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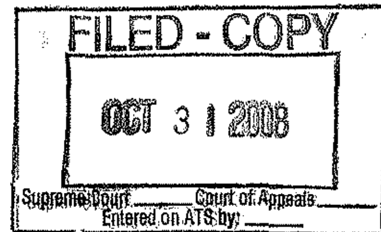
IN THE SUPREME COURT OF THE STATE OF IDAHO

PATRICK GARDINER and ADA GARDINER, husband and wife, Plaintiffs-Respondents, vs. BOUNDARY COUNTY BOARD OF COMMISSIONERS, Defendant-Appellant. and TUNGSTEN HOLDINGS, INC., a Montana corporation, Intervenor.	SUPREME COURT NO. 35007 District Court No. CV-2006-339



Appeal from the District Court of the First Judicial District of the State of Idaho, in and for the County of Boundary, the Honorable James R. Michaud, Presiding.

RESPONDENTS' BRIEF

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STATEMENT OF THE CASE

A. NATURE OF THE CASE AND PROCEEDINGS BELOW.

Appellant, Boundary County Board of Commissioners ("board," or "commissioners"), unlawfully issued a special use permit to Tungsten Holdings, Inc. ("Tungsten"), intervenor-appellant. Rick Dinning, who is an owner and the president of Tungsten, is the brother of Dan Dinning, one of the county commissioners. See Administrative Record ("AR"), p. 216; Administrator's Transcript ("Tr.") May 19, 2005 hearing ("5/19/05"), p.18, L.15-16. Idaho Code 67-6506 prohibits a commissioner from participating in a hearing involving a close relative.

The permit allowed Tungsten, a real estate developer, to permanently operate a gravel pit/rock quarry in Porthill, Boundary County, Idaho, adjacent to respondents, Patrick and Ada Gardiner's Registered Angus cattle ranch and residence. The quarry involved blasting, rock crushing, heavy excavators and/or jack hammers mounted on an excavator. The surrounding properties are residences, ranches and farms. The properties are in an agricultural/forestry zone.

Gardiners and other residents opposed the special use permit. The Boundary County Planning and Zoning Commission ("P&Z"), recommended that the permit be denied. The commissioners overrode P&Z's decision.

Gardiners filed a petition for judicial review. Later, the board and Gardiners stipulated to void the permit due to Commissioner Dinning's conflict of interest. On May 26, 2006, District Court Judge Steve Verby voided the permit and ordered a new hearing without Commissioner Dinning participating. But the other two board members re-adopted the same findings and decision in which Commissioner Dinning participated when the first permit was granted.

Idaho Code 67-6512(a) ("§ 67-6512") prohibits county boards from issuing special use permits for uses that are not conditionally permitted by the terms of the county zoning ordinance. Gravel pits are not a conditionally permitted use in the county zoning ordinance. But the commissioners interpreted the ordinance as conditionally permitting gravel pits in all zone districts.

Gardiners petitioned for judicial review. Senior District Judge James R. Michaud reversed the board's decision under Idaho Code 67-5279(3) as being in excess of the board's statutory authority, made upon unlawful procedure, and violating constitutional and statutory provisions. The Court found the board's action was without a reasonable basis in fact or law, and awarded Gardiners attorney fees and costs. The county appeals these decisions. Tungsten intervened, without objection, in the appeal. Tungsten did not intervene in District Court.

B. DISTRICT COURT DECISION.

Judge Michaud held: (1) the board's decision violated § 67-6512; (2) Section 1E of the county zoning ordinance ("the Ordinance") conflicts with § 67-6512 and is void; (3) even if the Ordinance provision were not void, the special use permit violates the Ordinance because gravel pits/rock quarries are not a "commercial" use under the provisions for agriculture/forestry zones; (4) the board failed to hold Tungsten to the burden of persuasion required by law; (5) the written decision failed to comply with Idaho Code 67-6535; (6) the board's action prejudiced Gardiners' substantial rights, and (7) Gardiners are entitled to recover attorney fees and costs. The Court did not remand the matter because the board acted in excess of lawful authority, either upon an invalid ordinance or failure to comply with the ordinance, if valid.

The administrative record is not extensive in terms of Tungsten's evidence. Tungsten did

not produce pertinent documents or reports. It did not provide relevant or reliable testimony. This brief responds to the county's and Tungsten's briefs.

C. STATEMENT OF FACTS.

1. Tungsten's Application for Special Use Permit. In or about March, 2005, county road and bridge supervisor, Jeff Gutshall ("Gutshall" or "county road supervisor") contacted Rick Dinning about getting rock from Tungsten's property for upgrades to Farm To Market Road (also known as County Road 46). The road supervisor reports directly to the board. County trucks and possibly, the county rock crusher would be involved in development and operation of the pit. Gutshall told the commissioners about this, and pointed the site out to them on a "road trip" pre-dating the board's hearings on Tungsten's gravel pit. AR., p. 141; Tr. 5/19/05, p.1, L. 18-20; p. 4, L. 20-24; Tr. 7/26/05 hearing ("7/26/05"), p. 14, L. 4-19; p. 34, L. 21-25.

Tungsten applied for the special use permit for a permanent gravel pit/rock quarry on March 22, 2005. It would operate Monday – Friday, 8:00 a.m. to 5:00 p.m.; crushing not to exceed 60 contiguous days per year; material stockpiled on site for year round hauling; estimated vehicle traffic five trucks per day. Blasting could be required. AR., p.1. Respondents are the adjacent property owners to the south. Their residence is 6/10 mile from the pit site. The Ponsness family are adjacent property owners to the north. Their residence is 8/10 of a mile from the pit site. The Bushnell family resides 1/2 mile east of Tungsten. AR., p. 2.

Under Chapter 7 of the Ordinance, gravel pits are not a use by right, a permitted use, or a conditional use in agriculture/forestry zones. Tungsten applied for the special use permit under Chapter 7, Section 1E, which states that "any use not specified in this section as a use by right or

conditional use is eligible for consideration as a special use," subject to the provisions of Chapter 13 of the Ordinance (stating the rules for obtaining a special use permit.) AR., p. 256, 258-260.

2. Gardiner Prime Angus Ranch. The property on which Tungsten proposed to excavate a seven acre open pit mine and operate a permanent rock quarry with blasting and rock crushing is adjacent to respondents' ranch, where they live and raise purebred Angus cattle. Their calving barn and vet room and their foreman and his family's residence are 8/10 of a mile south of the gravel pit location. Gardiners' residence is 6/10 mile away. The blasting site is less than ½ mile from Gardiners' property line where they pasture their cattle and have established a 440 ft. deep well and irrigation system. The well extends to the valley floor in close proximity to the proposed blasting and crushing. AR., p. 109-110; Tr. 7/24/06, p. 7, L.5-8. Neither Tungsten nor Gutshall advised Gardiners about Tungsten's application for gravel pit.

Gardiners' breeding program uses embryo transfer ("E.T.") and artificial insemination ("A.I.") techniques. These require a consistent synchronization process for which a quiet, stress-free environment is essential. The breeding program runs from February to June. The calving program runs from mid-December through March. A power company's blasting for pole installation by Farm To Market Road agitated the cows for several days afterwards. AR., p. 89-110; Tr. 5/19/05, p. 8, L.5-21.

3. May 19, 2005 P&Z Hearing. The Ordinance requires P&Z to hold a public hearing on permit applications. Written notice is provided to adjacent property owners within 300 feet of the proposed special use. AR, p. 259. Respondents received notice of the May 19, 2005 hearing on May 3, 2005. Their request for continuance to prepare for the hearing was denied. On May 11, 2005, road supervisor Gutshall sent P&Z an e-mail supporting the gravel pit. It said the county "may

desire to negotiate for materials from this or other sources in the area." AR., p.148, 149.

At the P&Z hearing, respondents expressed concern that the close proximity of blasting could disrupt their irrigation water source, the noisy crushing and quarrying activities could interfere with their cattle breeding program, blasting and quarrying activities would disrupt the peaceful use of their residence and ranch, negatively impact the aesthetic value and reduce the real value of their property. Other Porthill residents opposed the permit for similar reasons. Rick Dinning supported the permit. Gutshall attended the hearing. AR., p.146, 183; 188; Tr. 5/19/05, p. 5, L.11-25; p.8, L. 5 to p. 9, L. 23; p. 11, L. 19 to p. 15, L. 9, AR., p.183 (P&Z findings); 188.

These facts were revealed at the hearing: the "initial reason" Tungsten applied for the permit was Gutshall's contact with Rick Dinning to obtain rock. Rick Dinning is "not a rock person." He has no special knowledge about rock quarries, geology, hydrology or blasting. He hoped there would not be blasting, but wanted that "option." The pit would be permanent. He was not sure about the basis for his estimate of five truck trips per day. Blasting has been known to affect wells. He did not have a good answer to that. He would try to work crushing around respondents' calving period. AR, p. 183 (P&Z finding); Tr. 5/19/05, p. 1, L.18-20; p. 4; p. 18.

Previously, Gutshall had contacted Ponsness and then, Bushnell about getting rock from their properties. Gutshall told them to get a special use permit if they wanted a county contract. Ponsness obtained a permit in January, 2000. But the county never came for any rock. Bushnell obtained a permit in February, 2004. The county never came for any rock. In early 2005, Ponsness was told that Gutshall "had other plans." Tr. 5/19/05, p. 11, L. 19 to p. 14, L. 10.

Gardiners did not know about Ponsness' hearing or permit because they live farther than

300 feet from Ponsness. Gardiners were told about Bushnell's application and attended that hearing. Gardiners and other Porthill residents opposed blasting and crushing. A permit was granted but blasting was prohibited. Crushing was limited to January and February. An old pit, known as the "Munson pit," had been "grandfathered" in the area. Rick Dinning said the rock in the other area pits was not adequate or sufficient for the county's needs. A.R. 141; Tr. 5/19/05, p. 3, L. 14-23; p. 9, L. 13-16; p. 17, L. 19-22.

Pam Ponsness questioned Gutshall's motives going to residents in the area and asking them to apply for special use permits under the assumption the county would buy rock from them. Gutshall was like an "arrogant" public servant. Ponsness was opposed to the "underhandedness going around." Tr. 5/19/05 p.14, L.5 to p.15, L 9; p.19, L.12 to p.20, L.6; p. 21, L. 3-8. Gutshall later told the commissioners that Ponsness had launched "an emotional and scathing attack" on his character. At the subsequent board hearing, Commissioner Smith rebuked respondents for Gutshall's "treatment" at P&Z. AR, p. 140; Tr. 7/26/05, p.15, L.1-21.

4. P&Z Findings and Decision Denying Special Use Permit. Under Chapter 13 of the Ordinance, P&Z makes findings and a recommendation for a decision on the special use permit. P&Z must consider, among other requirements, that the proposed special use "will not have any substantial adverse effects" on, and "will not create hazards to" adjacent property; also that the use "will not create noise, traffic, odors, dust or other nuisances substantially in excess of permitted uses in the area." AR, p. 259. The commissioners make the final decision.

P&Z discussed these issues. The pit would seriously impact neighbors because of the peaceful nature of the area. No P&Z member could say what affect blasting had on water strata

in the rock. If a crack were broken and water ran out neighbors are left "high and dry." To blast and mine rock from the seven acre area was not just a gravel pit, but an open face mine. P&Z members did not know if any measures could be taken to protect adjacent landowners, or what a safe distance would be to blast, if any. Tr. 5/19/05, p. 20, L. 10 to p. 23, L. 17.

P&Z found the gravel pit failed to comply with Sections I, III, and V of the Comprehensive Plan ("Plan") because it would interfere with neighboring landowners' health or safety and deny them their property rights; pose undue risk, and was not being accomplished with due consideration of surrounding property uses and for the potential impact of such extraction. The gravel pit failed to comply with Chapter 13 of the Ordinance because there was insufficient assurance that potential adverse effects from blasting to water and livestock production could be mitigated or prevented. The proposed use would create noise, odors and dust substantially in excess of permitted uses in the zone district. P&Z recommended the special use permit be denied. They offered no suggestions for mitigation. AR., p. 183-184.

5. July 26, 2005 Board Hearing and Decision Overriding P&Z. On July 13, 2005, Gutshall sent an e-mail to the commissioners supporting Tungsten's gravel pit. It said there was "no developed source for crushed aggregate in the area." Gutshall attended the commissioners' hearing as the county's expert on road matters. Tr. 7/26/05, p.15, L.9-12.

On July 18, 2005, respondents submitted written opposition and testimony describing their cattle business, water wells and irrigation system, and expressing concerns that blasting could damage or disrupt their water supply, and that crushing and other quarrying noise could interfere with their cattle breeding program, peaceful use of their residential property, and their

property value. AR., p. 119-134; Tr. 7/26/05, p. 9, L. 8 to p. 13, L. 24.

The hearing took place on July 26, 2005, before Commissioners Dan Dinning, Ron Smith, and Walt Kirby. Board attorney, John Topp ("Topp"), wrongly advised Commissioner Dinning that he did not have a conflict of interest and could participate in the hearing. Commissioner Dinning participated in all of the board's hearings, but abstained from voting. Tr. 7/26/05, p.2, L. 21 to p. 3, L. 15.

Tungsten did not submit documents or reports concerning blasting, noise or hydrology. It's oral testimony was the following: Rick Dinning said that Porthill needed crushed rock; the state of Idaho regulates rock pits; it was "impossible" to see the pit from respondents' property; respondents' closest well was far from the pit site; a Montana rock pit developer told him that respondents "probably" would not hear the crushing, based on distance and geographical features. Tr. 7/26/05, p.3, L.22 to p. 5, L. 23. George Hays, a resident of Northern Boundary County (not Porthill,) said that Mission Creek Store (not in Porthill) lost its water source after blasting for Highway 95. Department of Environmental Quality ("DEQ") engineers thought this resulted from drought, not the blasting. Blasting did not bother Hays' family's cows. The State took seismic readings by Hays' parents' house before, during and after the blast to make sure the foundation had not cracked. Id., p. 7, L. 3 to p. 8, L. 20.

Respondents questioned Hays' cattle breeding experience, and disputed the above statements. They expressed the concerns about blasting creating hazards to their water source, wells, irrigation system and affecting their water right, and crushing and the other noisy activities disrupting their breeding program, residential use, and reducing their property values. Other

Porthill residents said that residents did not need more crushed rock. They objected to the noise and disruption to their homes and peaceful community. Tr. 7/26/05, p.26-28 (Epstein); p.28-31 (Banks); p.31-32 (Mrs. Ponsness); p.32-37 (Mr. Ponsness.) A blast for Highway 95 three or four miles away from one resident's home on Farm To Market Road shook the house considerably. DEQ confirmed this. Id., p. 27, L. 1-11. The opponents supported P&Z's findings and recommendation. Tr. 7/26/05, p. 9, L. 8 to p. 14, L. 25; p. 16, L. 24 to p. 21, L. 25.

But Chair Smith was "very upset" with P&Z's "treatment" of Gutshall. Smith "did not like it," and "had a problem" when Gutshall's integrity was questioned. Did respondents have "anything, anything that says blasting can [affect] water," or was that "just" a "fear" respondents had. Smith was only interested in whether respondents had "some fact out there," or "some documentation" that "dynamiting can have an affect on somebody's water." Hays said blasting had no effects, so Smith "ha[d] it one way," but not "the other way." Id., p.15, L.1 to p.16, L.12. Respondents said Tungsten had not shown the gravel pit would not adversely effect them. Id., p.20, L.16-22, p. 25, L. 20 to p. 6, L. 12.

Commissioner Dan Dinning asked one of the resident opponents if it was acceptable for respondents to restrict the use of over 3000 feet around their property and not pay Tungsten for "lost economic opportunities." Id., p.26, L.16 to p.34, L. 16.

Chair Smith said Tungsten had "a right to have a gravel pit." Staff was directed "to come up with" conditions to "ease the pain" on the community, "without changing the whole structure" of the gravel pit. One of the conditions could "not be to not have a gravel pit." After the hearing, respondents retained an expert to do a hydrology study. Id., p.43, L.11-21.

6. <u>August 8, 2005 Board Hearing and Approval of the Permit With Conditions</u>. This hearing was to discuss staff's proposed conditions, which were the following: (1) surface mining operations must be conducted on site and not encroach on Farm To Market Road; (2) dust abatement to be applied as needed; (3) operations must follow Best Management Practices for Mining in Idaho published by the Idaho Department of Lands ("IDL"); (4) two days of blasting allowed per year; fifteen days' notice must be provided to residents within 500 feet; (5) blasting shall meet OSHA requirements at 29 CFR, Subpart U; (6) crushing allowed Monday through Friday, 8:00 a.m. to 5:00 p.m. from May 1 to June 30 each year; (7) Tungsten must comply with IDL mining requirements, including filing a reclamation plan and bond; (8) Tungsten must notify county when reclamation bond redeemed; (9) Tungsten must file a record of survey of the gravel pit parcels; (10) Tungsten must notify blasters about neighbors' concerns about damage to area water systems. AR., p.182.

Respondents advised the commissioners they had retained a hydrologist, and asked for a reasonable continuance of the hearing to submit the hydrologist's report. This was denied. Attorney Topp said that blasting problems were a "civil matter" between respondents and Tungsten, not the county. Topp cautioned the board from becoming the "arbitrator" of "conflicting reports." Commissioner Dinning thought they had no obligation to consider those problems. Chair Smith "definitely want[ed] to approve the pit," and did not want "delaying tactics" or "road blocks" to put off the "inevitable." There was "no hint out there that there is a problem." Respondents had "ample opportunity since March to get those reports in here," and should have had a report for the P&Z hearing in May. Tr. 8/8/05, p. 6, L. 1 to p. 10, L. 4; p. 33, L.15 to p. 37, L. 11.

Rick Dinning wanted twelve days of blasting (one per month) instead of two days, and he wanted to change the crushing period to mid-February through May (respondents' calving and breeding period), instead of May 1 – June 30. His requests were granted. Attorney Topp did not think it necessary to define the intensity of blasting. Topp was "no expert on blasting," and had "no idea" what to add besides being consistent with IDL practices. Commissioner Kirby thought more days was a "good idea" because they would use less dynamite. Tr. 5/19/05, p. 8, L. 16-21; Tr. 8/8/05, p. 20, L. 2-25; p. 21, L. 21 to p. 22; L. 15; p.30, L.16-24; p. 39, L. 21-23.

Zoning Administrator, Mike Weland ("zoning administrator" or "Weland,"), not an attorney, had not studied CFR 29 that closely. Best Mining Practices had to do with the size of the pit, the slope and how far it has to be from fences. OSHA did not apply to respondents' concerns. Weland knew nothing about crushing. Topp had "no expertise." He could "only assume" that federal and state requirements associated with mining provided "sufficient safeguards." The commissioners approved the permit subject to further review of conditions. Tr. 8/8/05, p. p.14, L.11 to p. 18, L. 4; p. 34, L. 20 to p. 35, L. 11.

7. September 6, 2005 Meeting and May 26, 2006 Order Voiding Permit. The commissioners approved the conditions and granted the permit. Respondents petitioned for judicial review. AR., p. 60-64, 218-223. Later, the county stipulated with respondents to void the permit for conflict of interest and to hold a new hearing without Commissioner Dinning participating. If there was an appeal, the administrative record would include the 2005 hearings record. As part of the stipulation, respondents waived any objection to Commissioner Dinning's participation in the 2005 hearings, and agreed to bear their attorney fees to date. On May 26,

2006, Judge Verby voided the permit, and ordered a new hearing. AR., p.216-217.

8. Respondents' Hydrology Report and Expert Cattle Studies. Respondents' expert hydrologist, Kristine Uhlman, visited respondents' property from June 9 through June 11, 2006. She inspected the property and reviewed documents, reports and geologic maps. Her extensive expert qualifications and credentials as a consulting geologist in Idaho and other states, are at AR., p. 85-87. Based on the facts stated in her report, Uhlman concluded that the proposed blasting and excavation cause a risk of dewatering the aquifer fractures providing water to respondents' irrigation and other wells. If dewatering occurs, it would be permanent. Once excavated, aquifer capacity cannot be restored. Blasting will induce fractures in the rock. Ground water will drain from the quarry face as excavation proceeded. (AR., p. 79-84.)

Respondents submitted the hydrologist's report to Commissioners Smith and Kirby, and also submitted two university studies and one article from the Angus Journal addressing the importance of a stress free environment on successful breeding programs using A.I. and E.T. techniques. They explain how excessive stress on the animal can markedly reduce conception rates. Respondents also submitted written objections and concerns about the gravel pit's operations. AR., p. 71-78 (objections,) 88 (aerial map,) 79-87 (hydrology report and vitae,) 89-107 (breeding studies,) 108-124 (written comments and objections,) 125-134 (ranch website breeding and sales information.)

9. July 24, 2006 Hearing Before Commissioners Smith and Kirby. Rick Dinning repeated his remarks from the previous hearings. He "doubted" respondents would hear crushing. He said Jim Brady of the IDL "doubted" the pit would affect Gardiners' wells. He said they had

one detonation in the spring that was "surprisingly quiet and muffled," like "a series of 22 caliber primers going off with an underground rumble." Gardiners' cows tolerate thunder. Gardiners are misinformed and confused. The hydrologist's conclusions are speculative. The world is full of risk. The state of Idaho approved his reclamation plan. His experts said not to worry about water flows this year. Other cattle ranchers laugh at the idea of gravel pits scaring cattle. He had not heard of problems with wells near other quarries. Tr. 7/24/06, p.5, L. 8 to p. 9, L. 15; p.32, L. 18.

Respondents' attorney explained the reasons Ch. 7, Section 1E of the Ordinance conflicts with § 67-6512. Respondents commented on their expert's report and university studies. Another opponent said that while '.22's are not very loud, '.44's are, and using more dynamite to get embedded rock is a different kind of blasting. Id., p. 18, L. 7 to p. 20, L. 15; p.24, L.20 to p.25, L.6; p. 29, L. 3 to p. 30, L. 20. The matter was continued.

10. August 7, 2006 Meeting in Which the Voided Decision Was Re-adopted. No public input was allowed. Commissioner Smith read a prepared decision into the record. The decision was a copy of the full board's 2005 findings, conditions and decision granting special use permit. It also included a "staff analysis" interpreting the Ordinance as conditionally permitting gravel pits in all zone districts, a second copy of the 2005 findings and decision with prepared questions and answers inserted in re-numbered paragraphs, an additional condition that Tungsten's blasters be "licensed, qualified, and insured," argument disagreeing with respondents' legal objections and dismissing the expert hydrologist's opinion as "merely conjecture," and a finding that the gravel pit is a conditional use within the meaning of Chapter 7, Section 1D1, as being a "commercial business" supplying products and services for

agriculture and forestry. AR 198-2-2, 203-204, 204-209, 209 [top,] 208 (viii, ix,) 209-210.

After reading the entire document out loud and crossing out the wrong answers in the re-copied findings, Commissioners Smith and Kirby reaffirmed the full board's original findings, adopted the decision as read, and re-issued the permit. (Corr. Tr. 8/7/06, p.1-27; AR, p. 225-236.)

ADDITIONAL ISSUES PRESENTED ON APPEAL

1. Is the board's decision supported by substantial evidence in the record, and does it comply with the Plan? (Appellants also raise these as issues on appeal. Respondents raised these and the following issues below, but the Court did not decide them.)
2. Were respondents deprived of an impartial tribunal and, therefore, due process of law?
3. Did the board's decision constitute unlawful spot zoning? (These are properly included as issues on appeal because they are other bases to sustain the District Court's judgment for reasons presented at trial which the court did not rely on. No affirmative relief is sought. [Walker v. Shoshone County, 112 Idaho 991, 993, (1987)].)
4. Are respondents entitled to attorney fees and costs on appeal?

ARGUMENT

A. THE BOARD'S ACTION GRANTING SPECIAL USE PERMIT VIOLATES IDAHO CODE 67-6512.

1. A Gravel Pit/Rock Quarry Is Not a Conditionally Permitted Use in the Zone District. Whether a board of commissioners violated a statutory provision is a matter of law over which the Court exercises free review. Friends of Farm To Market v. Valley County, 137 Idaho 192,

196 (2002); Evans v. Teton County, 139 Idaho 71, 75 (2003). Section 67-6512 governs the issuance of special use permits by local agencies. It provides that a special use permit may be granted to an applicant "if the proposed use is conditionally permitted by the terms of the ordinance."

Gravel pits are not conditionally permitted by the terms of the Ordinance. Therefore, Tungsten may not be issued a special use permit for a gravel pit. It follows that the board's action granting special use permit for a gravel pit is illegal and void.

Chapter 7, Section 1 of the Ordinance (AR, p. 256) specifies three categories of uses that are permitted in agriculture/forestry zones. These are "uses by right," "permitted uses," and "conditional uses." Farming and livestock production are "uses by right." Thus, respondents' ranch is a use by right. Farm and ranch residences are "permitted uses." Chapter 7 lists seven categories of conditional uses. Neither gravel pits nor "mineral extraction" are included in any of these categories. Thus, gravel pits are not allowed as a use by right, permitted use or conditional use. Therefore, the board may not grant a special use permit for a gravel pit.

2. Section 1E Conflicts With Section 67-6512 and Is Unlawful and Void. The board relied on Section 1E of Chapter 7 of the Ordinance to issue Tungsten's permit. But Section 1E conflicts with § 67-6512, and therefore, is unlawful and void.

Section 1E states that "[a]ny use **not specified** in this section as a use by right or conditional use is eligible for consideration as a special use." (Emphasis added.) But Section 67-6512 only authorizes special use permits for uses the ordinance **specifies**. Therefore, Section 1E directly conflicts with § 67-6512. A county ordinance may not conflict with a state statute. Boise v. Bench Sewer Dist., 116 Idaho 25 (1989) (county ordinance that conflicts with general law is void); Brower

v. Bingham County, 140 Idaho 512, 515 (2004) (county ordinance that conflicts with local land use planning statutes is void); In re Ridenbaugh, 5 Idaho 371, 375 (1897) (under § 2 of article 12 of the Idaho Constitution, counties may not enact regulations that conflict with general laws).

Section 1E reflects the earlier version of § 67-6512 before it was amended, effective July 1, 1999. The former statute stated that a special use permit may be granted to an applicant "if the proposed use is otherwise prohibited by the terms of the ordinance," but may be allowed with conditions under specific provisions of the ordinance. (See County brief, p. 9.) Under this language, special use permits might be issued for uses that were not specified in the ordinance as uses by right or conditional uses. This language was deleted and replaced by the current language. (See Senate Bill No. 1202, 1999 Ida. ALS 396, 1999 Idaho Sess. Laws 396.)

The board ignored the change to § 67-6512, and granted the special use permit on the basis of Section 1E. Thus, the board's action was predicated on an Ordinance provision the Legislature repudiated. Accordingly, the board's action is unlawful because it is based on an invalid provision in an ordinance. The county has no authority to act on an ordinance that conflicts with Idaho Code 67-6512. Fischer v. City of Ketchum, 141 Idaho 349, 356 (2005); Ralph Naylor Farms v. Latah County, 144 Idaho 806, 810 (2007) (ordinance that obviously conflicts with state law is pre-empted).

Appellants' contention that Section 1E complies with § 67-6512 is meritless. The county argues that the 1999 amendment to Section 1E only disallowed special use permits for uses that the Ordinance prohibits, and that since the Ordinance does not prohibit gravel pits, it "conditionally permits" special use permits for gravel pits. The county says the only way special

use permits for gravel pits are not allowed is if the Ordinance prohibited gravel pits, or if the Ordinance did not authorize special use permits. These arguments lack merit because they ignore the plain language of § 67-6512 which does not say that. Counties are not free to ignore the plain language of state statutes. Ralph Naylor Farms v. Latah County, supra.

Tungsten contends the county intended Section 1E to process special use permits for "unscheduled" uses, and thus, to allow uses which may not have been anticipated when the ordinance was enacted or which could be allowed with conditions. But that was the old law.

Tungsten complains that any other interpretation would result in a situation where only specifically defined uses are allowed in any zone. Both appellants think this would be harsh and onerous because as they concede, gravel pits are not listed anywhere in the Ordinance as a conditional use or any other kind of permitted use.

But that is the point. While special use permits might be granted for "unspecified" uses under the former version of § 67-6512, the Legislature changed the law to prohibit special use permits for "unspecified" uses. Therefore, a use, such as a gravel pit, that is not permitted in a zone district, may no longer come in through the "back door" of a special use permit, as occurred three times here. Local officials who wish to grant an economic benefit to a particular landowner under a special use permit may think the amendment is harsh or onerous, but the Legislature disagrees for good reason.

LLUPA requires counties to adopt comprehensive land use plans and zoning ordinances that promote ordered development while protecting property rights and the environment. Idaho Code 67-6502. Requiring zoning ordinances to state the permitted uses for conditional and special use permits protects landowners making substantial investment in their property, such as a purebred cattle ranch

and residences in reliance on zoning provisions, from the catastrophe of an unanticipated, "unspecified," conflicting use moving in next door, such as a gravel pit/rock quarry. Such policy encourages economic investment in the county and promotes ordered, not haphazard development.

3. The County's Contrary "Interpretation" Is Clearly Erroneous and Does Not Merit Deference. Interpretation of an ordinance, like construction of a statute, is an issue of law over which the court exercises free review. Friends of Farm To Market supra.

Appellant and Tungsten ("appellants") contend the board interpreted the Ordinance to conditionally permit special use permits for unspecified uses, and this is entitled to a strong presumption of validity. But the presumption of validity favoring actions of a zoning authority does not apply unless the actions are free from capriciousness, arbitrariness or discrimination. Rural Kootenai Organization, Inc. v. Board of Comm'rs, 133 Idaho 833, 842 (1999); Davisco Foods International, Inc. v. Gooding County, 141 Idaho 784, 788 (2005). A court will substitute its judgment for that of an agency when the agency acts outside the bounds of its discretion. Lane Ranch Partnership v. City of Sun Valley ("Lane II"), 175 P.3d 776, 780 (2006) (reversing a city's interpretation of an ordinance denying a permit to a disfavored person). Courts do not defer to an agency's interpretation of law. Friends of Farm to Market v. Valley County, supra. No deference is due to an agency's findings that are clearly erroneous. Butters v. Hauser, 125 Idaho 79, 81 (1993) (reversing a decision where findings not supported by substantial evidence).

Appellants contend that Section 1E authorizes the board to issue special use permits for "unspecified" uses under the procedures of Chapter 13, which allows the county to attach conditions to special use permits. In their view, the Ordinance "conditionally permits" special

use permits, and therefore, a special use permit for a gravel pit does not conflict with § 67-6512. Such illogical interpretation ignores the statutory language.

Section 67-6512 requires the ordinance to conditionally permit the proposed use, not the special use permit. The same statute that prohibits special use permits for "unspecified" uses also authorizes county boards to attach conditions to special use permits. § 67-6512(d). Therefore, the authority to attach conditions to a special use permit does not mean that "unspecified uses" that are not permitted in a zone district, are "conditionally permitted."

All sections of the applicable statute must be construed together to determine the legislative body's intent. Statutes must be construed so as to give effect to all their provisions and not to render any part superfluous or insignificant. Evans v. Teton County, supra, 139 Idaho at 77. Accordingly, subsection (d) of § 67-6512 may not be interpreted as changing or eliminating the requirements in subsection (a). Under the statute, the proposed use must be conditionally permitted. When issuing a permit, specific conditions may be attached tailored to the specific use. Granting an unlawful permit with conditions does not make the permit valid. Appellants concede that gravel pits are an "unspecified" use. Therefore, § 67-6512(a) prohibits the board from issuing a special use permit for a gravel pit.

The District Court properly rejected this same argument below because § 67-6512 plainly states that the proposed use, not the special use permit, must be conditionally permitted in the ordinance. The plain meaning of statutes must be given effect. Evans v. Teton County, supra; Lane Ranch Partnership, supra, 175 P.3d at 778.

Essentially, appellants argue that the plain meaning of § 67-6512 does not mean what it

says, and the county is free to interpret the Ordinance as if former § 67-6512 still applies. There is no authority for appellants to argue the old law still applies. It is clear the county is charged with knowledge of statutory changes, and the county failed in its duty not to enact regulations that conflict with state law. The county had legal counsel at all times relevant and is presumed to know the law. See Cannon v. Univ. of Chi., 441 U.S. 677, 696-97, 60 L.Ed.2ds 560 (1979) (elected officials are presumed to know the law). The District Court correctly read the plain, unambiguous language in § 67-6512 to require that the use – here, a gravel pit/rock quarry – not the special use permit, must be conditionally permitted in the ordinance for a special use permit to be granted. The decision is correct and should be affirmed.

If the county intended to allow gravel pits in any or all zone districts, it should have amended the Ordinance. No reason is given why the Ordinance was not amended. Appellants erroneously attempt to reconcile a superceded ordinance provision with current § 67-6512. This is impossible because § 67-6512 prohibits what Section 1E allows. If counties are permitted to avoid the plain language of statutes through interpretations of conflicting ordinances, no state law could be enforced. Appellants' interpretation of the Ordinance must be rejected as meritless.

4. The Zoning Administrator Provides No Authority for the County's Views. The county relies on the "analysis" the zoning administrator "came up with" to justify the special use permit. Nowhere in the record do the commissioners seek a legal opinion from its attorney on this issue. Weland's ad hoc administrative analysis does not substitute for a legal opinion or provide any valid authority.

Essentially, Weland argues that failure to mention gravel pits in the Ordinance means that

gravel pits are permitted in every zone district. This view is not reasonable because it conflicts with Section 67-6512, and also conflicts with the *expressio unius* rule of statutory construction that things left out of a statute may not be implied in. (See Peck v. State, 63 Idaho 375 (1941.) The suggestion that mining operations can take place in every zone in the county -- every rural zone, every residential zone, every suburban zone as a special use defeats the purpose of the special use legislation as allowed by the State Legislature and adopted by the county.

Nothing stopped the county from amending the Ordinance to conditionally permit gravel pits in particular zones if it wanted to do that. If the county addressed mineral extraction in the Plan, but not in the Ordinance, it must have been because the county valued a rural agricultural lifestyle at the time of the adoption of the ordinance, but allowed for the fact that in the future, mineral development might need to be considered more fully. But that goal is reached through amendment of the Ordinance, not a contortion of provisions in the Plan. See Giltner Dairy v. Jerome County, 181 P.3d 1238, 1240 (2008) (comprehensive plan not a legally controlling zoning law). Weland also improperly relies on selective portions of the Plan and Appendix I to the Plan, and ignores other portions of both documents that value agriculture and the rural lifestyle over the economic impact of minerals.[1]

Weland's analysis conflicts with other Ordinance provisions. Chapters 8 and 9 of the Ordinance pertain to non-conforming uses and variances. A non-conforming use is defined as a

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[1] Appendix I, p. 1 also states that it is "imperative" to maintain the county's rural lifestyle "upon which no monetary value can be placed." Appendix I is a document that was outside the administrative record. Therefore, it could not be used to support a finding. Eacret v. Bonner County, 139 Idaho 780, 786 (2004); Sanders Orchard v. Gem County, 137 Idaho 695, 702-03 (2002)(decision based on matters outside the record is prejudicial and void.) The District Court granted judicial notice of the conflicting portions of Appendix I.

use that was lawfully in existence when the Ordinance was enacted but that is not in compliance with ordinance requirements. (Ord., Ch. 8. Section 1; see Addendum) Munson's gravel pit is an example. Non-conforming uses are only allowed to continue because they were lawful on the date the ordinance was enacted. The intent of the Ordinance is to allow the continuation of non-conforming uses, but to prevent their expansion. (Ch. 8, Section 1.)

Chapter 9 (Addendum) allows a property owner to obtain a variance if the use does not constitute a grant of special privilege and will not be materially detrimental to adjacent landowners. Tungsten's gravel pit does not meet these requirements. Therefore, under Chapters 8 and 9, a gravel pit is not permitted in every zone district. Accordingly, gravel pits are a prohibited use. It follows that Weland's analysis is wholly erroneous.

5. The District Court Did Not Interpret "Conditionally Permitted" as Synonymous With Conditional Use. The county contends the Court interpreted "conditionally permitted" narrowly to mean "requiring a conditional use permit." But the Court did not do that. The Court read the uses that are permitted in Ch. 7 of the Ordinance, and correctly concluded that gravel pits are not on the list. The county argues the Court should have given "conditionally permitted," its plain meaning, which, the county says, is "permitted with conditions." That is exactly what the District Court did.

Tungsten contends that the District Court's interpretation makes the words "conditionally permitted" synonymous with a conditional use, but that these are two different things. But the District Court did not interpret the statute as meaning anything other than what the plain language says. Section 67-6512 authorizes county boards to issue conditional or special use permits, and states that special use permits may be granted if the proposed use is conditionally

permitted by the terms of the ordinance. The statute does not make special use permits and conditional use permits the same, although the rules for both permits may be similar.

That both types of permit require conditions does not make them the same. It is up to the individual county to determine and specify whether a particular use should be subject to a conditional or special use permit. The difference between conditional and special use permits in Boundary County is one of degree. Conditional uses are "more intensive than permitted uses." (Ord., Ch. 12, Section 1.) Special uses are "significantly more intensive" than permitted uses. (Ord., Ch. 13, Section 1; AR, p. 258.) These uses are different.

Section 67-6512 is unambiguous and clear. The District Court said the language was "plain." Therefore, the Court did not engage in statutory interpretation. Where statutory language is plain and unambiguous, the clearly expressed intent of the legislative body must be given effect, and there is no occasion for a court to consider rules of statutory interpretation. Neighbors For A Healthy Gold Fork v. Valley County, 176 P.3d 126, 136 (2007), citing Payette River Property Owners Ass'n v. Board of Comm'rs, 132 Idaho 551, 557 (1999).

The District Court applied the plain language of § 67-6512 to the facts in this case, and properly gave effect to clearly expressed legislative intent. One of the Court's holdings is the Ordinance violates § 67-6512 "which allows a special use permit only if the use is a listed conditional use in the applicable zone." (Slip Op., p. 1.) This holding is not an "interpretation" of "conditionally permitted" in the statute. Rather, the Court applied the statute to the facts in this case, in which gravel pits are not conditionally permitted because they are not listed as a conditional use or any other permitted use. Therefore, the holding is correct.

If gravel pits were a conditional use in agriculture/forestry zones, there may well be no need for it to be a special use. The apparent contradiction is resolved by closer examination of the statute. When the statute refers to "terms of the ordinance," the logical reading is that it refers to the ordinance in its entirety. Accordingly, if gravel pits were a conditional use in some other zone district, but not agriculture/forestry zones then, in that event, a gravel permit might be allowed in an agriculture/forestry zone as a special use and in accordance with a special use permit. The failure, however, to permit, either conditionally or as a matter of right, gravel pits in any zone, results in a prohibition against a special use permit in any zone. Since special uses are more intense, why should they be allowed if the less-intense conditional use is not allowed?

6. The County's Interpretation of the 1999 Amendment Is Erroneous. The county contends that a "loophole" in former § 67-6512 allowed landowners to obtain special use permits for uses the ordinance prohibited, and that the amendment closed that loophole by not allowing special use permits only for prohibited uses. The county argues that the special use permit for gravel pit complies with § 67-6512 because gravel pits are not prohibited in agriculture/forestry zones, and are "conditionally permitted" through the special use process. Again, the county erroneously argues that the old law still applies, and also erroneously argues that gravel pits are not prohibited.

The 1999 amendment may have closed a loophole, but not in the way the county argues. Former § 67-6512 provided that a special use permit may be granted if the proposed use is "otherwise prohibited" by the terms of the ordinance. The words, "otherwise prohibited" are ambiguous. The county interprets "otherwise prohibited" as meaning only uses the ordinance expressly prohibits. But that interpretation does not make sense because the law already prohibits

special use permits for uses prohibited in a zoning ordinance. County of Ada v. Walter, 96 Idaho 630, 632 (1975) (board lacks authority to allow a use within a zone that would constitute a prohibited use). "Otherwise prohibited" could have meant uses not expressly permitted.

The amendment eliminates the ambiguity in "otherwise prohibited" by requiring county ordinances to specify the uses for which special use permits may be granted. This provides a baseline standard for special use permits in all counties. This view not only eliminates the possibility of counties issuing special use permits for prohibited uses (which they could not do anyway), but also for uses that may not be expressly prohibited, but that conflict with permitted uses in the zone district. Such view comports with the laws pertaining to non-conforming uses which are disallowed except where they pre-date the zoning ordinance. See Glengary-Gamlin Protective Ass'n v. Bird, 106 Idaho 84, 90 (1983). Thus, the amendment brings special use permits into conformity with existing law by disallowing such permits for "unspecified" uses that do not conform to permitted uses in the zone, as well as prohibited uses.

7. The County's Interpretation That Gravel Pits Are Commercial Is Unreasonable and Wrong. The board's decision included a finding that the gravel pit was a "conditional use" in agriculture/forestry zones because it qualified as a "commercial business supplying products and services for agriculture and forestry activities. That is one of the listed conditional uses in agriculture/forestry zones. (Ord., Ch. 7, Section 1(D)(1), A.R. 256; Findings, ¶ 9, AR., p. 235.) The finding is based on an argument that "construction of roads and protecting against flood are two critical factors necessary to promote the continuity and continued productivity of agriculture and forest use in Boundary County." (AR., p. 235.)

The county argues that the Court must defer to the county's interpretation of "commercial." But the District Court held the interpretation is unreasonable. A gravel pit or surface mining operation such as Tungsten's proposed quarry with its aspects of excavation, crushing and blasting cannot be deemed a commercial activity. In the context of community planning and zoning, gravel pits and surface mines are activities of an extractive and industrial nature involving raw material extraction and processes such as excavation and crushing with use of heavy equipment and blasting. (Slip Op., p. 8.) Therefore, it is not a "commercial" use.

Once again, the county's interpretation conflicts with the provisions in the Ordinance. The Ordinance defines "commercial use" as a use "intended primarily for the conduct of retail trade in goods and services," and "industrial use" as the use of a parcel "intended primarily for the manufacture, assembly, or finishing of products" for wholesale distribution. The District Court said that while Tungsten's use might be termed "industrial," it could "certainly not" be termed "commercial." (Slip Op., p. 8.) Therefore, even if the ordinance did not conflict with § 67-6512, as it does conflict; the special use permit could still not be issued because the gravel pit could not be deemed a commercial business.

The District Court properly rejected the view that the gravel pit is a commercial business supplying products for agriculture and forestry. Gravel pits do not supply products for agriculture or forestry. Road construction and flood protection are not "work ordinarily done by farmers." Lesperance v. Cooper, 104 Idaho 792, 794-95 (1983) (raising crops for feeding to cattle is an agricultural pursuit). Agricultural products are feed, veterinary supplies, farm equipment, tools and supplies used directly in agricultural pursuits. Lesperance v. Cooper, supra. Tungsten, a

developer, wanted to supply rock for county roads and residential development, not agriculture.

Neither farmers nor lumbermen ordinarily operate gravel pits/rock quarries for roads or residential development. Neither agriculture nor forestry is work typically done by miners or county road departments. Tractors use gasoline, but that does not mean an oil refinery is a commercial business supplying products or services for agriculture. The county's overly broad, self-serving interpretation fits any zone classification, and permits uses the zone district prohibits. Industrial uses may not be conditionally permitted in agriculture/forestry zones because they bear no similarity to the permitted uses in the zone district. An industrial use is plainly not compatible with the permitted agricultural uses.

It is obvious that Tungsten's gravel pit is not a conditionally permitted use in agriculture/forestry zones. That is why Tungsten applied for a special use permit, and section 1E was the basis upon which the board granted the permit. If gravel pits are a conditional use in agriculture/forestry zones, why did the county even bother with a special use permit process?

The county's argument relies on: words in the Ordinance preface indicating the county is rural; the "Natural Resources" provision of the Plan, stating that mining is critical to the county; § 67-6502 of LLUPA, for the idea the State seeks to protect local economies by allowing them to adopt "lenient" codes; and the problem that less than 1% of the county is zoned industrial. The argument is erroneous because it ignores: the definition of "commercial" and "industrial" in the Ordinance which conflict with this view; the common understanding of "rural," expressed in other provisions of the Plan which is a peaceful and quiet atmosphere, not blasting or rock crushing; and the requirements for reasoned decision-making in Idaho Code 67-6535.

The county's argument is not based on any reliable authority and conflicts with provisions in the Ordinance. Therefore, it is arbitrary and capricious. No deference is due to arbitrary interpretations of an ordinance. Interpretation of an ordinance that conflicts with ordinance provisions is erroneous. Payette River Property Owners Assn, supra, 132 Idaho at 557 (reversing a county's interpretation of an ordinance that conflicted with ordinance provisions). No deference is due to an erroneous interpretation of an ordinance. Rural Kootenai Org. supra; Lane II, supra, 175 P. 3d at 780.

B. THE BOARD'S DECISION CONFLICTS WITH THE COUNTY PLAN.

Tungsten contends it has a right to a gravel pit. Tungsten also contends that the gravel pit conforms to the Plan because the board balanced competing interests. In fact, the board did not balance competing interests, but disregarded all interests except Tungsten's and Gutshall's. The board's terms and conditions "did not change the structure" of the gravel pit. Such conditions do not "balance" competing interests.

Tungsten has no right to a gravel pit. Its property is zoned agricultural/forestry, not commercial or industrial. Gravel pit/rock quarries are not a use by right, permitted use or a conditional use in agriculture/forestry zones. Gravel pits do not conform to the permitted uses in the zone, and thus, are prohibited uses. Tungsten does not meet the requirements for a variance.

Section 67-6512 requires a special use permit to comply with the county Plan. Tungsten's gravel pit fails to comply with Sections I, III, and V of the Plan because there is no reliable evidence it would not interfere with respondents' health or safety, it deprives respondents of their property rights, poses undue risk, and is being accomplished without due

consideration of other landowners or for the potential impact of such extraction. (See P&Z Findings, AR, p. 184.) It does not meet the goal of encouraging agricultural enterprise to retain the predominantly rural nature of the community in Section IV of the Plan, "Land Use." Imposing the rock quarry next to respondents' cattle ranch discourages agricultural enterprise and destroys the rural nature of the area forever. The board's contrary findings are based on an erroneous and factually unsupported assumption that the eleven terms and conditions mitigate the adverse impacts. They do not. (See discussion next, "Substantial Evidence.")

C. NO SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S DECISION.

1. Tungsten Failed to Prove Compliance With the Ordinance. The county and Tungsten contend that written documentation and oral testimony support the board's decision. Neither points out any. Tungsten says the Court should defer to the board's findings of fact, but fails to point out any such findings. There are none on the contested facts. No oral testimony supports the board's findings.

Contrary to Tungsten's argument, the distance of the pit from respondents' wells says nothing about whether the wells are safe from dewatering from blasting. The non-expert applicant gave no credible testimony. The IDL permit and reclamation plan (AR 282-288) are completely irrelevant to blasting or the safety of the wells. An IDL employee's "doubt" about hearing the crushing does not prove neighbors will not hear it. A phantom "expert's" hearsay statement to Rick Dinning not to worry about water flows this year, begs the question of what happens in the future.

Layperson Hays' remark that DEQ thought one-time blasting for Highway 95 did not

cause water loss to Mission Creek is not relevant to continuous blasting in a rock quarry by an aquifer in Porthill. Hays' statements were also contradicted by the expert hydrologist and by a Porthill resident who said DEQ had not ruled out blasting as a cause of the water loss. Hays' lay opinion his cows did not mind road blasting lacks any reliable foundation and is irrelevant to the effect of continual blasting and daily crushing in an adjacent gravel pit during respondents' calving and breeding season. Such testimony does not amount to a scintilla of proof. Reasonable people would not rely on such testimony because it provides no assurance of any fact.

Hydrology is a proper subject for expert testimony because it is a science about which laypersons lack competence. Marty v. State of Idaho, 122 Idaho 766, 762 (1992)(resident not trained in hydrology lacks expertise to render an expert opinion.) Non-experts, such as Rick Dinning, lack competence to render opinions on scientific matters. Rule 701, Idaho Rules of Evidence (lay witness opinions limited to those not based on scientific, technical or other special knowledge). Hydrology, geology, blasting, and synchronized cattle breeding are all scientific matters. There is no expert or competent testimony that the gravel pit would not adversely affect respondents. Thus, there is no substantial evidence the gravel pit meets the Ordinance requirements for a special use permit.

2. No Evidence Supports the Findings That "Terms and Conditions Exist." While the commissioners never commented on P&Z's decision except to criticize Gutshall's "treatment," the commissioners' decision conflicts with P&Z's decision in essentially only one way. While P&Z found no evidence on which to predicate suggestions for mitigation, the board found that "terms and conditions exist" to mitigate the adverse impacts of blasting and increased

dust and noise. Except for respondents' hydrology report and university studies, the record before both hearing boards was essentially the same.

This is a critical finding, because it is the only real difference between the board's decision that the gravel pit meets Plan and Ordinance requirements and P&Z's decision that it does not. Appellants' arguments that substantial evidence exists are based solely on this finding. By relying on "terms and conditions," the board implicitly recognizes adverse impacts exist. The board found: the proposed use has the potential to create adverse effects, but "terms and conditions can be implemented to reduce this impact;" "terms and conditions are available to reduce noise, traffic, and dust to levels commensurate with permitted uses," and that the "conditions originally established will provide sufficient restriction" to mitigate potential adverse effects. (Decision, p.8, ¶¶ 7(b)(iii)(3), (4), (5), (6); ¶ 7(b)(iv); AR., p.232.)

The finding that "terms and conditions exist" is purely conclusory. No factual findings or any facts support this conclusion. The staff who "came up with" the terms and conditions knew nothing about blasting, crushing, mining or hydrology. Weland and Topp candidly admit having "no expertise" in these matters. So they could not and did not develop specific conditions that are "clearly designed to minimize potential adverse impacts created by the special use," as the Ordinance requires. (Ordinance, Ch. 13, § 5.)

Findings that merely recite conclusions are not sufficient. Workman Family Partnership v. City of Twin Falls, 104 Idaho 32, 37 (1982). What is needed for adequate judicial review "is a clear statement of what, specifically, the decision making body believes" to be the relevant and important facts upon which its decision is based. Workman Family Partnership, supra. Board

member's personal inclinations are not findings of fact. Workman Family Partnership, supra, 104 Idaho at p. 38. Where, as here, no pertinent, relevant or reliable facts support the findings that "terms and conditions exist," the decision lacks substantial evidence and must be reversed. Sanders Orchard v. Gem County, 137 Idaho at 702 (2002) (finding reversed where nothing was submitted orally or in writing indicating the finding was true).

The only statements relating to conditions consist of: averments of road safety from Gutshall, an interested party; Commissioner Smith's assumption that OSHA requirements take blasting into consideration; Weland's statement he had not studied 29 CFR that closely; Commissioner Kirby's imagination that twelve days of blasting was a good idea because they would use less dynamite; Topp's inability to suggest "anything specific" because he was not a blasting expert and "had no idea" what kind of restrictions could be imposed, and Topp's speculation that federal and state requirements "associated with mining" provided "sufficient safeguards." These statements are not based on any facts.

Essentially, the board granted the permit and ignored its duty of determining whether ordinance requirements were met on the assumption that various other agencies would deal with the problems. Thus, the decision does not clearly or precisely state what the board found to be the facts. The board's disregard of facts is arbitrary, and an abuse of discretion. Lane II, supra.

There is no factual basis for the board's arbitrary disregard of the hydrologist's opinion. The hydrologist's report and respondents' university studies are the only expert evidence in the record. The uncontradicted expert opinion constitutes substantial competent evidence of the gravel pit's potential adverse effects. St. Joseph Regional Medical Center v. Nez Perce County

Commissioners, 134 Idaho 486, 489-91 (2000) (uncontradicted expert's opinion constitutes substantial, competent evidence). An inexpert board's independent interpretation of expert testimony is clearly erroneous. St. Joseph Regional Medical Center, supra, 134 Idaho at 471, 489 (inexpert board may not independently analyze expert testimony).

No facts support the commissioners' lay presumption that the hydrologist's opinion is "merely conjecture," and the threat to the wells is "remote." (See decision, AR 234.) The "conjecture" is a scientific, expert opinion based on specific, uncontroverted facts. (AR 79-84.) There is no evidence that any distance from blasting will not dewater the wells. There is no evidence that "initial blasting" in Tungsten's pit, whatever that consisted of, did not affect the aquifer or respondents' wells. It is disingenuous to say that blasting will not cause injury when its sole purpose is to blow things up and cause damage by tearing the mountain apart. The intensity of Tungsten's blasting was never specified.

The "condition" of notifying blasters and requiring them to be licensed and insured does nothing to mitigate the recognized potential harm to the wells. No coverage level is specified. Minimal insurance provides little protection for the damage that could occur. No facts support the commissioners' presumption that notifying blasters means wells are safe. Blasters are not required to keep them safe. Tungsten is not required to obtain a hydrology study guaranteeing the wells will not be damaged.

The mean sea level ("MSL") elevations of Tungsten's excavation and respondents' irrigation well (AR 234) shows that the main portion of the well that is above the valley floor may be dewatered from blasting. The well functions because of the column of water above the

pump. As the column of water is depleted, the yield of the well is reduced, in addition to the fact that water is being removed from the aquifer. The bottom of Tungsten's pit on the valley floor allows drainage of any fractures the pit intercepts down to that level. Excavation of the pit will allow for more drainage, and will reduce the volume of water entering the aquifer and the amount of water accessible to the well, will reduce the column of water above the pump, and will impact the well. The extent to which this will occur will not be known until afterwards -- when it is irreparable.

In Evans v. Teton County, supra, the Court upheld a county's finding that a zone change was in accord with the comprehensive plan because the finding was supported by substantial, competent evidence even though a hydrologist's statements conflicted with the board's finding. Here, the hydrologist's report "documents" the potential adverse effects, and no competent evidence conflicts with it. Accordingly, the board's decision is not supported by substantial evidence, and must be reversed. Evans v. Teton County, supra at 75; see also Tungsten Holdings, Inc. v. Drake, 143 Idaho 69, 72 (2006) (no deeds or facts support Tungsten's statement of succession in interest; finding of ownership vacated because not based on substantial evidence).

The duty of fact finding to support a decision is not a "road block" or "delaying tactic." The board must decide if ordinance requirements are met on the basis of substantial evidence in the record, not abandon that duty on the supposition that other agencies will take care of things.

In contrast, when the unbiased P&Z members were confronted with the same community concerns and the same lack of evidence and the same lack of knowledge about the effects of blasting and crushing, they did not "come up with" suggestions for mitigation and did not even

try. They properly recommended that a permit be denied because Tungsten did not factually demonstrate compliance with requirements for a safe, non-injurious and compatible operation.

3. No Facts Support the Finding That Eleven Conditions Mitigate Adverse Impacts. For the same reasons, there are no facts supporting the conclusion that the eleven conditions mitigate adverse impacts. Most of the conditions do not relate to these impacts. Some conditions exacerbate the hazards. Clearly, they were not intended to mitigate the impacts on respondents or other landowners.

Condition 1 (mining operations to be conducted on site) only pertains to the county road. Condition 2 (dust abatement as needed) is virtually meaningless, since it makes dust abatement discretionary with Tungsten who can decide it is not needed. Conditions 3 (IDL best management practices), 5 (OSHA regulations), and 7 (comply with IDL requirements, including reclamation plan) purport to require Tungsten to comply with other agency's rules that Tungsten presumably has to do anyway. Neither the commissioners, nor "staff" knew how or if such rules would operate to mitigate the potential adverse affects to adjacent properties.

Conditions 4 and 6 (twelve days of blasting; 60 days of crushing every day during respondents' calving and breeding season), expand these dangerous activities and exacerbate the impacts. They do not mitigate them. No real reason was given for the expansion of blasting, changing the crushing days, and not "working around" respondents' calving and breeding period, as Rick Dinning said he would at the P&Z hearing.

Condition 7 (file reclamation plan and bond), Condition 8 (notify county when bond is redeemed), and Condition 9 (file record of survey), are irrelevant to the impacts. Bond

requirements can be waived, as they were for Tungsten. A.R., p.282, ¶ 4. The reclamation plan is not relevant to noise, cattle breeding or the aquifer, as it only requires Tungsten to maintain state water quality standards. Conditions 10 and 11 (notify blasters of concerns; blasters qualified and licensed) merely assume that other people understand and will take protective measures. No protective measures are required. No one knew if there were any protective measures.. Thus, no evidence supports these conditions.

Not only is the board's decision not supported by substantial evidence, but, additionally, the fact that the conditions fail to mitigate the adverse effects establishes that the board's actions are in excess of its statutory authority. I.C. 67-6512 requires that board approval of a special use permit be predicated on compliance with the ordinance. The statute requires the special use permit to be subject to conditions pursuant to the specific provisions of the ordinance. The Ordinance requires conditions to minimize potential adverse impacts. If the conditions do not minimize those impacts, the board is not in compliance with the Ordinance, and therefore, acts in excess of the authority granted by statute.

D. THE BOARD FAILED TO HOLD TUNGSTEN TO THE BURDEN OF PROOF.

At the July 26, 2005 hearing, Commissioner Smith asked respondents, for "any fact" or "documentation" that dynamiting could affect somebody's water. During the same hearing, Smith said Rick Dinning had a "right" to a gravel pit. One of the conditions could not be "to not have a gravel pit." Tungsten was not asked to "document" that its operation would not adversely affect respondents or the other adjacent properties.

These statements show that Smith's mind was made up as to the outcome of the hearing from the very beginning. At the August 8, 2005, meeting, Smith reiterated he "definitely want[ed] to approve the pit, and did not want "delaying tactics" or "road blocks" to "put off the inevitable."

The county wrongly argues Smith's mind was not made up before the decision to grant a permit. Tungsten argues it was appropriate to require respondents to document their "fears." But when respondents submitted expert documentation in the 2006 hearing, it was belittled and ignored. Thus, the commissioners unlawfully put the burden of proof on respondents, and did not require Tungsten to demonstrate that it complied with Ordinance requirements.

Tungsten contends that applicants for a special use permit do not have the burden of persuasion if the ordinance says nothing about this. But that would mean the applicant does not have to prove compliance with ordinance provisions in order to be granted a permit. That is essentially what happened in Fischer v. City of Ketchum, supra, that the Supreme Court reversed. In Fischer, the City P&Z granted a conditional use permit without requiring the applicant to submit an Idaho engineer's certification, which was a requirement of the ordinance. The Supreme Court held the City could not legally grant a permit without such report. Otherwise, permit approval avoided compliance with the ordinance. Fischer, 141 Idaho, at p.351. Without such certification at the public hearing, the interested public had no meaningful chance to comment on the project's impact on the community. Fischer, supra, 141 Idaho at 355.

The Supreme Court said the burden of persuasion is upon the applicant to show that all of the ordinance requirements are satisfied. Id., at p.353. Apparently, the ordinance did not contain an express provision about the burden of proof, as the Court did not cite any. But it is implicit in

the permit procedures that the applicant is the moving party, and the moving party has the burden of persuasion. See E. Cleary, McCormick On Evidence, § 357 (3d ed. 1984) (customary common law rule is that the person going first is the moving party, and the moving party has the burden of proof, including not only the burden of going forward but the burden of persuasion).

This is a matter of due process. The applicant controls the timing and presentation at the hearing. Tungsten filed its application in March. Respondents were not notified until two weeks before the P&Z hearing in May. Their request for continuance to prepare for the hearing was denied. It became obvious in the board's July 24, 2005 hearing that respondents had the burden to "document" adverse impacts, rather than Tungsten having to prove the proposed use had no *substantial* adverse affects. But when respondents asked for a reasonable continuance in the August 8, 2005 hearing to submit a hydrologist's report, this was denied on the basis that they should have had a report for the P&Z hearing. This "Catch 22" in the board's hearing process deprived respondents of due process and a fair hearing.

There was no indication of any change between the 2005 and 2006 board proceedings regarding Commissioner Smith's statements related to the proper allocation of the burden of persuasion. There is no indication in the hearings held in 2006 or in the written decision of August 14, 2006 that the board was holding the applicant, Tungsten, to the burden of persuasion. The District Court correctly found the board unlawfully reversed the burden of proof.

E. <u>THE BOARD'S DECISION FAILS TO COMPLY WITH IDAHO CODE 67-6535.</u>

The August 14, 2006 decision is not a reasoned statement explaining the criteria and standards considered relevant. It did not fairly resolve all relevant contested facts, and lacked a

rationale based upon applicable ordinance and statutory provisions. The District Court correctly held the decision was arbitrary and violated respondents' rights under § 67-6535.

Tungsten contends the decision comports with § 67-6535 because it is in writing, sets forth some reasons, references applicable county ordinance sections, and "draws attention" to the community's concerns about adverse effects of blasting, dust and noise. Tungsten relies on form over substance. The decision substantively fails to comply with Idaho Code 67-6535 because it lacks factual findings and a reasoned decision.

As stated above, the rationale that terms and conditions mitigate the adverse impacts is wrong, and has no factual support. The board decided to grant Tungsten a permit first. The "terms and conditions" rationale came second. Nothing changed between 2005 and 2006, when the new evidence was disregarded and the same old findings were re-adopted. Contrast the straightforward, unbiased, two-page P&Z decision (A.R., p.183-84), with the duplicative, argumentative, manipulative and conclusory findings and decision of the board. (A.R., p.235-36).

The board's decision is not a reasoned statement because not supported by facts. Clearly, it was outcome driven. In the commissioners' minds, Tungsten "had a right" to his gravel pit, and Gutshall had a right to contract for rock with the commissioner's brother. Clearly that is the board's only rationale. The decision was written to achieve that outcome regardless of what evidence there was and was not in the record. This is ad hoc, not reasoned decision-making.

The colloquy between Commissioners Smith and Kirby at the August 7, 2006 board meeting did not address or resolve the material factual issues concerning the contentions regarding well dewatering and the impact of noise upon the cattle operation and respondents'

enjoyment of their residential rural property. There was no indication of a proper allocation of the burden of persuasion contradicting Smith's statements at the July 26, 2005 hearing.

The commissioners discounted the hydrologist's expert opinion without basis for doing so. The decision briefly comments on dust abatement but does not fairly address the contentious issues of the adverse impact of the uses proposed by Tungsten upon the use and peaceful enjoyment of respondents' property. The impacts asserted relative to the cattle operation are dealt with in a conclusory fashion. A rationale for the conclusions relevant to a fair decision upon the application is not demonstrated. Thus, there is no showing of a proper exercise of discretion.

The decision does not clearly and precisely state what it found to be the facts underlying the eleven conditions, or fully explain why those facts lead to the decision for any meaningful judicial scrutiny. Incorrect criteria and standards were applied. Accordingly, the board did not demonstrate it applied the criteria prescribed by statute and, therefore, it acted arbitrarily and on an ad hoc basis. Workman Family Partnership, supra, 104 Idaho at 37. Both the written decision and transcript of the August 7, 2006 board proceeding show an absence of meaningful consideration of issues or resolution of conflicting factual information using the applicable criteria required by law. Accordingly, there was no showing of a proper exercise of discretion.

F. RESPONDENTS WERE DEPRIVED OF AN IMPARTIAL TRIBUNAL.

An impartial tribunal is a requirement of due process. Eacret v. Bonner County, 139 Idaho 780 (2004) (commissioner's statements that he had a personal interest in promoting "blanket" variances and that a variance request would be approved reveal lack of impartiality and violate due process); Idaho Historic Preservation Council, Inc. v. City Council, 134 Idaho 651

(2000) (parties to a quasi-judicial land use hearing are entitled to a tribunal that is impartial in the matter; that is, having had no pre-hearing or ex parte contacts concerning the question at issue).

The board lacked impartiality in 2005 and 2006 as demonstrated by: (1) Commissioner Dinning's conflict of interest with Tungsten, that was resolved and then revived when Commissioners Smith and Kirby re-adopted the conflicted decision; (2) the road supervisor's pre-hearing involvement with the commissioner's brother and the board's resolve to support their road supervisor; (3) the board's anger at criticism of Gutshall at the P&Z hearing and toward those associated with it shows pre-hearing bias against respondents who opposed the permit; and (5) Commissioner Dinning's personal view that neighbors should not deprive a property owner, here his brother; from pursuing his economic advantage without paying him for lost economic opportunities also shows pre-hearing bias against respondents. These layers of pre-hearing bias against opponents of the special use permit, and respondents in particular, deprived respondents of an impartial tribunal and thus, deprived them of due process of law.

Gutshall initiated the pit, and was directly involved in supporting the permit through e-mails, attending the P&Z and commissioners' hearings, and advocating for the permit with the commissioners both outside and inside the hearing. Gutshall was clearly a moving party and directly involved, and plainly had a personal interest in Tungsten's permit. Conflict of interest laws prohibit such contracts. Idaho Code 67-5726 prohibits county employees from influencing or attempting to influence the award of a contract to a particular vendor. Idaho Code 18-1361 prohibits county employees from contracting with relatives unless the statutory criteria are met, which they were not in this case.

The commissioners' defense of Gutshall at the hearing shows actual bias against respondents. Interested parties have the constitutional right to criticize public employees without fear of retaliation or humiliation by elected government officials. Leventhal v. Vista Unified School Dist., 973 F.Supp. 951, 957 (1997) (school district's bylaw prohibiting public criticism of district employees violates First Amendment). Insofar as the board's decision resulted from retaliation for protected speech, it is unlawful and must be reversed.

A member of a zoning hearing panel who is personally opposed to zoning laws has already made up his mind about the outcome and has indicated a predisposition not to apply the law. Such bias is fatal to the validity of the zoning determination. Eacret, supra, 139 Idaho at 785-86. While Commissioner Dinning did not participate in the 2006 hearings, the 2005 findings in which he did participate were "affirmed" and re-adopted by Commissioners Smith and Kirby. The new hearing had been a charade. These actions deprived respondents of an unbiased tribunal and a fair hearing.

G. THE BOARD'S DECISION CONSTITUTES UNLAWFUL SPOT ZONING.

"Type two" spot zoning refers to a zone change that singles out a parcel of land for use inconsistent with the permitted use in the rest of the zone district for the benefit of an individual landowner. This type of spot zoning is invalid. Evans v. Teton County, supra, 139 Idaho at p.76-77, citing Dawson Enters., Inc. v. Blaine County, 98 Idaho 506, 524 (1977). The board singled out seven acres of land for use inconsistent with the permitted use in the rest of the zone district for the benefit of a board member's brother. This is unlawful spot-zoning per se. It gave a personal, financial benefit to Tungsten, not to the public, which pays for the rock either way.

Zoning decisions do not depend on what is the most profitable use of property. If it were otherwise, "the very purpose of zoning would be nullified and spot zoning would be the order of the day." Dawson Enterprises, supra, 98 Idaho at 514 (validity of zoning regulations has never been determined by the highest and best use concept or in terms of dollars and cents profitability. To hold otherwise would be the very antithesis of sound zoning). The board gave no reason other than "economic advantage" to impose an industrial use in the agricultural zone for the benefit of a non-resident relative. This constitutes Type II spot zoning, which is unlawful.

H. RESPONDENTS' SUBSTANTIAL RIGHTS HAVE BEEN PREJUDICED.

The board's actions prejudiced respondents' substantial rights. The rights referred to in Idaho Code 67-5279(4) include substantive and procedural rights.

The decision prejudiced respondents' substantive rights, as follows: their water right to the irrigation well water (see Follett v. Taylor Bros., 77 Idaho 416, 425-26 (1956) [landowner's decreed water rights are real property; adjacent owner may not interfere with the flow of the owner's water]); their statutory right to use agricultural land for agricultural production without interference by adverse government action (Idaho Code 67-6529 [local agencies may not take any action that deprives an owner of full and complete use of agricultural land for production of any agricultural product]); the gravel pit on adjacent property will reduce the value of respondents' real property.

Tungsten blasted in March, 2006, shortly after its permit was issued. The board's unlawful action granting the permit allowed the blasting that is potentially damaging to respondents' property. This action also prejudiced respondents' substantial rights.

All of the board's unlawful procedures deny respondents their right to procedural due

process. See County Residents Against Pollution, et al. v. Bonner County, 138 Idaho 585 (2003) (board's summary dismissal of the plaintiff's appeal of a P&Z decision to the county board prejudiced the plaintiff's substantial rights); Lane Ranch Partnership v. City of Sun Valley ("Lane I"), 144 Idaho 584, 591 (2007) (developer's substantial rights prejudiced because the developer was entitled to receive due process in quasi-judicial proceedings like those conducted by zoning boards, and did not receive due process); Lane II, supra, 175 P.3d at 780 (developer's substantial rights prejudiced because of the city's unreasonable interpretation of its code); Sanders Orchard v. Gem County, supra, 137 Idaho at p.702 (county's action basing decision on an issue upon which no evidence was presented prejudiced the landowner's substantial rights).

I. THE DISTRICT COURT PROPERLY AWARDED ATTORNEY FEES.

Under Idaho Code 12-117, attorney fees must be awarded if the court finds in favor of the person and the agency acted without a reasonable basis in fact or law. Ralph Naylor Farms, supra, 144 Idaho at 808. Where, as here, a county acts without authority in the face of clear provisions, it acts without a reasonable basis in fact of law. Id., at 810.

Section 1E is clear in authorizing special use permits for uses the terms of the ordinance do not conditionally permit, and this provision conflicts with the plain language of Section 67-6512. In the face of these clear provisions, the county acted to unreasonably interpret Section 1E as complying with Section 67-6512. It gambled on the presumption of validity of an agency's interpretation of an ordinance to obscure the obvious conflict between Section 67-6512 and Section 1E. There is no authority for the county to do that. Accordingly, as the District Court held, the county acted without a reasonable basis in fact or law. This ruling should be upheld.

Relying principally on Ralph Naylor Farms, the county erroneously contends that it acted in a way that fairly and reasonably addressed the issue, and therefore, fees should not be awarded even if its interpretation was erroneous. The county argues it was processing a special use permit under LLUPA in the same manner it has done many times before.

The county is wrong because the board failed to comply with LLUPA in fundamental ways: by ignoring the conflict between its superseded ordinance provision and the state statute, and attempting to make the conflict disappear through an unreasonable interpretation of its ordinance as complying with the statute; by adopting conditions that fail to mitigate the potential adverse effects; by making conclusory findings not supported by facts in the record, and by granting a permit that conflicts with the Plan and Ordinance. For all of these reasons, the board acted without legal authority under LLUPA.

In Ralph Naylor Farms, a county board adopted a land use ordinance that was later held to be invalid. The District Court denied an award of fees on the basis that the county's action adopting the ordinance had not been unreasonable because the board was authorized to adopt land use ordinances, and state pre-emption of the subject had not been clear. The Supreme Court affirmed the District Court's finding that the county had not acted unreasonably. The issue on that appeal was whether the county had been faced with an ambiguous or unclear statute that would excuse a reasonable but erroneous interpretation of law.

The facts here are the opposite. Section 67-6512 and Section 1E are clear. "Staff's" "interpretation" of the clear language in Section 1E was not reasonable because: it ignored the clear conflict with state statute and the statute's plain language; it was outcome driven to allow

the commissioners to issue an invalid permit, and therefore the interpretation was not made in good faith; it conflicted with other provisions in the Ordinance and with the county Plan. It was made in a quasi-judicial proceeding governed by due process, and was not an authorized legislative action such as the adoption of a land use ordinance in Ralph Naylor Farms. A county has no discretion to ignore a state statute in a quasi-judicial proceeding in which the statute defines the parameters of county authority to act.

Lane II, supra, is more on point. There, a city unreasonably interpreted an ordinance to deny a developer a permit for a private road to which he was entitled under the ordinance, because the city distrusted the developer. The Supreme Court held the city's unreasonable interpretation was an abuse of discretion under Idaho Code 67-5279(3.) The developer was awarded attorney fees because by abusing its discretion, the city acted without a reasonable basis in fact or law. Similarly, the board unreasonably interpreted its ordinance to unlawfully grant the permit because that was the outcome it wanted. The board improperly used the Ordinance as a shield against the state statute that disallowed the action the board wanted to take. If this is "business as usual" in Boundary County, it must be discouraged by upholding the fee award.

In Ralph Naylor Farms, the county had the legal authority to adopt land use ordinances under LLUPA, and a reasonable basis for confusion about the state's implied pre-emption of the field. Here, the board had no legal authority to issue a permit for a use that was not conditionally permitted by the terms of the Ordinance, and there was no basis for confusion about what Section 67-6512 and Section 1E said. An agency that is confused about statutory duties would seek a legal opinion from its attorney, not an illogical analysis from its zoning administrator that

conflicts with legal principles and Ordinance provisions. Those actions avoid statutory duty.

Like Fischer v. City of Ketcham, supra, the board improperly ignored statutory requirements, and acted without authority in the face of clear provisions. The board also engaged in the unlawful procedures discussed above, violated competitive bidding laws, conflict of interest laws, and retaliated against respondents for exercising their constitutional rights. The District Court's finding that the board's overall actions warrant the determination the board acted without a reasonable basis in fact or law is fully supported by the record, and should be upheld.

J. RESPONDENTS SHOULD BE ENTITLED TO RECOVER ATTORNEY FEES AND COSTS ON APPEAL.

Respondents are entitled to recover attorney fees and costs on appeal pursuant to I.C. § 12-117 and I.A.R. 41. The District Court awarded attorney fees pursuant to I.C. 12-117 after determining that the county acted without a reasonable basis in fact or law. In addressing the purpose of I.C. 12-117, the court stated, in Reardon v. City of Burley, 140 Idaho 115 (2004), that:

> The purpose of I.C. § 12-117 is two-fold. First, it serves as a deterrent to groundless arbitrary agency action; and [second] it provides a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges for attempting to correct mistakes agencies never should have made.

After upholding the District Court's award of atorney fees, the Idaho Supreme Court then awarded Magic Valley (a respondent along with Reardon) attorney fees on appeal holding that the two-part test of I.C. 12-117 applies on appeal. The Court did not, however, require Magic Valley to establish that the city or county acted without a reasonable basis in fact by bringing the appeal. In Reardon, the court noted that the county's ability to make and enforce local regulations was dependent on the fact that the regulations were not in conflict with the general laws of the State of

Idaho. In the instant case the county enacted chapter 7, Section 1E in December, 2001 at a point in time after the legislature repealed similar language in the earlier version of I.C. 67-6512.

In the instant case the county alleges that it was merely following its Ordinance. This was the same argument asserted by Bonner County in County Residents Against Pollution, et al. v. Bonner County, supra at p.42. In that case, the Idaho Supreme Court upheld the District Court's award of attorney fees and, because the Supreme Court also found that the county acted without a reasonable basis in fact or law, awarded attorney fees on appeal to respondents.

The District Court correctly focused on the overall action of the agency when making a decision to award attorney fees. Rincover v. State Dep't of Fin., 129 Idaho 442 (1996). In Rincover, the Supreme Court reversed a denial of attorney fees and remanded the matter back to the District Court for determination of attorney fees. Of interest was the fact that the Supreme Court instructed the District Court to award attorney fees on appeal if attorney fees were awarded at the District Court level.

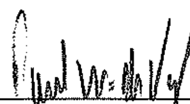
As a result of these rulings, it seems clear that, should this Court uphold the District Court's award of attorney fees, it follows that this Court should award respondents attorney fees on appeal even if the appeal were not brought frivolously. The rationale behind the award of attorney fees, to provide a remedy for persons who have borne unfair and unjustified financial burdens attempting to correct mistakes agencies never should have made, applies equally as well at the appellate level as it does at the District Court level.

CONCLUSION

For all the reasons stated above, the District Court decision should be affirmed. The

matter should not be remanded because the board's actions violate a state statute and its own ordinance. It would be impossible for respondents to have a fair hearing on the gravel pit issue before any member of the board of commissioners.

Respectfully submitted,



Paul William Vogel
Attorney for Plaintiffs-Respondents

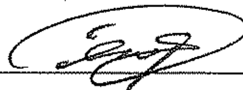
CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of October, 2008, I caused to be served a true and correct copy of the foregoing RESPONDENTS' BRIEF via the U.S. first class mail, postage prepaid, addressed to:

Janet D. Robnett
Paine Hamblen, LLP
P.O. Box E
Coeur d'Alene, ID 83816

and via hand delivery to:

Philip H. Robinson
Louis E. Marshall III
Bonner County Civil Attorney
Courthouse Mail

By: 

for Paul William Vogel
Attorney for Respondents

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CHAPTER 8: NON-CONFORMING USES

Section 1: General: At the effective date of this ordinance, certain lots, buildings, structures and uses of land which have been created, constructed or established may not meet the requirements of this ordinance for the zone district in which they are located. It is the intent of this ordinance to allow the continuation of non-conforming uses, but to prevent the expansion of such non-conformity.

Section 2: Non-Conforming Lots of Record:

A. In any zone district, where a lot, parcel or tract of land is in legal existence on the effective date of this ordinance, and such lot is smaller than the minimum lot size required for that zone district, a non-conforming lot of record shall be deemed to exist. For the purpose of establishing the legal existence of a lot, parcel or tract of land, evidence may be presented that the lot, parcel or tract was legally created by plat, recorded deed, recorded warranty deed, recorded contract of sale or purchase agreement executed prior to the effective date of this ordinance.

B. In any zone district, any use by right or permitted use may be established on a non-conforming lot of record so long as the requirements for setbacks within the zone district are met. Any conditional use or special use which is proposed to be established on a non-conforming lot of record shall comply with the requirements of this ordinance.

C. In the agriculture/suburban, rural residential, residential and rural community/commercial zone districts, one (1) single family residential structure may be constructed or placed on any non-conforming lot of record as a permitted use. Such residential use shall not be deemed to be a non-conforming use so long as the requirements for setbacks within the zone district are met.

Section 3: Non-Conforming Structures:

A. A structure which is not in conformance with the requirements of this ordinance due solely to the purpose for which the structure is used shall be deemed a non-conforming use subject to the provisions of Section 4, below.

B. A structure which is not in conformance with the requirements of this ordinance because of its physical placement on a parcel of land so that it cannot meet setback requirements shall be deemed a non-conforming structure and shall not be expanded, enlarged or structurally altered in such manner as to increase the non-conformity. Should a non-conforming structure be destroyed, any replacement structure shall meet the setback requirements of the zone district in which it is located.

Section 4: Non-Conforming Uses:

A. Where a use of land and/or structures are lawfully in existence on the effective date of this ordinance, and are not in compliance with the requirements herein, it shall be deemed a non-conforming use. Non-conforming uses shall not be expanded or altered in a manner which would increase the non-conformity.

B. No structure devoted to a non-conforming use shall be enlarged, extended or structurally altered in a manner that would increase the non-conformity.

Section 5: Extension of Non-Conforming Use: A nonconforming use may be re-established or altered by obtaining a variance following the procedures set forth at Chapter 9 of this ordinance.

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CHAPTER 9: VARIANCES

Section 1: General: Variances are special grants of relief from any specific provision of this ordinance provided:

A. Special circumstances of the property, including the shape, size, topography, location or surroundings of the property make it unsuited for uses established in the zone district in which it lies.

B. The variance request does not constitute a grant of special privilege inconsistent with limitations placed on similarly situated properties in the same zone district.

C. The variance requested will not be materially detrimental to the public welfare or injurious to property or improvements in the vicinity.

Section 2: Variance for Waiver of Violation: In the event that a building, structure or use is erected or established in good faith and with intent to comply with the provisions of this ordinance, and is later determined not to comply, the planning and zoning commission may grant a variance for waiver of violation. In granting a variance for waiver of violation, the commission may:

A. Grant a variance from required setback, lot size or other such specific provision as may eliminate the violation.

B. Impose conditions or restrictions upon the variance as will assure that further violations do not occur or to prevent or abate any nuisance which may be imposed.

Section 3: Applications for Variance

A. Applications for variance will be made on forms provided by the zoning administrator and will include:

1. A description of the variance being sought.
2. A site plan showing property boundaries and the location of structures, access, parking and other details necessary to reflect the nature of the variance sought.
3. An application fee as established at Chapter 17.

B. Upon receipt of a completed application for variance, the zoning administrator shall schedule a public hearing on the next available regular meeting agenda of the planning and zoning commission, allowing for public notification established at Chapter 16.

C. The commission shall conduct a public hearing on the application in accordance with the procedures set forth at Chapter 16.

D. Upon completion of the public hearing, the commission may:

1. Approve the application.
2. Approve the application with conditions.
3. Table the application pending modifications or receipt of additional information.
4. Deny the variance application. If the commission denies the variance application, the applicant shall be provided the reasons for denial, in writing, and actions, if any, which could be taken to obtain approval. In the event of denial, the applicant has the right of appeal pursuant to the provisions of Chapter 11 of this ordinance.