE COUNTY	Yes.	Yes.
QUALITY AND QUANTITY OF FARM GROUND TO BE DEVELOPED	49 acres of poor farm ground due to the soil quality, shape, low spots, subwater, and configuration problems because of Highway 20.	Over 130 acres of farm ground that is bordered by other large tracts of farm ground.

TABLE II.

ISSUE	COMMISSION ANALYSIS	
	BURNS	WALTERS
LOCATION OF RESIDENCES NEXT TO HIGHWAYS IN THE COUNTY	A Policy of Madison County.	Not a policy of Madison County.
TRUCK TRAFFIC AND THE POTENTIAL FOR ACCIDENTS.	Significant.	Not significant.
POTENTIAL FUTURE TRAFFIC.	Considered.	Not considered.
POTENTIAL FUTURE COMMERCIAL TRAFFIC.	The Commission used this as a basis for denying the Burns application.	No traffic study on any traffic issue was submitted by Walters or considered.

ISSUE	COMMISSION ANALYSIS	
	BURNS	WALTERS
THE PRESENCE OF SPEEDING DRIVERS.	Considered and used as a basis for denying the Burns application.	Not considered.
PRIMARY PURPOSE OF APPLICATION.	To benefit Burns only.	To benefit Madison County.
EFFECT OF AMENDMENT ON THE COMPREHENSIVE PLAN	Significant.	Not significant.
DEVELOPMENT OF COMMERCIAL PROPERTY NEXT TO AN INDUSTRIAL SITE DETERMINED TO BE SPECULATIVE.	Yes.	No.
PLACEMENT OF DIFFERING LAND USES NEXT TO EACH OTHER FOUND UNACCEPTABLE.	Yes.	Not considered.
IS THE APPLICANT'S PROPERTY CONTIGUOUS WITH THE REXBURG CITY IMPACT ZONE?	Yes.	No.
EFFECT ON POPULATION.	Negative.	Not negative.
PROPERTY RIGHTS.	Dramatic negative impact on property values.	Minimal impact on property values.
ECONOMIC DEVELOPMENT	Primary beneficiary is Burns.	Primary beneficiary is Madison County.
IS THE APPLICATION SUPPORTIVE OF AGRICULTURE?	No.	Not considered.
SPOT ZONING	Considered a "spot zone".	Not considered.

In deciding as it has, the Commission has never articulated in its written decisions or its briefing on appeal to the district court why the standards applied to Burns were so patently different from those applied to Walters. The simultaneous application of differing standards on substantially identical issues is arbitrary and capricious, and the foregoing tables demonstrate the arbitrary and capricious nature of the Commission's decision-making. Moreover, because of these differing standards, it is not possible for the County to articulate its desired standard on any one issue. The Commission's decision-making is fundamentally unfair and should not be allowed under the LLUPA. The County's standards should be substantially the same for all properties and be applied consistently, and demonstrably disparate treatment should be held to be entirely unlawful. For these reasons, the Commission's decision must be reversed.

B. *Evans v. Board of Commissioners of Cassia County* Should Be Extended to Require That Oral Testimony of Lay Witnesses in Opposition to Official and Expert Reports to be Supported by Credible Evidence Before Such Lay Testimony Is Adopted.

A common thread running throughout the County's decision on nearly every issue involved was the County's reliance on anecdotal evidence–oral claims and testimony only–without supporting empirical evidence, even when such claims and testimony were directly contrary to empirical evidence presented to the Commission. Concerned citizens and county commissioners participating in land use hearings should not be able to prevail by simply making assertions contrary to official reports and expert opinions without meaningful evidence to support those claims. Otherwise, there can be no meaningful limitation on the ability of elected officials to make land use decisions based on mere whim and emotion, rather than evidence and logic.

In making this argument, Burns recognizes that strict evidentiary rules should not be enforced in a land use hearing or the Idaho Rules of Evidence be applied. Indeed, in *Evans v. Board of Commissioners of Cassia County*, this court rightly held that it "would not be feasible to require those conducting [a local land use hearing], who frequently are not trained in the law, to accept only that evidence which would be admissible in a court proceeding."[46]

Nevertheless, it is significant to note the *Evans* courts' subsequent language that, while strict rules of evidence should not apply, evidentiary principles of credibility, trustworthiness and reliability still have their place in land use hearings. Thus, as noted by the *Evans* court, the evidence must be presented "in a format in which the credibility of the witnesses and the evidence could be assessed firsthand."[47] This court stated that this was accomplished in *Evans* through the submission of both oral testimony **and** twenty-five exhibits supporting and bolstering the oral testimony.[48]

In nearly every aspect of the Commission's decision as to Burns, the court relied entirely on local residents' testimony even though the testimony was contrary to both official reports and expert reports and testimony. Such whole-hearted reliance on unsupported testimony, without any explanation of why the Commission disregarded the official and expert reports and the recommendation of its own planning and zoning commission, does not inspire confidence in the this process.

Put another way, without supporting evidence for the Commission to gauge the credibility of the oral representations made by local residents, the Commission's reliance on such statements

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46 *Evans v. Board of Comm'rs of Cassia County*, 137 Idaho 428, 432, 50 P.3d 443, 447 (2002).
47 *Id.*
48 137 Idaho 428, 432, 50 P.3d 443, 447 (2002).

in its decision results in a decision that is not supported by substantial evidence on the record as a whole, and therefore violates Idaho Code § 67-6735(c). Specific instances where the Commission made this crucial error will be discussed in more detail below. The issue is raised and discussed here, however, because it is a common critical issue throughout the remaining sections, which discuss specific topics analyzed by the Commission.

C. The County's Determinations on the Issues Set Forth Below Were Arbitrary and Capricious and Not Supported by Substantial Evidence on the Record as a Whole.

(1) Transportation, Traffic, and Safety at the North Interchange of Highway 20 and Salem Road.

(a) Introduction.

Both Burns and the County would surely agree that the major issue regarding the Burns application was traffic and safety. As noted by the district court, "[b]oth parties have spent considerable time, energy and money analyzing the transportation component."[49] Burns presented expert evidence from a number of sources concluding that the North Interchange was safe. Opponents of Burns presented only oral testimony that the interchange was unsafe as to both traffic and interchange design because of numerous alleged accidents that had taken place in the past.

The access to Burns' proposed site on the northwest side of the Highway 20 interchange is proposed to connect with Salem Highway approximately 822 feet from the center of the North Interchange.[50] The 65-foot access to the Burns parcel was originally installed by ITD when the North Interchange was constructed, and is the only access to the property.[51] The access was not proposed

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49 R. Vol. 3 at 498.

50 R. Exhibit 12 Tab 3 at *2 (James L. Pline, Traffic Analysis, BURNS HOLDINGS, LLC, Salem Road, North of US 20 Interchange, December 9, 2004).

51 Burns 8 at p. 20 LL5-7 (Testimony of ITD District Engineer Tom Cole); See also R. Exhibit *Public Hearing Transcript, RE: Burns Holdings, LLC Request for Comprehensive Plan Change*, February 28, 2005, at p. 6 LL. 3-5.

nor constructed by Burns, rather, it was a preexisting access constructed in the late 1970s by ITD. The Burns access is across Salem Road from an already-existing driveway to two residential homes located on the same property across from the Burns site, the only homes adjacent to the Burns site which are also adjacent to the west-bound off ramp of Highway 20.[52] In earlier land use hearings involving Mrs. Gayle Taylor, the County made suggestions relative to her proposal. After Burns purchased the property, and instead of challenging the Commission on its recommendations, Burns worked to address those perceived issues.

Burns went to extensive lengths to address traffic and safety. Burns' actions included (i) the purchase of two additional acres to improve the dedicated access already existing on the property, (ii) the submission of a detailed traffic study from a nationally recognized traffic engineer, (iii) reliance upon and utilization of a thorough traffic study commissioned by and paid for by Madison County itself, and (iv) Burns' agreement to pay for a left turn bay north of the North Interchange.

The most thorough and important information submitted by Burns is entitled "Traffic Analysis–BURNS HOLDINGS, LLC–Salem Road, North of US 20 Interchange" (hereinafter, the "Traffic Analysis"),[53] which was submitted by Mr. James Pline, an expert in performing traffic analyses. As shown by his curriculum vitae,[54] Pline has an extensive educational and employment background in the traffic engineering field and is affiliated with a number of professional organizations and technical organizations. Perhaps Mr. Pline's qualifications were best summarized by Planning and Zoning: "James [Pline is] a nationally recognized professional traffic engineer with

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52 *See* Appendices A and B attached hereto.
53 R. Exhibit 12 at Tab 3.
54 R. Exhibit 12 at Tab 4.

over 30 years of experience."[55] In sum, Burns employed one of the best traffic engineers in the United States to analyze and address the concerns and issues raised by the Commission.

Pline's Traffic Analysis not only contains his analysis of the proposed Burns site, but it also incorporates and analyzes a number of additional important studies, including the Dyer Group Study, the Madison County Transportation Plan performed by Keller Associates, and the Safety Analysis and Collision Summaries of the ITD for Salem Road at the North Rexburg Interchange. Each of these reports is briefly discussed below, followed by a thorough discussion of Pline's Traffic Analysis.

(b) The Dyer Group Study.

The Dyer Group Study was submitted by Winston R. Dyer, P.E., Manager of The Dyer Group, LLC, on December 31, 2003.[56] The report was requested by Planning and Zoning to evaluate traffic impacts associated with the Burns facility as part of Mrs. Taylor's application. Mr. Dyer concluded that placement of the Burns facility at the proposed location was appropriate and did not present traffic and safety concerns. Mr. Dyer suggested that a single approach to the Burns facility would be sufficient for the additional traffic coming to and from the facility.

Concerning impacts on the Salem Highway, Mr. Dyer first stated that the site of Burns' proposed facility "provides excellent transportation access for serving the surrounding area."[57] In order to preserve safety and operation of the Salem Highway, Mr. Dyer suggested that placement of

55 R. Burns 15 at 9.
56 R. Exhibit 12, Tab 3 at 13.
57 *Id.*

a stop sign at the Burns' access and construction of a left turn bay.[58] Burns agreed to both suggestions and to pay for the construction of the left turn bay.

Mr. Dyer also noted a perceived sight distance problem on the north side of the North Interchange and suggested that Burns place the approach from its facility as far north of the interchange as possible. Burns responded to this suggestion by purchasing two acres formerly owned by Bruce Shirley to accommodate Mr. Dyer's recommendation. The purchase of the former Shirley property allowed Burns to redesign its site access, which permitted a more level entrance with better sight lines for traffic entering or exiting the Burns facility.

(c) Madison County Transportation Plan (Keller Associates).

The Madison County Transportation Plan (the "Transportation Plan") performed by Keller Associates, dated June 2004, was done with the sponsorship of Madison County, the City of Rexburg, and the City of Sugar City.[59] The Transportation Plan was a comprehensive, expensive, detailed, recent, and well-conducted analysis of transportation as it currently exists in Madison County and what should be done for the next twenty years of anticipated growth.

It is significant to note the following conclusions contained in the Transportation Plan pertaining to the North Interchange. In Figure 2.12, entitled "Roadway Deficiencies Map," neither the North Interchange nor the Salem Highway were identified as one of the ten roadway deficiency areas.[60] Also, in Figure 4.5, entitled "Forecast Deficiencies-Existing Roadways and Intersections,"

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58 *Id.*.
59 R. Exhibit 10, Keller Associates, *Madison County Transportation Plan*, June 2004, at ES-1.
60 *Id.* at ES-3, p. 2-31. For ease of reference, a copy of this figure is attached hereto as Appendix E.

both the north and south off-ramps at the North Interchange were classified as "sufficient," which is the best classification for a road in the Transportation Plan.[61]

The Transportation Plan characterized Salem Road south of the North Interchange as a major collector with existing level of service "D" and recommended additional traffic lanes in 10 to 15 years.[62] The Transportation Plan characterized Salem Road north of the interchange as a major collector with existing level of service "C" and recommended additional traffic lanes in 16 to 20 years.[63] Mr. Pline concluded that the Transportation Plan appeared to be "reasonable considering the projected traffic growth on Salem Road," and that "[t]he relatively minor traffic generated by the Concrete Batch Plant in comparison to Salem Road volumes would have . . . relatively no impact on these level of services calculations or the planned roadway improvements."[64]

(d) Safety Analysis of Salem Road at the North Rexburg Interchange (Idaho Transportation Department).

The Safety Analysis of the Salem Road at the North Rexburg Interchange (the "Safety Analysis"), dated January 2004, was prepared by John W. Becker, District 6 Traffic Engineer for the ITD.[65] The Safety Analysis was performed at the request of Planning and Zoning in conjunction with the prior application submitted by Mrs. Gayle Taylor.

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61 *Id.* at ES-5, p. 4-15. The "sufficient" classification is the lowest classification used in the Transportation Plan. The classification scheme used, in descending order of intersection deficiency forecast, is "critical," "significant," "moderate," and "sufficient."

62 R. Exhibit 12, Tab 3 at *4.

63 *Id.*

64 *Id.*

65 R. Exhibit 5, John W. Becker, Safety *Analysis of the Salem Road at the North Rexburg Interchange*, January 2004; *See also* R. Burns 5 at 4, 8 (testimony of John Becker).

The analysis was conducted for the years 2000-2002 for the stretch of the Salem Highway between milepost 1.395 and 1.750,[66] which is essentially the stretch of road beginning just south of the south on and off ramps at the North Interchange and ending 686 feet north of the north on/off ramp terminal of the North Interchange.[67] Milepost 1.750 is approximately 300 feet north of the proposed access to Burns' site, which means that the Safety Analysis included the stretch of road that Burns would utilize north of the North Interchange.

The ITD found that four accidents occurred within the above stretch of road, two of which occurred at the intersection of the north ramp and two of which occurred at the south intersection of the south ramp.[68] ITD found that three accidents occurred on the westbound off ramp, and one accident occurred on the eastbound off ramp. None of these accidents, however, happened north of the north ramp terminal intersection;[69] thus, there were no accidents reported on the stretch of road that would access the Burns facility. Based on these accident records, ITD performed a safety evaluation and found that this stretch was a "safe, typical roadway segment" when compared to accidents per million mile numbers.[70]

ITD also looked at traffic volumes, the roadway itself, the interchange profile, sight distances, and whether traffic signals were warranted at the ramp intersections. ITD "determined there are no serious safety hazards or concerns at either of the ramp intersections with the Salem road."[71] ITD

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66 R. Exhibit 5 at 1.

67 *Id.*

68 *Id.*; See also R. Exhibit 4, Idaho Transportation Department, *Crashes by Year and Severity US 20 IC 337 (Salem IC) 2000-2003.*

69 R. Exhibit 5 at 1; *See also* R. Ex. 12 at *4.

70 R. Exhibit 5 at 2.

71 *See* R. Burns 8 at p. 17 LL. 19-25 through p. 21 LL.1-9 for the testimony of ITD representatives John Becker and Tom Cole; *See also* R. Burns 16 (ITD sight distance standards).

District Engineer Tom Cole testified that if the "Salem Highway were a State highway, the State would allow the proposed access at this location."[72] Mr. Cole also noted that a similar interchange for Sunnyside Road in Idaho Falls, an interchange in the design phase at the time, was similarly situated and that the Sunnyside site was evaluated as a safe location.[73] The only safety improvement suggested by the ITD for the North Interchange was that "[a] sign could be installed on the Salem road in advance of each intersection reading 'Trucks Entering Highway.'"[74]

In a letter dated December 16, 2004, Matthew A. Davison, P.E., a District 6 ITD Traffic Engineer, stated that he had reviewed the Safety Analysis prepared by John Becker and concurred with its findings.[75] Mr. Davison stated that "the State does not anticipate any safety issues at the interchange resulting from [Burns'] site plan development."[76] Mr. Davison also expressed appreciation for Burns' "willingness to hold [its] access point onto Salem Road as far north from the US-20 on-off ramps and [its] plans to provide for a dedicated left turn bay into [Burns'] site."[77]

(e) Traffic Analysis, BURNS HOLDINGS, LLC, Salem Road, North of US 20 Interchange (James L. Pline, P.E.).

Pline's Traffic Analysis not only contained his analysis of the proposed Burns site, but it also incorporated and analyzed the studies and reports discussed above. The Traffic Analysis specifically addressed the "public concerns and perceived problems with [the Burns' site] and the access

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72 R. Burns 7 at 5.

73 R. Burns 8 at p. 20, LL.11 through p. 21 LL. 9. The Sunnyside Interchange has now been constructed and is fully operational.

74 *Id.*

75 R. Exhibit 12, Tab 5, Matthew A. Davison, *Letter to Kirk Burns*, December 16, 2004.

76 *Id.*

77 *Id.*

location."[78] Mr. Pline relied on information he received from the above studies and reports and on his own personal field review of the site made on November 19, 2004. In his analysis, Pline specifically addressed traffic volumes, sight distance, operational concerns, safety, and the Madison County Transportation Plan, all of which were raised during the hearings on Gayle Taylor's applications and raised again on Burns' applications. In regards to the traffic volume issue, Pline concluded that the increase in traffic volume from Burns' facility would be insignificant and would not have an effect on the level of service on the Salem Highway. Pline calculated the number of vehicles per hour that would be generated by the Burns facility and illustrated the generated truck traffic and distribution in the vicinity of the North Interchange in Figure 2 of his report.[79] As shown in that report, the Burns facility would increase traffic by 110 vehicles per day traveling northbound in the road stretch located north of the north on/off ramps up to the Burns access road and by 110 vehicles per day traveling southbound at that same stretch. This increase in traffic volume north of the north on/off ramps is "less than 5 percent of the total traffic north of the Interchange,"[80] whic increase was determined to be insignificant and "would have no influence on the level of service."

Pline also concluded that the sight distances relative to the access road to Burns' facility and the North Interchange are more than adequate to observe other vehicles in the vicinity of the North Interchange and the Salem Road and that a normal automobile on the Burns site access approach can see and be seen from the centerline of Highway 20 in the middle of the overpass, which is

78 R. Exhibit 12, Tab 3, at *1.
79 *Id.* at *7 (Figure 2).
80 *Id.* at *7 (Figure 3).

approximately 822 feet.[81] Pline further concluded that the "sight distances available are more than adequate to observe other vehicles in the vicinity of the Interchange and on Salem Road."[82] This conclusion is supported by a review of the interchange design performed by ITD and the American Association of State Highway and Transportation Officials ("AASHTO") Design Guidelines.[83]

Pline also addressed operational concerns expressed by some residents with a proposed left turn bay that Burns agreed to construct, concluding that there would not be operational concerns with the Burns site and the left turn bay.[84]

In Pline's study of the overall safety of the North Interchange, he also reviewed the Safety Analysis and Collision Summaries of the ITD, dated January 2004. He concluded that the stretch north of the North Interchange was safe because no accidents were reported at that intersection. The data from ITD showed that no accidents occurred north of the north on/off ramps from 2000-2002. Mr. Pline also discussed a collision summary for the North Interchange, dated June 14, 2004, covering some of the same reported collisions, but also including collisions from 2003. The collision summary showed that fifteen collisions occurred, but that none of those collisions occurred north of the north on/off ramps–meaning that none of the reported accidents occurred on the portion of the Salem Road north of the North Interchange adjacent to the Burns parcel.[85] The ITD reports showed that all of the accidents occurred on the ramps surrounding the North Interchange.[86]

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81 *Id.* at *2, *7 (Figure 2).
82 *Id.*
83 *Id.*
84 *Id.* at *3.
85 *Id.* at *4. The Collision Reports are found at R. Exhibit 4.
86 *Id.*

In the hearing relating to the Gayle Taylor application, some residents of the county claimed that many vehicles had been involved in traffic incidents north of the north on/off ramps. These claims were also renewed at the hearings on the Burns application. The data compiled by ITD does not support such claims.

In accordance with the *Evans* case discussed above, the residents could have submitted information or documentation from the sheriff's office or presented oral or written testimony of those who may have been in accidents near the North Interchange to support their claims, if there was any factual basis for the claims. A lack of documentation or other evidence to support the residents' claims undermines the credibility of such claims and the credibility of the Commission's reliance on such claims.

In regards to the comprehensive Transportation Plan (the Keller Report) prepared by the County, Pline concluded that the "relatively minor traffic generation by the Concrete Batch Plant . . . in comparison to the Salem Road volumes . . . would have . . . relatively no impact on [the] level of services calculations of the planned roadway improvements . . . ."[87]

Based on the above extensive and thorough analysis, Pline concluded that the North Interchange was safe on every level.

As discussed in the beginning of this brief, the County made a significant error in its first review of the transportation and safety issue, which caused the district court to remand the matter back to the Commission for additional review. Unfortunately, in its second round of analysis, the County again simply ignored Pline's Traffic Analysis summarized above and instead relied whole-

87 *Id.*

heartedly on the oral testimony presented by local residents, even though it was not supported by ITD accident records, expert reports, engineering reports, or any other verifiable evidence.

In its analysis of traffic and safety issues, the County admitted that the current studies by the State of Idaho demonstrate that the intersection is safe: "Current State traffic studies say the highway interchange located near the project site is safe and adequate to absorb the expected additional traffic."[88] Yet, despite these findings by the State, and without any expert or engineer opposing the State's findings, the County concluded:

> Access to the proposed project site is located in such close proximity to the interchange as to reasonably raise legitimate concerns as to the safety of such an access, especially where the usage of the access would be primarily dedicated to large cement trucks, delivery vehicles, employee vehicles, and hoped for heavy commercial traffic.[89]

There is no expert testimony or other reasonably reliable evidence supporting the above conclusion. Furthermore, the County did not explain why Pline's Traffic Analysis, the Keller Report, and ITD statistics were not relied upon in its decision, nor did the County explain why it relied only on the residents' unsubstantiated concerns.

Furthermore, it appears that the Commission was intent to find ways to discredit Mr. Pline's expert testimony without actually addressing the substance of his testimony. Thus, Commissioner Muir characterized Mr. Pline's expert testimony in this manner: "I view that [Mr. Pline's testimony] as an emotional opinion, what he said, not a professional opinion."[90]

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88 R. Exhibit, *Findings of Fact and Conclusions of Law and Decision of the Board of County Commissioners of Madison County, Idaho, RE: Comprehensive Plan Map Change to Amend a Property Designation From Agricultural to Commercial and Light Industrial Near the North Interchange with U.S. Highway 20*, June 1, 2006, [hereinafter, "Second Written Commission Decision"], at 14.

89 *Id.*

90 R. Exhibit, *Public Meeting, RE Burn's [sic] Holdings, LLC*, April 13, 2006, p.54, LL. 7-8.

In addition, without any supporting evidence from an engineer, Commissioner Muir made the following claim as to the road width at the North Interchange:

> He [Mr. Pline] talks about width of the roadway at that entrance. There is decent width, but the road width itself does not support turning lanes without restructuring the overpass. . . . I question the road width in that area. You could put a turning lane there, but then you'd compromise the shoulder width on that overpass structure."[91]

This claim is not supported by any evidence in the record, nor was it mentioned in the Commission's first decision in this matter. Further, the Dyer Report, which Planning and Zoning commissioned, implicitly concluded that there is adequate room for a left turn lane, because Dyer specifically recommended construction of the left turn lane for the site access. [92]

In regards to sight distance, Commissioner Muir also made the following statement:

> He [Mr. Pline] mentioned the site [sic] distance. I drive over there about every day, but there's over 800 feet site distance from the south. I have to arguably decline to question that because you can sit on the off-ramp coming from the north and look towards the south and the closest thing you can see to the south is that you can barely see the top light at Artco. You can't view any of that traffic over the hill, so having 800-foot vision, I question that highly."[93]

The above statement misconstrued Mr. Pline's testimony. Pline's testimony was that "a normal automobile on the site access approach can see and be seen from the centerline of US Highway 20 in the **middle** of the overpass structure or about 822 feet."[94] Furthermore, Pline's testimony addressed sight distance to the **north** of the center of the North Interchange. Commissioner Muir argued that Mr. Pline's testimony pertained to sight distance from the north on-

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91 *Id.* at p. 54, LL. 15-18, p. 62, LL. 16-19.

92 R. Exhibit 12 at Tab 3.

93 R. Exhibit, *Public Meeting, RE Burn's [sic] Holdings, LLC,* April 13, 2006, p.54, LL.18-25 to p.55, LL. 1-2.

94 R. Ex. 12 Tab 3, at *2 (emphasis added); *See also* Figure B.

off ramps looking **south** on the North Interchange. Properly understood, Mr. Pline's determination that there is a 822-foot sight distance from the center of the North Interchange to the Burns proposed access is completely accurate and supportable, unlike the Commission's claims. Indeed, the 822-foot sight distance exceeds ITD standards on this issue.[95]

As if the above attempts by the Commission to discredit Mr. Pline were not egregious enough, the Commission again attempted to discredit Pline as to his testimony concerning farm vehicles. In Pline's video presentation,[96] Pline concluded that there was more than adequate sight distance to the Burns access based on a 55 mph speed limit for regular traffic. However, as to slower moving farm vehicles, Mr. Pline noted that the sight distances may not be adequate, and proposed lowering the speed limit. In response, Commissioner Muir remarked:

> Another thing that's kind of offensive for me and the agricultural community, he says that you can't place the commercial vehicles in the same line as older farm trucks that maybe wouldn't get to speed adequately. There's two issues there. The farmers in our local community have diesel trucks that will compare in horsepower to any commercial truck, and there's drivers in those farm trucks that are adequate for the road system for our agricultural community is insulting to me.[97]

Mr. Pline was in no way "insulting" the local farmers. He was simply offering a safety suggestion for the County where slower moving farm vehicles are prevalent. Such advice from a nationally renowned expert, in normal circumstances, would be received with appreciation. This suggestion demonstrates that Pline's review of the project site was a true evaluation of the site, and not, as the Commission appears to suggest, paid-for biased testimony in favor of Burns. The

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95 R. Vol. 4 Burns 16. The sight distance standard for a 50 mph speed limit is 400-475 feet.

96 R. Exhibit 1.

97 R. Exhibit, *Public Meeting, RE Burn's [sic] Holdings, LLC*, April 13, 2006, at p.55, LL. 19-25 to p.56 LL. 1-3.

Commission instead used Pline's suggestion as ammunition against Burns, further demonstrating the unfairness both Pline and Burns received from the Commission.

As to traffic and safety, the evidence overwhelmingly shows that the North Interchange is safe. The Commission failed to explain why it did not rely upon any of the above traffic reports, including Pline's, which demonstrates that the decision on this issue was results-oriented.

(2) Inadequacy of the Design and Construction of the North Interchange.

In an effort to further justify its factually unsupportable conclusion that the North Interchange was unsafe, the Commission went so far as to conclude that the North Interchange design is inadequate, and likely is inadequate because, as the Commission speculated, budgets were strained when the North Interchange was built:

> A majority of the Board found that the interchange design is inadequate, due to sight limitations. While design standards may appear adequate on paper to the designer, actual practical use of the resulting design in reality often has a far different outcome. It is not unknown for projects to succeed on paper and fail in reality, or for lower standards to become much more acceptable when budgets become strained.[98]

Not only is this conclusion unsupported by substantial evidence, it is not supported by **any** evidence at all, which is certainly a violation of the LLUPA. Indeed, Pline specifically noted that the interchange was constructed in compliance with State of Idaho policies.[99] Further, Planning and Zoning concluded that "the testimony from the two road engineers that the overpass was built to standard and would be safe could not be ignored."[100] The Commission failed to articulate why its

98 R. Exhibit, Second Written Commission Decision at 14.

99 R. Exhibit I.

100 R. Vol. 4 Burns 17 at 2 (Planning and Zoning Findings of Fact and Conclusions of Law on Comprehensive Plan Change); R. Vol. 4 Burns 22 at 2 (Planning and Zoning Findings of Fact and Conclusions of Law on Zone Change).

findings were opposite of findings made by Planning and Zoning. Thus, it appears that the inclusion of this finding is further evidence of the results-oriented nature of the Commission's decision.

(3) Property Rights.

The Commission's decision relative to impact on property rights is arbitrary and capricious and not supported by substantial evidence on the record. In support of its decision to deny the Burns application, the Commission determined that the Burns proposal would have a negative impact on property rights, and based this determination on the testimony of two neighbors, one of which lived one-quarter mile away and the other of which lived adjacent to the proposed Burns site across Salem Road.[101] While these neighbors had fears that their property would suffer diminuition in property value, there was no evidence supporting their claims, which is contrary to the principle articulated in *Evans*. The need for specific supporting evidence is crucial in this instance because it is possible that the commercial and industrial facilities at the Burns site could actually increase property values. As noted by Commissioner Robison:

> Traditionally, if you've got an industrial [and] commercial site then you're actually worth more than like an agricultural piece of property or a residential piece of property. Actually, the property values would go up, in my opinion. And what we're seeing in effect go up is if land use is changed from a residential to another type of use. [102]

The Commission did not properly consider the property rights issue. It relied on oral statements alone, without any supporting evidence. A decision based on such evidence does not meet the substantial evidence test.

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101 R. Exhibit, Second Written Commission Decision at 11.

102 R. Exhibit, *Public Meeting, RE Burn's [sic] Holdings, LLC*, April 13, 2006, p.19, LL.15-22.

(4) Compatible Uses.

The Commission also determined that the proposed Burns facility was not compatible with other uses. In order to best address this issue and others to follow, we must first discuss the Commission's supposed standard when it uses the terminology of "incompatible uses" or "incompatibility" or "complimentary uses," because these terms were used frequently by the Commission. In explaining its standard, the Commission argued as follows in its briefing to the district court:

> For example, Burns never challenges the existing Comprehensive Plan goal of keeping complimentary uses together, yet, the Burns' proposal would insert two inconsistent uses in the middle of country now devoted to agriculture and residential, where there are no neighboring complimentary uses. In contrast, the Walter's project would be neighbored by several existing complimentary uses.
>
> * * *
>
> In order to keep "complimentary uses in the same land use area," the County could only find as it did in both the Walters and Burns cases. In Burns, the neighboring uses are **residential and agricultural**. In Walters, the neighboring uses are **commercial, industrial, residential and agricultural**. The facts in the record amply justify the decisions made by the County.[103]

Burns is confused, to say the least, with the Commission's articulation of its standard as to compatible or consistent uses. The Commission found with Walters that all land-use types (commercial, industrial, residential, and agricultural) are compatible; yet with Burns, the Commission argues that commercial and industrial are not compatible with residential and agricultural. This simply makes no sense.

(5) Population.

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103 R. Vol. 3 at 412, 416 (emphasis added).

Using the Burns-only complimentary use standard discussed in the above section, the Commission concluded that the Burns proposal would affect future housing and where population locates. The Commission claims, "[a] cement batch plant is generally incompatible and inconsistent with closely neighboring housing."[104] (To clarify, the proposed Burns facility is a concrete batch plant, not a cement plant). Further, the Commission references "closely neighboring housing," yet there are only two home on the same parcel that could be considered as bordering the Burns site. The remaining homes are over one-quarter mile away.[105] In addition, the Burns parcel is not presently zoned residential for housing. It is zoned as trans-ag 2 property.

Conversely, with the Walters proposal, many homes line 4700 South along the southern boundary of the Walters site, which homes directly border the Walters site with a now-approved gravel pit. Further, as to sheer scale of potential residential sites, the Walters proposal has taken 130 acres (over 250% the size of the Burns parcel) off the residential housing market. No mention of this is made in the Walters decision.

Yet the County summarily determined there would be "no negative impact by the proposed [Walters] plan amendment on population."[106] As a result, two entirely different standards were demonstrably applied by the Commission.[107]

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104 *Id.* at 12.

105 See Appendices A and B. The proximity of the Val Ball home to the off ramp is closer than the Burns facility.

106 R. Exhibit, *Findings of Fact and Conclusions of Law and Decision of the Board of County Commissioners of Madison County, Idaho, RE: Comprehensive Plan Zone Change to Add a Commercial and a Light Industrial Zone Near State Highway 191*, at 22. This is the written decision approving Walters' application.

107 Additionally, as to Burns but not Walters, the Commission claims a population analysis includes a determination of whether residential homes could be located on the proposed parcel, and if so, the proposal "could affect where future housing, and thus population in this area locates." Such a consideration is not articulated in Idaho Code § 67-6508. This statute states the population analysis is for an "analysis of past, present, and future trends in population including such characteristics as total population, age, sex, and income." Under the newly articulated "potential future housing standard" inserted into the population analysis by the Commission, it seems that no future non-residential development could happen in Madison County because such

(6) Housing. The arguments raised by the County on this issue are merely restatements of the arguments relative to the Commission's Burns-only "residential first" standard, as discussed above.

(7) Land Use.

The Commission claims that Burns would insert two inconsistent uses (commercial and industrial) into agricultural and residential land if it approved the Burns application.[108] The claim that commercial and industrial properties are not complimentary is not supported by the record. Kim Leavitt testified that industrial zones imbedded in commercial property is well-accepted and used in land use planning.[109] Furthermore, the commercial and industrial combination was suggested to Burns by Planning and Zoning. There was no contrary testimony otherwise presented at the hearings. Furthermore, Walters' industrial and commercial application was approved in trans-ag 2 zoned property which was adjacent to residential property.[110]

The Commission also claimed that the Burns proposal was rejected because the County was "preserving agriculture." But what is the County's standard for "preserving agriculture"? Based on the Walters decision, it is clearly not to prevent commercial and industrial development of agricultural ground because the Commission allowed these non-agricultural uses for the 130-acre Walters parcel.

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proposals would always take potential residential land off the market. This conclusion is, to say the least, illogical.

108 R. Exhibit, Second Written Commission Decision at 17.

109 R. Exhibit, R. Exhibit *Public Hearing Transcript, RE: Burns Holdings, LLC Request for Comprehensive Plan Change*, February 28, 2005, p.11, LL. 22-23.

110 R. Vol. 4 Walters 1.

Under the Commission's newly-articulated standard applied to Burns (but not Walters), any agricultural land located next to major highways such as Highway 20 would have to be considered for residential development before it could be considered for commercial or industrial use:

> If the Burns' property was poor farm ground, as they claimed, the objectives set by the Comprehensive Plan in support of the goal of preserving agriculture, called for having the ground first considered for residential development.[111]

There is no support in the Comprehensive Plan for this rationale. There are no land preferences articulated in the Comprehensive Plan for what a landowner must consider first, second, and third when it comes to marginal agricultural ground. Further, this rationale is illogical in light of other provisions of its Comprehensive Plan:

> Commercial use in Madison County has traditionally been located along the state highways and in the Rexburg area, with the primary uses serving travelers through the area, serving the consumer needs of the residents, and serving agricultural needs. It is the desire of the citizens of Madison County to continue such uses along or within the area of the highway corridors, . . .[112]

This provision provides that the proximity of property to transportation corridors should factor into the Commission's decision. For example, commercial use is encouraged on property located next to state highways. Thus, marginal agricultural ground located next to a major highway could and should be developed as commercial property under this provision of the Comprehensive Plan. It is arbitrary and capricious for the Commission to focus on one provision of the Comprehensive Plan

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111 R. Vol. 3 at 415.

112 R. Exhibit 18 at 16 (Madison County Comprehensive Plan).

to the exclusion of other applicable provisions. Yet, with its "residential first" standard as applied to Burns, it has done just that.[113]

Further, placement of residential subdivisions next to major interchanges is not consistent with what has historically been done in Madison County. Instead, the County has placed commercial and industrial facilities around the other existing interchanges in Madison County. Although the Commission argued to the district court that there is "no evidence in the record . . . that the other two highway interchanges in the County have commercial and industrial property located near them . . . ,"[114] this argument is not accurate and is contrary to the record. Commissioner Muir acknowledged the historic practices of the County:

> If we look at here down Main Street we have commercial areas developed off of that interchange definitely. If we look at the next interchange to the south, we have commercial areas around it and we have two industrial areas because we have potato plants that are complementing each other in that area.
>
> If we go further south to Thornton, we have industrial areas coming off of those interchanges with some commercial.[115]

The Burns proposal is consistent with past County practices and the provisions of its Comprehensive Plan. A claim that the Comprehensive Plan supports placement of homes next to major interchanges is neither supportable nor logical.

(8) Public Services, Facilities and Utilities.

The Commission, as to Burns only, claims the following:

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113 As a related point, page 22 of Comprehensive Plan specifically calls for protection of "farm to market roads." The Burns facility would meet that provision because of its close proximity to Highway 20. This raises a question as to how the County could protect farm-to-market roads if it encourages development of residential areas next to highways and interchanges, which necessarily forces commercial and industrial uses further out into the County. See R. Exhibit 12, Tab 2 at 3.

114 R. Vol. 3 at 415.

115 R. Exhibit, *Public Meeting, RE Burn's [sic] Holdings, LLC*, April 13, 2006, p. 37,LL.3-11.

> Since no public services such as water or sewer are available at the Burns' project site, and the project site is not in any area of city impact, the proposed Burns project site is inappropriate for the proposed zone change.[116]

While it is true that Burns is not located within Rexburg's area of city impact, it is located adjacent to the City's impact area. Further, there have been discussions that either Rexburg or Sugar City will include the Burns site as part of their impact area in the near future given that growth surrounding the interchange is inevitable.

Conversely, the Walters property is neither located within Rexburg's area of impact nor adjacent to the city's area of impact. It is also not located near any major interchange. Based on the Commission's rationale on this issue, the Walters proposal should likewise not have been allowed. The Commission's inconsistency on this issue further evidences the results-oriented motives of the County.

(9) Community Design.

The Commission argues that Burns is not located next to other industrial uses, and that this violates the Comprehensive Plan. This claim is not accurate, and ignores the location of the Burns site next to the Corneilsen gravel pit, which is located west of and adjacent to the Burns site (the County considers gravel pits to be industrial sites).[117] Therefore, Burns is located next to a presently existing industrial use, and the County's claim to the contrary ignores this fact entirely.

The Commission also states that the concrete batch plant would have a negative impact on community design, and specifically argues that it would negatively affect a "doorway" into Madison

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116 R. Vol. 3 at *419*.
117 *See* Appendicies A and B; *See also* footnote 5 above.

County. There is nothing in the Comprehensive Plan which addresses "doorways" and what tandards ought to be applied to such a consideration. Moreover, it has been established that the other doorways to the County–the other two major interchanges on Highway 20 in Madison County–also have industrial and commercial sites surrounding them. The nebulous "doorway" rationale is not a legitimate reason for denying the Burns application.

(10) Implementation.

The County's arguments relative to this issue are simply restatements of earlier arguments on industrial grouping, placement of industrial zones within areas of city impact, preservation of agriculture, and community design. Burns' response to these arguments are set forth above and incorporated herein by reference.

D. A Substantial Right of Burns has been Violated Because Burns did not Receive a Decision Based on the Merits of Its Application.

Judicial review is a two-step process, wherein "[t]he party appealing the Board of Commissioners' decision must first show the Board of Commissioners erred in a manner specified under I.C. § 67-5279(3), and second, that a substantial right has been prejudiced. One of the Idaho cases specifically discussing the substantial rights issue is *Sanders Orchard v. Gem County.*[118]

In the *Sanders Orchard* case, the Gem County Commissioners relied upon a purported fact to form the basis of their decision relative to a proposed subdivision. On appeal, the Idaho Supreme Court found that no written documents or oral testimony was submitted regarding the purported fact that the City of Emmett's central sewer and water lines would be extended to the subdivision in the

118 *Sanders Orchard v. Gem County*, 137 Idaho 695, 52 P.3d 840 (2002).

reasonably near future. The court held that the commission's findings were therefore not supported by substantial evidence and held that "substantial rights of Sanders Orchard have been prejudiced by the Board's action in basing its decision on an issue upon which no evidence was presented."[119] Therefore, the court vacated the commission's decision.

Similar to the *Sanders Orchard* case, Burns has had substantial rights prejudiced because it has received an adverse results-oriented decision with no credible contrary evidence being presented in opposition to Burns' evidence.

E. Burns Is Entitled to an Award of Attorney Fees Pursuant to Idaho Code § 12-117 for the Fees Incurred in Challenging the County's Decision, Both for this Appeal and for the Actions Required to Be Taken Below in Challenging the County's Decisions.

In its October 17, 2006 decision, the district court awarded attorney fees to Burns pursuant to Idaho Code § 12-121, but decided against awarding attorney fees pursuant to Idaho Code § 12-117. Burns has always been of the opinion that an award of fees pursuant to Idaho Code § 12-117 was appropriate. However, rather than engage in an academic exercise over the basis for an award of attorney fees, Burns elected not to file a motion for reconsideration of the attorney's fees award when the district court made its award to Burns.

The County filed a motion for reconsideration asking the court to reconsider the portion of the court's October 17, 2006 decision awarding attorney fees to Burns because the amount was excessive. In a surprise change of course, the court reversed its earlier decision on fees as to the basis for the award, which is not what the County had requested in its motion.

119 *Id.* at 703, 52 P.3d at 847.

In arguing against the basis for an award of fees, the correct standard for making such an argument is set forth in the case of *Burns v. Baldwin.*[120] The County had made no argument addressing those standards articulated in the above quotation. And without such an argument having been made, Burns was not on notice that the court might reconsider its award of fees pursuant to Idaho Code § 12-121. This court should therefore reverse the district court's decision as to attorney fees.

In *Fischer v. City of Ketchum*, the Idaho Supreme Court held that the City of Ketchum "failed to properly grant a Conditional Use Permit" and in so doing, made a mistake that should never have been made.[121] The court also stated that Idaho Code § 12-117 "is not discretionary but provides that the court must award attorney fees where a state agency did not act with a reasonable basis in fact or law in a proceeding involving a person who prevails in the action."[122] One of the purposes of Idaho Code § 12-117 "is to provide a remedy for persons who have borne unfair and unjustified financial burden attempting to correct mistakes agencies never should have made."

Burns has argued that just as in the *Fischer* case, the Commission in Burns' case made mistakes that never should have been made. In its October 17 decision, the district court determined that the *Fischer* case was factually distinguishable from the above-entitled case.[123] Burns disagrees

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120 *Burns v. Baldwin*, 138 Idaho 480, 486-87, 65 P.3d 502, 508-09 (2003): "To determine whether the award of attorney fees was an abuse of discretion, this Court applies the three-factor test from *Sun Valley Shopping Center:* "(1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason." *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991). The district court correctly perceived that it had discretion to decide attorney fees and acted within the boundaries of its discretion and consistent with legal standards. Trial courts may award attorney fees under I.C. § 12-121 if the case was "brought, pursued or defended frivolously, unreasonably or without foundation." I.R.C.P. 54(e) (1).

121 *Fischer v. City of Ketchum*, 141 Idaho 349, 355, 109 P.3d 1091,1097 (2005) (emphasis added).

122 *Id.* at 356, 109 P.3d at 1098.

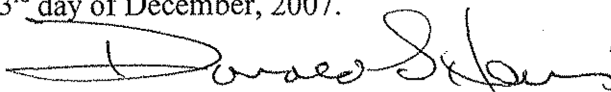
123 R. Vol. 3 at 505.

with the district court's conclusion that the County acted "under a basis of fact" in misinterpreting the traffic and safety issues presented to the County during the first round of consideration. It is quite clear from the County's written decision that the traffic and safety issue was the gravamen of the County's decision, and in arriving at this decision, the County relied heavily on discrediting the Pline Traffic Analysis provided by Burns, even with a second opportunity to properly review and understand it. The County made a mistake that never should have been made, and consequently, acted without a basis in fact. An award of attorney fees pursuant to Idaho Code § 12-117 is thus warranted for fees incurred below, and for fees incurred in this appeal.

VI. CONCLUSION

For the reasons set forth above, this court should reverse the County's decision and allow for the comprehensive plan and zoning changes. In addition, Burns should receive an award of its reasonable attorney's fees.

Respectfully submitted this 3rd day of December, 2007.



Donald L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, 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 3rd day of December, 2007.

DOCUMENT SERVED: APPELLANT'S OPENING BRIEF

ATTORNEY SERVED:

Troy D. Evans
Madison County Prosecutor's Office
PO Box 350
Rexburg, Idaho 83440

[X] Mail [ ] Hand Delivery [ ] Facsimile

Donald L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

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APPENDIX A

Exhibit 8
Aerial Map 1

N

Burns

1/4 Mile Radius

1/2 Mile Radius

3/4 Mile Radius

6

53

91

W 3500 N

E 3500 N

E 3375 N

N 125 E

N 375 E

E 3250 N

N 500 E

Havan Loop

Cottonwood Ln

N Salem Hwy

W 3000 N

E 3000 N

N 1000 W

US Highway 20

N 2nd E

S Railroad Ave

W 14th N

W Moody Rd

E Moody Rd

N 5th W

Stationery Rd

N Yellowstone Hwy

APPENDIX B

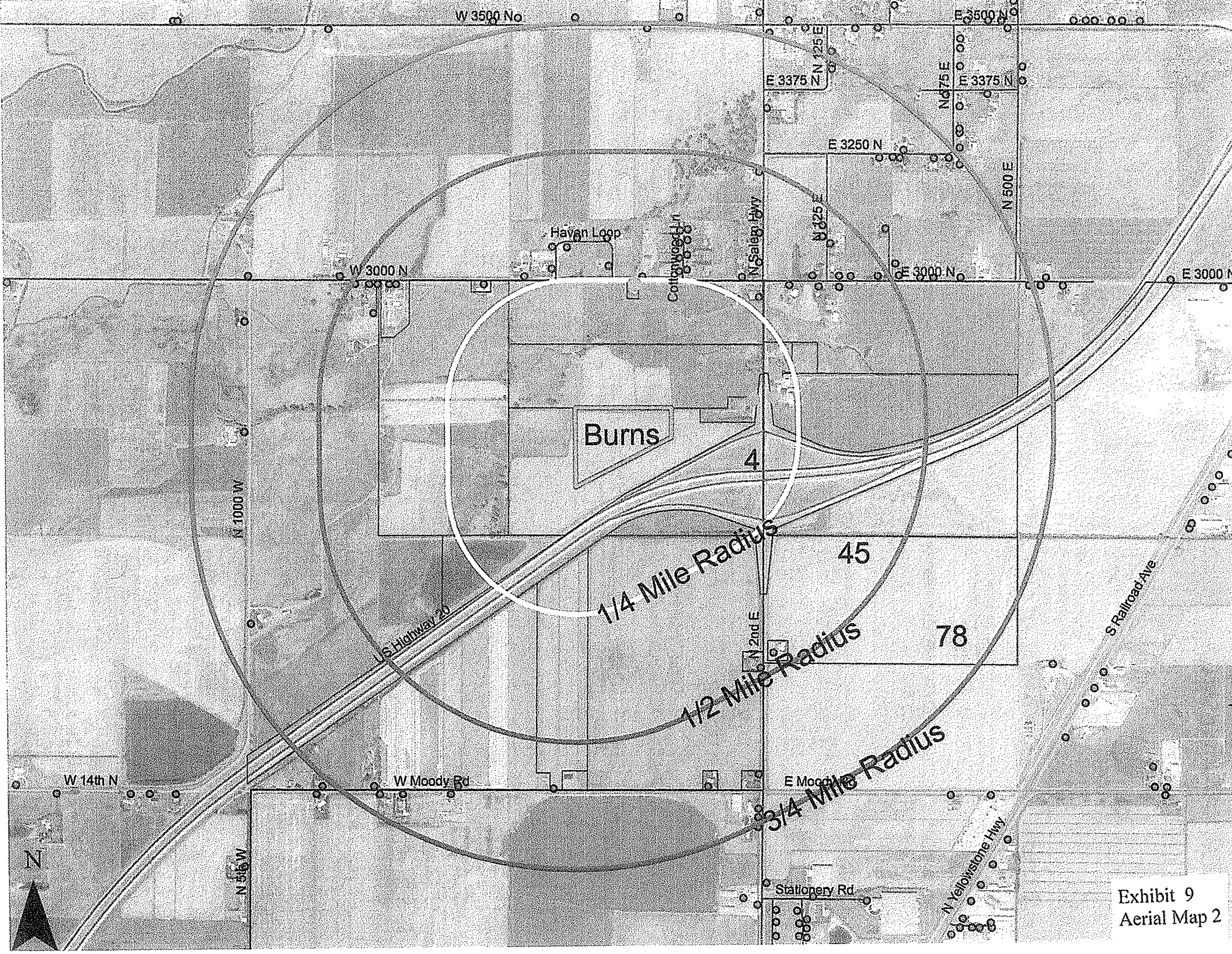

Exhibit 9
Aerial Map 2

APPENDIX C

SCALE
HORZ. 1" = 600'

1900 EAST (SALEM ROAD)

U.S. HIGHWAY 20 & 191

OLD US HIGHWAY 191

600 NORTH (MOODY ROAD)

INDUSTRIAL ZONING

NORTH 18TH EAST

BURNS HOLDINGS

MADISON COUNTY SUBDIVISION

MADISON COUNTY IDAHO

OVERALL ZONING MAP

HARPER–LEAVITT ENGINEERING, INC.
PROFESSIONAL ENGINEERS AND LAND SURVEYORS
985 N. Capital Ave., P.O. Box 50691, Idaho Falls Idaho 83405
Telephone: (208) 524-0212 Fax: (208) 524-0229

APPENDIX D

TABLE I.

ISSUE	**APPLICATIONS**	
	BURNS	**WALTERS**
APPLICATION *DESCRIPTION*	Both Burns and Walters applied for amendments to the comprehensive plan and zoning ordinance, to rezone agricultural or transitional agricultural property to a mix of light industrial and commercial. As to the actual light industrial uses proposed, Burns proposed a concrete batch facility while Walters proposed locating a gravel pit at its site.	
WAS A TRAFFIC STUDY REQUESTED BY AND SUBMITTED TO THE COMMISSION?	Yes. Those reports include the Pline Report, the Dyer Report, the report from the Idaho Transportation Department, the Keller Report, and the traffic count performed by Dusty Cureton.	No. No traffic study on any traffic issue was submitted by Walters, or requested by the Commission.

ISSUE	APPLICATIONS	
	BURNS	**WALTERS**
CONCERNS VOICED BY RESIDENTS ABOUT TRAFFIC AND SAFETY?	Yes. To address these issues, Burns prepared a comprehensive traffic report. Nevertheless, in response, the Commission concluded: "The north highway interchange near proposed project site has sight and other inadequacies which would be exacerbated by allowing a high volume access to exist in such close proximity as the proposed plan amendment requests. The problem becomes even worse where a substantial portion of proposed new traffic using the new access will be heavily laden cement and delivery vehicles, and where there is insufficient data to judge the impact of the proposed new commercial traffic."[1]	Yes. "Testimony received indicated that the existing roadways already see significant residential and industrial traffic, due to the existing industrial uses and residential neighborhoods existing in the area. The applicant indicated his desire to limit his truck traffic on county roads, but needed flexibility in determining which roads to use, due to a lack of knowing where the state proposed highway overpass and interchange in the area will go in. The location of this interchange will impact what county roads a significant portion of the commercial/industrial traffic in the area will use."[2] Nevertheless, the Commission concluded: "The site of the proposed amendment has access to state highways and to railways. Existing limitations on county roads may be lessened upon the construction of a proposed new overpass/interchange. Local roadways are already begin used by industrial and residential traffic in the neighborhood, and potential additional traffic posed by the proposed project would have minimal further impact on transportation."[3]
EXISTING INTERCHANGE ON HIGHWAY 20 LOCATED NEARBY?	Yes, the North Interchange.	No. At the time of the Walters decision, the decision had not yet been made on the Thornton Interchange.[4]

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1 R. Exhibit, *Findings of Fact, Conclusions of Law and Decision of the Board of County Commissioners of Madison County, Idaho, RE: Comprehensive Plan Map Change to Amend a Property Designation from Agricultural to Commercial and Light Industrial Near the North Interchange of U.S. Highway 20*, June 1, 2006, at 23 [hereinafter, "Second Written Commission Decision"]. This document is the subject of the Motion to Augment filed on November 29, 2007.

2 R. Exhibit, *Findings of Fact, Conclusions of Law and Decision of the Board of County Commissioners of Madison County, Idaho, RE: Comprehensive Plan Zone Change to Add a Commercial and a Light Industrial Zone Near State Highway 191*, April 11, 2005, at 17-18 (This is the Walters written decision, and is subject of the Motion to Augment filed on November 29, 2007).

3 *Id.* at 24.

4 *Id.*

ISSUE	APPLICATIONS	
	BURNS	**WALTERS**
INGRESS AND EGRESS SPECIFIED AND PLANNED FOR?	The ingress and egress was specified and planned for. The only access to the Burns site is an access designated and approved by the Idaho Transportation Department.	The ingress and egress was not specified, required or planned for, yet the Walters application was approved. The following is testimony from Walters attorney on the issue: "Another issue is vehicle travel. We have already acknowledged and recognize that we would wish to, if we can, have the flexibility of course, but wish to go to the road, to the State road, just as easy and fast as possible. The interesting part of it depends on whose routes you're going. Some people want to enter the State highway immediately west of the property, others want us to go south of the property because if that's the interchange they want to get us on the State highway faster than the County highway–well, I guess they're both State highways–in other words, the dual lane highway rather than the other one. . . . We don't know where the exchange is going to be yet. We don't know what kind of constraints we're going to have. Obviously, you can appreciate that he needs to keep the flexibility there, ..."[5] "First of all, as to the issue of traveling down 4700 . As we said in the Planning and Zoning and we say here. It is not the intent to go down 4700, especially past those homes. The only question here is an exit strategy, which is best. Until the off ramp is actually made, there is no way to know that . . ."[6] "For the purpose of leaving the property, I guess that I didn't make it clear enough. Mr. Walters does fully intend, if he can, to exit by way of the State Highway. Obviously, that still requires a permit from the State Highway. Until the State Highway actually makes a determination as to whether or not there is going to be an exit from the dual lane highway, kind of puts us in a bad position."[7]

5 R. Exhibit, *Public Hearing RE: Walter's Concrete Comprehensive Plan Change*, February 28, 2005, at p.10, LL. 21-25, to p.11, LL. 1-15 (This document is the subject of the Motion to Augment filed on November 29, 2007).

6 *Id.* at p.45 LL.10-15.

7 *Id.* at p.28 LL. 15-23.

ISSUE	APPLICATIONS	
	BURNS	WALTERS
AGREED TO PROVIDE AND PAY FOR INFRASTRUCTURE IMPROVEMENTS?	Yes. Burns agreed to provide and pay for a left turn bay, and also purchased additional property to straighten out the site access.	No. Was not asked to pay for any infrastructure improvements, but when it was suggested by County residents, Walters objected to a suggestion to build a road through the middle of the site property. The local residents suggested this road so that both the Walters trucks and the trucks from Edstrom's gravel pit could use this road and avoid 4700 South. The Commission concluded that requiring construction of the road would amount to a taking.[8]
COMMERCIAL BUFFER DESIGN SUGGESTED TO APPLICANT BY THE COUNTY	Yes.	Yes.
QUALITY AND QUANTITY OF FARM GROUND TO BE DEVELOPED	49 acres of poor farm ground due to the soil quality, shape, low spots, subwater, and configuration problems because of Highway 20.[9]	Over 130 acres of farm ground that is bordered by other large tracts of farm ground. The acreage proposed by Walters is over 2 ½ times the size of the Burns parcel.[10]

8 R. Exhibit, *Findings of Fact, Conclusions of Law and Decision of the Board of County Commissioners of Madison County, Idaho, RE: Comprehensive Plan Zone Change to Add a Commercial and a Light Industrial Zone Near State Highway 191*, April 11, 2005, at 18.

9 *See* Exhibits A through C; *See also* R. Exhibit 12, Tab 2, p. 2-3.

10 For some reason, there was contradictory testimony as to the exact acreage involved with the Walters parcel. The application stated that it involved development of 119.6 acres. R. Vol. 4 Walters 1. However, Walters later stated that the parcel was approximately 131 acres. R. Exhibit *Public Hearing RE: Walter's Concrete Comprehensive Plan Change*, February 28, 2005, at p. 12, LL. 20-25.

TABLE II.

<u>**ISSUE**</u>	<u>**COMMISSION ANALYSIS**</u>	
	BURNS	**WALTERS**
LOCATION OF *RESIDENCES NEXT* TO HIGHWAYS	"It has become increasingly common for residences to be located close to highways in the county, . . ."[11] "Although the property is bounded on one side by U.S. Highway 20, it is not uncommon for nice homes to border such highways. The property owned by Val Ball, *located directly East of the project* site across the Salem Highway, has a lovely home which faces the freeway. If the project site is in fact less desirable for agriculture, neighboring growth in the area has, and should continue to be toward residential development."[12] "The project site has continued suitability for agriculture, and is also suitable for residential uses and commercial uses."[13] "The project site of the proposed amendment had a negative overall impact on housing based on removing ground from the housing market which, if no longer used for agriculture could and should be used for residential, and the proposed project's negative impact on neighboring residences."[14]	"Due to the physical characteristics of the site of the proposed zone change, the neighboring uses, and frontage of the property on State Highway 191, U.S. Highway 20 and the Eastern Idaho Railroad, the area has limited suitability for agricultural or residential uses. The best use of the property is that proposed by the applicant, commercial and industrial."

11 Second Written Commission Decision at 19.

12 *Id.* at 8-9.

13 R. Exhibit, *Findings of Fact, Conclusions of Law and Decision of the Board of County Commissioners of Madison County, Idaho, RE: Comprehensive Plan Zone Change to Add a Commercial and a Light Industrial Zone Near State Highway 191*, April 11, 2005, at 22.

14 Second Written Commission Decision at 23-24.

ISSUE	COMMISSION ANALYSIS	
	BURNS	**WALTERS**
TRUCK TRAFFIC AND THE POTENTIAL FOR ACCIDENTS.	Employed the following logic: 1. The Burns' facility will "substantially increase traffic." 2. The County "can not view even one accident as insignificant, where the safety of people are at stake." 3. "It is reasonable to presume that an increase of traffic through the [North Interchange] will likely increase the number of accidents at the North Interchange." 4. A large number of cement and delivery trucks using the North Interchange "only increases the hazard." 5. "Even if the large number of cement trucks using the [North Interchange] does not increase the number of accidents, they certainly increase the risk of accidents being more serious." 6. All of the above "is, and should be significant to the County."[15]	No discussion of perceived increased potential for accidents with truck traffic. The logic applied to Burns by the County was not applied to Walters, even though heavy truck traffic was discussed at length at the Walters hearings.
POTENTIAL FUTURE TRAFFIC.	Yes, this was discussed in the Burns application: "There is substantial usage of the Salem Highway north of the interchange by those recreationists utilizing the Salem Highway to access the St. Anthony Sand Dunes, which usage is likely to only increase with additional tourist oriented developments going into that area."[16]	Not considered.
POTENTIAL FUTURE COMMERCIAL TRAFFIC.	The Commission used this as a basis for denying the Burns application. Mr. Pline did not analyze the potential commercial traffic in his Traffic Analysis because at the time, the determination had not been made as to the businesses that would locate there.	No traffic study on any traffic issue was submitted by Walters, or requested by the Commission. Further, no traffic count was performed by Dusty Cureton.
THE PRESENCE OF SPEEDING DRIVERS.	Considered and used as a basis for denying the Burns application.	Not discussed or considered.

15 R. Vol. 1 at 166-67.
16 R. Vol. 4 Burns 29 at 30.

ISSUE	COMMISSION ANALYSIS	
	BURNS	**WALTERS**
PRIMARY PURPOSE OF APPLICATION	"The primary purpose of the proposed amendment to the Comprehensive Plan is to further the economic interests of the owner of the land to be redesignated."[17] "[t]he proposed plan amendment and resulting review is made primarily for the business and financial benefit of the proponents of the amendment, not necessarily the betterment of the County."[18] "[T]he primary recipient of benefits of the project would be Burns."[19]	"The primary purpose of the proposed amendment to the Comprehensive Plan is to add an additional industrial zone in an area where such uses already exist, and to create a commercial corridor on state highways, as recommended by the Comprehensive Plan."[20] This above statement claims that an additional industrial use area will be added to the county. *However, the County is not really adding new* industrial ground. When the gravel pit is mined, the result will be a large pit filled with water, and no industrial businesses will be able to locate there.
EFFECT OF AMENDMENT TO THE COMPREHENSIVE PLAN	" . . . the standards of beautification included in state and county Community Design standards would have to be either substantially changes, or the basic notion of beautification would have to be completely redefined. The changes to the Comprehensive Plan would be significant and would require a near complete rewriting of the Comprehensive Plan. No sufficient reason has been shown to warrant such a *drastic* change to the Comprehensive Plan."[21]	"Implementation of the proposed plan amendment will be of only minimal impact, since it will require only an amendment to the Comprehensive Plan Map."[22]

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17 R. Vol. 4. Burns 29 at 37-38.

18 *Id.* at 23.

19 Second Written Commission Decision at 10.

20 R. Exhibit, *Findings of Fact, Conclusions of Law and Decision of the Board of County Commissioners of Madison County, Idaho, RE: Comprehensive Plan Zone Change to Add a Commercial and a Light Industrial Zone Near State Highway 191*, April 11, 2005, at 22-23.

21 Second Written Commission Decision at 18 (italics added).

22 R. Exhibit, *Findings of Fact, Conclusions of Law and Decision of the Board of County Commissioners of Madison County, Idaho, RE: Comprehensive Plan Zone Change to Add a Commercial and a Light Industrial Zone Near State Highway 191*, April 11, 2005, at 25.

ISSUE	COMMISSION ANALYSIS	
	BURNS	**WALTERS**
DEVELOPMENT OF COMMERCIAL PROPERTY NEXT TO AN INDUSTRIAL SITE IS DETERMINED TO BE SPECULATIVE.	Yes. The Commission stated that the realistic development of commercial property next to an industrial area would be "at best speculative."[23] After the close of the Taylor hearings, where the Commission denied the Taylor application, the Commission suggested to the Plaintiffs and their counsel that commercial development would be appropriate at the Burns site. Also, the commercial buffer was suggested by Mr. Jeppeson of the Madison County P&Z. As stated by Kirk Burns: "During the original Planning and Zoning meeting, Jerry Jeppesen, who made the original request, or the original motion for approval for industrial ground, asked to change the front three or four acres near the Salem Road into commercial to act as a buffer for the overall size of the industrial property."[24]	No. The Commission never questioned whether development of the commercial buffer next to the industrial Walters site was speculative. As stated in the Walters hearings by Walters attorney, the commercial buffer idea was suggested by Mr. Jeppeson of the Madison County Planning and Zoning: "[The commercial buffer], [a]s a matter of fact, it was brought up by Mr. Jeppesen, who was on the Planning and Zoning and used to be on the Commission, he felt like that was an important issue, that is why the change was made."[25]
PLACEMENT OF DIFFERING LAND USES NEXT TO EACH OTHER FOUND UNACCEPTABLE.	Yes. "Although the applicant's proposed industrial project is a modern and clean facility, the placement of an industrial cement batch plant at such a doorway, surrounded by commercial, agricultural and residential uses, is not aesthetically pleasing, but rather gives the impression of indecisive and unplanned growth, leading to incompatible and inconsistent usages being placed side by side."[26]	Not considered or discussed, even though the Walters site is bordered by commercial, agricultural, and residential uses.
IS THE APPLICANT'S PROPERTY CONTIGUOUS WITH THE REXBURG CITY IMPACT ZONE?	Yes.	No.

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23 R. Vol. 4. Burns 29 at 25-26.

24 R. Exhibit *Public Hearing Transcript, RE: Burns Holdings, LLC Request for Comprehensive Plan Change*, February 28, 2005, at p. 99, LL. 23-25 to p.100, LL. 1-2.

25 R. Exhibit *Public Hearing Transcript, RE: Walter's Concrete Request for Zone Change*, February 28, 2005, p.5 LL. 12-17.

26 Second Written Commission Decision at 17.

ISSUE	COMMISSION ANALYSIS	
	BURNS	**WALTERS**
EFFECT ON POPULATION.	"The proposed site is in close proximity to several substantial residential neighborhoods which would be negatively impacted by the proposed Plan change. In addition, current and appropriate residential trends in the area neighboring the project site would be drastically and negatively altered by adoption of the plan amendment."[27] There are only two homes on the same property that border the Burns site.	"The proposed site is in close proximity to residential neighborhoods, which neighborhoods are also in close proximity to several existing industrial or commercial uses. There would be no negative impact by the proposed plan amendment on population.[28] On the south side of 4700 South, there are many homes adjacent to the Walters site.
PROPERTY RIGHTS.	"The proposed amendment to the comprehensive plan to insert an island of industrial zoning into the middle of residential and agricultural properties, could have a dramatic adverse impact on the property values of those whose property borders the project site."[29]	"The proposed amendment would have minimal if any impact on property rights."[30]
ECONOMIC DEVELOPMENT.	"While the proposed project would have a positive economic effect, as discussed herein, the primary recipient of benefits of the project would be Burns."[31]	"Economic Development would be positively impacted by the proposed amendment by the addition of jobs, tax base and providing local resources for existing businesses."[32]
IS THE APPLICATION SUPPORTIVE OF AGRICULTURE?	"The proposed [concrete] batch plant by its nature does not specifically support the industry of agriculture."[33]	This issue was never discussed in the Walters decision. A gravel pit does support the production of concrete. Presumably, the Commission felt that Walters gravel pit will support the production of concrete at a batch plant, which will support agriculture. The Commission did not conclude that Burns' concrete batch plant would support agriculture.

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27 Second Written Commission Decision at 22.

28 R. Exhibit, *Findings of Fact, Conclusions of Law and Decision of the Board of County Commissioners of Madison County, Idaho, RE: Comprehensive Plan Zone Change to Add a Commercial and a Light Industrial Zone Near State Highway 191*, April 11, 2005, at 23.

29 Second Written Commission Decision at 21-22.

30 R. Exhibit, *Findings of Fact, Conclusions of Law and Decision of the Board of County Commissioners of Madison County, Idaho, RE: Comprehensive Plan Zone Change to Add a Commercial and a Light Industrial Zone Near State Highway 191*, April 11, 2005, at 23.

31 Second Written Commission Decision at 10.

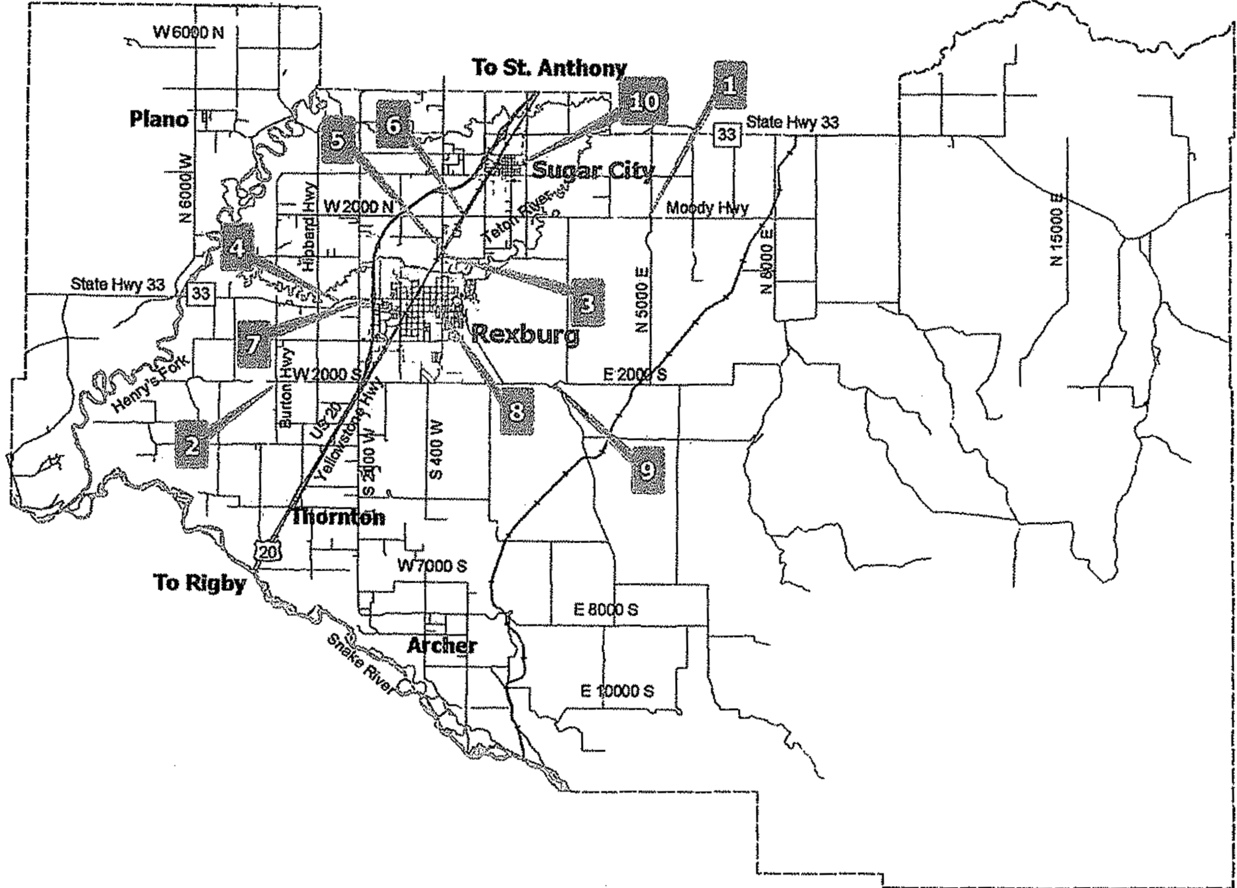
32 R. Exhibit, *Findings of Fact, Conclusions of Law and Decision of the Board of County Commissioners of Madison County, Idaho, RE: Comprehensive Plan Zone Change to Add a Commercial and a Light Industrial Zone Near State Highway 191*, April 11, 2005, at 23-24.

33 Second Written Commission Decision at 8.

ISSUE	COMMISSION ANALYSIS	
	BURNS	WALTERS
SPOT ZONING	This issue was not raised in the Commission's first decision, but is now argued by the Commission to be a reason it denied the Burns application.[34]	Not discussed or considered by the Commission.

34 *Id.* at 17-18.

APPENDIX E



Key No.	Description
1	Intersection of 5000 E and Moody Highway - awkward intersection lane geometry and traffic control creates three offset intersections difficult to navigate vehicle through. Also has sight distance restrictions about 500 feet west of intersection.
2	Burton Highway (various locations) - small shoulder with steep side slopes going into ditch, creates problems for large farm vehicles
3	Intersection of SH 33 and 7th N (1000 N - Madison County) - offset approaches on 7th N
4	Hwy 33 - west of Rexburg: tight reverse curves, difficult for vehicles to negotiate curve
5	Hwy 33 - north of Rexburg: acute intersections with 1000 E, 2000 N
6	2000 N - offset approaches at 2000 N and SH 33 (on 2000 N)
7	US 20 and SH33 interchange - small turn radius from SH 33 EB to US 20 westbound on ramp
8	Main Street - need for center turn lane in downtown area
9	2000 S - intersection with 3600 E "the Dugway" - sight distance issues, grade issues, acute intersection, safety issues for farm trucks
10	Intersection of Center Street and Digger Drive - Acute Intersection

0 0.5 1 2 3 4 Miles

Legend

- US 20
- Roadways
- Sugar City
- Rexburg
- Madison County

mad-def.mxd

Madison County - Roadway Deficiencies Map
Figure 2.12