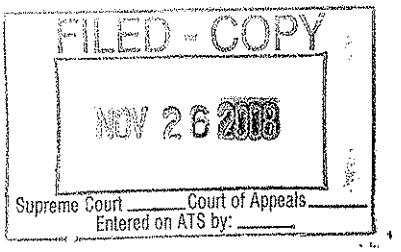
11-26-2008

Gardiner v. Boundary County Bd. Of Com'rs Appellant's Reply Brief Dckt. 35007

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, Defendants/Appellants, and TUNGSTEN HOLDINGS, INC., a Montana corporation, Intervenor.	SUPREME COURT NO. 35007 District Court No. CV-2006-339



INTERVENOR'S REPLY

Appeal from the District Court of the First Judicial District for Boundary County
Honorable James R. Michaud, Senior District Judge, presiding.

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Intervenor, Tungsten Holdings, Inc., submits the following in reply to the Brief of Respondents, Patrick and Ada Gardiner.

I. ISSUES PRESENTED

As the challengers of the decision by the Boundary County Board of Commissioners, the Gardiners must first show the Board committed error under I.C. 67-5279(3), and secondly that such error has prejudiced a substantial right of that party:

> [T]he Court shall affirm the zoning agency's action unless the Court finds that the agency's findings, inferences, conclusions or decisions are: (a) in excess of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. *(Citations omitted).* The party attacking the agency's action must first illustrate that it erred in the manner specified therein and must then show that a substantial right of the party has been prejudiced. *Neighbors v. Valley County, ____ Idaho ____,* 176 P.3d 126, 131 (2007).

The Gardiners' three (exclusive of their claim for attorney's fees and costs) "Additional Issues Presented on Appeal", and eight separate points of "Argument", can be distilled into the following:

A. Was the decision of the Board in violation of constitutional or statutory provisions?

B. Was the decision of the Board made upon unlawful procedure?

C. Was the decision of the Board supported by substantial evidence in the record?

II. ARGUMENT

A. The approval of the special use permit allowing the operation of a gravel pit and rock quarry on the Tungsten property was consistent with applicable constitutional and statutory provisions.

1. Idaho Code 67-6512 allows counties to include provisions in their zoning ordinances for processing and approval of applications for uses not otherwise specified.

Idaho Code § 67-6512(a) provides:

> **67-6512. Special use permits, conditions and procedures.**
>
> (a) **As part of a zoning ordinance** each governing board may provide by ordinance adopted, amended, or repealed in accordance with the notice and hearing procedures provided under section 67-6509, Idaho Code, for the **processing** of applications for special **or** conditional use permits. A special use permit **may be** granted to an applicant if the proposed use is **conditionally permitted** by the terms of the ordinance, **subject to conditions** pursuant to specific provisions of the ordinance, subject to the ability of political subdivisions, including school districts, to provide services for the proposed use, and when it is **not in conflict with the plan**. *(Emphasis added).*

Analysis of a statute or ordinance begins with the literal language of the enactment. *Friends of Farm to Market v. Valley County*, 137 Idaho 192, 197, 46 P.3d 9, 14 (2002), (citations omitted).

A clear and simple reading of I.C. § 67-6512, taken as a whole, reflects the legislature's recognition that not all potential uses of land can be neatly categorized into one zone or another. Some more intensive land uses could be considered and allowed if conditions of approval make them compatible with other uses allowed in a particular zone. Semantic gymnastics aside, I.C. § 67-6512(a) appears to use "special" and "conditional" interchangeably.[1] The purpose, though, remains the same -- to allow counties to adopt ordinances that allow for the processing of other

[1] Interestingly, the use of the phrase "conditional use permits," appears only in subsection (a) of §67-6512. Throughout the remainder of that section, reference is only made to "special use permits," including subsection (d), which enumerates the kinds of conditions which may be imposed on the granting of a "special use permit."

than specifically identified uses (whether called "special" or "conditional"), and approving such "special use permits" with conditions if needed to mitigate the potential for adverse impacts on other development. I.C. § 67-6512(d).

2. Boundary County did that.

Four (4) categories of uses are allowed in the Agriculture/Forestry zoning district by Boundary County ordinance: (1) uses by right, (2) permitted uses, (3) conditional uses, and (4) special uses. (Zoning Ordinance Chapter 7, Section 1). Chapter 7, Section 1.E then goes on to provide that, "Any use not specified as a use by right or conditional use is eligible for consideration as a special use, subject to the provisions of Chapter 13." To put it another way, otherwise unscheduled uses are to be processed as applications for special use permits. The Board may then impose conditions on the granting of a special use permit "to minimize potential adverse impacts created by the special use. In other words, special use permits are "conditionally permitted" under the Zoning Ordinance. (*Id.*).

With its adoption of the language in Chapter 7, Section 1.E, Boundary County enabled consideration of unspecified uses which may not have been anticipated at the time of adoption of the Zoning Ordinance, or which could be allowed with conditions of use and operation to mitigate potential adverse impacts on neighboring properties, and allow them to be "conditionally permitted" in accordance with Chapter 13. The language used in the Zoning Ordinance for unspecified or unanticipated uses is comparable to that used in many jurisdictions' zoning ordinances, and consistent with a fair reading of the intent of Idaho Code § 67-6512, leaving room for future uses and needs which could be accommodated in a variety of zoning

districts.

3. An application for a gravel pit and rock quarry is appropriately considered as an application for a "special use" in the Agriculture/Forestry zone under the Boundary County Zoning Ordinance and Idaho Code § 67-6512.

Gravel pits and rock quarries are not listed anywhere as a "conditional use", or any other kind of use for that matter, in the Zoning Ordinance. Nevertheless, mining, particularly non-metallic mining for gravel and sand, is recognized in the Boundary County Comprehensive Plan as an important natural and economic resource. (AR, pp. 0252 – 0254). It is unreasonable to suggest that in the absence of specific mention of gravel pits and rock quarries in the Zoning Ordinance, they simply are not allowed, specially, conditionally or otherwise, anywhere in Boundary County.

The Board's application and interpretation of its Zoning Ordinance is not only entitled to a strong presumption of validity, it is fair, reasonable and in accordance with Idaho Code § 67-6512. The Special Use Permit was "conditionally permitted" by the Board; subject to restrictions and conditions imposed pursuant to Chapter 13 of the Zoning Ordinance. Under these circumstances, the decision of the Board was not "in excess of constitutional or statutory provisions," (I.C. 67-5279(3)(a)), and therefore should be affirmed on appeal.

4. The Board's decision was in conformance with the Boundary County Comprehensive Plan.

The Gardiners' argument that the Board's decision is inconsistent with the County's Comprehensive Plan merely reflects their disagreement with the Board's conclusion that

Tungsten's project would not unreasonably interfere with the neighbors, and that the conditions of approval are sufficient to mitigate any potential adverse impacts. Their argument also seems to reflect a belief that they are entitled to live without *any* interference or impacts from their neighbors.

In fact, the policy of the County, reflected in its Comprehensive Plan, is to "advocate the rights of property ownership, recognizing the primacy of private property rights and the sanctity of private property ownership as enunciated in the Fifth Amendment of the United States Constitution and Articles 1 and 14 of the Idaho Constitution." (AR, p. 0243). Such advocacy of course applies to all property owners, not just applicants, and not just their opponents.

In this case, there are competing private property interests. The special use being applied for could be considered to be more intensive than other permitted uses in the Agriculture/Forestry zone (although consider the potential intensity of historically "agricultural" and "forestry" activities – logging, harvesting, transporting, etc.). As such, the proposed use is subject to "restrictions, requirements and conditions more stringent than those applying generally within the zone district." (AR, p. 0258). The proposed use may not create noise, traffic, odors, dust or other nuisances *substantially in excess of permitted uses within the zone district.* (Zoning Ordinance Chapter 13, Section 4.C.4, AR p. 0259).

The Board determined that Tungsten's proposed use is in conformance with the Comprehensive Plan, as detailed in the Findings and Decision. (AR, pp. 0226-0227). Its determination in that regard reflects a balancing of the competing interests inherent in an analysis of compliance with a comprehensive plan, and should be affirmed on appeal

5. The Gardiners did enjoy the benefit of an impartial tribunal.

Because decisions in zoning matters are quasi-judicial in nature, they are subject to due process constraints. The Due Process Clause entitles a person to an "impartial and disinterested tribunal." *Turner v. City of Twin Falls*, 144 Idaho 203, 159 P.3d 840, 846, citing *Eacret v. Bonner County*, 139 Idaho 780, 784, 86 P.3d 494, 498 (2004). "When acting upon a quasi judicial zoning matter, a governing board is neither a proponent nor an opponent of the proposal at issue, but sits instead in the seat of a judge." *Id.*, citing *Lowery v. Board of County Commissioners for Ada County*, 115 Idaho 64-71, 764 P.2d 431, 438 (1988). "Impartiality", however, does not necessarily mean "lack of preconception." Instead, it means the lack of bias as to either party, in order to assure the "equal application of the law." *Id.*, citing *Republican Party of Minnesota v. White*, 536 U.S. 765, 775-76, 122 S.Ct. 2528, 2535, 153 L.Ed2d 694, 705 (2002).

In their Brief, the Gardiners point to several "layers of pre-hearing bias", which they assert deprived them of an impartial tribunal. They impute nefarious motives to the Board and the County's road and bridge supervisor, Jeff Gutshall, from what appears to be nothing more than Mr. Gutshall's attempt to identify "a small rock source up north." (AR, p. 0139). They decry the Commissioners' support for their road supervisor in the face of heated, and what they felt to be unjustified, criticism leveled at him from an opponent to the project (Mrs. Ponsness), who had attempted to herself develop a competing pit and sell rock to the County. (AR, pp. 0139-0141). And, despite the stipulation to remand to cure possible taint of the proceedings by virtue of Commissioner Dan Dinning's participation in the 2005 proceedings, they now argue the

taint remained simply because the remaining Board members reached the same conclusion.

It would seem that Mr. Gutshall's communications and efforts were legitimately within the scope of his duties as the County road and bridge supervisor. More importantly, they were disclosed as a matter of record. The Gardiner's knew about them – as evidenced by the fact that they are now arguing about them.

By the same token, Commissioner Dan Dinning did NOT participate in any way, shape or form in the 2006 proceedings. The Board did hold a new hearing. While much of the testimony provided was redundant, all of the testimony and evidence were considered in its adoption of the Findings and Decision.

Under the circumstances, none of the Gardiners' "layers of pre-hearing bias," either singly or collectively, support their claim of having been denied an "impartial tribunal."

6. The Board's decision did not constitute unlawful "spot zoning."

The Gardiners further argue that the granting of the special use permit constituted an illegal, "type two" spot zoning. As discussed in *Evans v. Teton County*, 139 Idaho 71, 76-77, 73 P.3d 84, 89-90 (2003):

> A claim of "spot zoning" is essentially an argument the change in zoning is not in accord with the comprehensive plan. There are two types of "spot zoning." Type one spot zoning may simply refer to a rezoning of property for a use prohibited by the original zoning classification. The test for whether such a zone reclassification is valid is whether the zone change is in accord with the comprehensive plan. Type two spot zoning refers to a zone change that singles out a parcel of land for use inconsistent with the permitted use in the rest of the zoning district for the benefit of an individual property owner. This latter type of spot zoning is invalid. (Citations omitted).

Tungsten, of course, did not apply for a *change* in zoning. It applied for a special use permit as allowed in the zoning district, to which the Board appended conditions and restrictions to mitigate potential adverse impacts, and to ensure that the use would not create noise, traffic, odors, dust or other nuisances *substantially in excess of permitted uses within the zone district.* (Zoning Ordinance Chapter 13, Section 4.C.4, AR p. 0259). This was not a re-zoning or a spot zoning. Carried to its logical extreme, the Gardiners' argument would preclude the permitting of any special or conditional use not specifically identified in a zoning ordinance, and regardless of its compatibility, with or without conditions, with outright permitted uses in the zone.

7. The Board's "Findings and Decisions" satisfy the requirements of Idaho Code § 67-7535.

The Gardiners, disagreeing with the outcome, argue that the Board's decision lacks the requisite findings and conclusions to support their decision. Idaho Code § 67-6535 requires that the approval or denial of a land use application be in writing and:

> Accompanied by a reasoned statement that explains the criteria and standards considered relevant, states the relevant contested facts relied upon, and explains the rationale for the decision based on the applicable provisions of the comprehensive plan, relevant ordinance and statutory provisions, pertinent constitutional principles and factual information contained in the record.

I.C. 67-6535(b).

The Board's Findings and Decision entered August 7, 2006 demonstrate that the Board did apply the criteria prescribed by the law, and that they did not act arbitrarily or on an ad-hoc basis. *Workman Family Partnership v. City of Twin Falls*, 104 Idaho 32 (1982). When considering the proceedings as a whole, in light of practical considerations and an emphasis on

fundamental fairness (I.C. § 67-6535(c)), the Findings and Decision approving the Special Use Permit are in conformance with the requirements of Idaho Code.

The Board's findings specifically draw attention to the concerns expressed by surrounding landowners, most notably regarding the potential adverse effects of blasting on surrounding water wells and the Trow Creek Water Association, as well as the increased dust and noise. Taking those factors and others into consideration, the Board imposed restrictions and conditions to mitigate the effects of the operations on the surrounding public. As required, the Board adopted findings and placed them in writing, set forth reasons for their decisions, and referenced the applicable county ordinance sections. Under these circumstances, the Board's Findings and Decision were wholly in accordance with I.C. § 67-6535, as well as the Zoning Ordinance.

B. The decision of the Board was reached after following lawful procedure.

The Gardiners urge this Court to conclude, as the District Court did, that the Board had improperly failed to hold Tungsten to the "burden of persuasion" as to all of the requirements for a special use permit. The District Court had cited *Fischer v. City of Ketchum*, 141 Idaho 349, 109 P.3rd 1091 (2005), which we know involved an incomplete application, and which relied upon *Howard v. Canyon County Bd. Of Comm'rs*, 128 Idaho 479, 481, 015 P.2d 709, 711 (1996) for the proposition that, "The burden of persuasion is upon the applicant . . . to show that all of the above requirements were satisfied." Of course, the *Howard* case involved a Canyon County ordinance that specifically provided that the person or persons requesting relief under the Zoning Ordinance shall have the burden of persuasion. *Id.*

In the instant case, there is no similar provision in the Boundary County Zoning Ordinance. The issue is not who carried the burden of persuasion, but whether there is substantial evidence in the record to support the decision. The Gardiners' arguments, again, merely reflect their disagreement with the outcome -- essentially their disagreement with the Board's determinations as to the weight of the evidence on questions of fact. This Court, of course, "shall not substitute its judgment for that of the [Board] as to the weight of the evidence on questions of fact." I.C. § 67-5279(1).

C. The decision of the Board is supported by substantial evidence in the record.

Despite citation to numerous examples of disagreements between the Gardiners and their consultant, and the applicant and its supporters, the Gardiners argue in their brief that there was no evidence whatsoever to support the Board's decision. In reality, they're arguing that they and their witnesses were more credible than Tungsten and its supporters. In other words, they want this Court to substitute its judgment for that of the Board, on the weight of the evidence as to issues of fact.

The Gardiners further argue that there is no evidence to support the finding that there are "terms and conditions" which mitigate the potential for negative adverse impacts. This argument is puzzling in light of not only the applicant's own application, defining the scope of the operations, but also the list of eleven (11) conditions of approval which the Board found would be "sufficient . . . to assure public safety and to mitigate potential adverse effects":

> (1) All surface mining operations, including crushing, loading, material storage, etc., shall be conducted on the site and shall not encroach onto County Road 46 except as normal traffic. Access shall be by private drive

approved by Boundary county Road and Bridge.

(2) Dust abatement measures shall be applied as needed so as to minimize dust.

(3) All operations shall follow "Best Management Practices for Mining in Idaho," published by the Idaho Department of Lands November 16, 1992, or as updated.

(4) Blast [sic] shall occur on no more than twelve (12) days per calendar year. Blasting shall be conducted on a weekday between the hours of 8 a.m. and 5 p.m. Boundary County Planning and Zoning and property owners within five hundred (500) feet of the boundaries of parcels RP65N01W172211A and RP67N01W200012A shall be notified, in writing, at least fifteen (15) days in advance of the proposed date of blasting, specifying the date, time and length of time the blasting is expected to occur.

(5) All blasting shall meet OSHA requirements established at 29 CFR Subpart U.

(6) Crushing operations shall be allowed from 8 a.m. to 5 p.m. Monday through Friday between the dates of February 15 and May 2 each year.

(7) Prior to establishing the permitted surface mining operation, the applicant shall comply with all requirements established by the Idaho Department of Lands, to include filing a reclamation plan and posting the required bond. A copy of those documents shall be provided [sic] the Boundary County Planning and Zoning office prior to the onset of mining operations.

(8) The Planning and Zoning office shall be notified, in writing, when the reclamation bond is redeemed or in the event bond is forfeited. This special use permit shall lapse upon bond redemption or forfeiture, and no further mining operations may take place without issuance of a new special use permit.

(9) The seven acre portion of parcels RP65N01W172211A and RP65N01W2000012A depicted in the site plan of application SUP 0505 shall be formally identified by record of survey filed and recorded with the Recording Clerk of Boundary County.

(10) Any person or persons employed to conduct blasting operations shall be notified prior to blasting of concerns expressed during the hearing process

over the potential for damage to area water systems, including Trow Creek Water Association.

(11) Any person employed to conduct blasting operations [sic] be qualified, licensed and insured.

(AR, pp. 0232-0233).

Certainly if the Gardiners thought these conditions were at all specious, ill-defined, or unenforceable, they were free to suggest additional conditions for consideration during the more than two (2) year course of these proceedings.

The substance of the Gardiners' arguments seem to be focused on two (2) issues: (1) the potential impact of blasting and crushing operations on their black Angus cattle operations, and (2) the potential impact of blasting on their wells.

With respect to the impact of the operations on their cattle, the Gardiners presented scholarly articles (all hearsay of course), to the effect that stress is bad for cattle. (AR, pp. 0089-0107). Mr. Gardiner opined that "blasting and the constant noise of a rock crusher would disrupt the synchronization process for a successful embryo transfer and artificial insemination program, and would make it impossible for [them] to stay in business." (AR, p. 0109). The Gardiners were merely speculating, apparently, that the blasting and crushing would cause noise and vibration to travel more than one-half (1/2) mile (just to their home from the pit site), across two major ridge lines (Amendment to Transcript of July 24, 2006 hearing, p. 7), and still retain sufficient intensity to actually stress their cattle. To the contrary, Rick Dinning testified that it is physically impossible for the Gardiners to see the pit from their property due to the two (2) major ridge lines in between. (Amendment to Transcript of July 24, 2006 hearing, p. 7). He also

testified that through the one drilling and shooting in the spring of 2006, the sound was "surprisingly quiet and muffled", and described by one of the licensed experts as "a series of 22 caliber primers going off with an underground rumble" (in fact, that's exactly what it sounded like to him). *Id.* George Hays, a third generation cattle rancher in Boundary County, and the President of the Mission Creek Water Association, testified that blasting for highway improvements near Mission Creek was determined not to have caused disruptions to the Mission Creek Water Association's wells, *Id,* (Clerk's Transcript July 26, 2005 Hearing, pp. 7-8). Mr. Hays further testified that the blasting appeared to be nothing more than a "muffled thump" – the cows never looked up from eating their grass." *Id.*

With respect to the potential impact on the Gardiners' wells, the Gardiners did apparently retain a hydrologist, Ms. Uhlman. Her report to the Gardiners is in the record. (AR pp. 0079-0084). Of course, Ms. Uhlman did not attend the hearings in person, where the Board could assess her credibility or even ask questions. It appears that the primary risk, from Ms. Uhlman's point of view, is to the Gardiner's irrigation well. Such risk from the pit excavation, would arise when the natural drainage from land surface would be lowered from 1,860 feet to 1,760 feet mean sea level on the western-most boundary. (AR p. 0083). However, this was contrary to Rick Dinning's findings and observations – not having seen water running out of other rock faces (as where the railroad was cut), and the fact that, based upon the well driller's report, the bottom of the pit would still be 33 to 53 feet above the water elevation in the well. (Amendment to Transcript of July 24, 2006 hearing, p. 7).

The Board also reviewed Ms. Uhlman's report, and concluded that, based on the distance

of the pit to those wells, testimony from the applicant, and the permit and reclamation plan under the jurisdiction of the Idaho Department of Lands, it was "reasonable to determine that direct threat to these wells is a remote possibility, and the threat can be further mitigated with additional restriction requiring that those conducting the blasting be licensed, certified and insured." (*Findings and Decision p. 9,* AR, pp. 0234).

There is conflicting testimony on these and other issues pertinent to the Board's Findings and Decision. The Board weighed the evidence, found its facts, and made a decision. Again, this Court is not to substitute its judgment for that of the Board, and should defer to the Board's findings of fact unless they are clearly erroneous. *Neighbors v. Valley County,* 176 P.3d at 131. There is, furthermore, a strong presumption in favor of the validity of the actions of zoning authorities. *Id.*; *Howard*, 128 Idaho at 480. The decision of the Board in this matter is supported by substantial evidence in the record as a whole, and should be affirmed on appeal.

III. CONCLUSION

Tungsten Holdings, Inc. properly made application to Bonner County for a Special Use Permit allowing it to conduct a gravel pit and rock crushing operation on seven (7) of its three hundred thirty (330) acres near Porthill in Boundary County. Boundary County allows property owners to petition the County for a special use permit for uses which are not otherwise described or defined in the Zoning Ordinance, including gravel pits and rock quarries. The application was approved with conditions designed to minimize potential adverse impacts created by the special use. Not all potential adverse impacts are required to be eliminated, but only minimized to ensure the proposed special use will not create noise, traffic, odors, dust or other nuisances

substantially in excess of permitted uses within the zone district. Boundary County's Zoning Ordinance is in accordance with the authority granted to it under Idaho Code § 67-6512.

The Board's decision to grant the Special Use Permit is supported by substantial evidence in the record as a whole. The Board's Findings and Decision includes a reasoned statement that explains the criteria and standards considered relevant, states the relevant contested facts relied upon, and explains the rationale for the decision based on the applicable provisions of the comprehensive plan, relevant ordinance and statutory provisions, pertinent constitutional principles and factual information contained in the record, in conformance with Idaho Code § 67-6535.

The decision of the Board of County Commissioners for Boundary County granting *Tungsten Holdings, Inc. a Special Use Permit should be affirmed.*

DATED this 21st day of November, 2008.

PAINE HAMBLEN LLP

By: Janet D. Robnett
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Attorney for Intervenor

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of November, 2008, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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