6-18-2008

Gardiner v. Boundary County Bd. Of Com'rs Clerk's Record v. 1 Dckt. 35007

LAW CLERK

VOLUME I of II

IN THE

SUPREME COURT

OF THE

STATE OF IDAHO

Patrick Gardiner and Ada Gardiner

husband and wife

Plaintiffs *and*

Respondents

VS.

Boundary County Board of

Commissioners

Defendants *and*

Appellants

Appealed from the District Court of the First *Judicial District of the State of Idaho, in and for* Boundary *County*

Hon. James R. Michaud *District Judge*

Philip H. Robinson

Attorney X *for Appellant*

Paul William Vogel

Attorney for Respondent

FILED - COPY

Filed this _____ *day of* JUN 18 2008

_____ *Clerk*

Supreme Court _____ Court of Appeals _____

Entered on ATS by: _____

By _____ *Deputy*

Selkirk Press, Inc.

IN THE SUPREME COURT OF THE STATE OF IDAHO

PATRICK GARDINER AND ADA GARDINER, husband and wife	)	SUPREME COURT NO. 35007
Plaintiffs/Respondents,	)	District Court No. CV 2006 339
vs.	)	
BOUNDARY COUNTY BOARD OF COMMISSIONERS,	)	
Defendants/Appellants.	)	

CLERK'S RECORD ON APPEAL

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

HON. JAMES R. MICHAUD
Senior District Judge

Paul William Vogel
PO Box 1828
Sandpoint, Idaho 83864

ATTORNEY FOR APPELLANT

Philip H. Robinson
PO Box 1405
Sandpoint, Idaho 83864

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

CLERK'S INDEX

First Judicial District Court - Boundary County

ROA Report

Case: CV-2006-0000339 Current Judge: Steve Verby

Patrick Gardiner, etal. vs. Boundary County Commissioners

Patrick Gardiner, Ada Gardiner vs. Boundary County Commissioners

Date	Code	User		Judge
9/11/2006	NCOC	SELENA	Petition for Judicial Review	Steve Verby
		SELENA	*Filing*: R2 - Appeals And Transfers For Judicial Review To The District Court Paid by: Paul Vogel Receipt number: 0003198 Dated: 9/11/2006 Amount: $78.00 (Check)	Steve Verby
	APER	SELENA	Plaintiff: Gardiner, Patrick Appearance Paul W. Vogel	Steve Verby
	APER	SELENA	Plaintiff: Gardiner, Ada Appearance Paul W. Vogel	Steve Verby
9/19/2006	ORDR	SELENA	Order Governing Judicial Review	Steve Verby
9/25/2006	NOTC	SELENA	Notice of Lodging of Transcript and Record	Steve Verby
11/2/2006	MISC	SELENA	Objection to Amended Notice of Lodging of Transcript and Record	Steve Verby
11/3/2006	MISC	SELENA	Supplemental Objection to Amended Notice of Lodging of Transcript and Record	Steve Verby
11/21/2006	STIP	SELENA	Stipulation as to Record	Steve Verby
3/12/2007	BONT	TACIE	Bond Posted for Transcript (Receipt 864 Dated 3/12/2007 for 302.25)	Steve Verby
	ME	TACIE	*Minute Entry*Re: Transcript/Record Bond	Steve Verby
3/13/2007	STIP	SELENA	Stipulation Re: Settlement of Record	Steve Verby
3/14/2007	NOTC	SELENA	Amended Notice of Lodging of Transcript and Record	Steve Verby
	NOTC	SELENA	Amended Notice of Lodging of Transcript and Record	Steve Verby
	NOTC	SELENA	Amended Notice of Lodging of Record	Steve Verby
	MISC	SELENA	Administrators Record	Steve Verby
	MISC	SELENA	Administrators Record	Steve Verby
	MISC	SELENA	Amendment to Record	Steve Verby
	TRAN	SELENA	Agency's Transcript and Certified Copy of Minutes of 8/7/06	Steve Verby
	TRAN	SELENA	Agency's Transcript and Certified Copy of Commissioner Minutes from 7/24/06 and CD of 7/24/06 AND 8/7/06 Hearings Before Commissioners	Steve Verby
	MISC	SELENA	Amendment to Transcript	Steve Verby
	MISC	SELENA	Supplemental Amendment to Transcript	Steve Verby
3/15/2007	NOTC	SELENA	Notice of Filing of Transcript and Record	Steve Verby
4/4/2007	BNDV	TACIE	Bond Converted (Transaction number 115 dated 4/4/2007 amount 297.00)	Steve Verby
	BNDE	TACIE	Transcript Bond Exonerated (Amount 5.25)	Steve Verby
4/17/2007	MEMO	TACIE	Memorandum In Support Of Appellants' Petition For Judicial Review	Steve Verby
6/1/2007	MEMO	TACIE	Memorandum In Opposition Of Appellant's Petition For Judicial Review	Steve Verby

First Judicial District Court - Boundary County

ROA Report

Case: CV-2006-0000339 Current Judge: Steve Verby

Patrick Gardiner, etal. vs. Boundary County Commissioners

Patrick Gardiner, Ada Gardiner vs. Boundary County Commissioners

Date	Code	User		Judge
7/23/2007	HRSC	TACIE	Hearing Scheduled (Oral Argument 09/06/2007 11:30 AM)	Steve Verby
7/25/2007		TACIE	Notice Of Hearing	Steve Verby
8/1/2007	CONT	TACIE	Continued (Oral Argument 10/25/2007 01:30 PM)	Steve Verby
		TACIE	Amended Notice Of Hearing	Steve Verby
	REQT	TACIE	Request For Judicial Notice	Steve Verby
	MEMO	TACIE	Memorandum Of Points And Authorities	Steve Verby
10/25/2007	INHD	TACIE	Hearing result for Oral Argument held on 10/25/2007 01:30 PM: Interim Hearing Held	James R. Michaud
	*LOG	TACIE	#7-1-139	James R. Michaud
1/4/2008	MEMO	TACIE	Memorandum And Opinion And Order Setting Aside Special Use Permit	James R. Michaud
	CDIS	TACIE	Civil Disposition entered for: Boundary County Commissioners, Defendant; Gardiner, Ada, Plaintiff; Gardiner, Patrick, Plaintiff. order date: 1/4/2008	James R. Michaud
1/14/2008	MEMO	TACIE	*Memorandum And Affidavit Re: Attorney Fees And Costs*	Steve Verby
1/24/2008	MISC	TACIE	Objection To Attorney Fees And Costs	Steve Verby
1/30/2008	MEMO	DARMSTRONG	*Memorandum and Argument in Support of* Petitioner's Fee and Cost Memorandum	Steve Verby
1/31/2008	DPHR	JAMIE	Hearing result for Oral Argument held on 01/31/2008 08:30 AM: Disposition With Hearing Respondent's Objection to Attorney Fees and Costs	Steve Verby
	*LOG	JAMIE	Bonner County Minutes-No CD	Steve Verby
2/1/2008	NOTH	JAMIE	Notice Of Hearing	Steve Verby
	HRSC	JAMIE	Hearing Scheduled (Oral Argument 01/31/2008 08:30 AM) Respondent's Objection to Attorney Fees and Costs	Steve Verby
2/15/2008	APSC	TACIE	Appealed To The Supreme Court	Steve Verby
	NOTC	TACIE	Notice Of Appeal	Steve Verby
	MEMO	JAMIE	Attorney Fee Memorandum	Steve Verby
2/22/2008	ORDR	DARMSTRONG	Order (Amended Notice of Appeal)	Steve Verby
3/5/2008	NOTC	DARMSTRONG	Amended Notice of Appeal	Steve Verby
4/4/2008	MEMO	TACIE	Memorandum Opinion And Order Setting Aside Special Permit (Corrected)	James R. Michaud
	ORDR	TACIE	OrderCorrecting Memorandum Opinion And Order	James R. Michaud
4/16/2008	MEMO	DARMSTRONG	Memorandum Opinion and Order Awarding Attorney Fees and Costs	Steve Verby

ORIGINAL

PAUL WILLIAM VOGEL, P.A.
ATTORNEY AT LAW
P.O. BOX 1828
SANDPOINT, ID 83864
PHONE (208) 263-6636
FAX (208) 265-6775
ISB NO. 2504

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

PATRICK GARDINER and ADA GARDINER, husband and wife, Petitioners, vs. BOUNDARY COUNTY BOARD OF COMMISSIONERS, Respondent.	CASE NO. CV-2006- 339 PETITION FOR JUDICIAL REVIEW Fee Category: R(2) Fee: $78.00

Patrick Gardiner and Ada Gardiner, husband and wife, the above-named Petitioners, through their attorney, Paul William Vogel, file this Petition for Judicial Review and in support thereof state and allege as follows:

1. The name of the agency for which judicial review is sought is the Boundary County Board of Commissioners.

2. This Petition is taken to the District Court of the First Judicial District in and for Boundary County, Idaho.

Paul William Vogel, P.A.
Attorney-at-Law
120 East Lake Street
Suite 313
P.O. Box 1828
Sandpoint, ID 83864-0903
Ph: (208) 263-6636
Fax: (208) 265-6775

3. Judicial review is sought for a decision of the Boundary County Board of Commissioners approving an application for a Special Use Permit filed by Tungsten Holdings, Inc. The case contains a County designation of SUP 05-05.

The Boundary County Board of Commissioners conducted a public hearing on July 26, 2005. The hearing was continued until August 8, 2005. At hearing on August 8, 2005, the application was approved. Thereafter, Petitioners herein filed a Petition for Judicial Review under Boundary County Case No. CV-2005-380. Pursuant to an Order of Remand in Case No. CV-2005-380, filed May 30, 2006, the special use application and proceedings associated therewith were remanded to the Boundary County Board of Commissioners for a new public hearing. The new public hearing occurred on July 24, 2006. Thereafter, the matter was adjourned until August 7, 2006 at which time the Boundary County Board of Commissioners approved the application.

4. There was a public hearing before the Boundary County Board of Commissioners on July 27, 2006.

Additionally, on August 14, 2006, the Respondent Board of Commissioners adopted Findings of Fact and issued their decision.

The method of recording the hearings was by tape recording. The name and address of the person with possession of such recording is Michelle Wallace, Deputy Clerk, Boundary County Board of Commissioners, P.O. Box 419, Bonners Ferry, ID 83805.

5. Petitioners assert the following issues on judicial review:

A. The Board's actions were in violation of constitutional and statutory provisions in that:

1) The Respondent has not complied with the provisions of I.C. 67-6535 in that the Findings approved on August 14, 2006 do not state the relevant contested facts relied upon, and fail to explain 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.

2) The decision of the Boundary County Board of Commissioners is in violation of I.C. 67-6512 in that a Special Use Permit may be granted only if the proposed use is conditionally permitted by the terms of the zoning ordinance. Bonner County Zoning Ordinance, Chapter 7: Section 1, relating to agricultural/forestry zones, does not allow a gravel pit/rock quarry operation as a conditional use in said zone.

3) The decision of the Boundary County Board of Commissioners is in violation of I.C. 67-6512 in that said decision approving a Special Use Permit is in conflict with the Boundary County Comprehensive Plan as follows:

a. The approval of the special use application violates the Section I: Private Property Rights section of the Comprehensive Plan in that said approval interferes with the health and safety of Petitioners and said approval constitutes uncompensated deprivation of Petitioners' private property rights.

b. The approval of the Special Use Permit violates Section IV: Land Use in that said decision adversely impacts Petitioners' agricultural use of their property and thus said decision does not encourage agricultural enterprise. Said decision violates the commercial land use policy of Section IV on the basis that consideration has not been given to the impact the gravel pit/rock quarry operation has on the current uses of surrounding land, nor does it consider the impact on the flow of traffic in the area.

4) Pre-hearing comments by the Board of Commissioners violated Petitioners' procedural due process rights in that, prior to the public hearing before the Board, unidentified Commissioners stated confidence in the Road and Bridge Supervisor's support of the Special Use Permit and, further, expressed unhappiness with the proceedings before the Boundary County Planning and Zoning Commission.

5) Discussions between applicant Tungsten Holdings, Inc. and Boundary County's Road Supervisor, wherein the Road Supervisor initiated talks with the applicant about the prospect of obtaining rock from the Tungsten property, deprived Petitioners of a fair hearing and thus violated their procedural due process rights.

B. The decision of the Boundary County Board of Commissioners was made upon unlawful procedure in that:

1) The participation of the County's Road and Bridge Supervisor, Jeff Gutshall, in procuring the subject application and advocating for approval of the same, violates Petitioners' procedural due process rights.

2) Pre-hearing comments by the Board of Commissioners violated Petitioners' procedural due process rights in that, prior to the public hearing before the Board, unidentified Commissioners stated confidence in the Road and Bridge Supervisor's support of the Special Use Permit and, further, expressed unhappiness with the proceedings before the Boundary County Planning and Zoning Commission.

C. The decision of the Boundary County Board of Commissioners is arbitrary, capricious and an abuse of discretion on the basis that the deliberations undertaken by the Boundary County Board of Commissioners on August 7, 2006 did not constitute true

deliberations but, instead, consisted of a mere recitation of a decision that was prepared in writing, prior to deliberation, by unknown parties.

D. The decision reached by the Boundary County Board of Commissioners is not supported by substantial evidence on the record as a whole.

6. The substantial rights of the Petitioners have been prejudiced.

7. Pursuant to the Order of Remand in Boundary County Case No. CV-2005-380, the record on appeal shall consist of the record previously lodged with this Court in that action and any additional record developed as a result of the new proceedings. Accordingly, transcripts of the public hearing on July 27, 2006 and the Commissioners' meeting on August 14, 2006 are requested.

8. A. This Petition has been served upon the Boundary County Board of Commissioners.

B. The Boundary County Clerk has been paid the estimated fee for preparation of the transcripts.

C. The Clerk for the Boundary County Commissioners has been paid the estimated fee for preparation of the record.

9. Petitioners reserve the right to supplement their issues on appeal.

Dated this 8th day of September, 2006.

PAUL WILLIAM VOGEL
Attorney for Petitioners

CERTIFICATE OF DELIVERY

I hereby certify that on this 8th day of September, 2006, I delivered a true and correct copy of the foregoing PETITION FOR JUDICIAL REVIEW via U.S. first class mail, postage prepaid, addressed to:

John Topp, P.A.
P.O. Box 586
Kootenai, ID 83840

Boundary County Board of Commissioners
6452 Kootenai St.
Bonners Ferry, ID 83805

B Stout
Bonnie Stout

cc: Judge Verby 9-11-06

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

Patrick Gardiner and Ada Gardiner, husband and wife, Petitioner, vs. Boundary County Board of Commissioners, Respondent.	)	CASE NO. CV 2006-339 ORDER GOVERNING JUDICIAL REVIEW

A Petition for Judicial Review having been filed in this case, and it appearing that the time requirements of Rule 84 of the Idaho Rules of Civil Procedure should be modified in this case, it is hereby ordered as follows:

1. Within seven (7) days from the date this order is filed, the Agency shall provide Petitioner with an estimate of the cost for preparation of the agency record and an estimate of the cost for preparation of the transcript, if requested. Within fourteen (14) days from the mailing of the cost estimate, the Petitioner shall pay the estimated fee for the record to the Agency. If a transcript is requested, the Petitioner has fourteen (14) days from the mailing of the estimate to pay the estimated fee for preparation of the transcript. The balance of the costs for the record and transcript must be paid when notice is received from the Agency.

2. In accordance with Rule 84(j), upon completion of the agency record and upon receipt of the transcript, if applicable, the Agency shall mail a notice of lodging of the transcript and record to the parties. The parties have fourteen (14) days from the date of the mailing of the notice to file with the agency any objections to the record and/or the transcript. The notice shall also advise the petitioner to pay the balance, if any, of the fees for preparation of the agency record and transcript.

3. If there is no objection to the transcript and record within fourteen (14) days from the mailing of the notice described in Paragraph 2, the agency record and transcript shall be deemed settled. If objections are received, the record and transcript shall be deemed settled on the date that such objections are determined by the Agency.

4. Within forty-two (42) days from the date this order is filed, the Agency shall transmit to the court the original or a certified copy of the settled record in this proceeding.

5. If a transcript has been requested, the Agency shall cause the settled transcript to be transmitted to the Clerk of Court within forty-two (42) days from the date this order is filed.

6. The Agency, upon lodging with the court the record (and transcript, if necessary), shall send notice of such filing to all parties in accordance with Rule 84(k) of the Idaho Rules of Civil Procedure.

7. At the time the notice described in Paragraph 6 is received, the Petitioner shall contact Cherie Moore, at (208) 265-1445, to request that this

case be set for oral argument at a time which allows the briefing schedule set forth in Paragraph 8 to be completed.

8. Briefing Schedule: After the record is deemed settled, the parties shall submit briefs according to the following schedule:

a. Petitioner shall submit his or her initial brief (Petitioner's Brief) within 35 days from the date the record is deemed settled;

b. Respondent shall file a reply brief (Respondent's Brief) within 28 days from the date the Respondent's Brief is filed;

c. Petitioner will then have 21 days from the date the Respondent's Brief is filed to submit a closing brief or to notify the court that the matter is fully submitted.

Briefs shall be in compliance with Rule 84(p) of the Idaho Rules of Civil Procedure and Rule 35 of the Idaho Appellate Rules, except that the briefs need not be bound or have colored covers and need not contain a table of contents.

Failure of any party to timely comply with the above orders may be grounds for such action or sanctions as the court deems appropriate, which may include **dismissal** of the Petition for Judicial Review, pursuant to Rule 84(n) of the Idaho Rules of Civil Procedure.

Dated this 19 day of September, 2006.

Steve Verby
District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, regular mail, faxed, and/or delivered this 19 day of September, 2006, to:

Paul Vogel
Attorney For Petitioners
PO Box 1828
Sandpoint, Idaho 83864

John Topp
Attorney At Law
PO Box 586
Kootenai, Idaho 83840

Boundary County Board of Commissioners
6452 Kootenai St.
Bonners Ferry, Idaho 83805

District Court Secretary/Deputy Clerk

FILED ORIGINAL

2006 SEP 25 AM 9:04

STATE OF IDAHO
COUNTY OF BOUNDARY
GLENDA POSTON, CLERK
BY Suanne
DEPUTY CLERK

STATE OF IDAHO,
IN AND FOR THE COUNTY OF BOUNDARY

In the Matter of :	)	CASE NO. CV06-339
	)	
Patrick & Ada Gardiner, Plaintiff.	)	NOTICE OF LODGING OF
Vs.	)	TRANSCRIPT AND RECORD
Boundary County Planning & Zoning	)	
Application SUP 05-05, Tungsten	)	
Holdings Inc. Gravel Pit	)	
Defendant.	)	

TO: THE PARTIES ABOVE NAMED OR THEIR ATTORNEYS:

YOU ARE HEREBY NOTIFIED PURSUANT TO I.R.C.P. 83(r), the transcript and Agency's Record ordered in the above entitled matter have been lodged with the Clerk of the Boundary County Commissioners, the Agency, of Boundary County, State of Idaho.

YOU ARE FURTHER NOTIFIED that you have fourteen (14) days from the date of this Order to secure your copy of the transcript and Agency's Record from the Clerk of the Agency, and to file any objections to the content thereof.

DATED this 25th day of September, 2006.

Board of Boundary County Commissioners

By Michelle Rohrwasser
Deputy Clerk

I hereby certify that a true and correct copy of the foregoing was mailed, regular mail, postage prepaid, faxed, and/or delivered, this 25th day of September, 2006, to:

Paul W. Paul, P.A.
120 E. Lake Street, Suite 313
P.O. Box 1828
Sandpoint, Idaho 83864-0903

Attorney John Topp
P.O. Box 28
Kootenai, Idaho 83840

Michelle Rohrsen, Deputy
Deputy Clerk

ORIGINAL

PAUL WILLIAM VOGEL, P.A.
ATTORNEY AT LAW
P.O. BOX 1828
SANDPOINT, ID 83864
PHONE (208) 263-6636
FAX (208) 265-6775
ISB NO. 2504

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

PATRICK GARDINER and ADA GARDINER, husband and wife, Petitioners, vs. BOUNDARY COUNTY BOARD OF COMMISSIONERS, Respondent.	CASE NO. CV-2006-339 OBJECTION TO AMENDED NOTICE OF LODGING OF TRANSCRIPT AND RECORD

Patrick Gardiner and Ada Gardiner, Petitioners above named, through their attorney, Paul William Vogel, pursuant to I.R.C.P. 84(j), and the Court's September 19, 2006 Order Governing Judicial Review, hereby file the following Objection to Amended Notice of Lodging of Transcript and Record lodged with the Clerk of the Boundary County Commissioners on September 25, 2006.

The following documents have been omitted from the record: the record lodged with the Clerk of the Court in Boundary County Case No. CV-2005-380.

Pursuant to the Court's Order in Boundary County Case No. CV-2005-380, filed May 30, 2006, the record on appeal, in the event of further judicial review (the instant case)

Paul William Vogel, P.A.
Attorney-at-Law
120 East Lake Street
Suite 313
P.O. Box 1828
Sandpoint, ID 83864-0903
Ph: (208) 263-6636
Fax: (208) 265-6775

shall consist of the record previously lodged with the Court and any additional record developed as a result of new public hearings.

The agency can resolve this matter by stipulation of Respondent Boundary County Board of Commissioners that the record on review in the instant case consists of the record currently lodged with the agency, to be forwarded to the Court, as well as the record from Boundary County Case No. CV-2005-380.

Dated this 17 day of November, 2006.

Paul William Vogel
Attorney for Petitioners

CERTIFICATE OF DELIVERY

I hereby certify that on this 1st day of November, 2006, I delivered a true and correct copy of the foregoing OBJECTION TO AMENDED NOTICE OF LODGING OF TRANSCRIPT AND RECORD via U.S. first class mail, postage prepaid, addressed to:

John Topp, P.A.
P.O. Box 586
Kootenai, ID 83840

Michelle Rohrwasser, Clerk
Boundary County Board of Commissioners
P.O. Box 419
Bonners Ferry, ID 83805

Bonnie Stout

ORIGINAL

PAUL WILLIAM VOGEL, P.A.
ATTORNEY AT LAW
P.O. BOX 1828
SANDPOINT, ID 83864
PHONE (208) 263-6636
FAX (208) 265-6775
ISB NO. 2504

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

PATRICK GARDINER and ADA GARDINER, husband and wife,

Petitioners,

vs.

BOUNDARY COUNTY BOARD OF COMMISSIONERS,

Respondent.

CASE NO. CV-2006-339

SUPPLEMENTAL OBJECTION TO AMENDED NOTICE OF LODGING OF TRANSCRIPT AND RECORD

Patrick Gardiner and Ada Gardiner, Petitioners above named, through their attorney, Paul William Vogel, pursuant to I.R.C.P. 84(j), and the Court's September 19, 2006 Order Governing Judicial Review, hereby file the following Supplemental Objection to Amended Notice of Lodging of Transcript and Record lodged with the Clerk of the Boundary County Commissioners on September 25, 2006.

Petitioners' objections are as follows:

1. Each and every objection previously lodged in this matter, to-wit: the Objections to Transcript and Record filed October 5, 2006 and the Objection to Amended Notice of Lodging of Transcript and Record filed November 2, 2006 are realleged as if fully set forth herein.

Paul William Vogel, P.A.
Attorney-at-Law
120 East Lake Street
Suite 313
P.O. Box 1828
Sandpoint, ID 83864-0903
Ph: (208) 263-6636
Fax: (208) 265-6775

2. The following objections are made to the Amendment to Transcript prepared October 25, 2006 by Michelle Rohrwasser, Deputy Clerk, Boundary County Board of Commissioners:

A. Amendment to August 7, 2006 transcript; p. 14, line 5: there should be quotation marks before the words "natural resources," in that sentence;

B. August 7, 2006 transcript, p. 15: the quotation marks following the word "system" in line 10 should be deleted.

C. August 7, 2006 transcript, p. 15: quotation marks should be added before the word "allowing" on line 11.

D. August 7, 2006 transcript, p. 17; line 5: quotation marks should be added before the letter "K." Quotation marks should be deleted before the word "the."

E. August 7, 2006 transcript, p. 17, line 20, after the text "far edge of 300 acres." The transcript states that Commissioner Kirby stated the next sentence. This is incorrect, as that sentence was read into the record by Commissioner Smith. Therefore, line 20 should end after the word "acres" and a new line 21 should begin with "Commissioner Smith . . .' the proposed use has a potential to create . . ." and continue with the rest of current line 21. In other words, the text "the proposed use has the potential to create possible adverse affects on adjacent property owners. but terms and conditions can or cannot be implemented to reduce the impact" was read by Commissioner Smith, not Commissioner Kirby.

3. The transcript makes references to various subsections of Chapters 7 and 13 of the Boundary County Zoning Ordinance. Only excerpts were included in the record. The entire Sections 7 and 13 should be included.

4. The "proposed findings" referenced Tungsten's "permit and reclamation plan issued by" the Idaho Department of Lands. This reclamation plan should be included in the record.

5. The findings of the Planning and Zoning Commission for May, 2005 were alleged to be attached to the 2006 Staff Report but were not. They should be re-included in the record from the 2006 proceedings.

6. Neither the record nor the amended record lodged with the agency contain a written decision on the objection. I.R.C.P. 84(j) states, in part, that: "The agency's decision on the objection . . . shall be included in the record on petition for review."

Although one may attempt to understand the agency's decision by its failure to act on Petitioners' objections, there should be a specific decision from the agency as to the items, requested by Petitioners to be made part of the record, that have not been included in either the record or amended record. The basis for the decision should also be set forth

Dated this 2nd day of November, 2006.

Paul William Vogel
Attorney for Petitioners

CERTIFICATE OF DELIVERY

I hereby certify that on this 2nd day of November, 2006, I delivered a true and correct copy of the foregoing SUPPLEMENTAL OBJECTION TO AMENDED NOTICE OF LODGING OF TRANSCRIPT AND RECORD via U.S. first class mail, postage prepaid, addressed to:

Boundary County Prosecuting Attorney
Attn: Tammy Munson
P.O. Box 1148
Bonners Ferry, ID 83805

Michelle Rohrwasser, Clerk
Boundary County Board of Commissioners
P.O. Box 419
Bonners Ferry, ID 83805

Bonnie Stout

ORIGINAL

PAUL WILLIAM VOGEL, P.A.
ATTORNEY AT LAW
P.O. BOX 1828
SANDPOINT, ID 83864
PHONE (208) 263-6636
FAX (208) 265-6775
ISB NO. 2504

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

PATRICK GARDINER and ADA GARDINER, husband and wife, Petitioners, vs. BOUNDARY COUNTY BOARD OF COMMISSIONERS, Respondent.	CASE NO. CV-2006-339 STIPULATION AS TO RECORD

Patrick Gardiner and Ada Gardiner, the above-named Petitioners, through their attorney, Paul William Vogel, and Respondent Boundary County Board of Commissioners, through their attorney, John Topp, hereby stipulate that the record lodged with the Court in Boundary County Case No. CV-2005-380 be included in the record on appeal in this instant case.

This Stipulation is based on the Court's Order of Remand in Boundary County Case No. CV-2005-380 filed May 30, 2006.

11-14-06
Date

John Topp
Attorney for Respondent

11.16.06
Date

Paul William Vogel
Attorney for Petitioners

Paul William Vogel, P.A.
Attorney-at-Law
120 East Lake Street
Suite 313
P.O. Box 1828
Sandpoint, ID 83864-0903
Ph: (208) 263-6636
Fax: (208) 265-6775

STATE OF IDAHO
County of Boundary

FILED 3/12/07
AT 4:30 O'CLOCK pm
CLERK OF THE DISTRICT COURT
Hammond
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BOUNDARY MAGISTRATE DIVISION

MINUTE ENTRY

DATE: 3/12/07
CASE NO. CV 05-380/CV 06-339
RE: Transcript and Record Bond

PATRICK GARDINER, ETAL
Atty: Vogel

vs.

BOUNDARY COUNTY COMMISSIONRS
Atty: Topp

On 8-22-06 the above referenced bond was posted in CV 05-380. After speaking with the Commissioner's Clerk it was determined that this bond should have been posted in CV 06-339. The bond was voided in CV 05-380 and reposted to CV 06-339 on this date.

Tacie Hammond, Deputy

PAUL WILLIAM VOGEL, P.A.
ATTORNEY AT LAW
P.O. BOX 1828
SANDPOINT, ID 83864
PHONE (208) 263-6636
FAX (208) 265-6775
ISB NO. 2504

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

PATRICK GARDINER and ADA GARDINER, husband and wife, Petitioners, vs. BOUNDARY COUNTY BOARD OF COMMISSIONERS, Respondent.	CASE NO. CV-2006-339 STIPULATION RE: SETTLEMENT OF RECORD

Patrick Gardiner and Ada Gardiner, the above-named Petitioners, through their attorney of record, Paul William Vogel, and Respondent Boundary County Board of Commissioners, through Tevis W. Hull, Boundary County Deputy Prosecuting Attorney, hereby stipulate and represent to the Court that the record is settled and the same can be lodged with the Court.

3-13-07
Date

Tevis W. Hull
Boundary County Deputy Prosecuting Attorney

March 5th, 2007
Date

Paul William Vogel
Attorney for Petitioners

Paul William Vogel, P.A.
Attorney-at-Law
120 East Lake Street
Suite 313
P.O. Box 1828
Sandpoint, ID 83864-0903
Ph: (208) 263-6636
Fax: (208) 265-6775

STATE OF IDAHO
COUNTY OF BOUNDARY
FILED 3:40 PM AT 4:30 PM
BY [signature]
DEPUTY CLERK

STATE OF IDAHO,
IN AND FOR THE COUNTY OF BOUNDARY

In the Matter of :	)	CASE NO. CV2006-339
	)	
Patrick Gardiner and Ada Gardiner, husband and wife, Petitioners	)	AMENDED NOTICE OF LODGING OF TRANSCRIPT AND RECORD
	)	
Vs.	)	
Boundary County Board of Commissioners *Defendant.*	)	

TO: THE PARTIES ABOVE NAMED OR THEIR ATTORNEYS:

YOU ARE HEREBY NOTIFIED PURSUANT TO I.R.C.P. 84(j), the transcript and Agency's Record ordered in the above entitled matter have been lodged with the Agency of Boundary County, State of Idaho.

YOU ARE FURTHER NOTIFIED that you have fourteen (14) days from the date of this Order to secure your copy of the Agency's transcript and record, and to file any objections to the content thereof.

DATED this 25th day of October, 2006.

Board of Boundary County Commissioners

By Michelle Rohrwasser
Deputy Clerk

I hereby certify that a true and correct copy of the foregoing was mailed, regular mail, postage prepaid, faxed, and/or delivered, this 25th day of October, 2006, to:

Attorney Paul W. Vogel
120 E Lake Street, Suite 313
P.O. Box 1828
Sandpoint, ID 83864-0903

Attorney John Topp
Boundary County Courthouse
Interoffice Mail

Michelle Rohrwasser
Deputy Clerk

ORIGINAL

STATE OF IDAHO
COUNTY OF BOUNDARY
FILED 12-20-06 AT 4:31 PM
BY Sherrie
DEPUTY CLERK

STATE OF IDAHO,
IN AND FOR THE COUNTY OF BOUNDARY

In the Matter of :	)	CASE NO. CV2006-339
	)	
Patrick Gardiner and Ada Gardiner, husband and wife, Petitioners	)	AMENDED NOTICE OF LODGING OF TRANSCRIPT AND RECORD
	)	
Vs.	)	
Boundary County Board of Commissioners Defendant.	)	

TO: THE PARTIES ABOVE NAMED OR THEIR ATTORNEYS:

YOU ARE HEREBY NOTIFIED PURSUANT TO I.R.C.P. 84(j), the transcript and Agency's Record ordered in the above entitled matter have been lodged with the Agency of Boundary County, State of Idaho.

YOU ARE FURTHER NOTIFIED that you have fourteen (14) days from the date of this Order to secure your copy of the Agency's transcript and record, and to file any objections to the content thereof.

DATED this 20th day of December, 2006.

Board of Boundary County Commissioners

By Michelle Rohrwasser
Deputy Clerk

I hereby certify that a true and correct copy of the foregoing was mailed, regular mail, postage prepaid, faxed, and/or delivered, this 20th day of December, 2006, to:

Attorney Paul W. Vogel
120 E Lake Street, Suite 313
P.O. Box 1828
Sandpoint, ID 83864-0903

Attorney John Topp
Boundary County Courthouse
Interoffice Mail

Michelle Rohrwasser
Deputy Clerk

ORIGINAL

STATE OF IDAHO
COUNTY OF BOUNDARY
FILED 3-14-07 AT 4:31 PM
BY Shennedi
DEPUTY CLERK

STATE OF IDAHO,
IN AND FOR THE COUNTY OF BOUNDARY

In the Matter of :	)	CASE NO. CV2006-339
	)	
Patrick Gardiner and Ada Gardiner, husband and wife, Petitioners	)	AMENDED NOTICE OF LODGING OF RECORD
	)	
Vs.	)	
Boundary County Board of Commissioners Defendant.	)	

TO: THE PARTIES ABOVE NAMED OR THEIR ATTORNEYS:

YOU ARE HEREBY NOTIFIED PURSUANT TO I.R.C.P. 84(j), the Transcript and Agency's Record ordered in the above entitled matter have been lodged with the Agency of Boundary County, State of Idaho.

YOU ARE FURTHER NOTIFIED that you have fourteen (14) days from the date of this Order to secure your copy of the Agency's amended record, and to file any objections to the content thereof.

DATED this 14th day of February, 2007.

Board of Boundary County Commissioners

By Michelle Rohrwasser, Deputy
Deputy Clerk

I hereby certify that a true and correct copy of the foregoing was mailed, regular mail, postage prepaid, faxed, and/or delivered, this 14th day of February, 2007, to:

Attorney Paul W. Vogel
120 E Lake Street, Suite 313
P.O. Box 1828
Sandpoint, ID 83864-0903

Attorney John Topp
Boundary County Courthouse
Interoffice Mail

Michelle Rohrwasser, Deputy
Deputy Clerk

By Michelle Rohrwasser
Deputy Clerk

ORIGINAL

PAUL WILLIAM VOGEL, P.A.
ATTORNEY AT LAW
P.O. BOX 1828
SANDPOINT, ID 83864
PHONE (208) 263-6636
FAX (208) 265-6775
ISB NO. 2504

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

PATRICK GARDINER and ADA GARDINER, husband and wife,

Petitioners,

vs.

BOUNDARY COUNTY BOARD OF COMMISSIONERS,

Respondent.

CASE NO. CV-2006-339

MEMORANDUM IN SUPPORT OF APPELLANTS' PETITION FOR JUDICIAL REVIEW

Paul William Vogel, P.A.
Attorney-at-Law
120 East Lake Street
Suite 313
P.O. Box 1828
Sandpoint, ID 83864-0903
Ph: (208) 263-6636
Fax: (208) 265-6775

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Cases

Page

Statutes and Codes

Page

Constitutions

MEMORANDUM IN SUPPORT OF APPELLANTS' PETITION FOR JUDICIAL REVIEW

Patrick and Ada Gardiner, appellants, through their attorney of record, Paul William Vogel, submit the following Memorandum in Support of Appellants' Petition for Judicial Review of a decision by the Boundary County Board of Commissioners:

I. PROCEDURAL BACKGROUND

On March 22, 2005, Tungsten Holdings, Inc., a Montana real estate developer ("Tungsten"), filed an application for special use permit ("SUP") to operate a permanent, commercial gravel pit on seven acres of property in Porthill, Boundary County, Idaho. The site is adjacent to appellants' Registered Angus cattle ranch. R.O.A. 2006, p. 1-2.

The Boundary County Planning & Zoning Commission ("zoning commission") held a public hearing on May 19, 2005. R.O.A. 2006, p. 29. After hearing the evidence, the zoning commission made findings and a recommendation to the Boundary County Board of Commissioners ("county board" or "board"), to deny the SUP. R.O.A. 2006, p. 183-184.

Under the Boundary County Zoning Ordinance ("zoning ordinance" or "ordinance"), the zoning commission hears the evidence and makes findings and a recommendation to approve or deny the SUP. The county board makes the final decision after a second public hearing. R.O.A. 2006, p. 258-259. The members of the county board are Ron Smith, Chairman; Walt Kirby, and Dan Dinning. C.T. 7/26/05, cover page. Board member Dan Dinning is the brother of Tungsten's president, Rick Dinning. R.O.A. 2006, p. 216.

A hearing took place before the county board on July 26, 2005, following which the board tentatively approved the SUP and took the matter under advisement to determine if

mitigating conditions could be imposed. Board member Dinning participated in the hearing but abstained from voting. C.T. 7/26/05, p. 43:7-25, p. 45:10-22, 46:21-25, 47-48.

The board met again on August 8, 2005, and approved the SUP subject to a review of suggested conditions. Member Dinning participated in the hearing, but abstained from voting. C.T. 8/8/05, p. 1:23, p. 39:24-25, p. 41:14-25, p. 42:1-4. The county board met again on September 6, 2005. Board member Dinning addressed prepared findings with zoning coordinator, Mike Weland. No public discussion was allowed. C.T. 9/6/05, p. 1:3-12. The board approved the SUP and findings. Member Dinning participated in the board's discussion, but abstained from voting. C.T. 9/6/05, p. 18: 3-17; R.O.A. 2006, p. 61-64.

On August 13, 2005, appellants filed a request for regulatory takings analysis pursuant to I.C. 67-8003. R.O.A. 2006, p. 174. On September 27, 2005, the board denied that a taking of appellants' property had occurred. R.O.A. 2006, p. 172-174. On October 3, 2005, appellants filed a petition for judicial review under Boundary County Case No. CV-2005-380. R.O.A. 2006, p. 218.

On April 30, 2006, appellants and the board stipulated that board member Dinning's participation in the hearings had been a conflict of interest that was prohibited by I.C. 67-6506, and that the SUP should be voided and the proceedings remanded to the board for a new public hearing, without member Dinning participating. As part of the stipulation, appellants waived any objection to member Dinning's participation in the prior proceedings. On May 26, 2006, this Court entered its Order of Remand voiding the SUP and remanding the matter to the county board for a new public hearing. R.O.A. 2006, p. 216-217.

The new hearing took place on July 24, 2006, before board members Smith and Kirby. C.T. 7/24/06, p. 2:13-16. A second hearing or meeting without public participation took place

on August 7, 2006. C.T. 8/7/06, p. 1:1-11. At this meeting, board members Smith and Kirby approved the SUP and reaffirmed the validity of the findings that had been voided by this Court for conflict of interest, plus an additional condition. C.T. 8/7/06, p. 27:4 to p. 29, R.O.A. 2006, p. 236. Appellants filed a request for regulatory takings analysis on August 29, 2006. R.O.A. 2006, p. 261. On September 26, 2006, the county board denied that a taking had occurred. Appellants filed this petition for judicial review on September 8, 2006.

II. FACTUAL BACKGROUND

A. APPELLANTS' RANCH, COMPREHENSIVE PLAN AND ZONING ORDINANCE. The Gardiner Prime Angus Ranch in Porthill, Idaho, is a seed stock operation in which appellants raise purebred Black Angus cattle for breeding. Appellants' ranch, which fronts on county road 46 (also known as "Farm to Market Road"), is adjacent to Tungsten's property on the south, approximately .8 of a mile from the proposed gravel pit. R.O.A. 206, p. 2, 119-120. Appellants' and Tungsten's properties are in an agricultural/forestry zone. R.O.A. 2006, p. 191. In Boundary County, commercial gravel pits are not permitted in agricultural/forestry zones. In contrast, cattle-breeding is a use by right. R.O.A. 2006, p. 256.

Under the zoning ordinance, SUPs may be granted for non-permitted uses, but not unless the proposed use complies with the Boundary County Comprehensive Plan ("comprehensive plan" or "Plan"), and the ordinance. R.O.A. 2006, p. 256, 258-259. Among other things, the comprehensive plan requires that the proposed special use must not interfere with the health or safety of neighboring property owners or deny them the rights of property ownership, that development of mineral resources may not pose undue risk to adjacent properties, and that development of "non-metallic mineral resources" cannot be accomplished without due consideration of surrounding property uses and the potential impact

of such extraction. (Plan, Section I ["Private Property Rights"], Section III ["Economic"], Section V ["Natural Resources"].) R.O.A. 2006, p. 243-246.

The zoning ordinance requires that a special use may not have "any substantial adverse effects" on adjacent properties or to the general public, "will not create hazards" to adjacent property owners, and "will not create noise, traffic, odors, dust or other nuisances substantially in excess of permitted uses" in the zone district. (Ordinance, Ch. 13, Section 4(C)(3), Section 4(C)(4); R.O.A. 2006, p. 259). Therefore, Tungsten's SUP cannot be approved unless it meets these standards.

B. TUNGSTEN'S GRAVEL PIT AND APPELLANTS' RANCH OPERATION.

According to Tungsten's application, the gravel pit was to be located on seven acres of property next to the Farm to Market Road (also known as County Road 46). It would be operated five days per week, Monday-Friday, from 8:00 a.m.–5:00 p.m. There would be 60 non-contiguous days of rock crushing per calendar year, and blasting may be required. Material would be stockpiled on site for year-round hauling. Estimated vehicle traffic would be five trips per day, depending on season and demand. Water would be used during crushing operations to control dust. The gravel pit was to be permanent. R.O.A. 2006, p. 1.

Appellants commenced their Angus seed stock business in 1994. Their barn, veterinary room, calving pens, cattle handling equipment, and pastures are approximately .8 of a mile from the proposed gravel pit site. Their summer pastures, alfalfa fields, 450-foot water well and irrigation system are approximately .5 of a mile from the pit site where blasting could occur. Appellants use embryo transfer and artificial insemination techniques in their breeding program. These require a delicate synchronization process for which a quiet, stress-free environment is essential. Power Company blasting for pole installation some years

ago had agitated the cows for several days afterwards. R.O.A. 2006, p. 120-121; C.T. 5/19/05, p. 8:5-16.

Appellants' breeding program runs from April to June, and their calving program runs from mid-December through March. C.T. 5/19/05, p. 8:16-20. Appellants sell through private treaty when customers come to the ranch and at consignment sales in Idaho, Washington and Montana. Customers from as far away as Louisiana and Texas have stopped by the ranch to visit and purchase cattle. R.O.A. 2006, p.121.

Tungsten's proposed special use contained no safeguards to protect adjacent properties from noise, potential water loss associated with blasting, for restoring lost water to surrounding ranches, farms or residences, or compensating property owners for injuries or damages resulting from blasting or operation of the pit, or compensating them for lost business or loss of peaceful enjoyment of their property.

C. COUNTY INVOLVEMENT IN TUNGSTEN'S GRAVEL PIT. County officials initiated Tungsten's gravel pit development plan and special use permit application. When Tungsten acquired its property, County Road Superintendent, Jeff Gutshall, approached Tungsten's president, Rick Dinning, about obtaining rock for the county road. C.T. 5/19/05, p. 1:18-20; 4:20-21. Rick Dinning admitted the "initial reason" he applied for the SUP was to supply gravel to the county. C.T. 5/19/05, p. 1:18-20, 4:20-21.

It was also revealed that Road Superintendent Gutshall had encouraged other local residents to obtain SUPs for gravel pits. In 2000, Dennis and Pam Ponsness obtained an SUP for a gravel pit after Road Superintendent Gutshall approached them about getting rock off of their property. C.T. 5/19/05, p. 3:14-23, 12:5-10. The Ponsnesses own and live on a ranch adjacent to Tungsten on the north, approximately .8 of a mile from Tungsten's proposed site.

R.O.A. 2006, p. 2. But after acquiring their permit, Road Superintendent Gutshall changed his mind about using their rock. C.T. 5/19/05, p. 13:18-24. Rick Dinning said their rock was not considered "fit" for road purposes. C.T. 5/19/05, p. 13:18-25.

In or about 2003, Tom and Sherry Bushnell acquired an SUP for a gravel pit, after Road Superintendent Gutshall approached them about using their rock. C.T. 5/19/05, p. 14:5-10. The Bushnells' property is approximately .5 of a mile from Tungsten's property, on the east. R.O.A. 2006, p. 2. The Bushnells obtained an SUP, but due to neighbors' concerns about blasting and noise, they were prohibited from blasting and crushing activities were limited to January and February each year. The county did not use any rock off the Bushnells' property. C.T. 5/19/05, p. 3:19-25; p. 4:1-2. A third gravel pit in the area is on the Munson property, approximately 8 miles south of Tungsten's gravel pit site. The Munson pit had been "grandfathered" in. Rick Dinning said that Munson's rock was not adequate for the county to use for road building. C.T. 5/19/05, p. 9:12-16, 17:19-20.

D. MAY 15, 2005 HEARING BEFORE THE ZONING COMMISSION. The public hearing on Tungsten's application before the zoning commission was not scheduled until May 19, 2005. Appellants did not receive notice of the hearing until May 3, 2005. Appellants' timely request for a 45 day continuance to prepare for the hearing was denied. R.O.A. 2006, p. 149.

On May 11, 2005, Road Superintendent Gutshall sent an e-mail to the zoning commission stating that Tungsten's gravel pit would have "no negative impacts" on the Farm to Market road which was "already subject to heavy seasonal agricultural hauling." It also said the county "may desire to negotiate for materials" from this source. R.O.A. 2006, p. 148.

Rick Dinning was present at the hearing on behalf of Tungsten. He repeatedly admitted that he was "not a rock person." He said he did not know how much blasting would be required, and that the county could run more than five dump trucks per day. C.T. 5/19/05, p. 2:7; 4:3-24; 5:11-22. He acknowledged the existing gravel pits in the area, but said that none were adequate for the county. C.T. 5/19/05, p. 3:15-20, 17:19-23.

Appellants and other local residents who were present at the hearing expressed concerns about Rick Dinning's lack of knowledge about rocks, blasting and quarrying operations, and the potentially harmful effects of blasting and quarrying on current uses of surrounding properties. They were concerned about the potentially harmful effects blasting could have on local water supplies and current agricultural uses on surrounding properties, and other environmental impacts. They expressed concern about the unnecessary duplication of gravel pits in the small Porthill area. They questioned what would happen to the surrounding properties from an absentee developer's permanent, commercial rock quarrying operation in an agricultural area, and possible sale of the quarry to other non-resident operators. C.T. 5/19/05, p. 5:11-22, 8:5:22, 9:16, 14:23-24, 15:1-9.

Road Superintendent Gutshall attended the hearing, but the zoning commission felt it would be inappropriate for him to comment on his contacts with Rick Dinning or other property owners. C.T. 5/19/05, p.15:17-24; 21:7-8; R.O.A. 2006, p. 188. Rick Dinning provided no expert or other evidence to show that his special use would not create hazards or have any substantial adverse effects on adjacent properties, and would not create noise, traffic, odors, dust or other nuisances substantially in excess of permitted uses within the zone district.

E. ZONING COMMISSION'S FINDINGS AND RECOMMENDATION. In deliberations, zoning commission members commented that the gravel pit would "seriously, horribly, and drastically" impact the use of surrounding properties and the quiet, rural area in which a person could "hear a pin drop" from half a mile away. C.T. 5/19/05, p. 20:10-14. The location proposed for intensive commercial development was zoned for non-commercial agriculture and agricultural products, and used for such purposes in reliance on the zoning. C.T. 5/19/05, p. 22:8-14. The narrow area by the Farm to Market road in which the pit would be operated was not a good location for an open face mine, particularly since there were other pits in the area with rock available. C.T. 5/19/05, p. 22:16-17; 23:2-6.

The commission determined that without expert or competent evidence about the effects of blasting on surrounding properties, it did not know what a safe distance might be for blasting respecting water wells and cattle breeding, or what effect blasting could have on water strata in the rock. Commissioners were concerned that property owners could be "high and dry" if blasting cracked the rock and the water ran out. C.T. 5/19/05, p. 22:19-24; p.23:11-18. Without expert or other competent evidence to show how or if the gravel pit could be operated safely to adjoining property owners, the commission had no suggestions for mitigation. R.O.A. 2005, p. 91; R.O.A. 2006, p. 184.

Based on the above, the zoning commission found that Tungsten's proposed use did not comply with Sections I, III and V of the comprehensive plan because the operation would pose undue risk, interfere with the health or safety of neighboring property owners and deny them their inherent property rights, and failed to give due consideration to surrounding property uses or sufficient consideration for its potential impacts. The commission also found that the gravel pit failed to comply with Chapter 13, Section 4, of the zoning ordinance

because there was not sufficient assurance that potential adverse effects to surrounding property owners could be mitigated or prevented as a result of blasting and its effect on water and livestock production, and because the gravel pit would create noise, odors and dust substantially in excess of permitted uses in the zone district. The zoning commission recommended that the county board deny the SUP. R.O.A. 2006, p. 183-184.

F. JULY 26, 2005 HEARING BEFORE THE COUNTY BOARD. The hearing before the county board took place on July 26, 2005. Prior to the hearing, Road Superintendent Gutshall sent an e-mail to the county board stating that the proposed gravel pit would not adversely affect the county road because it had "low traffic numbers" and "ample sight distance;" also that there was "no developed source for crushed aggregate in the area," and that Tungsten's pit "could probably be expanded." Gutshall also submitted a three-page, unsigned narrative about his contacts with Rick Dinning, the Ponsnesses, and the Bushnells, and denying certain things that were said at the zoning commission hearing. R.O.A. 2005, p. 69-72; R.O.A. 2006, p. 138-141. Gutshall attended the July 26, 2005 hearing as the county's expert on road matters. C.T. 7/26/05, p. 15:9-12; 38:19-20.

Rick Dinning did not provide any expert or other competent evidence at the county board hearing that his blasting would not affect appellants' water or irrigation system, or that the operation would not have any substantial adverse effects on adjacent properties, would not create hazards to adjacent property owners, and would not create noise, traffic, odors, dust or other nuisances substantially in excess of permitted uses within the zone district. He only said that his rock pit developer told him that appellants would "probably" not hear the crushing. C.T. 7/26/05, p. 4:23, 5:14-19.

In public comment, George Hays, a resident of Northern Boundary County, said that blasting for a new portion of Highway 95 outside of the Porthill area did not affect his cattle, and did not cause water loss to the Mission Creek area. He said that the State had taken seismic readings before, during and after the blasting. He felt that Tungsten's blasting would not be harmful. C.T. 7/26/05, p. 7:3-24; p. 8:14, 13-14.

Appellants and other Porthill residents expressed concerns about the detrimental effect of blasting and rock crushing on ranches and farms near the proposed pit and on appellants' cattle-breeding program. C.T. 7/26/05, p.9:10-13; 27:2-9. They were concerned that a property developer such as Tungsten, would only be interested in selling off the rock quarry business to another non-resident operator. Residents stated there was no local need for more rock, that the commercial operation posed a safety risk to people on Farm to Market road, and that blasting and dynamiting posed a threat to adjacent water wells and irrigation . C.T. 7/26/05, p. 11:4-13, 12:2-17; 13:9-18; 29:2-17; 30:22-24; 32:7-15; 35:19-25; 36:1-12. Concern was expressed about the noise and incompatibility of a permanent, commercial quarrying operation in the agricultural area, and with the county's involvement in developing the pit. (*Id.*, 14:1-9, 17:20-22; 27:1,11-19; 30:1, 31:9-20; 37:9-12.)

Chairman Smith denied that the gravel pit was connected to county road-building, and said that Road Superintendent's Gutshall's involvement was not a reason to deny a permit. Chairman Smith said that he and the other board members were "very upset" with Gutshall's "treatment" at the zoning commission hearing, that Gutshall's integrity meant a lot to the county board, and Chairman Smith had "a problem when [Gutshall's integrity] is questioned." C.T. 7/26/05, p. 15:1-4, 13-21.

Chairman Smith asked appellants for "any fact" or "documentation" that dynamiting could affect somebody's water, or if that was "just a fear" appellants had. C.T. 7/26/05, p.15:23-25, p.16:2-12. Member Dan Dinning thought it was unfair for people to restrict the use of private property and not pay the owner for lost economic opportunities. C.T. 7/26/05, p. 28:13-16. Road Superintendent Gutshall had "no concerns about safety along the county road." C.T. 7/26/05, p. 16:3-12; 39:5-7.

In discussion, Chairman Smith said that Rick Dinning had a "right" to have a gravel pit. C.T. 7/26/05, p. 43:11. Member Kirby wanted more time "to dig around to see what's going on and ask some questions that haven't been asked." C.T. 7/26/05, p. 45:10-13. The board wanted staff to "come up with" conditions to "ease the pain" on the community. One of the conditions could not be to not have a gravel pit. C.T. 7/26/05, p. 43:15-21.

The board made no findings that Tungsten's proposed gravel pit did not create hazards to adjacent property owners, and would not create noise, traffic, odors, dust, or other nuisances substantially in excess of permitted uses in the zone district. Board members made no comment on the zoning commission's findings or recommendation to deny the SUP.

G. AUGUST 8, 2005 HEARING BEFORE THE COUNTY BOARD. The board met again on August 8, 2005. Appellants told the Board they had obtained a hydrologist to study the effects of blasting on their property. Appellants requested the board to continue the proceedings for a reasonable time to obtain a report. C.T. 8/8/05, p. 5:18-25; 7:20-25 to p. 8:1-4. The board denied appellants' request, on the basis that problems occurring after the permit issued were a "civil matter" between appellants and Tungsten that was not the county's problem. C.T. 8/8/05, p. 6:11-13; 7:6-11, 14-17; 8:16-25; 9:2-11. Board members did not want to become the "arbitrator" of conflicting reports. C.T. 8/8/05, p. 9:16-21.

Rick Dinning wanted his 60 day crushing period to start in mid-February through May, and he wanted to have twelve days of blasting each year, not two as he had originally stated. Chairman Smith said that two days was not enough blasting, and that twelve days was not "out of line." C.T. 8/8/05, p. 22:14-15; p. 33:3-6. Board member Kirby thought that more blasting was a "good idea because more days is less intensity," and that "they won't try to do as much on each shot if they had the opportunity" for more blasting. C.T. 8/8/05, p. 20:5-9, p. 22:1-8; 33:3-6; 39:21-25.

A Porthill resident requested the board to define the intensity of the blasting to occur, so that residents could understand its effects. His request was denied because the county had "no expertise" in that area, and "no idea" what blasting requirements could be imposed other than being done consistent with Idaho Department of Lands' Best Management Practices for Mining. They assumed the Department of Lands "takes these things into consideration." C.T. 8/8/05, p.30:6-9, 16-24; 34:23-25. Member Dan Dinning said the Board had no obligation to consider these issues because they were "civil matters" for "other venues." C.T. 8/8/05, p. 34:12-17.

Chairman Smith "definitely want[ed] to approve the pit," and did not want "delaying tactics" or "road blocks" to "put off the inevitable." He thought appellants should have obtained expert evidence before the zoning commission hearing. Further discussion was cut off. The board voted to grant the SUP. Member Dan Dinning abstained from voting. C.T. 8/8/05, p. 33:15-25; 34:1-3; 35:16-20.

H. COUNTY BOARD HEARING OF SEPTEMBER 6, 2005. At its meeting on September 6, 2005, the county board approved and issued the SUP with the following ten conditions:

(1) Surface mining operations including crushing, loading materials, storing, etc. must be conducted on the site and not encroach onto county road 46.

(2) Dust abatement measures must be applied "as needed."

(3) Mining operations shall follow "Best Management Practices for Mining in Idaho," published by the Idaho Department of Lands.

(4) 12 days of blasting per year, on weekdays between 8:00 a.m. and 5:00 p.m. Tungsten to provide written notice to property owners within 500 feet of the pit 15 days before blasting is to occur, specifying the date, time and length of time blasting will occur.

(5) Blasting shall meet OSHA requirements established at 29 CFR, Subpart U.

(6) Crushing is allowed from 8 a.m. to 5 p.m., Monday through Friday between February 15 and May 2 each year.

(7) Before mining begins, Tungsten must comply with Idaho Department of Lands' requirements, including filing a reclamation plan and posting a bond, a copy of which must be filed with the Zoning office.

(8) Tungsten must provide written notice to the Zoning office when the reclamation bond is redeemed or forfeited, at which time the SUP will lapse.

(9) The pit site shall be formally identified by survey filed and recorded with the Boundary County Recording Clerk.

(10) Persons employed to conduct blasting shall be notified prior to blasting of the concerns expressed during the hearing process over the potential for damage to area water systems.

R.O.A. 2005, p. 85-88; R.O.A. 2006, p. 216-217.

I. CONFLICT OF INTEREST VOIDS SUP. On May 26, 2006, the SUP was voided by court order, because Board Member Dan Dinning's participation in the county board's proceedings was a conflict of interest in violation of I.C. 67-6506. R.O.A. 2006, p. 216-217. A new hearing on the SUP was scheduled for July 24, 2006.

J. TUNGSTEN'S DEVELOPMENT OF GRAVEL PIT WITHOUT A PERMIT. On July 6, 2006, Tungsten undertook development activities on the pit site without a permit in

violation of county law. On July 10, 2006, the Board's attorney notified Tungsten to cease all activities or development of the pit. But Tungsten worked the pit again on July 11, and July 17, 2006. Tungsten worked the pit again on July 31, and August 1, 2006. R.O.A. 2006, p. 215, 269, 73; C.T. 7/24/06, p. 14:1-18; 15:13-16.

K. HYDROLOGY REPORT. Prior to the new hearing, appellants submitted to the board the written opinion of hydrologist, Kristine Uhlman, R.G. R.O.A. 2006, p. 79-84. Uhlman is a member of the Association of Engineering Geologists and a Certified Ground Water Professional under the National Ground Water Association's national certification program. She has a Bachelor of Science degree in Hydrology with Distinction, from the University of Arizona, and a Master of Science degree in Civil Engineering from Ohio State University. Uhlman has thirty-one years of experience in geosciences focusing on ground water hydrology, including supervision and direction of aquifer characterization programs and the staff and subcontracted firms responsible for subsurface exploration and hydrogeologic testing. These programs include geophysical exploration, aquifer testing, ground water tracing, and geochemical analysis and assessment of ground water flow having fractured rock and blasting/excavation attributes similar to those for Tungsten's quarry. R.O.A. 2006, p. 85.

Uhlman visited and inspected appellants' property from June 9 through June 11, 2006. Uhlman's opinion as to the vulnerability of appellants' property and potential harm from the quarrying operation is based on her special knowledge and experience in hydrology and geology and her physical inspection of the property. R.O.A. 2006, p. 87.

In Uhlman's opinion, the proposed blasting and open pit excavation would cause an existing risk of dewatering aquifer fractures providing water to appellants' 450-foot well. Because of the fractured rock aquifer on the properties, the quarrying would induce drainage

that could dewater aquifer fractures important to the well's performance. If dewatering occurred, it would be permanent. Once excavated, there would be no way to restore the aquifer capacity or remediate the harm. R.O.A. 2006, p. 79-84.

Appellants also submitted two studies by Michigan State University Extension and one article from the Angus Journal on the importance of a stress free environment to cattle breeding programs using artificial insemination and embryo transfer techniques. R.O.A. 2006, p. 89-107. These studies discuss the need for a stress-free environment for successful artificial insemination ("A.I.") and embryo transfer ("E.T.") programs. They explain how excessive stress on the animal can markedly reduce conception rates. R.O.A. 2006, p. 72.

Appellants further submitted a copy of their July 18, 2005 letter to the Zoning Commission describing their cattle breeding operation and the substantial adverse affects the proposed gravel pit could cause them. R.O.A. 2006, p. 108-113. Appellants also filed written objections to the gravel pit based upon I.C. 67-6512 and laws prohibiting "spot zoning," and a written statement of reasons the SUP should be denied. R.O.A. 2006, p. 67-70, 71-78.

L. JULY 24, 2006 DE NOVO HEARING BEFORE TWO MEMBERS OF THE COUNTY BOARD. The new hearing took place as scheduled on July 24, 2006 before board members Smith and Kirby. In his opening remarks, Rick Dinning said that Tungsten's recent blasting had been "surprisingly quiet and muffled," like "a series of 22 caliber primers going off with an underground rumble." He said that an employee of the Idaho Department of Lands who looked at the pit site doubted it would have any effect on appellants' well. He criticized Uhlman's expert opinion as speculative. C.T. 7/25/06, p. 6:7-14; 7:8-11, 25; 8:1-2, 20; 9:5-6. As before, he provided no expert or other competent evidence that his rock quarry operation would not create hazards or have any substantial adverse effects on adjacent

properties, and would not create noise, traffic, odors, dust or other nuisances substantially in excess of permitted uses in the zone district.

Porthill resident, Steve Banks commented that the board members in prior hearings had not mentioned the zoning commission recommendation denying the SUP, or referred to any of the issues discussed in that hearing, or gave any reasons for reversing that decision other than the view that Rick Dinning had the right to do as he chose with his property. As before, the board members did not discuss the zoning commission's findings.

Porthill resident, Jay Epstein commented that the proximity and future unknown intensity of the operation made it impossible to ensure that appellants' water resources and agricultural enterprise would not be irrevocably injured. C.T. 7/24/06, p. 24:1-14. Bonners Ferry resident, Bruce Martins said that while "22's" are not very loud, "44's" are, and asked whether Tungsten would be using more dynamite the more they blasted into the rock. C.T. 7/24/06, p. 24:20-25; 25:1-6. There were no answers to these questions. Board members Smith and Kirby took the matter under advisement. Member Kirby wanted to review staff findings and engage in more discussion among themselves. C.T. 7/24/06, p. 25:1-5.

M. AUGUST 7, 2006 HEARING. Board members Smith and Kirby held a second hearing on August 7, 2006. In this hearing, **CHAIRMAN SMITH READ A PREPARED DECISION INTO THE RECORD** (emphasis provided). The decision consisted of a verbatim copy of the full Board's September 6, 2005 findings, conditions and decision, a second copy of the findings, conditions and decision, with renumbered paragraphs plus one additional condition, a one-sided history of this litigation, argument opposing appellants' legal objections and hydrologist opinion, and prepared questions and answers. See Draft decision, R.O.A. 2006, p. 197-202; 202-203; 203-204, 208-210; 204-210; 204-207, see also 207-210.

Following the reading of the entire document, including the prepared questions and answers, Board members Smith and Kirby "reaffirmed" the full Board's September 6, 2005 findings and adopted the decision as read. No public input was allowed. C.T. 8/8/06, p. 1:10-11. The new condition, No. 11, was that persons employed by Tungsten to conduct blasting are to be "qualified, licensed and insured." R.O.A. 2006, p. 225-236 (decision); 233 (eleventh condition); C.T. 8/8/07, p. 1:15-25 to p. 12-6; p. 12:22 to p. 13:4, 13-21; 14:5-9, 20-24; 15:7-13, 15-16, 19-23; 16:1-2, 3-7, 10-11, 12-19; 17:1-2, 5-7, 17-18, 21-23; 18:1-3, 5-7, 10-12, 18-25; 19:1-2, 9-25; 20:1-19, 21-25; 21:1-10, 16-25; 22:2-3, 4-12, 14-16, 18-25; 23:1-23; 24:7-11, 20-25; 25:1, 4-6, 9-15, 17-19, 22-25; 26:1-3, 5-7, 9-15, 17-20, 23-25; 27:1-2, 2-7, 22 (reading). Appellants' request for takings analysis was denied. R.O.A. 2006, p. 261-265.

III. ISSUES

1. Did the Board's action violate I.C. 67-6512 in that a special use permit may be granted only if the proposed use is conditionally permitted by the terms of the zoning ordinance?

2. Did the Board's decision conflict with Section I and IV of the Comprehensive Plan in that said approval interferes with appellants' health and safety, adversely impacts appellants' agricultural use of their property, does not evaluate the impact of the gravel pit/rock quarry operation on current uses of surrounding land, and constitutes uncompensated deprivation of appellants' private property rights?

3. Was the Board's decision supported by substantial evidence on the record?

4. Did the Board's decision fail to comply with I.C. 67-6535 in that the findings approved on August 14, 2006 do not state the relevant contested facts relied upon, fail to

explain the rationale for the decision based on applicable provisions of the Comprehensive Plan, relevant ordinance and statutory provisions and pertinent constitutional principles and factual information contained in the record?

5. Was the Board's decision made upon unlawful procedure and did it deprive appellants of due process of law because of inadequate notice or opportunity to respond?

6. Was the decision made upon unlawful procedure and did it deprive appellants of due process in the Board's pre-hearing statements of confidence in their Road Superintendent's advocacy for the special use permit, pre-hearing discussions between the Road Superintendent and the applicant about obtaining rock from the applicant's property, statements at the hearing supportive of the Road Superintendent in retaliation for adjacent property owners' public comment at the zoning commission hearing, and the Board's failure to allow appellants to comment on matters outside the record the Board relied on in making its decision?

7. Was the Board's decision arbitrary, capricious and an abuse of discretion in that deliberations undertaken by the Board on August 7, 2006 were biased, and did not constitute true deliberations but, instead, consisted of a mere recitation of a document containing prepared statements and predetermined responses by unknown parties prior to deliberation?

8. Did the Board's decision constitute unlawful "spot zoning?"

9. Did the Board's decision prejudice substantial rights of the appellant?

10. Are Appellants entitled to recovery of attorney fees and costs incurred in this action?

IV. ARGUMENT

1. THE BOARD'S DECISION VIOLATES THE IDAHO CONSTITUTION AND I.C. 67-6512 IN THAT A GRAVEL PIT/ROCK QUARRY OPERATION IS NOT A CONDITIONALLY PERMITTED USE WITHIN THE ZONE DISTRICT.

Whether the 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).

I.C. 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." I. C. 67-6512(a).

Chapter 7, Section 1 of the Boundary County Zoning Ordinance specifies three categories of uses that are permitted in agriculture/forestry zones. These are: uses by right, permitted uses, and conditional uses. Under I.C. 67-6512, SUPs may only be granted for conditionally permitted uses in the zone district.

Under Chapter 7 of the ordinance, the conditionally permitted uses in agricultural/forestry zones are:

"1. Commercial businesses supplying products and services for agricultural and forestry activities.

2. Agricultural auction yards.

3. Retail plant nurseries and greenhouses, off-premises produce stands.

4. Riding and rodeo arenas open to the public, commercial stables, commercial kennels, veterinary clinics.

5. Agricultural packaging and processing facilities.

6. Public cemeteries and churches or structures intended primarily as a place of worship.

7. Public service facilities and wireless communications facilities."

R.O.A. 2006, p. 256.

Neither gravel pits, rock quarries, or surface mining operations are in this list. Accordingly, the board may not legally grant Tungsten a special use permit for a gravel pit/rock quarry. Therefore, the board's action granting the SUP is illegal and void.

Under Chapter 7 of the Ordinance, agricultural uses including farming, livestock production and animal husbandry are "uses by right" in agricultural/forestry zones. R.O.A. 2006, p.256. Accordingly, appellants' cattle ranch is a use by right in the zone district and protected by the zoning laws.

"Permitted Uses" include public or private parks, not for profit community halls, one single family residential structure on a parcel not less than ten acres in size, and more than one single family residential structure provided the parcel contains at least ten acres per dwelling unit. R.O.A. 2006, p. 256. Under this provision, appellants' ranch home and ranch employee's home are protected permitted uses in the zone district.

It is obvious that Tungsten's proposed gravel pit is not a conditionally permitted use under Chapter 7 of the zoning ordinance. That is the reason Tungsten applied for a special use permit, and the zoning commission held a special use permit hearing, and the county board found that Section 1E of Ch. 7, pertaining to special use permits, was the basis upon which Tungsten's application was considered. R.O.A. 2005, p. 100; R.O.A. 2006, p.1, 225 (para. 1(e)). But Section 1E of Ch. 7 of the ordinance is erroneous and void.

Section 1E states: "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." R.O.A. 2006, p. 256. (Chapter 13 states the procedures for obtaining a special use permit. R.O.A. 2006, p. 258-260.) In purporting to make a property use that is not

conditionally permitted eligible for permit as a special use, Section 1E conflicts with I.C. 67-6512, and is void.

The language of Section 1E is similar to language in an earlier version of I.C. 67-6512. That version had 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 that language was repealed in 1999, and replaced by the current language prohibiting special use permits unless the use is conditionally permitted. See Senate Bill No.1202, 1999 Ida. ALS 396, 1999 Idaho Sess. Laws 396; see also Palmer v. Board of County Commissioners, 117 Idaho 562, 564 (1990).

Thus, the Legislature repudiated the language upon which the Board relies to grant Tungsten a special use permit, and changed the law to require that special use permits may only be considered for uses that are conditionally permitted in the ordinance. It follows that the Board's decision is based on an unlawful and invalid provision in the zoning ordinance. As such, the Board's decision is unlawful and void. A county has no authority to act on an ordinance that conflicts with I.C. 67-6512. Fischer v. City of Ketchum, 141 Idaho 349, 356 (2005).

The Legislature's repeal of the former language in I.C. 67-6512 makes sense. The Local Land Use Planning Act ("LLUPA") requires counties to adopt comprehensive land use plans and zoning ordinances that promote ordered growth while protecting property rights and the environment. I. C. 67-6512. The "catch-all" language in Section 1E of the Ordinance would allow local boards to circumvent zoning laws by granting special treatment to favored individuals as a "back door" into zone districts where the use is forbidden. The repeal of that language bars such action.

It is fundamental that a county ordinance may not conflict with general laws. 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 section 2 of article 12 of the Idaho Constitution, counties may not enact regulations that are in conflict with the general laws). Accordingly, the Board's decision granting the special use permit violates I. C. 67-6512, and must be reversed.

2. THE BOARD'S DECISION VIOLATES I.C. 67-6512 IN THAT THE DECISION CONFLICTS WITH THE COMPREHENSIVE PLAN AND ZONING ORDINANCE.

I.C. 67-6512(a) provides that a special use permit may be granted if the proposed use is conditionally permitted by the terms of the ordinance, and when it is not in conflict with the plan. The Board's decision violates I.C. 67-6512 because it conflicts with the comprehensive plan.

Section I of the Plan, "Private Property Rights," states that use of private property must not interfere with the health or safety of neighboring property owners or deny them the same inherent rights. The board's action granting the SUP violates this provision.

Tungsten's gravel pit is not being developed in an industrial area, or a commercial area, or in an abandoned rural area. Rather, it is on a farm to market road in a small area of existing residences, farms and ranches on which families live and work. The noisiest day on the ranch, with harvest trucks, cattle trailers, thunder storms, or airplanes overhead does not come close to the constant din and disruption of the trucks and machinery of a year-round open face rock quarry at the side of the road in plain view and hearing of everyone who live and work there.

Such an operation in a quiet farming and ranching area clearly interferes with the health and safety of neighboring property owners and denies them their property rights inherent in the zoning of that area. Tungsten's gravel pit is not a use by right or permitted use in the agricultural/forestry zone. When he purchased the property, Rick Dinning, a developer, should have had no expectation of putting a gravel pit there, and in fact, had none. His property was purchased for development. By admission of both Rick Dinning and Road Superintendent Gutshall, it was the county that initiated and encouraged the development of this pit.

As Chairman Smith said, it was "inevitable" that the permit would be granted, regardless of legal requirements, local need, or the concerns of local property owners. While the zoning commission required Tungsten to show compliance with the Plan and ordinance, the county board essentially rubber stamped its Road Superintendent's proposal to Tungsten regardless of the potential harm to adjacent properties. The board members' interest in protecting their road superintendent and ignoring the public's opposition deprived appellants of their property rights without due process.

The only expert evidence in the record is that Tungsten's proposed blasting causes an existing risk of dewatering aquifer fractures providing water to appellants' wells. Scholarly writings in the record explain why cattle-breeding using A.I. and E.T. techniques requires a stress free environment to be successful. Thus, the only expert evidence in the record shows non-compliance with zoning laws health, safety and property requirements. Since the proposed blasting and crushing are to take place in a populated area where no similar intensive use exists, expert evidence proving that there will be no harm to adjacent property owners would be a minimum for prudent and lawful decision-making. The burden of proof to

"be in accordance with the comprehensive plan" rests with the applicant. Tungsten provided no evidence and the county board was not interested in any.

The county board's decision violates the comprehensive plan by its disregard of county rules and standards and its personal interest in the subject matter. Tungsten's evidence in all of the county board hearings was virtually the same as that before the zoning commission, that is, Rick Dinning's personal and admittedly non-expert opinion that his proposed quarrying operation was not dangerous or disruptive. While the zoning commission applied the evidence to the standards in the ordinance and determined that there was insufficient information to show compliance, the county board simply granted the permit, and pushed off these determinations to other agencies having nothing to do with the county, property owners, local land use planning or local zoning laws. This is an arbitrary and capricious abuse of power in violation of the plan and ordinance.

The Board's decision conflicts with Section IV of the Plan, "Land Use," which states that county policy is to encourage agricultural enterprise to retain the predominantly rural nature of the community. R.O.A. 2006, p. 243-244. A permanent, open face mining operation in the middle of ranches and farms does not encourage agricultural enterprise and destroys the rural nature of the area forever.

In this State, appellants have a right to "full and complete" use of their agricultural land. Under I.C. 67-6529, county commissioners may not take any action that "deprives any owner of full and complete use of agricultural land for production of any agricultural product." Appellants produced evidence that constant noise and traffic of the pit operation could disrupt their cattle breeding program, and that blasting on the property causes a risk of dewatering aquifer fractures providing water to appellants' property. Such damage deprives

appellants of the full and complete use of their agricultural land for agricultural purposes, in violation of I.C. 67-6529.

The decision also fails to comply with the requirement in Section IV that the Board give consideration to the impact proposed commercial enterprises will have on current uses of surrounding lands and traffic flow in the area, and that county policy will encourage and promote "clean, low-impact industrial development in designated industrial zones." R.O.A. 2006, p. 244. Plainly, the increased truck traffic on the county road will impact current farm to market uses in the area. County road 46 is not used industrially and never has been. Typical seasonal farm equipment and machinery does not equate with heavy industry. By definition, an open face mining operation is not clean, low-impact industrial development in a designated industrial zone.

3. THE BOARD'S DECISION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Board must make findings that explain the facts upon which the decision is based. Gumprach v. City of Coeur d'Alene, 661 P.2d 1214 (1983). Explaining the facts requires more than copying the text of provisions in an ordinance and reading predetermined responses to rhetorical statements designed to rubber stamp a previous decision. Deliberations are required to demonstrate that an unbiased decision was made based on evidence showing compliance with the Plan and Ordinance.

For any meaningful judicial scrutiny of an agency's decision, and to require the agency to demonstrate it has applied the criteria prescribed by the statute and has not acted arbitrarily or on an ad hoc basis, the court must require the agency's order to "clearly and precisely state" what it found to be the facts and "fully explain" why those facts lead to its

decision. Workman Family Partnership v. City of Twin Falls, 104 Idaho 32 (1982), Neighborhood League v. Board of Commissioners, 569 P.2d 1063, 1076 (1977).

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, *supra*, p. 37. "Conclusions are not sufficient." *Id.* Failure to make factually supportable findings on all the Ordinance requirements is a failure to comply with the Ordinance. Taylor v. Board of County Commissioners, 124 Idaho 392, 401 (1993).

Under Chapter 13, Section 4 of the ordinance, a special use permit may not be granted unless the proposed use "will not have any substantial adverse effects" or "create hazards to" adjacent property owners, and "will not create noise, traffic, dust or other nuisances substantially in excess of permitted uses" in the zone district. (Ordinance, Ch. 13, Section 4C(3), (4), R.O.A. 2006, p.259 [emphasis added].) Thus, under Ch. 13, Section 4, the applicant must show the proposed operation will fit the community, not the other way around.

By its very nature, a commercial gravel pit on a county road next to a cattle breeding operation creates hazards, noise, traffic, dust and other nuisances substantially in excess of the uses in the area. Thus, the proposed operation by its very nature does not fit the community. The Board's decision disregards the ordinance to obtain a commodity from a Commissioner's brother that is easily obtainable from other sources in the area.

The county board's disregard of the evidence is clear. The county board's decision does not deny or overturn the zoning commission's factual findings of the potential harms to surrounding properties, and ignores the zoning commission's dilemma of the lack of expert or competent evidence to make suggestions for mitigation. The county board avoids confronting the issues by purporting to impose conditions on the operation, and by these conditions

"passing the buck" to other agencies and the court system in the hope that they will resolve the conflicts and deal with any damage. This is contrary to the standards in the ordinance which require the applicant to show that the proposed use will not damage adjacent property owners.

Shifting the burden to other agencies is not the standard for local agency decision making. The agency must demonstrate that it has applied the criteria prescribed by statute and by its own regulations and has not acted arbitrarily or on an ad hoc basis. The agency's decision must clearly and precisely state what it found to the facts and fully explain why those facts lead it to the decision it makes. (Workman Family Partnership v. City of Twin Falls (1982) 104 Idaho 32, 36-37.)

No evidence supports the proposition that other agencies or the courts will monitor Tungsten's gravel pit or protect adjacent property owners from damage from the gravel pit. The county board and its employees candidly admit they have no special knowledge about blasting or water, and just assume other agencies will take care of it. The Board does not specify what the other agencies' regulations say or do to mitigate the potential harm to adjacent properties and local water supplies.

The Board also fails to explain how any of its alleged conditions mitigates any of the identified potential harms to adjacent property owners. Conditions 1, 6, and 9 (mining operations to take place on site, crushing to take place 8:00 a.m. to 5:00 p.m., Monday through Friday between February 15 and May 2 of each year, survey of the pit site) only allow the operation to proceed as described in Tungsten's application. These specifications are the basis for the identified potential harms. They do not mitigate the harms.

A site plan showing "property boundaries, general topography, building layout, access, parking, landscaping and other details necessary to clearly depict the nature of the proposed use," is a requirement of Ch. 13, section 4(A)(3) for an application for special use permit, not a mitigating factor. R.O.A. 2006, p. 259. The only reason for Condition 9 is that Tungsten failed to comply with this requirement in the first place, which caused confusion as to the exact location of the pit. A site plan does not mitigate the identified potential harms.

Condition 4, allowing Tungsten twelve days of blasting rather than the two days originally requested expands rather than mitigates the potential adverse impact of blasting on water and irrigation. No restrictions are set on the time, intensity or location of blasting. There are no facts or expert evidence on which such restrictions could be set. A condition that expands the potentially harmful operation does not mitigate it.

The only expert evidence in the record is that Tungsten's proposed blasting will cause an existing risk of dewatering aquifer fractures providing water to appellants' wells. Based upon this expert evidence, it was incumbent on Tungsten to prove this would not happen. Without such evidence, increasing the number of blasting days without any limitations on the location or intensity of blasting does not mitigate the identified risk. "Passing the buck" to Tungsten's blasting contractors does not insure that any protective measures will be taken.

Condition 1 (keeping mining operations off the county road,) is a basic traffic safety law for the protection of motorists and pedestrians using the road from dangerous quarrying operations. It has nothing to do with the effect of blasting and quarrying operations on local water supplies, irrigation, cattle breeding, increased truck traffic, noise or diminished property values.

Condition 2 (dust abatement "as needed") provides no ascertainable standards and is discretionary with Tungsten, who can eliminate that condition by simply deciding it is not needed. The county board's reliance on the Idaho Department of Lands ("IDL") is also misplaced. County boards, not the IDL, are supposed to enforce local zoning ordinances. The decision does not identify the IDL regulations that are pertinent to the identified harms, if any.

Conditions 3 and 5 require Tungsten to comply with the "Best Management Practices For Mining in Idaho," and the blasting requirements of the federal Occupational Safety and Health Act ("OSHA.") What these requirements are is not specified. How OSHA requirements mitigate the identified harms is not explained. The Board members do not know.

OSHA, a federal agency overseeing employee safety in the workplace, has no responsibilities for protecting local property owners from adjacent rock quarrying operations. That is the county board's job pursuant to the plan and ordinance. Requiring Tungsten to use licensed blasters does not mitigate the potential harm to local water supplies caused by repeated blasting.[1]

Similarly, it is unknown how condition 7, requiring Tungsten to comply with IDL requirements, including filing a reclamation plan and bond, mitigates potential harm to adjacent property owners. A reclamation plan pertains to closing up the gravel pit, not operating it. Bond requirements can be waived, as they were for Tungsten. R.O.A. 2006, p. 282, para. 4. Similarly, condition 8, requiring Tungsten to notify the zoning commission upon redemption of the reclamation plan or forfeiture of the bond is irrelevant to operation of the pit.

---

[1] OSHA regulations require blasters to be qualified as a matter of employee safety. Accordingly, new condition 11, requiring blasters to be qualified, is redundant of old condition 5.

Condition 10, requiring Tungsten to notify the blasters Tungsten employs of the concerns of adjacent property owners does not require the blasters to do anything about those concerns or to take any precautions to protect surrounding properties. Having no evidence that precautions for specific, identified harms exist or can be taken, board members have no knowledge of what, if any protective measures can or should be taken.

The common thread between the conflicting decisions of the zoning commission and the county board is the absence of expert evidence or any other competent evidence that Tungsten's gravel pit can be operated to mitigate or eliminate potential adverse or hazardous impacts, or that noise, traffic and dust inherent in the mining operation can be reduced to levels commensurate with permitted uses in the zone district. *Absent competent evidence to support the Board's findings, the decision must be reversed.*

4. THE BOARD'S DECISION FAILS TO COMPLY WITH I.C. SECTION 67-6535 IN THAT IT FAILS TO STATE THE CONTESTED FACTS RELIED ON OR EXPLAIN THE RATIONALE FOR THE DECISION BASED ON APPLICABLE PROVISIONS OF THE COMPREHENSIVE PLAN AND RELEVANT ORDINANCE.

I.C. 67-6535 governs the issuance of findings of fact or conclusions of law relevant to a local land use agency's approval or denial of a land use application. Evans v. Teton County, 139 Idaho 71, 80 (2003). I.C. 67-6535 requires the findings to be in writing explaining the relevant criteria and standards, the relevant contested facts, and the rationale for the decision based on the applicable provisions of the comprehensive plan and ordinance and factual information contained in the record.

The decision must demonstrate that the agency applied the criteria prescribed by the statute, and did not act arbitrarily or on an ad-hoc basis. Workman Family Partnership, *supra,* 104 Idaho at p. 37. The Board's failure to identify the relevant facts underlying the conclusions in its decision violates I.C. 67-6535.

No meaningful discussion took place in the August 7, 2006 hearing. Chairman Smith simply read a prepared document that essentially told the two board members what to say to support a pre-made decision. Chairman Smith and member Kirby simply went along with the script. Neither asked any questions. No public comment was allowed.

At some point prior to the hearing, a decision had been made to readopt the full Board's 2005 decision verbatim, and that is what was done. The promised new hearing was a sham. It was arbitrary and capricious for the board to give lip service to its promise of a new hearing, and then totally ignore it by simply reinstating the former decision.. The old decision violated Idaho law prohibiting conflicts of interest. "Reinstating" a decision that violates an Idaho statute still violates Idaho law.

Under I.C. 67-6535, land use decisions should be founded upon sound reason and practical application of recognized principles of law. In reviewing such decisions, courts are directed to consider the proceedings as a whole and to evaluate the adequacy of procedures and resultant decisions in the light of practical considerations, fundamental fairness and the essentials of reasoned decision-making.

Going through the motions of holding a new hearing and then "readopting" an illegal decision is ad-hoc decision-making at its most contrived. Such decision violates the provisions of I.C. 67-6535.

5. THE DECISION WAS MADE UPON UNLAWFUL PROCEDURE AND DEPRIVED APPELLANTS OF DUE PROCESS BECAUSE NOTICE WAS INADEQUATE.

Decisions by zoning commissions apply general rules to specific individuals. As such, they are "quasi-judicial" in nature. Cowan v. Board of Commissioners of Fremont County, Docket No. 30061, 2006 Opinion No. 107, 2006 Ida. LEXIS 151 (November 29, 2006,), p. 16 of Opinion, quoting from Chambers v. Kootenai County Bd. Of Comm'rs, 125 Idaho 115,

lelo

118 (1994). Land use hearings that are quasi-judicial are subject to due process constraints. *Id.* Procedural due process requires some process to ensure the individual is not arbitrarily deprived of his rights in violation of the state or federal constitutions. *Id.* Due process issues are generally questions of law over which the court exercises free review. *Id.* p. 17.

Notice for special use permit hearings is governed by I.C. 67-6512. I.C. 67-6512(b) provides for published notice 15 days before the hearing, and that specific notice be given to property owners within 300 feet of the property being considered, and to "any additional area that may be substantially impacted by the proposed special use" as determined by the Zoning Commission. Chapter 13, Section 4(B) and Chapter 16 of the zoning ordinance requires only 15 days' notice be given to property owners within 300 feet of the land being considered. R.O.A. 2006, p. 259.

The Zoning Office gave appellants 15 days' notice as required by Chapters 13 and 16 of the ordinance. In view of the county board's requirement that appellants needed expert evidence to prove that the applicant failed to comply with the plan and ordinance, rather than the other way around, the abbreviated 15 day notice period was completely inadequate to protect appellants' rights.

Through its Road Superintendent, the county knew about Tungsten's intentions long before the zoning commission hearing in May. But the county did not mail notice of the application to appellants or otherwise provide public notice until May 2, 2005, only two weeks before the hearing. R.O.A. 2005, p. 98. Appellants request for continuance of that hearing to submit expert evidence was denied. Appellants' subsequent request for continuance of the county board hearing was denied on the basis that appellants had not

obtained their expert evidence for the zoning hearing. This Catch 22 in the county's hearing process deprived appellants of due process.

It is clear that the notice provisions in the zoning ordinance are inadequate to provide due process to impacted rural communities. Farm and ranch properties generally exceed 300 feet from all but their adjacent neighbors. In rural areas such as Porthill, the 300 foot limitation essentially restricts notice to all but the two or three neighboring farms. The impact of a commercial gravel pit/rock quarry operation affects the entire community, not just the two adjacent neighbors. Such limited notice conflicts with I.C. section 67-6512(b).

With only the nearest property owners notified, special use permits can be granted more or less in secret. Property owners or the county can quietly impose non-compatible uses without the impacted community being aware, as happened with the prior two special use permit applications in Porthill. Notice by publication is insufficient to directly notice all of the impacted property owners in a rural area. These limitations prevent due process and fair hearings.

In planning and zoning decisions, due process requires an opportunity to present and rebut evidence. Cowan v. Board of Commr's, supra. In its decision, the Board relied on a document, Appendix I of the Comprehensive Plan relating to mining, to support its decision granting the SUP. Although a public document, Appendix I is not generally available to the public. It was not provided to the public or made a part of the record. The Board's reliance on selected portions of an unknown document deprived appellants of due process. Other sections in Appendix I relating to Agriculture were purposefully omitted from the Board's decision.

6. THE DECISION WAS MADE UPON UNLAWFUL PROCEDURE AND DEPRIVED APPELLANTS OF DUE PROCESS IN THAT BOARD MEMBERS WERE NOT IMPARTIAL.

Parties to a quasi-judicial land use hearing are entitled to a tribunal which is impartial in the matter -- i.e., having had no pre-hearing or ex parte contacts concerning the question at issue. Idaho Historic Preservation Council, Inc., 134 Idaho 651 (2000) , quoting Fasano v. Board of County Commissioners, 264 Ore. 574 (Ore. 1973). The county road superintendent's pre-hearing involvement in Tungsten's gravel pit, and the county board members' expressed interest in protecting its employee deprived appellants of the due process requirement of an unbiased hearing tribunal.

The county board was also biased in their personal preference to obtain rock only from a board member's brother. Their bias permeated the hearings, and is expressed in the board's written findings. Finding 7 in the 2005 decision, "Transportation," ("readopted" as finding viii in the 2006 decision,) states that the special use permit would reduce "costs of road maintenance and upgrades by providing a local supply of suitable grade material for road use." R.O.A. 2006, p. 227, 231. In the context of these proceedings, "suitable grade material" refers only to rock from the board member's brother's pit, not from any other pit in the area. The Board's expressed bias denied appellants a fair and impartial hearing.

7. THE BOARD'S DECISION IS ARBITRARY AND CAPRICIOUS AND AN ABUSE OF DISCRETION.

The Board's actions may be reversed if the Court finds the Board acted arbitrarily, capriciously or abused it discretion. Eacret v. Bonner County, 139 Idaho 780, 784 (2004). The Board abused its discretion by failing to comply with the Plan and ordinance, failing to provide an unbiased hearing on Tungsten's SUP, and making a decision based on personal preference and the desire to obtain rock from a board member's brother.

Except for renumbering the paragraphs and adding one redundant condition, the 2006 findings and decision is a verbatim copy of the former decision. The board's "readoption" of a judicially nullified decision is arbitrary and capricious.

Instead of taking an additional look at the case, the Board continued where it left off with the same decision and same conditions and same lack of expert evidence to show compliance with the Plan and ordinance. Such action is arbitrary and capricious.

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

"A claim of 'spot zoning' is essentially an argument that 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." Evans v. Teton County, 139 Idaho 71, 76-77 (2003), citing Dawson Enters., Inc. v. Blaine County, 98 Idaho 506, 514 (1977).

It is clear from the "inevitable" decision that board members approved the special use permit and made findings around it to provide a special economic benefit to a board member's brother. From the inception of these proceedings, the Road Superintendent identified Tungsten as the county's rock provider of choice. The same rock from other sources was not "suitable." The intensive commercial mining use of Tungsten's property permanently changes the agricultural character of the Porthill area, as the rural atmosphere and continued usefulness for livestock production are severely compromised by such operation, if not completely devastated.

The county's argument that Tungsten's pit provides a public benefit is an obvious excuse for singling out Tungsten for a special economic benefit. There is no competent evidence that Tungsten's rock is any better or different from the rock on other properties in the same area, or that the Board cannot economically obtain rock from other areas. The gravel pit provides a personal economic benefit to a board member's brother, not to the public. The public pays for the rock either way. The same public benefit comes from rock from any source. Tungsten's SUP is clearly "type two" spot zoning, and is, therefore, invalid.

9. APPELLANTS' SUBSTANTIAL RIGHTS HAVE BEEN PREJUDICED.

The Board's action granting the SUP prejudices appellants because the operation will disrupt their cattle breeding operation, the peaceful enjoyment of their property, and will devalue their property for any purpose. Appellants exhausted their administrative remedies under I.C. 67-6512 and I.C. 67-8003 (approval of a special use permit with conditions unacceptable to the landowner may be subject to a regulatory taking analysis). The board's regulatory takings analysis denying violation of appellants' vested property rights is arbitrary and capricious for all the reasons stated above, and must be overturned.

10. APPELLANTS ARE ENTITLED TO RECOVERY OF ATTORNEY FEES AND COSTS.

Appellants are entitled to an award of attorney fees and costs pursuant to I.C. 12-117(1) which states, in part, that:

> (1) Unless otherwise provided by statute, in any administrative or civil judicial proceeding involving as adverse parties a . . . county . . . and a person, the court shall award the prevailing party reasonable attorney's fees, witness fees and reasonable expenses, if the court finds that the party against whom the judgment is rendered acted without a reasonable basis in fact or law.

I.A.R. 41(a) requires any party seeking attorney fees on appeal to assert such a claim as an issue presented on appeal in the first appellate brief filed by such party. Appellants herein complied with said section.

I.A.R. 35(a)(5) requires appellants, seeking attorney fees on appeal, to so indicate in the division of issues and state the basis for the claim. Again, appellants have complied with this rule.

Several recent Idaho Supreme Court cases are instructive on this issue and support an award of attorney fees to appellants. In Reardon v. City of Burley, 140 Idaho 115 (2004), the Idaho Supreme Court quoted prior case law and stated:

> 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 or attempting to correct mistakes agencies never should have made.

Under the statute, attorney fees must be awarded if the court finds in favor of the appellant and further finds that the county acted without a reasonable basis in fact or law.

Attorney fees were awarded to the plaintiff in Reardon on the basis that the court determined that the county acted without a reasonable basis in fact or law where an agency had no authority to take a particular action. In that case, a county ordinance was enacted contrary to the provisions of Idaho's Local Land Use Planning Act. 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. Idaho Const. Art. XII, § 2.

Although the county ordinance in Reardon involved areas of city impact, the argument is equally applicable in the instant case on the basis that respondent Boundary County enacted Chapter 7 Section 1(E) in December, 2001 at a point in time after the Legislature repealed similar language in the earlier version of I.C. 67-6512.. Accordingly, the county knew, or should have known at the time of enactment of the ordinance, that the language contained therein had been expressly disapproved by the Legislature.

Perhaps even more galling, however, is the fact that appellants' original Petition for Judicial Review, filed October 3, 2005, raised this issue. Paragraph 5.A 4) of said Petition for Judicial Review stated:

> 4) The decision of the Boundary County Board of Commissioners is in violation of I.C. 67-6512 in that a special use permit may be granted only if the proposed use is constitutionally permitted by the terms of the zoning ordinance. Bonner(sic) County Zoning Ordinance Chapter 7, section 1, relating to agriculture/forestry zones, does not allow a gravel pit/rock quarry operation as a conditional use in said zone.

The issue was reasserted in appellants' Petition for Judicial Review filed September 11, 2006 (see paragraph 5.A 2)).

In Fischer v. City of Ketchum, 141 Idaho 349 (2004), the Idaho Supreme Court awarded attorney fees against the City of Ketchum on the basis that the City wholly ignored a provision of its ordinance requiring certification by an Idaho licensed engineer prior to granting of a conditional use permit. Although the Boundary County ordinance does not expressly require expert testimony to support the issuance of a special use or conditional use permit, the provisions of Chapter 13: Special Uses Section 4: Application Procedure: subparagraph C.4) require the county to find that the proposed special use will not create

noise, traffic, odors, dust or other nuisances substantially in excess of permitted uses within the zone district. The failure of the county to require the applicant to provide any credible evidence whatsoever to meet this burden, and the resulting decision made by the county without any such evidence, falls within the same realm of prohibited conduct in that the county wholly ignored the provisions of its zoning ordinance.

In County Residents Against Pollution from Septic Sludge (CRAPSS) v. Bonner County, 138 Idaho 585 (2003), the Idaho Supreme Court addressed the issue of attorney fees. In that case the District Court awarded plaintiffs attorney fees against respondent county. The county argued that it acted with a reasonable basis in fact because it simply followed its ordinance. However, in that case, the District Court held that the county had not followed its ordinance. The court held that when the county failed to follow its ordinance, it acted without a reasonable basis in fact or law. In the Bonner County case, the county arbitrarily dismissed plaintiffs' administrative appeal with no basis. In the instant case, as can be gleaned from the prepared decision that mirrored exactly the prior decision (with the exception of one condition), the county arbitrarily granted the special use permit with no basis under the ordinance for doing so.

The standard for awarding attorney fees under I.C. 12-117 requires focusing on the overall action of the agency. Rincover v. State Dep't of Fin., 129 Idaho 442 (1996). In this case the overall action of the agency seems somewhat comparable to that of Bonner County in the case of Eacret, *supra*. In that case the District Court awarded attorney fees to appellants. Although the Supreme Court reversed on procedural grounds, a reading of the Eacret case reveals similarities to the instant case.

In Eacret, the applicants applied for a variance; in this case Dinning applied for a special use permit. In both cases the application was denied by the planning and zoning commission. In each case the board's actions and reasoning differed markedly from that of the planning and zoning commission. In each case there were allegations that the commissioners encouraged the applicant to apply (Dinning) and reapply (Harris). In each case the board of commissioners appeared to have reached a decision on the application prior to final hearing before the board. Although in Eacret, it was Harris who had ex parte contact with the commissioner, in this case it is the respondent county's road commissioner having ex parte contact.

In each case bias of a decision-maker was a primary concern. The reason for this, of course, as set forth more fully above, is that the due process clause entitles a person to an impartial and disinterested tribunal. Bias of a board member renders that board member's participation in the due process hearing constitutionally unacceptable. Commissioner Dinning has, previously, been disqualified from the decision-making process for conflict of interest. In that case bias is presumed. Equally offensive, however, are the comments and statements of board chair Smith, especially with regard to the contention that the applicants had a "right" to have a gravel pit and that the granting of the same was "inevitable." Further evidence of bias can be found when chairman Smith promoted 12 days of blasting as opposed to the two that had been requested by the applicant.

Commissioner Mueller criticized the decision of the zoning commission; commissioner Smith did as well.

In analyzing the remarks of commissioner Mueller, the court noted that a decision-maker is not disqualified simply because he has taken a position and that, further, pre-hearing

statements are not fatal to the validity of a zoning determination so long as the statement does not preclude the finding that the decision-maker maintained an open mind and continued to listen to all of the evidence. With regard to the issue of an open mind, it would appear as though the purpose behind deliberating, after closing of public hearing to testimony, is so that a decision-maker, as a result of hearing statements from fellow commission members, might have an opportunity to reflect and consider various points of view. The summary reading of a decision, without deliberation, modeled on the prior decision, is persuasive evidence that the respondent board did not come to a decision with an open mind. Just as Mueller's comments foretold the result in the Eacret case, the current board's lack of deliberation foretold the result of the proceedings in this case.

Finally, in the instant case the county's desire to obtain rock from the gravel pit led to a conclusion, unsupported by evidence, that this rock was, apparently, the only suitable rock in the general area.

The overall action of the agency in this case clearly discloses that the respondent acted without a reasonable basis in fact or law and, as a result thereof, appellants are entitled to attorney fees and costs on appeal.

V. CONCLUSION

Appellants are entitled to have the agency action set aside in whole. There is no need to remand for further proceedings. The reversal of the agency's decision is consistent with the provisions of I.C. 67-5279(3) in that the decision was:

A. In violation of constitutional and 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; and

E. Arbitrary, capricious and an abuse of discretion.

Respectfully submitted this 16 day of April, 2007.

Paul William Vogel
Attorney for Appellants

CERTIFICATE OF DELIVERY

I hereby certify that on this 16 day of April, 2007, I delivered a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF APPELLANTS' PETITION FOR JUDICIAL REVIEW via U.S. first class mail, postage prepaid, addressed to:

Boundary County Prosecutor's Office
P.O. Box 3136
Bonners Ferry, ID 83805

Bonnie Stout

FILED

2007 JUN -1 PM 3:57

STATE OF IDAHO
COUNTY OF BOUNDARY
GLENDA POSTON, CLERK
BY _____ DEPUTY CLERK

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

PATRICK GARDINER and ADA GARDINER, husband and wife, Petitioner, vs. BOUNDARY COUNTY BOARD OF COMMISSIONERS, Respondent	CASE NO. CV-2006-339 **MEMORANDUM IN OPPOSITION OF APPELLANTS' PETITION FOR JUDICIAL REVIEW**

COMES NOW, TEVIS W. HULL, Boundary County Deputy Prosecuting Attorney and hereby submits the following Memorandum in Opposition of Appellants' Petition for Judicial Review of the decision of the Boundary County Board of Commissioners

I.
STATEMENT OF THE CASE.

On March 22, 2005, Tungsten Holding, Inc., filed an application for a special use permit to operate a permanent commercial gravel pit on seven (7) acres near Porthill, Boundary County, Idaho. The Appellants' property is adjacent to the Respondent's property. (R.O.A. 2006, p.1-2) The appellants operate on their property a registered Angus cattle ranch.

The President of Tungsten Holding, Inc., is Rick Dinning. Rick Dinning is the brother of Dan Dinning, a member of the Boundary County Board of Commissioners. (R.O.A. p. 216) On May 19, 2005, the Boundary County Planning and Zoning Commission held a public hearing and after that hearing the evidence was submitted and findings, a recommendation to the Boundary

County Board of Commissioner to deny the special use permit. (R.O.A. 2006 p183-184). However, the Boundary County Board of Commissioners is charged with making the final decision.

The Boundary County Board of Commissioners held a hearing on July 26, 2005, in which the Board tentatively approved the special use permit but took under advisement to determine whether or not mitigating conditions could be imposed. A subsequent hearing was held on August 8, 2005, in which Board of County Commissioners approved the special use permit subject to suggested conditions. Dan Dinning participated in the hearing but abstained from voting. (C.T. 8/8/05 p.1:23, p 39:24-25, p41:14-25, p. 42:1-4). On September 6, 2005, the Board of County Commissioners met once again to address the Findings prepared by Zoning Coordinator, Mike Weland. No public discussion was permitted and Dan Dinning did not participate in the discussions and abstained from voting. (C.T. 9/6/05 p.18, R.O.A. 2006, p.172-174).

On September 13, 2005, the Appellants filed a Request for Regulatory Taking pursuant to Idaho Code 67-8003. On September 27, 2005, the Board of County Commissioners denied that the taking of Appellants' property had occurred. The Appellants filed a Petition for Judicial Review on October 3, 2005. (R.O.A. 2006, p.218). Pursuant to the filing of the Judicial Review and further negotiations between the Appellants and the County, on April 30, 2006, the parties stipulated that Dan Dinning's participation in the previous hearings constituted a conflict of interest and that the special use permit previously granted should be voided. In addition, the parties stipulated that the matter would be remanded for a new hearing without Commissioner Dinning's participation. That stipulation was memorialized and signed by the Court on May 26, 2006. (R.O.A. 2006, p.216-217)

A new hearing took place on July 24, 2006, and additional testimony was presented both in favor of and in opposition against the special use permit. The Appellants presented to the Board of

County Commissioners two additional written documents including a letter dated July 19, 2006, written by Pat and Ada Gardiner and a letter dated July 17, 2006, from Kristine Uhlman, R.G., who was hired by Pat and Ada Gardiner providing a hydrogeology analysis of the proposed special use permit and its potential affects on the Gardiner property. In addition, the Appellants provided a report from the Michigan State University Extension entitled "Getting the Cow Herd Bred." Finally, the Gardiners also presented a list of approvals and disapprovals of requests from individuals for gravel pit operations in certain geographical locations. It was also stated at the July 24, 2006, public hearing by John Topp, the Attorney for the Board of County Commissioners, "The previous record of the board heard pursuant to this stipulation is part of this record as well as basically everything that you have heard before you can utilize and make in your decision, you can go back through and review that information as necessary. Also we stipulated that it would be back before the County Commissioners for a hearing and Commissioner Dan Dinning, the record needs to reflect, is not even present within this room . . ." (C.T. 7/24/06 p.2-4) At the conclusion of the hearing, the matter was taken under advisement and the hearing was rescheduled for August 7, 2006. (C.T. 8/7/06 p. 1) The Commissioners approved the special use permit affirming the findings that had been voided by the Court due to the conflict of interest allegations. Moreover, an additional condition was placed on the special use permit. Again the Appellants filed a request for regulatory taking on August 29, 2006. On September 26, 2006, the County denied that a taking had occurred. The Appellants have now filed this petition for judicial review.

II
STANDARD OF REVIEW

This appeal is filed in accordance with the Idaho Administrative Procedure Act ("IAPA"), Title 67, Chapter 52 of Idaho Code. The court reviews the decision of a governmental agency under

the standards set forth in the IAPA, and in accordance with Idaho Code Section 67-5270(2), which states:

> "A person aggrieved by final agency action other than an order in a contested case is entitled to juridical review under this chapter if the person complies with the requirements of Sections 67-5271 through 67-5279, Idaho Code."

There is no issue that the County is treated as an administrative agency for the purpose of judicial review. The court has solidified this position, see Allen v Blaine County, 131 Idaho 138, 140, 953 P.2d 578, 580 (1998), Southfork Coalition v Board of Commissioners, 117 Idaho 857, 860, 792 P.2d 882, 885 (1990).

The scope of review is set forth in Idaho Code Section 67-5279 which provides in part as follows:

> "(1) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.
> (2) When the agency was not required by provisions of this chapter or by other provisions of law to base its action exclusively on a record, the court shall affirm the agency action unless the court finds that the action was:. . .
> (3) . . . the court shall affirm the agency action unless the court finds that the agency's findings, inferences, conclusions, or decisions are:
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon the unlawful procedure;
> (d) not supported by substantial evidence on the record as a whole; or
> (e) arbitrary, capricious, or an abuse of discretion.
> If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary.
> **(4) Notwithstanding the provisions of subsections (2) and (3) of this section, agency action shall be affirmed unless substantial rights of the petitioner have been prejudiced."** (Emphasis added)

Thus, the function of the reviewing court is to determine whether the decision of the County is supported by substantial evidence, and if so, whether the conclusions properly apply the law in relation to the facts as found. The court should be guided by Howard v Canyon County Board of

Commissioners, 128 Idaho 497, 480, 915 P.2d 709, 710 (1996), in determining "There is a strong presumption of the validity favoring the actions of zoning authorities." Id. "The County's findings of fact are upheld if they are supported by substantial and competent evidence. The court must defer to the agency findings of fact unless they are clearly erroneous." See Castaneda v Brighton Corp., 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998) citing Southfork Coalition v Board of Commissioners, 117 Idaho 857, 860, 792 P.2d 882, 885 (1990). Further, the Idaho Supreme Court has indicated that "**the agency's factual determinations are binding on the reviewing court even where there is conflicting evidence before the agency so long as the determinations are supported by substantial competent evidence in the record.**" Id. (Emphasis added)

The district court must not interfere with the County's substantiative decision making process. It is essential to note that the term "substantial evidence" does not refer to a particular quantum of evidence, but rather "substantial" requires that there be evidence that is sufficient in quantity and value that reasonable minds could conclude that there is evidence supporting the decision. Owen v Burcham, 100 Idaho 441, 559 P.2d 1021 (1979) (emphasis in original). The Supreme Court in Mancilla v Greg, 131 Idaho 685, 687 (1980), defines "substantial and competent evidence." The court stated:

> "Substantial and competent evidence is more than a scintilla of proof, but less than a preponderance. It is relevant evidence which a reasonable mind might accept to support a conclusion. Where conflicting evidence is presented that is supported by substantial and competent evidence, the findings of the commission must be sustained on appeal regardless of whether this court may have reached a different conclusion." Mancilla 131 Idaho at 687 (citation omitted)

Regardless of whether the petitioners or the court may have reached a different decision than that of the Boundary County Planning and Zoning Commission and that of the County, the decision of the County must be upheld by this court.

III
ISSUES

1. Did the Boundary County Board of Commissioners action violate Idaho Code Section 67-6512?
2. Does the Boundary County Board of Commissioners' decision conflict with the Comprehensive Plan and Zoning Ordinances?
3. Was the Boundary County Board of Commissioners' decision supported by substantial evidence on the record?
4. Did the Boundary County Board of Commissioners' decision fail to comply with Idaho Code 67-6535?
5. Do the Appellants have standing to bring this appeal?
6. Did the Boundary County Board of Commissioners adopt unlawful procedures and deprive the Appellants of due process?
7. Did the actions of the Board of County Commissioners deprive the Appellants of due process based upon impartiality?
8. Was the Boundary County Board of Commissioners decision arbitrary and capricious and an abuse of discretion?
9. Were substantial rights of the Appellants prejudiced?
10. Does the Board of County Commissioners' decision constitute unlawful spot zoning?
11. Is the county entitled to attorneys' fees?

1. Did the Boundary County Board of Commissioners action violate Idaho Code Section 67-6512?

No. Idaho Code Section 67-6512 provides in part in subparagraph (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)

The appellant argues that the Code 67-6512 specifically provides that the special use permit may be granted to an applicant "if the proposed use is conditionally permitted by the terms of the ordinance." The position taken by the Appellants is narrow in its scope and application. Appellants' position more correctly would be stated that unless it is a conditional use permit it cannot be a special use permit. The term used in the statute does not provide that special use permits are the same as conditional use permits. The statute specifically 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..." If intent of the statute was to say that there must be a conditional permit, it would logically follow then that there would be no need for special use permits. One must look at the county ordinances to determine if special use permits are conditionally permitted within the ordinance.

Pursuant to Boundary County Zoning and Subdivision Ordinance 99-06, Chapter 7, Section 1, subparagraph (e) it provides "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." Therefore, the ordinance conditionally permits special use permits subject Chapter 13 of the Boundary County Zoning and Subdivision Ordinance 99-06. Variations of special use permits are defined in Chapter 13, Section 1, subparagraph (A) "Special Uses are uses which, by their nature, are significantly more

intensive than the permitted uses in a zoned district, but which can be carried out with particular safe guards to insure compatibility with surrounding land uses. Special Uses are, therefore, subject to restrictions, requirements and conditions more stringent than those applying generally within the zoned district." It is clear that Idaho Code Section 67-6512 provides counties a mechanism to process applications for special or conditional use permits as part of their zoning regulations. Special use permits may be allowed with conditions attached to extent provided in local ordinances subject to the ability of local government to provide services if appropriate for the proposed use, and when the use is, as proposed, not in conflict with the comprehensive plan.

The issue raised by the appellants is also addressed by Mike Weland, the Planning Director for Boundary County, at the July 24, 2006, public hearing. Stated by Mike Weland, "...The agriculture/forestry zone district encompasses over 85% of the land area in Boundary County and it is by far the most predominant zoning in Boundary County. Rural community commercial zoning, which allows both residential and commercial development, comprises of less than 1% of the land area in Boundary County situated primarily in community centers in areas zoned for higher density development. Industrial zoning comprises of a fraction of 1% of the land area currently situated solely at the Boundary County airport and at two locations at three mile. Further, the Boundary County Zoning and Planning Ordinance defines commercial use as a use or structure intended primarily for conduct for retail trade of goods or services and industrial use as use of a partial or development of a structure intend primarily for the manufacture, assembly or finishing of products intended primarily for wholesale distribution. Boundary County Comprehensive Plan identifies minerals as a natural resource and note that nonmetallic mineral resource in the county may have an economic impact greater than that of metallic. Same gravel and crushed rocks are produced at minimal costs at various locations in the county. Deposits of sand and gravel are found in abundance

at lower elevations within the valley. Crushed rock is obtained from crushing operations at rock quarry sites with mineral deposits found at various locations throughout the county. Minerals are vital to the health and prosperity of not only to our area, but to the nation as a whole. In the first road and building rock, sand, gravel and related material have been mined here in abundance. Pits and quarries can be found throughout the county and are too numerous to list. Because the costs of roads and materials for building whatever materials were found on federal land and close to the area where to be used, they were mined. Mining for sand and gravel for road building and construction has been and remains a huge economic importance to Boundary County. Every road has gravel pits that were used during construction and remain in use as needed through the years. Boundary County Zoning and Subdivision Ordinance does not specifically refer to mining gravel pits or rock quarry in any district. Therefore, such use may be considered as a special use in any zoned district.

Based upon a reference made on the importance of mining in the comprehensive plan, it is unreasonable to assume that mining would be prohibited use in all zoned districts based simply on specific mention. It is recognized that mining is commercial as are agriculture and forestry. It is also recognized that mining is an extension of a natural resource and mining can only be accomplished where the resource exists.

Again, it is important to stress that the narrow reading of the appellants would have the court conclude that the term conditionally permitted as used in Idaho Code 67-6512, would be the same as a conditional use permit. By mere definition, a conditional use permit is different from a special use permit. Had Boundary County's ordinance been silent as to allow for a special use permit in the particular zoned area, then the county would be prohibited from granting a special use permit. Given the forethought of the Commissioners in adopting the ordinances provided that special use permits can be conditionally permitted according to the terms of their ordinance.

2. Does the Boundary County Board of Commissioners' decision conflict with the Comprehensive Plan and Zoning Ordinances?

No. The decision holds firm on the protection of private property rights expressed in the comprehensive plan. "Boundary County policy will advocate the rights of property ownership recognizing the prima se of private property rights and sanctity of private property ownership as annunciated in the Fifth Amendment of the United States Constitution, Articles 1 and Article 14 of the Idaho Constitution. There is no doubt that the Appellants feel that there is a competing interest in the approval of the special use permit. However, they have failed to recognize that the use of a special use permit granted is compatible with the Appellants' own use of their land. The concerns of the Appellants were specifically stated within the findings and decisions regarding the special use permit in this case which were duly noted and taken into consideration in approving the special use permit. Blasting was limited to 12 week days during a calendar year between the hours of 8:00 a.m. to 5:00 p.m. In addition, the crushing operation would only be allowed from 8:00 a.m. to 5:00 p.m. on Monday through Friday between the dates of February 15, and May 2 of each year. (See Finding and Conditions of Special Use Permit) There was not factual information presented by either the appellants or anyone in opposition to the special use permit that would demonstrate to the Commissioners that there would be any adverse effect on the community as a whole. There are only five residences within a mile radius of the proposed gravel pit.

As previously stated, the commissioners reviewed the information provided by the Appellants from their expert, Kristine Ulhman. On page five of her report, she draws generalized conclusions such as "due to the complicated nature of fracture rock, fractures important to the performance of the irrigation well may be intersected or the elevation of fracture drainage could be changed. It is obvious that any fractures that may have contributed to the irrigation well that are within the area of

excavation may drain as much as 100 feet, the maximum dept of excavation in the hill side. The effect of such drainage from the aquifer could reduce or alter ground water flow to the irrigation well." Furthermore, she went on to state on page six of her evaluation in the last full paragraph "...Excavation to a depth greater than 1840 . . . could result in drainage of important fractures providing water to the well." (Emphasis added)

In rebuttal, Rick Dinning made valid points stating, "Regarding the letter from Kristine Ulhman, the expert, I will remind you that she was employed by the Gardiners to assess the potential for water loss to the property as a result of our rock pit. In her conclusions, conclusion one she says there is a risk of dewater aquifer fractures. There is also a risk that the well could run dry from over use. Now this is what I am saying now, there is also a risk that the well could run dry from over use by irrigating too heavily, there is also a risk that the drought could cause the well to change, there being also a risk that the Gardiners' electric fence could start a wild fire which would cause irreparable harm to Tungsten Holdings and property. The world is full of risk. Her conclusion two the pit would induce drainage that could dewater aquifer fractures. Just south of our pit site are exposed cliffs and cuts made into the rock faces where, when the railroad was built in this area, I have never seen water running out of these rock faces. It is also interesting to note that based on Ms. Ulhman's letter and a well driller's report filed with the Idaho Department of Water Resources, all but five gallons per minute of the water located in the irrigation well was found at the elevation of 1,727 to 1,747 feet above sea level or lower. The bottom of our pit will be the valley floor which will be 1,760 feet above sea level. We will be a minimum of 33 to 55 feet above the elevations. Mr. Minden, the well driller, found 89.6% of the water when he drilled. Getting back to her point that it could dewater, could is not the same word as will. Could means might or may perhaps or possibility will. I could run for president or I could rob a bank, I will probably will not . . . "

(Emphasis added) He was using extreme examples in his argument, however, his point is certainly well taken. There is nothing of a definitive nature that talked about scientific probability of damage to the cattle operation of the Appellants. Nor is there any indication in the report authored by Michigan State University Extension that would draw anyone to the conclusion that a rock crushing pit would cause infertility or abortions of cattle, but only provided general information with regard to inseminated cows being put in a minimum stress situation as possible.

The Board of County Commissioners was not provided any information which would show any substantial adverse effects or would create hazards to the adjacent property owners. In the findings adopted by the Commissioners, they took into consideration, private property rights, population, economic factors, land use factors, natural resource factors, hazardous areas, public services facilities and utilities, transportation, recreation and community design. Each of those areas for consideration are outlined in the comprehensive plan.

3. Was the Boundary County Board of Commissioners' decision supported by substantial evidence on the record?

In addition to what has been stated above, it is imperative to recognize that making a decision as a board it is a matter of discretion. Specifically, in approving a special use permit, the Commissioners are directed to make appropriate conditions in a special use permit that would protect the consistency of the comprehensive plan. Therefore, the Commissioners made specific condition to the approval of the special use permit, which include roads and access that must be approved by the Boundary County Road and Bridge; dust abatement; operations of the pit that follow the best management practices for mining for Idaho, published by the Idaho Department of Lands on November 16, 1992, or as updated; blasting conditions which require 15 day notification in advance specifying the date, time and length of blasting, and that all blasting must meet OSHA requirements

established at 29 CFR, subpart U; that the pit must comply with all Idaho Department of Lands Reclamation Plan; all persons employed to blast must be qualified, licensed and insured; and any persons employed to conduct blasting operations shall be notified prior to blasting of the concerns expressed during the hearing process of the potential damage to area water systems including Trow Creek Water Association. Both the written documentation and oral testimony taken substantially support the decision made by the Commissioners to approve the special use permit.

4. Did the Boundary County Board of Commissioners' decision fail to comply with Idaho Code 67-6535?

Idaho Code Section 67-6535 (a) provides "The approval or denial of any application provided for in this chapter shall be based upon standards and criteria which shall be set forth in the comprehensive plan, zoning ordinance or other appropriate ordinance or regulation of the city or county."

Subparagraph (b) provides "The approval or denial of any application provided for in this chapter shall be in writing and accompanied by the reason statement that explains the criteria and standards considered relevant, states the relevant contested facts relied upon, and explains the rational for the decision based upon the applicable provisions of the comprehensive plan, relevant ordinance and statutory provisions, pertinent constitutional principles and factual information contained in the record."

In addition to Idaho Code 67-6535, Boundary County ordinance requires that the final decision of the special use must be in accordance with paragraph (g) of Chapter 13, Section 4(g) which states that the decision be in writing setting forth the reason for the decision and the ordinance sections referred to by the county which is a more restrictive standard than that stated in Idaho Code 67-6535. Specifically, the findings draw attention to the concerns expressed by surrounding property

owners, most notability regarding the potential adverse effects of blasting on surround water well and the Trow Creek Water Association and the increase dust and noise. Taking into consideration those factors, the Board of County Commissioners made findings to address those concerns and also made a finding to mitigate and establish terms and conditions that would address those concerns of the surrounding public. In addition, the concerns with regard to road dust, noise, blasting, were all concerns that were addressed by the Board of Commissioners. Therefore, the Board of County Commissioners was not in violation of Idaho Code 67-6535, nor were they in violation of their own county ordinance in paragraph (g) of Chapter 14, Section 4(g).

We are left to conclude that the Appellants are simply disgruntled. That the County Commissioners did not agree with their position. Appellants attempt to allege that the Commissioners misapplied law and implied that evidence imposed special use permit was ignored and somehow the Appellants' evidence and testimony should be more compelling to the county. The Commissioners chose to rely upon all evidence in the record.

If Court were to reverse and remand the actions of the county, then there would be no need for elected officials to made decision and interpret their own ordinances, as opposing parties could say to the court, "I disagree with the decision made by the governmental agency" and the court would be left to decide the issue of permits. Obviously, such a proposition is not recognized in the law and substitutes reason the governmental decision for activism. The Commissioners made the proper written finding and acknowledged the concerns of the Appellants in the written conditions of the special use permit.

5. Do the Appellants have standing to bring this appeal?

The party attacking a planning and zoning board's decision, in this case, the decision of the County, under Idaho Code 67-5279, first must illustrate that the County erred in a manner specified

in Idaho Code 67-5279(3) and then must show a substantial right of the party has been prejudice. Payette River Prop. Owners Assn. v Board of Commissioners, 132 Idaho 554, 976 P.2d 480 (citing Castaneda v Brighton Corp., 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998)) (citing Amgstman v City of Boise, 128 Idaho 575, 578, 917 P.2d 409, 412 (Ct.App. 1996). (Emphasis added)

In Troutner v Kempthorne, 142 Idaho 389, 128 P.3d 926 (2006), the Idaho Supreme Court summarized the law of standing as follows:

> "Standing is a preliminary question to be determined by this court before reaching the merits of the case." Young v City of Ketchum, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002). "The doctrine of standing focuses on the party seeking relief and not on the issue the party wishes to have adjudicated." Miles v Idaho Power Co., 116 Idaho 635, 641, 778 P.2d 757, 763 (1989). To satisfy the requirement of standing, "Litigants generally must allege or demonstrate any injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury." Id. "The injury must be distinct and palpable and not be one suffered alike by all citizens in the jurisdiction." Selkirk-Priest Basin Assn., Inc. v State ex rel, BATT, 128 Idaho 831, 833-34, 919 P.2d 1032, 1034-35 (1996). There must also be a fairly traceable causal connection between the claimed injury and the challenge to conduct. Young v City of Ketchum, 137 Idaho 102, 44 P.3d 1157 (2002). An interest as a concerned citizen in seeing that government abides by the law does not confer standing. Id 128 P.3d 928. (emphasis added)

Based upon the above, the court held the plaintiffs in Troutner lacked standing to seek an order enjoining the governor's alleged violation of Idaho Code Section 1-2101(1) by appointing a republican to the judicial counsel. Idaho Code 67-5270(1)(2) states:

> "(1) Judicial review of an agency action shall be governed by the provisions of this chapter unless other provision of law is applicable to the particular matter.
> (2) A person aggrieved by an agency action other than an order in a contested case is entitled to judicial review under this chapter if the person complies with the requirements of 67-5271 through 67-5279, Idaho Code." (emphasis added)

Idaho Code Section 67-5270(2) is clear and unambiguous in that an appeal may only be undertaken by "a person aggrieved by an agency action." To be an "aggrieved person" with standing to appeal the County's decision, the prerequisite of being aggrieved must first be met. In order to

be "aggrieved," there must be a substantial property right that is adversely affected. This proposition is found in Idaho Code Section 67-5279(4), which states:

> **"(4) Notwithstanding the provisions of subsections (2) and (3) of this section, agency action shall be affirmed unless substantial rights of the petitioner have been prejudiced.** (Emphasis added)

A disagreement with the County's interpretation of its own ordinance does not confer standing. In addition, the petitioners claim that they were not able to be fully heard. The Idaho Supreme Court in Sweitzer v. Dean, 118 Id 568, 573, 798 P.2d 27, 32 (1990) stated "The due process requirement of opportunity to be heard is fulfilled if the opportunity is at a meaningful time and in a meaningful manner."

Merely filing an appeal and disagreeing with the County's decision does not provide a basis for judicial review that would allow the petitioners to pursue this appeal.

The petitioners have not cited one issue that would allow them relief by the Court. Due process rights accrue only when there has been actual or potential deviation of a property right, and said proposition has been dealt with repeatedly in the court in determination of standing. This principal has been unwavering even where a property right is attached to real property. Sweitzer v. Dean, 118 Idaho 568, 798 P.2d 27 (1990)

The record in this case discloses that there were multiple hearings on the proposed special use. The County's decision must be upheld under the Idaho Administrative Procedure Act unless there is a showing by the petitioner that his rights have been prejudice. The petitioners have made absolutely no factual representation supported by the record that they have asserted a cognizable right upon which to claim a basis for standing.

The petitioner cannot obtain the status of standing absent being an "aggrieved person" within

the meaning of the statute. In the standing analysis, the petitioner must show that he has what has been identified an "affected person." Again, as stated, the district court must first find that the petitioner has standing in order to bring this action. The court cannot reach the merits of the case until such determination is made. Young v City of Ketchum, 137 Idaho 102, 44 P.3d 1157 (2002). A person wishing to invoke a court's jurisdiction must have standing to raise the issue to be litigated. Id. It is not enough that the party is a concerned citizen that seeks to insure that a governmental entity abides by the law. Thomas v City of Lewiston, 137 Idaho 473, 50 P.3d 488 (2002). "To have standing, a litigant must allege or demonstrate an injury in fact and a substantial likelihood that judicial relief requested will prevent or redress the claimed injury." Id. Just because the petitioner is opposed to the County's determination in this case does not confer standing.

The court can look for more guidance in determining whether or not the petitioner has standing by reviewing Glengry-Gemlin Protective Ass'n. v. Bird, 106 Idaho 84 (Ct.App. 1983). In that case Glengry-Gemlin Protective Ass'n. appealed the issuance of a conditional use permit by Bonner County to Forest M. Bird for the construction of a commercial air transport base. In making their determination that the association did have standing as an affected person, the court cited the U.S. Supreme Court's summarization of the rules of organizational standing as set forth in Hunt v Washington Apple Advertizing Commission, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 3 (1977). Although difficult to tell by the pleadings, the case before the court is not about organizational standing. However, the guidance given by the court in Glengry as to the procedural requirement in order to confer standing is very instructive. As part of the procedural requirements for standing, the court in Glengry (Id. 88) stated:

> In determining whether these tests had been satisfied the court should examine the pleadings and any supplementary materials filed . . . "

The court must review the pleadings of the petitioner in order to determine whether there have been sufficient allegations supported by the record to support standing. In the present case as indicated, there have been no allegations that would confer any standing rights to the petitioners. In other words, the petitioners have failed to articulate absolutely any facts that would indicate that they have been "aggrieved" by the action being appealed. Again, it is not sufficient that an individual disagrees with a decision by the County to be "aggrieved." Simply stated, disagreement does not equal standing.

There are no allegations by the petitioners identifying a particularized harm to a legally protected interest. There is no allegation or support in the record that the petitioners have been aggrieved by the County's decision as defined in law. The Idaho Supreme Court in Miles v Idaho Power Co, 116 Idaho 635, 778 P.2d 757 (1989) and in Selkirk-Priest Basin Ass'n v State, 128 Idaho 831, 919 P.2d 1032 (1996), examined the issue of what type of injury must be alleged in order to obtain standing. In making its determination cited for authority the U.S. Supreme Court decision in Duke Power Co. v Carolina Env Study Group, 438 U.S. 59, 72, 98 SUP.Ct. 2620, 2630, 57 L.Ed.2d 595 (1978). The Court in Duke stated:

> "The essence of the standing inquiry is whether the party seeking to invoke the court's jurisdiction has alleged such a personal stake in the outcome of the controversy as to assure the concrete adverseness which sharpens the presentation upon which the court so depends . . . , as refined by subsequent reformation, this requirement of a 'personal stake' has come to be understood to require not only a 'distinct palpable injury' to the plaintiff, but also 'fairly traceable' causal connection between the claimed injury and the challenged conduct."

The Idaho Supreme Court has upheld this concept and in Selkirk-Priest Basin Ass'n v State, (Supra 833) wherein the court stated:

> "The injury must be distinct and palpable and not be one suffered alike by all citizens in the jurisdiction . . . (stating that 'an interest,' as a concerned citizen, in seeing that government abides by the law does not confer standing'). Although the

record has testimony in opposition to the planned unit development, the petitioner has not alleged any facts that would support 'injury in fact' to a legally protected interest of the petitioner."

The United States Supreme Court further detailed the elements necessary to demonstrate an "injury in fact" in Lujan v Defenders of Wildlife, 112 SUP.Ct. 2130 (1992), the court in Lujan stated:

> "The plaintiff must have suffered an 'injury in fact' - an invasion of a legally protected interest, which is (a) concrete and particularized, . . . ; and (b) 'actual or immanent', not 'conjectural' or 'hypothetical,' second, there must be causal connection between the injury and the conduct complained of - the injury has to be 'fairly . . . traceable' to the challenged action of the defendant and not . . . [the] result [of] the independent action of some third party not before the court . . . third, it must be 'likely' as opposed to merely 'speculative' that the injury will be 'redressed by a favorable decision'."

Again, the petitioners have failed to demonstrate that they have standing in their own right by alleging an "injury in fact" as an "aggrieved person" or that this action will protect any property interest that they have. Petitioners have simply failed to allege any "injury in fact" whatsoever and have not demonstrated an "injury in fact." Therefore, it is impossible for the petitioners to seek redress by this court as the petitioners are simply not "aggrieved" under the law.

The petitioners cannot show how any injury could arise by allowing the special use as approved by the County to proceed forward. The petitioners have failed to cite absolutely any errors associated with the findings and decision. Therefore, unless the petitioner can allege a legal basis for being an "aggrieved person" alleging an "injury in fact," they simply do not have standing to proceed. Where standing cannot be adequately demonstrated, dismissal must follow. Thus, because the petitioners have failed to show any basis for standing, the Court must dismiss this appeal.

In addition, pursuant to Idaho Code 67-6535(c), "...only those whose challenge to a decision

demonstrates actual harm or violation of fundamental rights, not the mere possibility thereof, shall be entitled to a remedy or reversal of the decision." The Appellants have presented to the Board of County Commissioners their own personal opinion with regard to potential hazards to their embryonic breeding cattle and a potential hazard to their water system. However, they are dealing in the realm of possibility, but there is not actual harm that has been caused to the Appellants and, therefore, pursuant to Idaho Code 67-6535 they are not entitled to a remedy or a reversal of the County Commissioners' decision.

The Appellant has shown no actual harm or a violation of a fundamental right, and, therefore, cannot use the court system for judicial review to seek a remedy.

6. Did the Boundary County Board of Commissioners adopt unlawful procedures and deprive the Appellants of due process?

Idaho Code 67-6512(b) provides for the notice requirements for special use permits. In reviewing the Appellants' brief they are acknowledging they were given the proper notice requirements provided by Idaho Code 67-6512, however, they are objecting that the notice requirement pursuant to that statute is inadequate to protect their due process rights. However, they do not make a claim that the statute in and of itself is unconstitutional in its creation and application. The central focus is Appellants' inability to gather the necessary expert testimony to support the Appellants' position. However, the Appellants were able to provide a hydrogeologist, as well as, information from an animal science university and present that information to the Commissioners at the July 24, 2006, hearing. Not only did they receive that opportunity on July 24, 2006, but because of the previous hearings that they were involved in which resulted in the voiding of the original use permit, they certainly had been put on notice of over a year that they would perhaps need to present information that would support actual harm to themselves. They choose not to do that.

The Commissioners wanted to give everyone an opportunity to heard, in addition to the previous hearings, that opportunity came and went and it was their fault that they feel that their due process was violated.

7. Did the actions of the Board of County Commissioners deprive the Appellants of due process based upon impartiality?

The County recognizes that impartiality is an important role in any type of legislative or judicial body. The taint due to a conflict of interest had been stipulated to by the parties in the May 26, 2006, Order of the Court remanding this matter back for rehearing. Both parties stipulated that the previous hearings could be used for the bases of the Commissioners' decision and now they are attempting to come back and say that the taint once removed but has returned even though Dan Dinning was not present.

The Petitioners' position is that the decision made by Commissioners Smith and Kirby would always be tainted if they agreed to follow the previous decision to approve the special use permit. It is a dammed if you do and dammed if you don't argument. There was no information presented during any of the hearings to suggest that either Commissioners Smith and Kirby were interested in providing work to their fellow Commissioner's brother. In any event, that taint was removed by stipulation of the parties when they allowed Commissioners Smith and Kirby to decide the matter without the presence and input of Commissioner Dinning.

8. Was the Boundary County Board of Commissioners decision arbitrary and capricious and an abuse of discretion?

No. The Appellants failed to recognize that the original decision plus the addition of one additional condition was a well-reasoned decision by the Commissioners. The Appellants simply object because they do not like the decision of the Commissioners. There are not any suggestions by the Appellants of what the Commissioners could have done differently, except deny the request.

They accept expert testimony presented the Appellant, they reviewed that information, they made a decision and they moved on. That does not qualify as arbitrary and capricious.

9. Were substantial rights of the Appellants be prejudice?

No. All the due process rights afforded to the Appellant have been given with regard to proper notice, opportunity to be heard at the hearings, administrative remedies pursuant to Idaho Code 67-6512 and Idaho Code 67-803. There has been actual harm, just a mentioned a mere possibility by the Appellants and dissatisfaction of the Commissioners' decision.

10. Does the Board of County Commissioners' decision constitute unlawful spot zoning?

The Appellants in this case think that rock that would be found in the proposed pit if the special use permit were granted would be the same rock that would be found in other gravel pits in the general location. Testimony was given by Rick Dinning which provided an overview of location of the site and what could be found. He stated,

> "Once again I'd like to state there's a real need for a rock quarry and gravel pit in the northern part of Boundary County. The closest pit with a rock source of this type of located approximately 23 miles south of our proposed site. Currently, the closest pit with crushed rock available to buy is the Redi-Mix pit near Moyie Springs, approximately 30 miles away. We have met all the requirements with the State regarding having a pit. We have an approved reclamation plan on file with the State and county and the pit area has a recorded survey showing it to be 7 acres, as required at our first meeting. This pit is important to Tungsten for our own uses and to the residents at the north end of the county. I have been personally contacted by farmers in the Kootenai Valley wondering when they can purchase rock to stabilize the river bank as we've had uh some high water lately, and for rock for their driveways. They can't afford to truck the amount of rock needed from 23 to 30 miles away. Additionally, with Boundary County experiencing a period of growth in population like I have not witnessed in 48 years here, there is an increasing need for rock products, whether it be for landscaping or base for roads or fine crushed for finished surfaces. The price of rural property has risen to the extent that the local wage earning families have great difficulty affording the dream of owning a place in the country to raise their children in a rural lifestyle. With the desire to keep and create good paying jobs in Boundary County, certain infrastructure must be in place to attract and retain business. The cost to haul rock material at a minimum of 23 to 30

> miles is quite a constraint to any sort of development in the State Highway 1 area of Boundary County. Without the ability to obtain less expensive raw materials, the dream of rural life will be relegated to those people who are independently wealthy and do not rely on our local economy to make a living. One of the arguments made against our proposed site was that there are already 3 rock pits in the area. The Munson pit is an entirely different sort of rock; it is round, tumbled stones with a lot of dirt and sand. This type of rock is unacceptable for road building because it does not adequately compact. There is not crushed rock available there. The Bushnell pit was subdivided by Mr. Bushnell in 2005 and sold in several pieces. It was never in production. The Ponsness pit has no crushed rock. Currently, you cannot buy a load of crushed rock in the Porthill area, unless you import it from Canada. One of the reasons for this is because there are certain fixed costs required to open and create a rock pit of sufficient size to be viable. Rock of different sorts and sizes must be on hand and stockpiled. This is an expensive process with no guarantee of return. The average individual is not able to put the finances into developing a pit whereas Tungsten Holdings is able to and has. We chose the location for our pit with many factors in mind. Our site borders a county maintained road. Access to our pit is entirely on Tungsten property to the county road. The closest neighbor is approximately 8/10 of a mile away by road. Within one mile radius of the site, there are only five residences, one of which is now vacant."

This testimony was unrebutted. The actions of the Commissioners do not constitute split zoning.

11. Is the county entitled to attorneys' fees?

Idaho Code Sections 12-121 and 12-117 form the basis for an award of attorneys' fees against the petitioner in this case. Attorneys' fees may be awarded under Idaho Code Section 12-121 if the court finds the actions were defended frivolously reasonably or without foundations. In addition, Idaho Code 12-117 provides "unless otherwise provided by statute, in any administrative or civil judicial proceeding involving as adverse parties a state agency, a city, a county, or other taxing district and a person, the court shall award the prevailing party reasonable attorney's fees, witness fees and reasonable expenses, if the court finds the party against whom the judgment is rendered acted without some reasonable basis in fact or law."

The County is of the position that the petitioners' appeal in this matter rises to the level for

an award of attorneys' fees and costs. Petitioners in this case have frivolously and/or without some reasonable basis in fact or law brought this appeal. The petitioners simply disagreed with the County's determination and desires this court to subplant its finding for that of the county and as such the petitioners' appeal is frivolous. The County is entitled statutorily to collect its costs and attorneys' fees in defending this cause of action.

IV
CONCLUSION

The function of the reviewing court is to determine whether the county's findings are supported by substantial evidence, and if so, whether the conclusions properly apply the ordinance to the facts as found. In the present case, the petitioners disagree with the facts found by the County. The decision of the County cannot be reversed by this court unless it finds that findings of the County are clearly erroneous. Despite the assumed alleged of error by the County, Idaho Code Section 67-5279(4) requires this court to affirm the actions of the County, unless substantial rights of the petitioner have been prejudiced. The petitioner has failed to meet the threshold of standing, and again, mere disagreement with the County's decision does not equate to a determination that substantial rights have been prejudiced. The factual determinations made by the county can only be overturned where the court finds that the facts found are clearly erroneous, but only after resolving the threshold of standing in favor of the petitioners.

The county has required its legal representative to do significant research in defending this action, and due to the frivolous nature and/or without some reasonable basis in fact or law, substantial amounts of time have been invested. Therefore, the County is entitled to attorneys' fees and costs in defending this action. Moreover, the Boundary County Board of Commissioner's decision in this matter must be affirmed by the court.

Respectfully submitted this 1 day of June 2007.

By _____
TEVIS W. HULL
Attorney for Boundary County

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of June 2007, I caused to be served a true and correct copy of the foregoing by the U.S. Mail, postage prepaid, to the following:

Paul W. Vogel
Attorney at Law
P.O. Box 1828
Sandpoint, ID 83864

_____
Legal Assistant

ORIGINAL

PAUL WILLIAM VOGEL, P.A.
ATTORNEY AT LAW
P.O. BOX 1828
SANDPOINT, ID 83864
PHONE (208) 263-6636
FAX (208) 265-6775
ISB NO. 2504

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

PATRICK GARDINER and ADA GARDINER, husband and wife,

Appellants,

vs.

BOUNDARY COUNTY BOARD OF COMMISSIONERS,

Respondent.

CASE NO. CV-2006-339

MEMORANDUM OF POINTS AND AUTHORITIES

Idaho Code of Civil Procedure § 9-101 authorizes courts to take judicial notice of facts of common knowledge and of official records of legislative, executive and judicial departments of the state and United States. Under this authority, the court may take judicial notice of ordinances of cities and towns within its jurisdiction. Lewiston v. Frary, 91 Idaho 322, 420 P.2d 805 (1966).

The documents for which judicial notice is requested consist of chapters of the Boundary County zoning ordinance, and an appendix to the Boundary County comprehensive plan, which are the subjects of these judicial review proceedings.

Paul William Vogel, P.A.
Attorney-at-Law
120 East Lake Street
Suite 313
P.O. Box 1828
Sandpoint, ID 83864-0903
Ph: (208) 263-6636
Fax: (208) 265-6775

While the reporter's transcript of proceedings contains the Boundary County comprehensive plan and several chapters of the zoning ordinance, it does not contain Appendix I to the comprehensive plan or a complete copy of the ordinance. These official documents are relevant to the issues in these proceedings, and necessary for a full understanding of county zoning hearing procedures and zone designations, construction of language in the ordinance, definitions of terms, conditional use permits, and the objectives of the comprehensive plan.

Appendix I to the comprehensive plan was referred to by the county commissioners in their written decision which is the subject of this appeal, and was one of the bases for the decision, although it had not been made a part of the record.

For the above reasons, judicial notice of these documents is appropriate and necessary to a full understanding of the issues, and this request should be granted.

Dated this 30th day of July, 2007.

PAUL WILLIAM VOGEL
Attorney for Appellants

CERTIFICATE OF DELIVERY

I hereby certify that on this 31th day of July, 2007, I delivered a true and correct copy of the foregoing MEMORANDUM OF POINTS AND AUTHORITIES via U.S. first class mail, postage prepaid, addressed to:

Boundary County Prosecutor's Office
P.O. Box 3136
Bonners Ferry, ID 83805

Bonnie Stout

ORIGINAL

PAUL WILLIAM VOGEL, P.A.
ATTORNEY AT LAW
P.O. BOX 1828
SANDPOINT, ID 83864
PHONE (208) 263-6636
FAX (208) 265-6775
ISB NO. 2504

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

PATRICK GARDINER and ADA GARDINER, husband and wife, Appellants, vs. BOUNDARY COUNTY BOARD OF COMMISSIONERS, Respondent.	CASE NO. CV-2006-339 REQUEST FOR JUDICIAL NOTICE

Appellants, Patrick and Ada Gardiner, request judicial notice of the following chapters in the Boundary County Zoning and Subdivision Ordinance 99-06 as amended through March, 2006, under Idaho Code of Civil Procedure § 9-101 (facts judicially noticed):

1. Chapter 1: Title, Authority, Purpose;
2. Chapter 12: Conditional Uses;
3. Chapter 16: Public Notification and Public Hearings;
4. Chapter 18: Definitions.

Appellants further request judicial notice of Appendix 1 to the Boundary County Comprehensive Plan under Idaho Code of Civil Procedure § 9-101.

Paul William Vogel, P.A.
Attorney-at-Law
120 East Lake Street
Suite 313
P.O. Box 1828
Sandpoint, ID 83864-0903
Ph: (208) 263-6636
Fax: (208) 265-6775

This request is based on the attached memorandum of points and authorities and declaration of Ada Gardiner, and all the papers and documents filed herein.

Dated this 30th day of July, 2007.

PAUL WILLIAM VOGEL
Attorney for Appellants

CERTIFICATE OF DELIVERY

I hereby certify that on this ~~30th~~ 31 day of July, 2007, I delivered a true and correct copy of the foregoing REQUEST FOR JUDICIAL NOTICE via U.S. first class mail, postage prepaid, addressed to:

Boundary County Prosecutor's Office
P.O. Box 3136
Bonners Ferry, ID 83805

Bonnie Stout

ORIGINAL

PAUL WILLIAM VOGEL, P.A.
ATTORNEY AT LAW
P.O. BOX 1828
SANDPOINT, ID 83864
PHONE (208) 263-6636
FAX (208) 265-6775
ISB NO. 2504

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

PATRICK GARDINER and ADA GARDINER, husband and wife,

Petitioners,

vs.

BOUNDARY COUNTY BOARD OF COMMISSIONERS,

Respondent.

CASE NO. CV-2006-339

DECLARATION OF ADA GARDINER

Paul William Vogel, P.A.
Attorney-at-Law
120 East Lake Street
Suite 313
P.O. Box 1828
Sandpoint, ID 83864-0903
Ph: (208) 263-6636
Fax: (208) 265-6775

DECLARATION OF ADA GARDINER

I, Ada Gardiner, declare as follows:

1. I am one of the petitioners in these judicial review proceedings.

2. I make this declaration in support of the petition for judicial review.

3. I have personal knowledge of the facts stated herein, and if called as a witness would competently testify to these facts.

4. Attached hereto as exhibit 1 is a true and correct copy of Chapter 12 of the Boundary County, Idaho Zoning and Subdivision Ordinance 99-06, as amended through March, 2006 ("the ordinance.") Chapter 12 is entitled "Conditional Uses."

5. Attached hereto as exhibit 2 is a true and correct copy of Chapter 18 of the ordinance, entitled "Definitions."

6. Attached hereto as exhibit 3 is a true and correct copy of Chapter 7, section 6 of the ordinance, "Zone District Specifications -- Industrial."

7. Attached hereto as exhibit 4 is a true and correct copy of pages 1-3 of Appendix I to the Boundary County, Idaho Comprehensive Plan, entitled "Histories of Boundary County."

8. Attached hereto as exhibit 5 is a true and correct copy of Chapter 1 of the ordinance, "Title, Authority, Purpose."

9. Attached hereto as exhibit 6 is a true and correct copy of Chapter 16 of the ordinance, "Public Notification and Public Hearings."

I declare under penalty of perjury under the laws of the State of Idaho that the foregoing is true and correct.

DATED: July 23, 2007

Ada Gardiner

EXHIBIT 1

Contents Next Chapter Previous Chapter
Planning Home
County Home

HAPTER 12: CONDITIONAL USES

ection 1: General:

A. Conditional uses as set forth in each zone district are uses that, by their nature, are more intensive than permitted ses. Conditional uses may have adverse affects on surrounding properties and are therefore subject to additional estrictions or requirements more stringent than those applying generally within the zone district.

B. Once a conditional use permit is approved, the terms and limitations of the permit shall become the controlling plan or the use of the property and shall not be changed or amended except by application for a new conditional use permit. ny development or use in violation of the terms and conditions of the conditional use permit shall be deemed a violation f this ordinance.

ack to Top

ection 2: Duration of Permit

A. Conditional use permits shall be deemed to run with the land to which they are attached, and the terms of such ermits shall not be modified, abrogated or abridged by change in the ownership of said land.

B. Should the use for which the conditional use permit was issued not be established within twenty four (24) months of ie approval date of the permit, the conditional use permit shall be deemed to lapse.

C. The zoning administrator may, upon request by the applicant, issue an extension not to exceed twelve (12) months ıould hardship or unforeseen circumstance preclude establishment of the conditional use per Section 2B above.

ack to Top

ection 3: Pre-Application Review:

A. Prior to submission of an application for a conditional use permit, the applicant may request a pre-application eview to determine whether the proposed conditional use meets the requirements of this ordinance and the omprehensive Plan, and if not, what measures may be available to bring about compliance. A request for review shall ıclude all information required by Section 4 of this chapter.

B. Upon receipt of a request for review, the zoning administrator shall consider the facts of the application and provide ıe applicant a written report of findings based solely on the provisions of this ordinance and the Boundary County omprehensive Plan. Should the applicant decide to submit an application for a conditional use permit, these findings ıall be included in the application documentation.

C. Findings of a pre-application review will not constitute a formal decision and will not waive any procedures set ırth by this chapter for completion of the application. There shall be no fee for a pre-application review.

ack to Top

ection 4: Application Procedure:

A. Applications for conditional use permits shall be made on forms supplied by the zoning administrator. These pplications shall include:

1. The name, address and telephone number of the applicant and the location and parcel number of the property on hich the conditional use is proposed.

2. A written description of the proposed use, including the type of activity, hours of operation, estimated number of ehicle trips per day expected to result from the use, whether the use will be temporary, seasonal or permanent, the size ıd nature of structures to be built, and actions planned to reduce the effects of the activity on surrounding properties.

3. A site plan showing the property boundaries, general topography, building and accessory structure layout, access, arking, landscaping and other such details necessary to clearly depict the nature of the proposed use.

4. An application fee as set forth at Chapter 17.

B. Upon receipt of a completed application for a conditional use permit, the zoning administrator shall schedule a ublic hearing on the next available planning and zoning commission agenda, allowing for public notification established Chapter 16.

C. The planning and zoning commission shall hold public hearing on conditional use permit applications in accordance with the provisions of Chapter 16. In reaching a decision, the commission will consider the following:

1. That the site plan and other documentation included with the application provide sufficient detail to provide a clear description of the nature of the conditional use.

2. Written and oral statements and testimony submitted by interested persons affected by the conditional use.

3. That there is sufficient land area to accommodate the proposed conditional use and that any structures are so arranged as to minimize adverse effects on surrounding properties.

4. That the proposed conditional use will not have substantial adverse effect on adjacent properties.

5. That adequate public services, including water, sewage disposal, roads, fire protection, etc., exist or will be built to accommodate the proposed use.

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

1. Approve the conditional use permit.

2. Table the application pending receipt of additional information or amendment of the application.

3. Disapprove the application for cause and recommend what actions, if any, may be taken to gain approval.

4. Determine that, due to the scope or potential impact of the proposal, the final decision should rest with the board of county commissioners. Should the commission elect to forward the application to the board, the commission may recommend:

a. Approval of the application.

b. Specific provisions to be required prior to approval.

c. Disapproval.

E. Should the commission exercise option D4 above, the zoning administrator shall place the conditional use permit on the next available agenda of the board of county commissioners. The board shall consider the facts of the application, the hearing record, the standards set forth by this ordinance and the Boundary County Comprehensive Plan, and the recommendation of the planning and zoning commission. The board may:

1. Approve the conditional use.

2. Require specific changes prior to approval.

3. Disapprove the application, specifying actions, if any, the applicant could take to obtain approval.

F. The final decision on any conditional use permit application shall be made in writing, setting forth the reason for the decision and the ordinance sections referred to. If the decision is made to approve the application, a conditional use permit shall be issued, specifying terms and conditions.

(ADDED SEPTEMBER 2003)

G. Upon approval of a conditional use permit, the specifications in the application and the limits specified on the permit shall be the controlling documents for that use, and any expansion or alteration shall require additional permitting processes.

Back to Top

EXHIBIT 2

Table of Contents Previous Chapter
Planning Home
County Home

CHAPTER 18: DEFINITIONS

For the purposes of this ordinance, the following words and terms shall have the specific meanings set forth in this chapter, unless the context in which the word or term is used clearly indicates otherwise:

Accessory: A building, structure or use which is a necessary and customary part of, but subordinate to and clearly incidental to, the primary building, structure or use.

Agricultural Lands: Lands used for the production of crops, timber or livestock.
Auto wrecking yard/junk yard: An open area where waste, used or second hand materials are bought, sold, exchanged, stored, baled, packed, disassembled or handled, including but not limited to scrap iron and other metals, automobile parts and bodies of three (3) or more inoperative and unlicensed vehicles. The terms auto wrecking yard and junk yard shall not be construed to include automobile sales lots, service and repair businesses, nor sanitary landfills or transfer stations.

Base Flood: The temporary inundation of lands from floodwaters of the nature and extent which is calculated to have a one (1) percent chance to be equaled or exceeded in any given year. The term is synonymous with "hundred year flood."

Body of Water: For the purpose of determining setbacks, a body of water shall include permanent and seasonal lakes and ponds, rivers and streams having a defined bed and banks with definite flow for more than four (4) months during the year, and swamps or bogs having standing water for more than four (4) months during the year. The term shall not include drainage or irrigation ditches, artificial swales for the on-site retention of stormwaters, livestock watering structures, springs, or natural depressions which contain standing water for short periods.

Commercial: A use or structure intended primarily for the conduct of retail trade in goods and services.

Conditional Use: Any use within a particular zone district specified by Chapter 7 of this ordinance and specifically referred to as a conditional use, subject to the procedures set forth at Chapter 12.

Condominium: A residential development which ownership consists of an undivided interest in common in a portion of real property, together with a separate interest in space, the boundaries of which are described on a recorded final plat in sufficient detail to locate all boundaries thereof.

Dwelling: A building or mobile structure or portion thereof designed exclusively for residential purposes. The term shall not include transient residential structures such as hotels, motels, campgrounds, boarding houses, etc.

Dwelling Unit: One or more rooms in a dwelling, commercial building apartment house or any type of building designed for occupancy by one (1) family.

Floodplain: Lands subject to inundation during a base flood.

Floodway: The channel of a river or stream and the adjacent portion of the floodplain which generally carries floodwaters with destructive volumes and velocities, and which is reserved in order to discharge the base flood without cumulatively increasing the water surface elevation of the base flood more than

one (1) foot.

Front Yard: For the purpose of determining the setback requirements for any particular building, the front yard shall be deemed to be that part of the lot or parcel of land which is adjacent to a street or road, or which is entered by a street or road. Where a lot or parcel lies at the intersection of two (2) streets or roads, the street or road which is faced by the primary entrance to the building or dwelling shall determine the location of the front yard, and the other street or road shall be considered the flanking street. The front yard shall be deemed to extend the full width of the lot.

Industrial: Use of a parcel or development of a structure intended primarily for the manufacture, assembly or finishing of products intended primarily for wholesale distribution.

Major facilities of public or private utilities: Structures, lines, towers and other facilities which are part of utility services and which are designed to provide service or transmission on a regional or community scale.

Manufactured home/Mobile home: A dwelling unit designed and constructed so as to be transported as a unit or in sections from one place to another, and which may have permanent location and attachment to a foundation and permanent connection to utility services.

Parcel: An unplatted piece of land which is uniquely described and meets the minimum zoning requirements for the district in which the property is located.

Permitted Use: Any use within a particular zone district specified by Chapter 7 of this ordinance and specifically referred to as a permitted use, which shall require the issuance of a permit by the zoning administrator following the procedures set forth at Chapter 5.

Rear Yard: That portion of a lot or parcel located at the opposite side of the lot from the front yard, and extending the full width of the lot or parcel.

Recreational Vehicle/Trailer: A dwelling which may be driven or towed, designed for temporary occupancy and containing holding tanks for drinking water or waste water and which cannot accommodate permanent utility service connections without modifications to the original structure.

Side Yard: That portion of a lot or parcel along a property line which is neither a front yard nor a year yard.

Single Family Residence: A separate or zero lot line dwelling unit designed for occupancy by one (1) family, or by eight or fewer unrelated mentally or physically handicapped or elderly persons which is supervised in accordance with the provisions of 67-6531 and 67-6532, Idaho Code.

Special Use: Any use in a particular zone district specified in Chapter 7 of this ordinance, and which is not specifically listed as a use by right, a permitted use or a conditional use, shall be considered a special use, subject to the provisions of Chapter 13 of this ordinance..

Stock Cooperative: A land development where title is held in common and individuals or bodies corporate receive a right of exclusive occupancy for building construction in a portion of the real property.

Street/Road: A publicly owned and maintained or recorded private thoroughfare which affords primary means of access to property, including a recorded easement for ingress or egress or a publicly owned

right of way where no public highway agency has accepted the right of way for maintenance.

Structural alteration: Any change in the supporting members of a building, such as foundations, bearing walls, columns, beams, girders or supporting members of the roof, or any addition to an existing structure which changes the "footprint" of the building.

Subdivision: Any tract of land divided into four (4) or more lots, parcels or sites for the purpose of sale or building development, whether immediate or future, providing that this definition shall not include bona fide division or partition of agricultural land into lots, all of which are five (5) acres or larger, and maintained as agricultural lands.

Use: The purpose for which lands or buildings are arranged, designed or intended or for which they are occupied or maintained.

Use by Right: Any use within a particular zone district specified in Chapter 7 of this ordinance and specifically referred to as a use by right, which requires no application, permit or action by the Boundary County Planning and Zoning Department.

EXHIBIT 3

Chapter 7 Contents Next Chapter Previous Chapter
Chapter 7, Section 7
Planning Home
County Home

CHAPTER 7: ZONE DISTRICT SPECIFICATIONS

Section 6: Industrial

A. Purpose: To provide locations for industrial and manufacturing uses which, by their nature, may not be compatible with uses permitted in other districts.

B. Permitted Uses:

1. Industrial and commercial uses and structures, with approved site plans, on parcels of sufficient size to accommodate the specific use but not less than one fourth (1/4) acre in size.

2. An owners or caretakers residence, located within the same structure or on the same parcel, as the industrial or commercial use.

3. Public service facilities, with approved site plans.

C. Special Uses: All uses not specifically listed as a permitted or prohibited use by this section are eligible for consideration as a special use subject to the provisions of Chapter 13.

D. Prohibited Uses: Residential uses except as specified at B2 of this section.

EXHIBIT 4

Boundary County, Idaho
Comprehensive Plan

Appendix I

Histories of
Boundary County

1994

As drafted by Public Land Use Committee members:

Jon Adams, Bud Behrman, Gene Blackhurst, Wally Cossairt, Carl Dalberg, Phil Davis, David Eby, Janice Eby, Larry Engert, Ken English, Denise Fodge, Sam Fodge, Helen Foust, Dave Gray, Roland Hall, Doug Higgins, Frances Houck, Terry Howe, Craig Hubbard, Tom Iverson, Myrna Johnson, Tom Mackey, Mike Naumann, Bob Neumeyer, Don Nystrom, Bob Olson, Ina Pluid, Brion Poston, Bob Raaum, Gary Regehr, Mike Ripatti, Chuck Roady, Tim Rosco, Cal Russell, Sally Shaw, Elmer Smith, Steve Tanner, Adrian Wages, Wayne Wakkinen, Dave Walter and Lon Willoughby

Appendix I
Table of Contents

TABLE OF CONTENTS (continued)

AGRICULTURE

I. INTRODUCTION

The custom and culture of agriculture in Boundary County can be best characterized as varied and predicated on unique environmental and soil resource conditions. The agricultural soils of Boundary County are sedimentary by origin, highly fertile and structured for a wide range of crop adaptability.

The prime bottomland soils and much of the benchland soils are topographically situated not to be threatened by wind or water erosion. Zero level on the Kootenai River proper is 1,743 feet elevation. A 136-day frost free period and a mean temperature of 51 degrees Fahrenheit coupled with a long day length at this north latitude makes these county agricultural lands a truly unique resource.

Over the past 100 years, the production of crops and livestock have changed in response to reclamation and technological advances in equipment, production practices, crop varieties and livestock breeds, transportation, marketing and communications. Adjustments in crop and livestock selection and the production methods have been necessary to counter problems from disease, insects, nutrition and weeds. Environmental concerns and continually changing governmental regulations have necessitated production changes and narrowed the options available.

Although agriculture has been through considerable change and variability, the two major themes that have continued to drive its perseverance are profitability and retention of lifestyle. Agriculture is a business and as such must maintain some level of profitability over time to survive. Producers in Boundary County have traditionally been willing to accept what most would consider minimal monetary return for their investment in exchange for a lifestyle they treasure. They value their freedom of choice, right to self-regulation, independence and wholesome family values which stress unity, high moral standards, hard work and pride in their accomplishments.

There exists a delicate balance between the social and economic contributions which agriculture makes to the community. It is imperative that any proposed land use changes consider not only the economic impact, but also the effects on the rural lifestyle that has evolved over time and upon which no monetary value can be placed.

The custom and culture of agriculture in Boundary County has always managed to retain both profitability and retention of lifestyle through change and variability. The right to continue to contribute to the socio-economic well-being of the community and state has been established by the Idaho Legislature (IC 22-4501, IC 22-4502, IC 22-4503 and IC 22-4504).

The following text is provided as an overview of the custom and culture of agriculture in Boundary County. It is not intended to be exhaustive but merely an outline of the agricultural activities in the county. The ultimate goal of this document is to expose those involved with land use planning to characteristics of agriculture in this community.

II. HISTORY OF BOUNDARY COUNTY AGRICULTURE

Following the hunting-gathering tradition of the Kootenai Indians, early white settlers to this region invariably cleared land and set about planting berry bushes, fruit trees and gardens and raised livestock for subsistence. Wild grass was cut for hay on overflow lands in the Kootenai Valley. The first commercial farms appeared in the late 1800s. Ranches, fruit orchards and berry production became common.

By 1910, the Bonners Ferry area had become known for its mild climate, abundant rainfall, low elevation and the richest soils in Idaho, and was producing hay and cereal crops with huge steam tractors. The farm lands were promoted widely for twice the normal yields of such crops as wheat, barley, oats, potatoes, cabbage, tomatoes, timothy grass, pears, apples, peaches, prunes, cherries, melons, corn, apricots and strawberries. The valley was called "The Nile of the North" since it supposedly possessed the richest lands this side of the Nile Valley.[1]

The first county agent arrived in 1910. As more land was cleared and settled in the "teens," the production of dairy products, hogs, poultry, bees, sheep and cattle grew.[2]

Every year during the spring runoff the water from melting snow in the mountains of British Columbia caused the river in the Kootenai Valley to rise and overflow its banks.[3] After the water receded, wild hay could be harvested on the open areas. Many times the town of Bonners Ferry was flooded and once or twice the town was nearly washed away.[4]

Early historical accounts describe the land in the Kootenai Valley as being divided into two general classes; that which was flooded annually and that which was only inundated in times of extremely high water. The value of the land which was subjected to annual flooding was between $50 and $75 per acre even though it had been cleared and was under cultivation, while the land removed from flood danger was worth twice that amount, even though it was less productive.

Some 35,000 acres of bottomland were drained and diked beginning in the 1920s. Excess water from streams and river seepage was either pumped or naturally flowed into the Kootenai River by a system of drainage ditches. While the valley lands grew mainly cereal crops, the tradition of experimentation with new crops continued with the growing of vegetable seeds and produce, edible dry and seed peas and mustard.

Nearly all of the Kootenai Valley bottom land is now in drainage districts. These were formed, starting in 1921, by landowners who taxed themselves to pay for the dikes and drainage ditches that converted swamps into highly productive farmlands. A system of ditches collects excess water from creeks and springs, and gravity flows it into the Kootenai River. When the river level is above the outlets, drains are closed and water is pumped into the river.[5] Except for a few years, the dikes kept the high river waters from flooding the farmlands, but heroic efforts were required to keep the dikes from giving way in high water years.

The Kootenai River has a record of causing millions of dollars in damage in Montana, Idaho and British Columbia by its many overflows through the years. The Kootenai is a main

---

[1] History of North Idaho, Western Publishing Company, 1903
[2] Boundary County Library Pamphlet File, Newspaper (Bonners Ferry Herald) clippings
[3] History of Boundary County, Idaho, 1987, Boundary County Historical Society
[4] Bonners Ferry Herald, Op.Cit., p5
[5] A Ground Water Monitoring Network for Kootenai Flats, Northern Idaho, Idaho Department of Water Information Bulletin No. 33

tributary to the Columbia River, hence any unrestrained high flows coming down from Canada and going on into the Columbia River added to the flood problems along that river's main stem between Washington and Oregon.[6] Libby Dam was built upstream in the early 1970s to turn this loss into benefits through flood control and power generation. Significant hydroelectric power is generated at the dam in Montana and downstream in the many other dams on the Kootenai and Columbia Rivers in two countries. Reservoir storage and stream flows are controlled by international joint use agreements.

Nowadays, there are no more devastating floods.

The farm population grew rapidly in the depressed agricultural times of the 20s and 30s as people left other areas, especially the "dust bowl" states, to seek refuge here on "stump ranches" carved from cutover lands sold by timber companies after being logged. Most non-valley farms have woodlots from which wood products are still sold.

By the 1950s, dairying had become a principle occupation of the bench farms and milk was being produced. Boundary County produced 80 percent of the world's White Dutch Clover seed. Rural water systems supplied water from the mountain streams to rural dwellings via pipelines.

Tourists driving through the county would view the lush, green fields surrounded by timbered mountains and, following local custom, would consider this scenery to be beautiful and orderly. They would recall it fondly and invariably refer to it as "God's Country."

Boundary County agriculture was considered an example of man living harmoniously with nature. Many tourists and visitors returned to become permanent residents.

After Libby Dam was constructed and valley farmers no longer faced the threat of Kootenai River floods, more specialized crops emerged, such as seed potatoes, hops and various seed grasses. Diversification continued when Boundary County became a leading area for the production of Christmas trees and later an enormous array of cold-hardy nursery stock species. Today, the hops and nursery industries are the largest employers of workers. Both use irrigation from local streams and rivers.

While the valley lands are strictly commercial enterprises, the other lands with their alfalfa hay, grazing, beef and woodlots are comprised of full-time and part-time farms providing subsistence, extra income and the rural lifestyle suitable for a safe and wholesome family life – the number one reason for immigration to this area. Almost all the 400-plus farms are owner operated, with very few absentee owners. A third are part-time farms. Over half the operators work off the farm, mainly in the timber industry. Approximately 14 percent (115,000 acres) is in farms, and some 1,500 people, or one in five, live on farms.[7]

III. CROPS

Types of Crops

Grains: The largest amount of agricultural acreage in Boundary County is devoted to the production of small grains with most of the fertile valley land utilized for grain production. Wheat is grown on 15,000 to 20,000 acres annually. While soft white winter wheat is the predominate type of wheat produced, varying amounts of hard red winter, hard red spring and

[6] Libby Dam and Reservoir, Federal Multiple-Development Project on the Kootenai River N.W. Montana, U.S. Army Engineering District, Seattle, Nov. 1964

[7] U.S. Census figures, Boundary County Library

EXHIBIT 5

Table of Contents Next Chapter
Planning Home
County Home

CHAPTER 1: TITLE, AUTHORITY, PURPOSE

Section 1: Title: This ordinance shall be known as the "Boundary County Zoning and Subdivision Ordinance," also referred to hereinafter as "ordinance."

Section 2: Authority: This ordinance is adopted pursuant to the authority granted to Boundary County, Idaho, per Title 67, Chapter 65, and Title 50, Chapter 13, of the Idaho Code and per Article 12, Section 2, of the Constitution of the State of Idaho, as amended.

Section 3: Purpose: The purpose of this ordinance is to promote the health, safety and general welfare of the people of Boundary County pursuant to the guidelines established in the Boundary County Comprehensive Plan, published and adopted May 26, 1998.

CHAPTER 2: GENERAL PROVISIONS

Section 1: Construction of Language: When consistent with the text of this ordinance, words in the singular include the plural, words in the plural include the singular and words in the present tense include the future. Words used in this document, except as specified in definitions included where further refinement is necessary, will be derived from definitions provided in the Second College edition of the American Heritage Dictionary, published by Houghton Mifflin.

Section 2: Applicability
A. The provisions of this ordinance apply to all lands situated within the boundaries of Boundary County, Idaho, as established by the State of Idaho. The provisions set forth herein do not pertain to lands situated within the incorporated boundaries of cities located within Boundary County, Idaho.
B. From the effective date of this ordinance, all uses of land and structures erected thereon will conform to the provisions of this ordinance. Uses of land and structures which were lawfully established prior to the effective date of this ordinance and which do not conform to the provisions herein will be subject to the provisions established in Chapter 8 of this ordinance.
C. This ordinance will not be construed to void or impair easements, covenants or other agreements between private parties and/or governmental agencies, but shall set forth minimum standards applicable to all. Where standards set forth in this ordinance impose greater restrictions or higher standards, the provisions of this ordinance shall prevail.

Section 3: Violations and Penalties:
(AMENDED SEPTEMBER 2003)
The violation of any provision of this ordinance shall be deemed a misdemeanor, punishable by a fine not to exceed three hundred dollars ($300), imprisonment in the Boundary County Jail for a period not to exceed six (6) months or both fine and imprisonment. In addition to the criminal penalties set forth above, the Boundary County Prosecuting Attorney, at the direction of the Board of County Commissioners, may take steps necessary to civilly enjoin further violations of this ordinance.

Section 4: Notice of Violation/Enforcement
(AMENDED SEPTEMBER 2003)
A. If the zoning administrator has cause to believe that a violation of this ordinance has occurred or is occurring, a notice of violation will be issued to the owner of record of the property on which alleged violations have occurred. Notice will be sent by registered mail, return receipt requested, and will

include the provisions of this ordinance believed to have been violated, a specific description of the violation, actions which could be taken to remedy the violation, and a date certain, not to exceed ninety (90) days from issuance of the notice, during which steps may be taken to bring about compliance without further enforcement action.

B. Should actions causing violation of this ordinance be deemed by the Board of County Commissioners to constitute a threat to the health or welfare of citizens of Boundary County, a cease and desist order will be obtained by the Boundary County Prosecuting Attorney to halt such activity pending public review by the Planning and Zoning Commission, the Board of County Commissioners and/or the Boundary County Prosecutor.

C. If no action is taken by the property owner to bring about compliance with a legally issued notice of violation within the time frame established, or if no attempt has been made to appeal the allegations specified, the zoning administrator shall forward a formal complaint to the Board of County Commissioners with the recommendation that the violation be submitted to the prosecutor for enforcement action.

Section 5: Severability: The provisions of this ordinance are hereby declared to be individually severable. Should any provision of this ordinance be declared invalid by a court of competent jurisdiction, such declaration shall not affect the validity of the remaining provisions.

Section 6: Effective Date: This ordinance shall be in full force and effect upon its passage and following publication in one (1) edition of the Boundary County Newspaper of Record.

EXHIBIT 6

Table of Contents Next Chapter Previous Chapter
Planning Home
County Home

CHAPTER 16: PUBLIC NOTIFICATION AND PUBLIC HEARINGS
(AS AMENDED DECEMBER, 2001)

Section 1: Public Notification: When so required by the provisions of this ordinance, the following procedures shall be followed to ensure the widest possible public notification of proposed actions and to allow for public comment on those proposals.

A. Upon receipt of an application requiring public notification, the zoning administrator shall establish the date, time and location of the public hearing during which the application will be considered, and will cause to be published in the official county newspaper of record, at least fifteen (15) days prior to the scheduled hearing, legal notice to include but not be limited to the following information:

1. The name of the applicant, the parcel number on which the action is proposed and a general description of the location.
2. A brief but clear description of the proposed action.
3. The date, time and location of the public hearing and any conditions, including submission deadlines and time limits on testimony, that will apply for that particular hearing.
4. An address to which written comments should be addressed and a deadline by which such comments should be sent.
5. A telephone number for those seeking further information on the proposal.
6. The location where the full public record can be reviewed.

B. The zoning administrator will prepare a press release on the application for general distribution to local media outlets.

C. The zoning administrator will compile a list, using the records of the assessor's office, of all property owners adjacent to or within three hundred (300) feet of the parcel on which the action is proposed and a list of all governmental or quasi-governmental agencies which would be affected by the application and cause a letter of public hearing to be sent to each by first-class mail at the expense of the applicant. The letter of public hearing shall contain all information provided in the legal notice, but may contain additional information. If the mailing list exceeds two hundred (200) property owners and agencies, a display advertisement of at least four (4) inches by two (2) columns shall be published in the county newspaper of record at least fifteen (15) days prior to the hearing in lieu of mailing notices.

D. At least seven (7) days prior to the public hearing, the zoning administrator shall post a sign at a publicly visible site on the parcel on which the activity is proposed providing a brief overview of the application and the date, time and location of the public hearing.

Section 2: Public Hearings:

A. Order of Proceedings:

1. The hearing chair shall announce that the public hearing is opened, define the hearing procedure and state the purpose of the public hearing. The chair shall call for conflict of interest, and members citing conflict of interest shall remove themselves from the panel. Removal for conflict of interest shall not preclude that member from making public comment, but the member shall not take part in the decision making process.
2. Presentation by the applicant or designated representative. Following this statement, the chair will entertain questions from the commission to the applicant.
3. Staff report. Following the staff report, the chair will entertain questions from the commission to the staff.
4. Statements from those members of the public speaking in favor of the application. Members of the commission may ask questions through the chair.

5. Statements from those uncommitted on the application. Members of the commission may ask questions through the chair.

6. Statements from those opposed to the application. Members of the commission may ask questions through the chair.

7. Rebuttal or clarification by the applicant. If any material changes are made to the application as a result of testimony received or if new information is entered into the record, steps four through seven shall be repeated. Members of the commission may ask questions through the chair.

8. Upon completion of all testimony, the chair shall close the public hearing and call for discussion among members. No further questions shall be asked of those who testified. The discussion shall be aimed toward developing a motion for a reasoned recommendation or decision. Such motions may include but are not limited to:

a. Recommendation, approval or denial. On a final decision, the motion may be provisional to allow the drafting and approval by final motion of the written decision.

b. To continue the public hearing to a future date certain.

c. To reopen the public testimony portion of the hearing.

d. To table the decision until a future date certain.

B. General Provisions

1. A deadline for the submission of written materials exceeding one (1) page in length may be imposed by publishing the deadline date in the legal notice and in letters of public hearing. All written materials received after this deadline shall not be considered unless read into the record during public hearing by the person making the submission.

2. A reasonable time limit may be imposed on public testimony provided such limits are established in the legal notice and letters of public hearing. Those providing verbal testimony shall state their name and address for the record and may be required to write their name and address on a register prior to testifying. At the discretion of the chair, this register may be used to call upon persons to testify.

3. Written materials submitted in support of an application or public testimony shall become the property of Boundary County and shall be maintained as part of the permanent hearing record.

4. All public hearings shall be recorded to provide a transcribable audio record, and such recordings shall be maintained by the zoning administrator for a period of at least six (6) months from the date of final decision. Written minutes shall be kept of all Planning and Zoning Commission meetings, and such minutes shall be maintained as a permanent record for a period of no less than twenty five (25) years. If the minutes are subsequently typed, the original notes from which the minutes were typed shall be maintained as part of the hearing record.

PAUL WILLIAM VOGEL, P.A.
ATTORNEY AT LAW
P.O. BOX 1828
SANDPOINT, ID 83864
PHONE (208) 263-6636
FAX (208) 265-6775
ISB NO. 2504

ORIGINAL

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

PATRICK GARDINER and ADA GARDINER, husband and wife,

Petitioners,

vs.

BOUNDARY COUNTY BOARD OF COMMISSIONERS,

Respondent.

CASE NO. CV-2006-339

REPLY TO MEMORANDUM IN OPPOSITION TO APPELLANTS' PETITION FOR REVIEW

Paul William Vogel, P.A.
Attorney-at-Law
120 East Lake Street
Suite 313
P.O. Box 1828
Sandpoint, ID 83864-0903
Ph: (208) 263-6636
Fax: (208) 265-6775

TABLE OF CONTENTS

132

TABLE OF AUTHORITIES

Page

Cases

Page

Statutes

REPLY TO MEMORANDUM IN OPPOSITION TO APPELLANTS' PETITION FOR REVIEW

I. STATEMENT OF THE CASE

Correcting errors in respondent's brief, the Boundary County Board of Commissioners ("board" or "county board") *is the only respondent.* Tungsten has not intervened. Appellants' registered Angus cattle ranch is adjacent to Tungsten's property, not to respondent's property. The proximity of appellants' property to the gravel pit site adversely affects appellants' property rights and reduces the value of their property.

Appellants did not fail to present expert evidence. In the 2006 hearing, they presented written testimony from a registered hydrologist that the gravel pit causes a risk of permanent harm to the water under appellants' property. Appellants depend on this water for irrigation, livestock and personal use. Appellants presented studies from veterinary experts that a stress free environment is critical for successful A.I. and E.T. cattle breeding. Tungsten did not provide expert evidence to rebut any of this testimony.

Respondent does not dispute, and thus concedes, these facts:

(1) Rick Dinning, Tungsten's president, is County board member Dan Dinning's brother. (The parties stipulated to these facts.)

(2) The initial reason for the gravel pit was that county road superintendent, Jeff Gutshall, encouraged Tungsten's president, Rick Dinning, to apply for a special use permit ("SUP") to supply rock to the county for road maintenance. Earlier, Gutshall had encouraged two other families in Porthill to do the same thing.

(3) The SUP confers a financial benefit on Rick Dinning, Tungsten Holdings, Inc., and the other Dinning family members who are principals of the corporation.

Paul William Vogel, P.A.
Attorney-at-Law
120 East Lake Street
Suite 313
P.O. Box 1828
Sandpoint, ID 83864-0903
Ph: (208) 263-6636
Fax: (208) 265-6775

(4) In 2006, the county board re-affirmed its conflicted 2005 decision granting the SUP, and re-adopted the conflicted 2005 findings and conclusions verbatim.

II.
STANDARD OF REVIEW

The board's decision must clearly and precisely state what it found to be the facts, and fully explain why those facts lead to its decision in order to demonstrate the board applied the criteria prescribed by statute and zoning ordinance and did not act arbitrarily or on an ad hoc basis. Workman Family Partnership v. City of Twin Falls, 104 Idaho 32, 37 (1982); Price v. Payette County, 131 Idaho 426, 431 (1998) (board must make specific factual findings). Merely stating conclusions is not sufficient. Workman Family Partnership, supra.

Board member's personal inclinations are not findings of fact. Workman Family Partnership, supra, 104 Idaho at p. 38. The presumption of validity favoring actions of a zoning authority does not apply unless the actions are free from capriciousness, arbitrariness or discrimination. Davisco Foods International, Inc. v. Gooding County, 118 P.3d 116, 120 (2005). The court does not defer to an agency's interpretation of law. Friends of Farm to Market v. Valley County, 137 Idaho 192, 196 (2002) (interpretation of an ordinance, like construction of a statute, is an issue of law over which the court exercises free review). No deference is due to an agency's findings that are clearly erroneous. Butters v. Hauser, 125 Idaho 79, 81 (1993).

III.
ISSUES

1. The County Board's decision violates I.C. 67-6512.

I.C. 67-6512(a) prohibits a county board from issuing SUPs for uses not conditionally permitted by the zoning ordinance. Respondent argues the zoning ordinance conditionally permits gravel pits because: (1) Ch. 7, section 1(E) of the ordinance, pertaining to

agriculture-forestry zones, allows the board to issue SUPs; (2) mining for gravel is important to the county, and (3) appellants' interpretation of I.C. 67-6512(a) makes SUPs and conditional use permits ("CUPs") the same thing.

Respondent is wrong for five reasons: (1) The terms of ch. 7, section 1 of the ordinance do not permit gravel pits; (2) use of property contrary to zone district designations does not mean the zone designations are erroneous; (3) respondent's interpretation conflicts with the plain language of I.C. 67-6512(a), and is repudiated by the legislature's repeal of former language in that provision that allowed SUPs for non-permitted uses; (4) respondent's interpretation violates the rule of *expressio unius est exclusio alterius* (designation of specific things in a statute excludes other things not mentioned); (5) by their inherent nature, gravel pits and rock quarries cannot be included in agricultural zones, and this SUP should never have seen the light of day.

a. Ch. 7, section 1(E) does not conditionally permit gravel pits.

Ch. 7, section 1 of the ordinance specifies the uses that are permitted in agriculture forestry zones. These include five specific agricultural uses, six specific farm structures, ar five specific recreational activities as "uses by right"; four specific residential structures, o community structure and public parks as "permitted uses," and 15 specific activities that permitted as "conditional uses." (R.O.A. 256.) Gravel pits, rock quarries, and surface min operations are not included in any of these specifications.

Respondent concedes this fact, but contends that since subparagraph (E) of secti allows the board to issue SUPs for non-permitted uses, gravel pits are conditionally perm by the ordinance. Respondent's roundabout interpretation is completely erroneous beca conflicts with the plain language of I.C. 67-6512, which states the contrary; and ignor

problem that since subparagraph (E) conflicts with I.C. 67-6512(a) it is illegal and void, and provides no authority for SUPs. Fischer v. City of Ketchum, 141 Idaho 349, 356 (2005) (county has no authority to act on an ordinance that conflicts with statute). Accordingly, the SUP cannot be issued under subparagraph (E), and the board's decision must be vacated.

b. Alleged existence of gravel pits throughout the county is irrelevant.

Respondent argues that the ordinance conditionally permits gravel pits because it is not reasonable to assume that gravel pits would have been left out of agriculture-forestry zones since these comprise over 85% of the county, and sand and gravel deposits are "abundant" in the county in pits and quarries "too numerous to mention."

If so, county lawmakers would have known about this, and could have included gravel pits as conditionally permitted uses in appropriate zones, or made appropriate zone designations for gravel pits if they had wanted to. Having not done so, it is reasonable to conclude that county law-makers did not intend to include gravel pits, probably because such use is incompatible with agricultural uses and detracts from the rural atmosphere they wanted zoning laws to retain. See Meader v. Unemployment Compensation Division, supra, 64 Idaho 716, 723 (1943) (had the legislature intended to include the raising of fish as "livestock" in covered employment it would have said so, as it did with bees and poultry).

The county board's current view, which has only been mentioned in these legal proceedings, does not make the official zone designations erroneous. Indeed, Munson's gravel pit was "grandfathered" in precisely because it was a non-conforming use, not a permitted use. See Glengary-Gamlin Protective Association, Inc. v. Bonner County, 106 Idaho 84, 90 (1983) (land use that conflicts with subsequently enacted zoning ordinance is a non-conforming use).

The courts correctly reject the proposition that a zoning designation is erroneous based on alleged non-conforming historical use in the zone district. See Taylor v. Board of County Comm'rs , 124 Idaho 392, 396 (1993) (where zone designation was contained in zoning map, commissioners' later interpretation based on alleged historical use that zone designation was erroneous fails).

Even if the county board mistakenly thought it could issue SUPs for gravel pits or other non-permitted uses in any zone district, and even if such interpretation had not violated I.C. 67-6512(a) when the comprehensive plan was adopted, the fact remains that gravel pits are not conditionally permitted uses in agricultural-forestry zones. Thus, from and after 1999, when I.C. 67-6512(a) was amended to prohibit SUPs for non-permitted uses, the board is not authorized to issue SUPs for gravel pits. Statutory procedures exist for amending zone district designations where appropriate. Where not appropriate, as here, prohibited uses may not come into a zone district through another door.

c. Respondent's view conflicts with the plain language of I.C. 67-6512.

Whether a board of commissioners violated a statute is a matter of law over which the court exercises free review. City of Sandpoint v. Sandpoint Indep. Highway Dist., 139 Idaho 65 (2003); Friends of Farm to Market v. Valley County, supra, 137 Idaho at 196. Statutory construction always begins with the literal language of the statute. If a statute is unambiguous, the court need not consider rules of statutory construction and the statute will be given its plain meaning. Evans v.Teton County, 139 Idaho 71, 77 (2003).

I.C. 67-6512(a) is unambiguous. It prohibits SUPs for uses that are not conditionally permitted **by the terms** of the ordinance. Thus, the zoning ordinance must expressly permit the particular special use, not just special uses in general. Accordingly, for an SUP to issue,

somewhere in the zoning ordinance, in some zone established by the zoning ordinance, gravel pits must be permitted as a conditional use.

Respondent's brief, at page 7, nips at the heels of the confusion. If gravel pits were a conditional use in an ag-forestry zone, there may well be no need for it to be a special use. The apparent contradiction, however, is resolved by a closer examination of the statute. When the statute makes reference to "terms of the ordinance," the only logical reading of this is that it refers to the zoning ordinance in its entirety. Accordingly, if gravel pits were a conditional use in some other zoning district, but not in an ag-forestry zone then, in that event, a gravel permit might be allowed in an ag-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?

Respondent concedes that the ordinance "does not specifically refer" to gravel pits, rock quarries or surface mining as permitted uses in any zone district. Therefore, under the plain language of I.C. 67-6512(a), the board may not grant an SUP for a gravel pit. Accordingly, the SUP violates I.C. 67-6512, and must be vacated.

The plain, statutory language makes sense. It does not mean that CUPs and SUPs are the same animal. It means that uses that are not permitted anywhere in the zoning ordinance can no longer come in through SUPs.

I.C. 67-6512(a) allows counties to process applications for SUPs or CUPs. Indeed, the ordinance provides for CUPs and SUPs. The difference is one of degree, in that CUPs are for "more intensive" uses, and SUPs are for "significantly more intensive" uses. (See Ord.,

Ch. 12 "Conditional Uses" [Judicial Notice Request, exh. 1]; Ch. 13, "Special Uses," R.O.A. 258.) But to obtain a permit for a significantly more intensive use, the particular use must first be one that is conditionally permitted somewhere in the ordinance.

Essentially, respondent contends that the plain meaning of I.C. 67-6512(a) does not mean what it says, and that the statute should be interpreted as if it had never been amended. But the county is not free to ignore a state statute. Clearly, the legislative amendment supersedes the provisions in the county ordinance, such as subsection (E), that conflict with it. Fischer v. City of Ketchum, supra. Accordingly, respondent's argument that section 1(E) "conditionally permits" SUPs for gravel pits is completely erroneous because the legislature rejected this interpretation years ago.

d. Respondent's interpretation violates the rule of *expressio unius.*

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, 137 Idaho at 196; Evans v. Teton County, 139 Idaho at 78; Fischer v. City of Ketchum, 141 Idaho 349, 354 (2005). The same principles that apply to construction of statutes also apply to municipal ordinances. Friends of Farm to Market, supra, at 197.

If statutory language is ambiguous, courts apply rules of construction for guidance. Statutes must be interpreted to effectuate legislative intent. Fremont-Madison Irr. Dist. v. Idaho Groundwater Approp., Inc., 129 Idaho 454, 461 (1996). Constructions that lead to absurd or unreasonably harsh results are disfavored. Evans v. Teton County, supra, at 77; Fischer v. City of Ketchum, supra.

Essentially, respondent's view is that since gravel pits are important to the county, permission for gravel pits may be implied in the ordinance because it would be unreasonable

not to. Even if I.C. 67-6512(a) were ambiguous, such interpretation violates fundamental rules of statutory construction that require words in a statute to be given their plain meaning, and instruct that things left out of a list of things in a statute are intended to be left out, and cannot be implied in. Peck v. State, 63 Idaho 375 (1941); D&M Country Estates Homeowner Ass'n v. Romriell, 138 Idaho 160, 165 (2002); Idaho Press Club, Inc. v State Legislature, 132 P.3d 397, 399 (2006).

Under the rule of *expressio unius,* the exclusion of gravel pits from permitted uses in agricultural-forestry zones must be interpreted as excluding gravel pits, and cannot be interpreted as including gravel pits by implication. Otherwise, neither the state statute nor the county ordinance makes sense, and both would lead to absurd results because all prohibited uses could be impliedly permitted. Such an interpretation is disfavored.

The state of Idaho applies the rule of *expressio unius* to the interpretation of statutes. Peck v. State, supra. The rule clearly applies here, since there is no indication that the exclusion of gravel pits from the specific list of permitted uses in agricultural zones was not intentional.

e. Gravel pits are not an allowed use in agricultural zones.

The ordinance defines "agricultural lands" as "lands used for the production of crops, timber or livestock." (Ordinance, Ch. 18, Judicial. Notice Request, exh. 2.) Gravel pits and rock quarries do not fall into those categories. Thus, it is clear that gravel pits are not uses as a matter of right, permitted uses, or allowable under any other theory. Accordingly, gravel pits are not allowed in agricultural zones and thus are a prohibited uses. See County of Ada v. Walter, 96 Idaho 630, 632 (1975) (commissioners do not have authority to allow a use within a zone that would constitute a prohibited use). Obviously, a gravel pit supplying rock for

county road maintenance and residential development is not compatible with public parks, hiking and riding trails, farm residences, commercial kennels or any of the permitted uses in agricultural-forestry zones.

What this SUP amounts to is an invalid attempt to change the zoning of seven acres in Porthill from agricultural to industrial, which the board cannot do without complying with the procedures for re-zoning in I.C. 67-6511. County of Ada, supra; Price v. Payette County, supra, 131 Idaho at 430 (permitting a prohibited use without complying with re-zone procedures is unlawful in violation of I.C. 67-5279(3)(c)).[1]

But an attempt to rezone the gravel pit would be unlawful spot zoning because such use neither conforms to current uses of surrounding properties nor is in accordance with the comprehensive plan, under which this area is zoned agricultural. Evans v. Teton County, supra, 139 Idaho at 76 (test for valid zone reclassification is whether zone change is consistent with permitted uses in the rest of the zoning district).

This SUP is being used for only one purpose -- to confer a financial benefit on an absentee landowner for his own purposes regardless of zone designations. The SUP plainly violates I.C. 67-6512 and must be vacated.

2. The decision conflicts with the Plan and Ordinance.

a. The SUP does not protect private property rights.

Tungsten has no property right to a gravel pit because the property is in an agricultural-forestry zone in which gravel pits are prohibited. Therefore, contrary to board members' personal inclinations, Tungsten does not have a right to a gravel pit next to appellants' cattle ranch.

---

[1] Residential subdivisions are prohibited in industrial zones. Ord., Ch. 7, Section 6, Judicial Notice Request, exh. 3.

In contrast, appellants' cattle ranch is a use by right in the zone district. Appellants have substantial investment backed expectations in their cattle ranch, and the legal right to use and protect the water under their property. See Follett v. Taylor Bros., 77 Idaho 416, 425-26 (1956) (property owner's decreed water rights are real property; adjacent property owner may not interfere with the flow of property owner's water). Thus, appellants have a property right not to have a gravel pit next to their cattle ranch. Therefore, an absentee landowner is not allowed to do what he wants with his property.

b. The SUP conflicts with the ordinance and comprehensive plan.

In granting the SUP, the board prioritized mineral extraction and transportation goals of the comprehensive plan over the conflicting goals of encouraging agriculture and retaining the community's rural atmosphere. But complying with some of the plan does not mean the SUP is in accordance with the plan. A special use must comply with all the provisions in the plan, not just some of them. See Taylor v. Board of County Comm'rs, supra, 124 Idaho at 399-401 (board cannot pick and choose between provisions that conflict with the proposed use and those than can be reconciled with it). Since the gravel pit conflicts with these goals, the SUP is not in accordance with the plan.

Similarly, the SUP must comply with all provisions in the ordinance, not just some of them. Taylor v. Board of County Commissioners, supra (land use permits are governed strictly by ordinance requirements; decision must make findings that use complies with each ordinance requirement). Here, the decision does not contain findings the gravel pit complies with provisions that special uses must not "have any substantial adverse effects on adjacent properties"; must not "create hazards to adjacent property owners," and must not "create noise, traffic, odors, dust or other nuisances substantially in excess of permitted uses in the

zone district." (Ordinance, Ch. 13 (C)(3), (4); R.O.A. 259.) Accordingly, the SUP does not comply with the ordinance.

Respondent contends the decision complies with the ordinance because the board's 11 conditions make it comply, in that they "reduce" the gravel pit's "impact" on adjacent property owners. But "reducing" the "impact," whatever that means, does not comply with the above ordinance provisions that require no substantial adverse impact on adjacent properties.

Apparently, board members assume the gravel pit will not injure appellants. But that is only the non-expert assumption of persons who do not live or work next to the gravel pit, and no facts in the record support that view. Additionally, the board has an ulterior motive for granting the SUP in their desire to obtain rock only from Tungsten, that has nothing to do with impact on the neighbors.

Importantly, no facts or expert evidence support the board's proposition that 12 days of blasting and 60 days of crushing will not adversely affect appellants. The only expert evidence in the record establishes that blasting *per se* adversely affects appellants because it causes an existing risk to the aquifer under appellants' property which once lost, cannot be restored. There is no expert or credible contrary evidence.

Permitting blasting at all creates this risk. Allowing 12 days of blasting every year expands it. Board member Kirby's non-expert view that 12 days of blasting means "less intensity," is baseless. There is no evidence that Tungsten wanted more days of blasting in order to use less dynamite. The opposite conclusion may reasonably be drawn. While 12 and 60 days may have less cumulative "impact" than 365 days of such activities, the ordinance

does not allow any impact that could substantially adversely affect adjacent property owners. Thus, the conditions do not comply with the ordinance.

Similarly, respondent does not explain how the noise and disruption of 60 days of rock crushing during appellants' cattle breeding season **will not** affect the cattle. No facts in the record support the board's view that the cows will not mind. Blasting and crushing activities create these potential adverse effects. Ensuring 12 days for blasting and 60 days for rock crushing guarantees appellants will be impacted.

c. The gravel pit is not a compatible use.

Obviously, blasting and crushing belong in industrial zones, not agricultural zones because such noisy and disruptive activities are not compatible with the peaceful, rural environment in agricultural zones. Respondent's view the SUP does not adversely affect "the community as a whole" because there are "only five residences" within a mile of the pit, misses the point that five families will be substantially adversely affected. Accordingly, the SUP violates the ordinance.

This fundamental principle that the comprehensive plan protects seems to have escaped respondent lawmakers. Since, under the plan, rural residences are a permitted use and gravel pits are a prohibited use, rural residences are not subordinate to the opportunity for profit.[2]

It is not true that gravel pits and cattle ranches have existed "side by side." There was no such testimony. The decision's "side by side" language derives from Appendix I to the plan, a document outside the record. Documents outside the record cannot be used to support a finding. Eacret v. Bonner County, 139 Idaho 780, 782-83 (2004) (decision may not be

[2] Rick Dinning indicates that the Bushnells have subdivided and sold their property. If so, more families live or will soon be living around Tungsten's property.

based on evidence outside the record); Sanders Orchard v. Gem County, 137 Idaho 695, 702-03 (2002) (decision based on matters outside the record prejudicial and void). Therefore, no evidence supports this self-serving view.

In selectively relying on Appendix I, board members chose not to reveal other portions of the same document that conflict with the decision; for example, that it is "imperative" that proposed land use changes consider not only economic impact, but also the "effects on the rural lifestyle that has evolved over time and upon which no monetary value can be placed." (Judicial Notice Request, exh. 4, p.1.)[3]

Clearly, if Tungsten's gravel pit had been there first instead of the other way around, appellants would not have established a registered Angus cattle ranch on the adjacent property. Indeed, the board's list of approved gravel pits reveals that **none** like Tungsten's exists. (R.O.A. 114-118.) In fact, the board denied a recent identical gravel pit application. (McLeish application, R.O.A. 116.)

The other two gravel pits in the area are not evidence that Tungsten's gravel pit can be operated without "undue" adverse impact. While the Ponsness and Bushnell pits are not directly at issue, they also are operating illegally for the reasons that Tungsten's pit is illegal. Tungsten's operation would add more damage to that already caused by the existing pits. Tungsten purports to do what Rick Dinning says the existing pits **cannot do** because, according to Rick Dinning, none have the finances or equipment to produce rock of sufficient

[3] The decision is replete with references to alleged facts outside the record. Another example is a statement that the gravel pit's location is in an area "furthest removed from established residences" on Tungsten's property. (R.O.A. 209.) There are no residences on Tungsten's property. Tungsten's "bench" property is being subdivided. Tungsten's subdivision is removed from the gravel pit on the county road below, on which appellants' property is located.

quantity and quality for the county's needs. Thus, Tungsten's operation would overpower the other pits. Accordingly, Tungsten's pit would be unduly disruptive.

d. Respondent's dispute of expert evidence is clearly erroneous.

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 who had no training or background in hydrology lacks the necessary expertise to render an expert opinion). Non-experts 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).

Where, as here, expert scientific evidence is presented and there is no expert evidence to rebut that testimony, a non-expert board's independent interpretation of expert testimony is clearly erroneous. St. Joseph Regional Medical Center v. Nez Perce County Commissioners, 134 Idaho 486, 471, 489 (board's independent interpretation of medical records must be ruled clearly erroneous).

Hydrologist Uhlman's written, expert testimony about the gravel pit's potential adverse effects is uncontroverted in this record. Uhlman's expert opinion constitutes substantial competent evidence of the gravel pit's potential adverse effects. St. Joseph Regional Medical Center v. Nez Perce County Commissioners, supra, 134 Idaho at 489–91 (uncontradicted expert's opinion constitutes substantial, competent evidence).

Rick Dinning's non-expert argument that such risk is "a remote possibility," and "merely conjecture," and the board's adoption of this argument is not supported by any rebuttal expert testimony or any fact in the record, and thus, is clearly erroneous. St. Joseph Medical Center, supra (inexpert board may not independently analyze expert testimony);

Marty v. State of Idaho, supra, 122 Idaho at 766 (resident having no training or background in hydrology lacks the qualifications to render an expert opinion).

Respondent's argument is not responsive to Uhlman's testimony that Tungsten's excavation causes a permanent risk of harm to the underground aquifer. Tungsten provided no one of any expertise to rebut Uhlman's testimony. Rick Dinning has no qualifications to rebut Uhlman's testimony. Board members are not experts in hydrology, or cattle breeding, from the erroneous assumptions they make.

Although not glowingly clear, the board's dispute with Uhlman's testimony boils down to the meritless argument that (1) "could" does not mean "will"; (2) the excavation is far enough from appellants' wells to not cause damage; (3) Tungsten submitted a reclamation plan and received a mining permit from the Idaho Department of Lands; and (4) the assumption that "initial" blasting in connection with the revoked 2005 permit did not adversely affect appellants' well. Respondent is wrong on all counts.

According to Uhlman's testimony, appellants' well functions because there is a column of water ABOVE the pump. As this 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. (See Uhlman report, R.O.A. 79-84; expert qualifications, R.O.A. 85-87.)

The aquifer receives water from ABOVE. It rains, water enters the subsurface through the fractures and cracks, and recharges the aquifer. Although appellants' well driller found 89.6% of the water when he drilled, that water came from ABOVE that elevation and trickled down to fill up the aquifer. The bottom of Tungsten's pit on the valley floor allows drainage of any fractures the pit intercepts down to that level.

Rick Dinning says he has never seen water running out from rock faces near the railroad, and that is because they have already DRAINED. 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. We will not know the extent to which this will occur until afterwards -- when it is irreparable.

Respondent's point that "could" does not mean "will" overlooks the fact that the risk of dewatering created by Tungsten's excavation **is** an **existing** risk, not the possibility of a risk; and also overlooks the flip side of that argument which is that "could" does not mean "won't." The plan and ordinance require dewatering **won't** occur if an SUP is to issue. The only thing in the reclamation plan having to do with water is a requirement to maintain state water quality against contamination. (R.O.A. 282.) This is irrelevant to dewatering the aquifer and does not prevent the dewatering risk.

Nobody knows at this point whether Tungsten's initial blasting affected the aquifer under appellant's property. Tungsten did not provide expert evidence that the aquifer was safe, or any evidence that continued blasting in the area would not disrupt the flow of water to the aquifer. Tungsten does not specify whether it will use greater charges of dynamite as rock becomes more deeply imbedded in the ground.

3. The decision is not supported by substantial evidence in the record.

Respondent argues that the 11 conditions support the board's decision, but does not point to any facts to support this bare conclusion. As stated above, no facts support this conclusion. Thus, the decision is not supported by substantial evidence, and must be vacated.

Price v. Payette County, supra, 131 Idaho at 431 (decision must be supported by substantial evidence).

As stated earlier, the 11 conditions purport to shift the burden of protecting adjacent property owners on Tungsten's neighbors and other agencies. The conditions do not: prohibit blasting, or specify the intensity of blasting; protect the neighbors from blasting activities; put any noise or dust buffers on rock crushing, truck traffic or the other disruptive quarrying operations; safeguard appellants' water supply or cattle breeding operation; contain requirements for walls, fences or trees to contain noise or protect property or the aesthetic value of the area. There is little, if any, protection for people using the Farm to Market road fronting the open pit.

The only evidence respondent points to in support of the conditions are statements or arguments of Rick Dinning, an admitted non-expert in these matters. There is no other evidence. Chairman Smith and member Kirby, also non-experts, simply "concurred" with each other that the old conditions provide "sufficient restriction." (R.O.A., p. 232, para. (iv).) They did not require any evidence to support this conclusion, and there is none to support it. Accordingly, the conclusion is clearly erroneous.

Land use decisions affecting people's property are not that simple. Conditions have to be relevant to the potential adverse effects and must control or eliminate them based upon competent evidence. A county board does not have discretion to make findings out of the clear blue sky.

4. The board's decision fails to comply with I.C. 67-6535.

Respondent erroneously contends the decision complies with I.C. 67-6535 because it is written, refers to standards in the plan and ordinance, draws attention to surrounding

property owners' concerns, and addresses and mitigates those concerns. But while the decision is written and pays lip service to community concerns, it does not factually address or mitigate any of them.

The decision document's 12 pages are deceiving. They consist almost entirely of argument and conclusions. They refer to few, if any facts. They do not contain findings on all zoning requirements and base their decision on selective plan goals. The first page of the document consists of the P&Z findings and recommendation to deny the SUP because of the lack of expert evidence of possible mitigation, if any. Tungsten's factually deficient record is unchanged in these proceedings, and does not support the county board's opposite decision. The next eight pages restate and repeat the old conclusions that mitigation is available, and the old conditions purporting to mitigate potential adverse effects. They do not explain how the board's leap of faith to other agencies and the courts is anything more than a red herring.

The remaining three to four pages consist of the board's one-sided description of these judicial review proceedings and the parties' stipulation for new hearing based on Commissioner Dan Dinning's unlawful conflict of interest; selections from documents outside the record supportive of the board's views, the board's legal interpretation of state statute and independent interpretation of expert testimony on hydrology. None of these narratives merit deference.

For example, the decision argues in the "narrative" section, that the ordinance conditionally permits gravel pits because gravel pits meet the definition of "a commercial business supplying products and services for agriculture and forestry activities," which is permitted as a conditional use in agriculture-forestry zones. Their conclusion is based on the fuzzy thinking that "construction of roads" and "protecting against flood" promote the

"continuity and continued productivity of agriculture," and therefore, "mineral extraction" supplies products for agriculture. (Decision Narrative, R.O.A. p. 235.) As discussed earlier, respondent argues differently in its papers that gravel pits are conditionally permitted because of their historical presence. These contradictory, self-serving arguments are the antithesis of reasoned decision making.

Plainly, gravel pits do not supply products for agriculture, and therefore are not permitted as a conditional use on that flimsy basis. The ordinance requires words to be interpreted according to their dictionary definition. (Judicial Notice Request, Exh. 4, p. 1.) The dictionary definition of "agricultural products" is feed, veterinary supplies, farm equipment, tools and supplies used directly in agricultural pursuits, or "work ordinarily done by farmers." See Lesperance v. Cooper, 104 Idaho 792, 794-95 (1983) (raising crops for feeding to cattle is an agricultural pursuit).

Neither farmers nor lumbermen ordinarily operate gravel pits/rock quarries for county road building 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. This overly broad, self-serving analysis fits any zone classification, and permits uses the zone district prohibits. Such interpretation is clearly erroneous.

5. Appellants have standing.

Respondent erroneously contends that appellants lack standing because they: (1) are not aggrieved persons; (2) are only interested in disagreeing with the board's interpretation of the ordinance; (3) are not being deprived of a property right; (4) have not been prejudiced; (5) have no injury in fact; and (6) no particularized harm to a legally protected interest; or

(7) any personal stake in the outcome, or (8) a distinct or palpable injury; or (9) suffered actual harm. Respondent is wrong again.

Respondent confuses standing for judicial review of local land use decisions under LLUPA with standing to confer jurisdiction on a court to hear and determine a civil complaint. Appellants clearly have standing under LLUPA.

Under LLUPA:

> I.C. 67-6521 . . . provides that an 'affected person' is entitled to be heard when an application for a permit is submitted to local land use authorities. An 'affected person' is defined as 'one **having an interest in real property** which **may** be adversely affected by the issuance or denial' of a permit. . . [A]fter the land use authorities have made a final decision upon the application, **an 'affected person** aggrieved' by the decision **may 'seek judicial review** under the procedures provided by sections 67-5215(b) through (g) and 67-5216, Idaho Code.'

Glengary-Gamlin Protective Assn., Inc. supra, 106 Idaho at 87.

Appellants have an interest in real property because they own property adjacent to Tungsten's gravel pit that may be adversely affected by the SUP because the gravel pit's operation would disrupt appellants' cattle breeding activities, endanger their water resources, and reduce their property values in view of their ranch's close proximity to the industrial pit. Appellants are aggrieved by the board's decision because of the gravel pit's potential adverse effects on the investment backed expectations in their cattle business, residence, and property. Accordingly appellants have standing to seek judicial review. Glengary Gamlin, supra.

Respondent's view that appellants are not "affected persons" is clearly erroneous. While respondent thinks that property owners are not "affected persons" until and unless they have suffered actual damage, that is not the test of standing under LLUPA. Pursuant to I.C. 67-6521(1)(a), a property owner is an "affected person" if the property **may** be adversely

affected by the board's decision. Evans v. Teton County, supra, 139 Idaho at 76 (existence of real **or potential harm** sufficient to challenge decision).

Thus, affected persons do not have to sustain actual damages to seek judicial review of potentially damaging local land use decisions. To hold otherwise means that property owners have no remedy to **prevent** potential harm from happening, and thus, no administrative remedy for local agency land use decisions under LLUPA. Since LLUPA provides an administrative remedy for potentially damaging decisions, respondent's contention is wholly erroneous.

Appellants' standing cannot be seriously questioned. In Glengary-Gamlin, supra, the land in issue was zoned "recreational open space." Applicants for a CUP sought to construct a commercial air transport base on property in the area. The court deemed it **clear** that individual landowners in that vicinity were "affected" within the meaning of I.C. 67-6521, and thus had standing to sue in their own right, because airplane and helicopter traffic to and from a nearby commercial air transport base could impact the enjoyment and value of properties in the area. Id., at 88-89.

Similarly, blasting, crushing, quarrying, and truck traffic to and from an adjoining rock quarry could impact the enjoyment and value of appellants' property as described herein. Accordingly, appellants are "affected persons" under LLUPA and have standing to seek judicial review of the board's decision. Respondent knows this because, as affected parties, appellants were provided written notice of the SUP hearings as the ordinance and state statute require. Affected persons are "aggrieved parties" for the purposes of LLUPA. I.C. 67-6521(d).

Accord: Evans v. Teton County, supra, 139 Idaho at 75-76 (adjacent property owners within 300 feet of proposed PUD have standing to appeal board's approval of PUD); Taylor v. Board of County Comm'rs, supra, 124 Idaho at 401 (zone change to industrial prejudices adjacent property owners in suburban district who stand to have their use and enjoyment, as well as the value, of their real property adversely affected); Cowan v. Board of Commissioners, 148 P.3d 1247, 1256 (2006) (neighbor has standing to appeal county board decision approving subdivision); County Residents Against Pollution, et al. v. Bonner County, 138 Idaho 585, 587 (2003) (residents' association may seek judicial review of P&Z decision granting CUP for storage of septic tank sludge).

The record clearly supports appellants' standing. Appellants received written notice of the gravel pit hearings. Appellants opposed the SUP in each of the hearings on the basis of the adverse effects on appellants' property; namely, that the proposed blasting and its effects on underground water flow could diminish or destroy appellants' water source and cause irreparable injury to appellants' ranch; that the constant noise of rock crushing and other quarrying operations would disrupt the peaceful, rural environment necessary for a successful cattle breeding program, and that the permanent, intensive quarrying operation would interfere with the peaceful enjoyment of appellants' home and diminish the value of their property. (R.O.A. 18, 24, 31, 33, 67-70, 71-78, 79-87,88, 89-107, 108-113, 119-134, 146, 147,149, 151-152, 158-161, 165, 172-177, 185-187, 193-194, 216-217, 218-223, 268-69; see also transcripts of all hearings.)

6. Unlawful procedures deprived appellants of due process.

Respondent's argument that appellants were provided due process because they knew they had to present expert evidence in the 2006 hearing, and that any lack of due process was

appellants' fault misses the point. Appellants are not complaining that they were unable to present expert evidence in the 2006 hearing, in which they did present expert evidence. Appellants contend that at least six unlawful procedures deprived them of due process in basic and fundamental ways.

First, respondent disallowed appellants a reasonable continuance to get expert evidence for the initial P&Z hearing in May, 2005. As it turned out, this was not critical to the P&Z hearing, since Tungsten provided no expert evidence either, and the P&Z commissioners denied the SUP.

Second, appellants' inability to obtain expert evidence for the P&Z hearing became critical in the county board hearing on July 26, 2005, when respondent unlawfully reversed the burden of proof and required appellants to prove actual damages from Tungsten's proposed gravel pit rather than requiring Tungsten to show that appellants would not be harmed. This violated due process because the order of presentation of evidence at the hearing is based on the applicant having the burden of proof (applicant makes opening statement, objectors respond, applicant allowed to make rebuttal statement. Ordinance, Ch. 16, Judicial Notice Request, exh. 5. The board's action surprised appellants and prejudiced them because their lack of expert evidence of harm on July 26, 2005 was a deciding factor in the board's decision to grant the SUP.

Third, the board's decision granting SUP was based in part on documents and facts outside the record and to which appellants had no opportunity to respond. Appellants were prejudiced because all of these outside references could have been rebutted had these documents or facts been made known.

Fourth, the board's discussions about the case and contacts made outside of public session violate I. C 67-2340, et seq., that require all meetings of a public agency governing body to be open to the public. I.C. 67-2342. Governing boards may not make decisions on discussions held outside public session without notice and opportunity for all parties to participate. Eacret v. Bonner County, 139 Idaho 780, 786-87 (2004). Board member Kirby's desire to "dig around" about the matter outside of public session violates these provisions and deprived appellants of a fair hearing.

Fifth, the board scripted its discussion for the July 24, 2006 hearing in advance, which implicitly shows a pre-existing decision and no genuine deliberation that is required by I.C. 67-6535. Obviously, the board approved the final script before the 2006 hearings. The pre-existing decision deprived appellants of due process.

County board members Smith and Kirby's scripted re-adoption of the old decision as their final decision on the matter confirms the new hearing was a sham, and also revives board member Dan Dinning's conflict of interest under which the 2005 findings and decision were made. Appellants were prejudiced because the 2005 decision remained the board's final decision one year later, and the new, 2006 hearing was a sham.

7. Appellants were deprived of an *impartial* hearing.

Appellants do not contend that the 2006 board was biased due to board member Dan Dinning's admitted conflict of interest. Appellants waived that argument when the county board members agreed to hold a new hearing.

Appellants contend that the remaining board members were not impartial because of their personal resolve to grant Rick Dinning a financial benefit and to protect road superintendent Gutshall by retaliating against the people who criticized him. Thus,

commencing at a time prior to the SUP application, board members and their employees were personally involved in the gravel pit that caused them not to be impartial.

Eacret v. Bonner County, supra, is directly on point. That case involved an application for a variance from a lake setback requirement. As here, the county P&Z commission denied the variance, but the county board granted the variance, reaching exactly the opposite conclusion as the P&Z commission on each of the standards required in the zoning ordinance for a variance to be granted. Id., p. 782.

In Eacret, prior to the hearing before the county board, a county board member had conversations with the applicant, encouraged him to re-apply for a variance and stated publicly that he (the board member) had a personal interest in promoting "blanket" variances like the applicant sought. The board member also said that "[i]n the end, [the variance application] is going to get approved . . .". Eacret, supra, 139 Idaho at 785. The court held these statements revealed lack of impartiality.

In the instant case, board member Dan Dinning made statements during the July 26, 2005 hearing that he had a personal interest in promoting property owners' economic interests, and that opponents should pay the property owner for lost economic opportunities. Chairman Smith stated publicly in the course of the hearing that Rick Dinning "had a right" to his gravel pit, and that the SUP was "inevitable." Chairman Smith also told objectors that the board did not like criticism of Gutshall. These statements and board members' special interest in Tungsten's gravel pit reveal a lack of impartiality that continued throughout these proceedings.

While there is no direct evidence that any board member privately discussed the gravel pit with the applicant, road superintendent Gutshall did, and it was Gutshall who encouraged Rick Dinning to apply. The road superintendent reports directly to the county board.

Board members were clearly aware of Gutshall's interest in the gravel pit before the county board's July 26, 2005 hearing, and acted to protect it at the hearing. Their bias deprived appellants of an impartial hearing. As in Eacret, supra, the decision makers' minds were already made up prior to the hearing.

Individuals have a 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 "inevitable" decision resulted from retaliation for criticizing a public employee, it must be vacated.

8. The decision was arbitrary and capricious and an abuse of discretion.

For all of the reasons stated herein, the decision was arbitrary and capricious and an abuse of discretion. There is a double standard at work here. While respondent demanded that appellants produce expert documentation of harm from Tungsten's gravel pit, it did not hold Tungsten to the same standard by requiring expert testimony of safety. Such ad hoc reversal of the burden of proof is arbitrary and capricious. As shown by the decisions on gravel pit applications such as Bushnell, McLeish, and Tungsten, there is no uniformity in the board's decision-making on these applications. Standards in the ordinance must be followed for uniformity to occur.

9. The substantial rights of appellants were prejudiced.

Respondent at times appears to be confused as to the applicability of the provisions of I.C. 67-5279. The statute is argued under the standing provisions of respondent's brief, but not argued when respondent alleges that appellants' substantial rights were not prejudiced. Standing, of course, refers to the entitlement to bring a lawsuit. I.C. 67-5279(4) establishes an element of petitioner's burden of proof.

Idaho's appellate courts have not addressed, to a significant extent, the meaning of I.C. 67-5279(4). To the extent that "substantial rights of the appellant" have a correlation with the type of palpable injury required by standing, respondent submits and contends that the arguments contained above under "6. Appellants have standing" establish that their substantial rights have been prejudiced.

The rights referred to in the statute, however, do not relate solely to substantive rights but to due process rights as well. In (CRAPSS) v. Bonner County, 138 Idaho 585 (2003), the Idaho Supreme Court held that the board of commissioners' summary dismissal of plaintiff's appeal of a decision of the Planning and Zoning Commission to the board of commissioners "clearly prejudiced the plaintiff's substantial rights." Accordingly, in addition to the substantive harm as pled in this matter, this court is also entitled to consider petitioners' procedural rights and whether they have been infringed upon in reaching a determination as to whether substantial rights of petitioners have been prejudiced.

In Lane Ranch Partnership v. City of Sun Valley, Docket No. 32545, 2007 Opinion No. 76, the Idaho Supreme Court held that a developer's substantial rights had been prejudiced because the developer was entitled to receive due process in quasi-judicial proceedings like those conducted by zoning boards.

It is clear, as argued extensively in petitioners' opening brief and as set forth above, that the decision of the board of commissioners violates the provisions of I.C. 67-5279(3). It is equally clear that petitioners have three substantial rights that have been prejudiced by the board's decision. Those rights, at a minimum, consist of their water right to the irrigation well water; the gravel pit on adjacent property will reduce the value of petitioners' real property; all of the unlawful procedures deny petitioners their entitlement to procedural due process. Certainly, diminished property values should qualify as actual injuries and the impairment of a substantial right.

10. The decision constitutes unlawful spot zoning.

Respondent contends that the gravel pit is not unlawful spot zoning because there is a need for crushed rock in the State Highway 1 area of Boundary County, and Tungsten is the only one financially able to provide such rock in the quantity and quality needed for road building, flood control and residential development. But these reasons constitute type two spot zoning and thus, the SUP is illegal and void.

Other rules apply to a county's need for supplies or materials for road building and flood control. Under I.C. 67-2808, a county governing board may declare that an emergency exists and the public interest demands immediate expenditure of public money if there is an extraordinary flood or other disaster, or for emergency work for national defense or to safeguard life, health or property. The county board has not declared that any such emergency exists. Therefore, the need for Tungsten's rock was not "critical," except insofar as the county wanted rock only from Tungsten's property.

In the absence of an emergency, counties obtain materials through competitive bidding laws under I.C. 67-2802, et seq., that are intended to "safeguard public funds and prevent

favoritism, fraud and extravagance in their expenditure." Beco Constr. Co., Inc. v. City of Idaho Falls, 124 Idaho 859, 861-62 (1993). These laws apply to expenditures in excess of $25,000. I.C. 67-2806. Contracts or purchases under $25,000 are excluded from these requirements. I.C. 67-2803. But I.C. 67-5726 prohibits county employees from influencing or attempting to influence the award of a contract to a particular vendor.

I.C. 18-1361 prohibits county officers and employees from contracting with relatives unless the contract is competitively bid and the relative submits the low bid; and the relative takes no part in the preparation of the contract or bid, and the public servant makes full written disclosure of the relative's interest in, and intention to bid on the contract, and neither the public servant nor the relative has violated competitive bidding laws. These laws prevent the bias in county contracts with relatives that occurred here.

The county made no attempt to comply with competitive bidding standards with respect to Tungsten's rock. Instead, a parcel of land was singled out by the county for use inconsistent with the permitted uses in the zone district for the benefit of an individual property owner. This is type two spot zoning per se. Evans v. Teton County, supra, 139 Idaho at 76-77 (this type of spot zoning is invalid).

There is no evidence that this attempt at a de facto zone change is in accordance with the comprehensive plan, and respondent does not argue that it is. Respondent quotes Rick Dinning for the proposition that there is a need for rock in Porthill. But there is no evidence of any such need. Only Rick Dinning, a developer, said there was. Porthill residents said they had no trouble obtaining crushed rock. (Tr. July 26, 2005, 29:1-17, 30:21-25–31:1-3 (Banks); 32:7-10 (Ponsness); Tr. July 24, 2006, 22:6-10 (Banks).)

Without competitive bidding procedures being followed, there is no evidence that crushed rock could not otherwise be obtained from other sources, or that the county or anyone could obtain crushed rock from Tungsten "at reduced cost." The details of the arrangement between Tungsten and the county were not revealed. Clearly, Tungsten does not intend to give crushed rock away.

Contrary to the views expressed by board members, 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 v. Blaine County, 98 Idaho 506, 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 real reasons other than "economic advantage" to impose an industrial use on the agricultural zone at the expense of adjacent property owners. Thus, the SUP changes the zone designation to confer an economic benefit on Tungsten, and constitutes unlawful spot zoning. Accordingly, the SUP must be vacated.

11. The county is not entitled to attorney fees.

The pleadings in this matter, as well as the evidence before the respondent county, and the record in this case, clearly establish a basis for this Petition for Judicial Review. Under no circumstances is the county entitled to an award of attorney fees.

IV.
CONCLUSION

Petitioners reassert their contention that the decision of the Boundary County Board of Commissioners should be set aside in whole without necessity for remand on the basis that the agency action did not comply with any of the requirements contained in said statute.

Dated this 31st day of July, 2007.

Respectfully submitted,

By: _____
Paul William Vogel
Attorney for Petitioners

CERTIFICATE OF DELIVERY

I hereby certify that on this 31st day of July, 2007, I delivered a true and correct copy of the foregoing REPLY TO MEMORANDUM IN OPPOSITION TO APPELLANTS' PETITION FOR REVIEW via U.S. first class mail, postage prepaid, addressed to:

Boundary County Prosecutor's Office
P.O. Box 3136
Bonners Ferry, ID 83805

_____
Bonnie Stout

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

COURT MINUTES

JUDGE:	**Michaud**	**CASE NO.**	**CV 06-339**	
REPORTER:	**Valerie Nunemacher**	**DATE:**	**10/25/07**	**TIME: 1:27 pm**
CLERK:	**Hammond**	**TAPE:**	**7-1-139**	

PATRICK GARDINER vs **BOUNDARY COUNTY COMMISSIONERS**

Plaintiff / Petitioner

Defendant / Respondent

Atty: Vogel

Atty: Robinson

SUBJECT OF PROCEEDINGS: Oral Argument

LEGEND							
	Ct	*Court (Judge)*	St	State	Di	Direct Examination
	Plf	Plaintiff	Pet	Petitioner	Redi	*Redirect Examination*
	Dft	Defendant	*Resp*	Respondent	X	Cross Examination
	PA	Plaintiff's Attorney	PA	Petitioner's Attorney	ReX	Recross Examination
	DA	Defendant's Attorney	RA	*Respondent's Attorney*	Juv	Juvenile
	3Plf	Third Party Plaintiff	3PA	Third Party Plf's Atty	JPO	Juvenile Probation
	3Dft	Third Party Defendant	3DA	Third Party Dft's Atty	MPO	Misdemeanor Probation

INDEX	SPEAKER	PHASE OF CASE
1:27 pm	CT	In session. Vogel present with Plf's. Robinson present for Dft. Has read the briefs and familiar with issues.
	PA	Refers to Fox vs. Boundary County case. Talks about special use and conditional use permits. Refers to the ordinance. This is the second petition for judicial review. Raised conflict of interest in the first petition. Negotiated a settlement. Plfs paid attorneys fees then, but should not pay fees in this case. Talks about the zoning ordinances. Gravel pit will cause nuisances. First case decision was reversed to due to conflict of interest. After new hearing, old decision was reinstated. Compares this case to Pack River case. Petitioners objected with no response. Refers to the memorandum. Attorneys fees – knows code is applicable.
1:55 pm	DA	Reviews to IC 67-6512, special use and conditional use permits. Talks about PA's memorandum. Commissioners have fulfilled their duties. Comments about the issues in case and conflicts of interest. Gravel pits are in places where natural resources are. Refers to page 7 of the transcript of proceedings. Argument against attorneys' fees. Asks to deny application.
2:13 pm	PA	Chapter 7 was amended in 2001. IC 67-6512 was amended in 1999. Refers to pages 19 and 21 of memorandum. Talks about reply memorandum.
	DA	Reviews page 21 to PA's memorandum.
	CT	Counsel studied Legislative history of IC 67-6512?
	DA	No.

	PA	Client has Legislative documents,
	CT	Further comments.
	PA	Asks to approach, the judicial notice is not in his file.
	CT	Both counsel can review, but needs to be heard on this issue.
2:27 pm	PA, DA	Reviews notice.
	PA	Ordinance is public record.
	DA	Entire ordinance is public record. Don't need to take judicial notice of specific chapters. No objection.
	CT	Stipulating comprehensive plan.
	PA	Comp plan without appendix was already part of record. Wanted to supplement record with the appendix.
	CT	So stipulated. Counsel to furnish a copy of appellants brief, reply brief, Appellants reply brief in electronic format. Need delivered to Verbys chambers by November 5.
	PA	Hard copy or CD copy?
	CT	Both. Anything further?
	PA, DA	No.
	CT	Under advisement, written decision will be mailed to parties.
2:34 pm		Adj.

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

PATRICK GARDINER and ADA GARDINER, husband and wife, Petitioners, vs. BOUNDARY COUNTY BOARD OF COMMISSIONERS, Respondent.	CASE NO. CV-2006-339 Memorandum Opinion and Order Setting Aside Special Use Permit

Background: The Boundary County Board of Commissioners granted a special use permit to Tungsten Holdings, Inc. for a gravel pit operation in an agricultural/forestry zone after the Boundary County Planning and Zoning Commission had recommended a denial of the permit. Petitioners Patrick and Ada Gardiner seek to have this court reverse the decision of the county board.

Holdings: James R. Michaud, Senior District Judge held that:
1. Petitioners have standing to be heard on their appeal.
2. The county board's action granting the special use permit to Tungsten may not be granted under Boundary County Zoning and Subdivision Ordinance 99-06, Chapter 7, pertaining to special use permits. That ordinance violates I.C. 67-6512 which allows a special use permit only if the use is a listed conditional use in the applicable zone. The use proposed by Tungsten is not a conditional use in the agricultural/forestry zone in the Boundary County Zoning Ordinance.
3. The county board failed to hold the applicant Tungsten to the burden of persuasion required by law. Instead the county board unlawfully imposed upon the petitioners Gardiner's the burden to demonstrate why the special use permit should not be granted.
4. The petitioners suffered no prejudice as regards notice of hearing in 2005. They were able, due to the remand, to acquire expert hydrological evidence to present at proceedings held in 2006.
6.The use by the county board of a statement of potential findings and conclusions and which were prepared prior to the deliberation to guide deliberations is, by itself, not arbitrary, capricious nor an abuse of discretion nor a deprivation of due process.

7. The written decision of the county board does not comply with I.C. 67-6535 because it is not a reasoned statement that explains the criteria and standards considered relevant. The decision does not fairly resolve all relevant contested facts. The decision lacks a rationale based upon applicable ordinance and statutory provisions.
8. The board's decision prejudiced the substantial rights of the petitioners and would, if permitted to stand, result in actual harm. They are entitled to relief from this court setting aside the decision of the county board.
9. Petitioners are entitled to recovery of attorney fees and costs incurred in this action.

I. Fact and Procedural History

In March 2005, Tungsten Holdings, Inc., a Montana real estate developer ("Tungsten"), applied for a special use permit to operate a permanent, commercial gravel pit on seven acres of property in the agricultural/forestry zone at Porthill, Boundary County, Idaho. The proposed gravel pit site is on property adjacent to appellants' Registered Angus cattle ranch. The Boundary County Planning & Zoning Commission held a public hearing on May 19, 2005. R.O.A. 2006, p. 29. The zoning commission made findings and a recommendation to the Boundary County Board of Commissioners ("county board"), to deny the permit. After a public hearing the county board approved the special use permit on September 6, 2005. Petitioners filed a request for regulatory takings analysis pursuant to I.C. 67-8003 which the board later denied.

Petitioners filed a petition for judicial review under Boundary County Case No. CV-2005-380. On April 30, 2006, Petitioners and the board stipulated that participation by board member Dinning in the hearings had been a conflict of interest that was prohibited by I.C. 67-6506, and that the permit should be voided and the proceedings remanded to the board for a new public hearing, without member Dinning participating. In the stipulation, Petitioners waived any objection to member Dinning's participation in the prior proceedings. On May 26, 2006, the Court entered an Order of Remand voiding the special use permit and remanding the matter to the county board for a new public hearing.

A new hearing took place on July 24, 2006, before board members Smith and Kirby. A second board proceeding took place August 7, 2006 and board members Smith and Kirby approved the special use permit. Petitioners filed a request for

regulatory takings analysis and the county board denied that a taking had occurred. Petitioners filed the petition for judicial review in this case on September 8, 2006.

II. Issues Presented

Petitioners raise the following issues in support of the relief sought in their petition for judicial review:

1. Did the county board's action violate I.C. 67-6512 in that a special use permit may be granted only if the proposed use is conditionally permitted by the terms of the zoning ordinance?

2. Does the county board's decision conflict with Sections I and IV of the Comprehensive Plan in that said approval interferes with appellants' health and safety, adversely impacts appellants' agricultural use of their property, does not evaluate the impact of the gravel pit/rock quarry operation on current uses of surrounding land, and constitutes uncompensated deprivation of petitioners' private property rights?

3. Is the county board's decision supported by substantial evidence in the record?

4. Does the county board's decision fail to comply with I.C. 67-6535 in that the findings approved on August 14, 2006 do not state the relevant contested facts relied upon, fail to explain the rationale for the decision based on applicable provisions of the Comprehensive Plan, relevant ordinance and statutory provisions and pertinent constitutional principles and factual information contained in the record?

5. Was the county board's decision made upon unlawful procedure and did it deprive appellants of due process of law because of inadequate notice or opportunity to respond?

6. Was the decision was made upon unlawful procedure and has it deprived appellants of due process by the Board's pre-hearing statements of confidence in their Road Superintendent's advocacy for the special use permit, pre-hearing discussions between the road superintendent and the applicant about obtaining rock from the applicant's property, statements at the hearing supportive of the road superintendent in retaliation for adjacent property owners' public comment at the zoning commission hearing, and the Board's failure to allow appellants to comment on matters outside the record the county board relied on in making its decision?

7. Was the board's decision arbitrary, capricious and an abuse of discretion in that deliberations undertaken by the Board on August 7, 2006 show bias, and do not constitute true deliberations but, instead, consist of a mere recitation of a document containing prepared statements and predetermined responses by unknown parties prior to deliberation?

8. Does the board's decision constitutes unlawful "spot zoning?"

9. Has the board's decision prejudiced substantial rights of the appellant?

10. Are petitioners entitled to recovery of attorney fees and costs incurred in this action?

Respondents raise the following issues:

1. Do the petitioners have standing to bring their petition for judicial review to this court?

2. Is the county is entitled to recover attorney fees and costs against petitioners?

Not all of the issues raised by the parties will be addressed by the court. The rulings of this court on the issues discussed herein render the remaining issues moot.

III. Nature and Scope of Judicial Review

The standards governing judicial review provide that this Court shall not substitute its judgment for that of the agency as to the weight of the evidence presented. I.C.§67-5279(1). Rather, this court defers to the agency's findings of fact unless they are clearly erroneous. *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). The agency's factual determinations are binding on the this court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record. Judicial review shall be conducted by the court without a jury, with the review of disputed issues of fact to be confined to the agency record. I.C. § 67-5277. There is a strong presumption of the validity favoring the actions of zoning authorities. *Howard v Canyon County Board of Commissioners*, 128 Idaho 497, 480, 915 P.2d 709, 710 (1996).

The county board's decision may only be overturned where its findings: (a) violate statutory or constitutional provisions; (b) exceed the agency's statutory authority; (c) are made upon unlawful procedure: (d) are not supported by substantial evidence in the record; or (e) are arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279. Whether the 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). The party attacking the Board's decision must first show that the Board erred in a manner specified in Idaho Code § 67-5279(3), and then it must show that its substantial right has been prejudiced. *Price v. Payette County Bd. Of Comm'rs*, 131 Idaho 426, 429, 958 P.2d 583, 586 (1998).

IV. Analysis

A. Appellants Have Standing to Challenge the Board of Commissioner's Decision to Approve Tungsten's application for a special use permit.

The county board argues the appellants lack standing citing both I.C. § 67-6521(d) and I.C. § 67-6535. Standing also has a constitutional dimension. This Court first notes that while it recognizes the underlying policy of I.C. § 67-6521(d) conferring standing to affected persons, it is important to remember that the legislature cannot, by statute, relieve a party from meeting the fundamental constitutional requirements for standing. See *Noh v. Cenarrusa*, 137 Idaho 798, 53 P.3d 1217 (2002).

The Local Land Use Planning Act (LLUPA) confers standing to seek judicial review of a local land use decision to an "affected person" aggrieved by the decision. I.C. § 67-6521(d). An affected person is "one having an interest in real property which may be adversely affected by the issuance or denial of a permit authorizing the development." I.C. § 67-6521(a). Clearly, the appellants' properties may be adversely affected by development of a gravel pit operation with associated activities of crushing, blasting and truck traffic all on property adjacent to their rural home and cattle operation. The

appellants have shown they may be affected and therefore they have standing. Standing is of course distinguished from entitlement to a remedy.

I.C. § 67-6535(c) requires "actual harm or a violation of fundamental rights" to obtain a remedy under LLUPA. As stated in *Evans v Teton County, Idaho Board of Commissioners,* 139 Idaho 71, 73 P.3d 84:

> I.C. § 67-6535(a) requires that approval or denial of any application provided for in LLUPA be based on criteria set forth in the local zoning ordinances and comprehensive plan. I.C. § 67-6535(c) directs the review of a LLUPA decision. The language in I.C. § 67-6535(c) instructing courts that "[o]nly those whose challenge to a decision demonstrates actual harm or violation of fundamental rights, not the mere possibility thereof, shall be entitled to a remedy or reversal of a decision" cannot be construed as a standing requirement. The existence of real or potential harm is sufficient to challenge a land use decision. I.C. § 67-6535(c) requires a demonstration of actual harm or violation of a fundamental right in order to be entitled to a remedy in cases disputing a LLUPA decision.

Petitioners have met the requirements of I.C. § 67-6535 as discussed later in this Memorandum Opinion.

B. The special use permit for a gravel pit, rock quarry or surface mining operation is not a lawfully issued permit because such uses are not conditional uses listed in the agricultural/forestry zone.

Tungsten's application was for a special use permit. The zoning commission held a special use permit hearing, and the county board considered and premised issuance of the permit upon Boundary County Zoning and Subdivision Ordinance 99-06, Chapter 7, pertaining to special use permits.

It is the contention of petitioners that under I.C. 67-6512, a special use permit may only be granted for conditionally permitted uses in the zone district and the uses proposed by Tungsten are not listed among any category of uses listed in the agricultural/forestry zone. The county board argues that appellants read the statute too narrowly and it relies on the ordinance to argue that the permit is lawful. The county board argues that because such permits are "conditionally permitted" that the conflict with IC 67-6512 alleged by petitioners does not exist. Therefore, according to the county

board, the ordinance is not in conflict with the statute and by the Tungsten permit is proper. The county board's position ignores the plain meaning of the statute which requires the use, and not the permit, to be conditionally permitted. It also ignores the definition of a conditional use as set forth in the definition section of the zoning ordinance.

This Court must construe a local ordinance as it construes a statute. *Friends of Farm to Market v Valley County*, 137 Idaho at 196, 46 P.3d at 13. Such construction begins with the literal language of the ordinance. *Id.* at 197, 46 P.3d at 14. If an ordinance is not ambiguous, this Court need not consider rules of statutory construction and the ordinance is to be given its plain meaning. *Hamilton ex rel. Hamilton v. Reeder Flying Serv.*, 135 Idaho 568, 572, 21 P.3d 890, 894 (2001); *Canal/Norcrest/Columbus Action Comm. v. City of Boise*, 136 Idaho 666, 670, 39 P.3d 606, 610 (2001). Where the language is ambiguous, this Court applies rules of construction for guidance. *Friends of Farm to Market v Valley County*, 137 Idaho at 197, 46 P.3d at 14. Constructions that lead to absurd or unreasonably harsh results are disfavored. *Id.* All sections of an applicable ordinance must be construed together to determine the legislative body's intent. Id. (citing *Lockhart v. Dept. of Fish and Game*, 121 Idaho 894, 897, 828 P.2d 1299, 1302 (1992)). Ordinances are to be construed so as to give effect to all their provisions and not to render any part superfluous or insignificant. *Id.* (citing *Brown v. Caldwell Sch. Dist.* No. 132, 127 Idaho 112, 117, 898 P.2d 43, 48 (1995)). There is a presumption that a local zoning board's actions are valid when interpreting and applying its own zoning ordinances. *Id.*; *Evans*, 137 Idaho at 431, 50 P.3d at 446.

A conditional use is defined in the definition section of the ordinance as follows: "Any use within a particular zone district specified by Chapter 7 of this ordinance and specifically referred to as a conditional use, subject to the procedures set forth at Chapter 12". Section 1E of Chapter 7 of the zoning ordinance states: "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." Chapter 13 of the zoning ordinance delineates the procedures for obtaining a special use permit. By its terms I.C. 67-6512 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." Chapter 7, Section 1 of the Boundary County Zoning Ordinance specifies three categories of uses that are allowed in an agriculture/forestry zone. They are: uses by right, permitted uses, and conditional uses. Gravel pits, rock quarries, surface mining operations, rock or gravel extraction activities are listed on any list of uses in any of the three categories in the county ordinance.

The county board adopted its planning staff determination that the use proposed by Tungsten may be considered a commercial use and thus permitted under the conditional uses of the agricultural/forestry zone. Chapter 13 does provide for a conditional use permit for commercial business or commercial activity in the agricultural/forestry zone. Considering the nature and purpose of comprehensive planning and zoning, the zones described in the Boundary County zoning ordinance, and the uses permitted it is not reasonable to conclude that a gravel pit or surface mining operation with its aspects of excavation, crushing and blasting can be deemed a commercial activity. There is an important distinction between commercial and industrial uses. Gravel pits and surface mines, in the context of community planning and zoning, are an activity of an extractive and industrial nature involving raw material extraction and processes such as excavation and crushing with use of heavy equipment and blasting. The definition of industrial use in the zoning ordinance is: "Commercial: A use or structure intended primarily for the conduct of retail trade in goods and services." The definition of industrial use in the zoning ordinance is "Industrial: Use of a parcel or development of a structure intended primarily for the manufacture, assembly or finishing of products intended primarily for wholesale distribution." The use sought by Tungsten might be termed industrial but certainly not commercial. Industrial uses and may not be conditionally permitted in the agricultural/forestry zone under the zoning ordinance.

Whether the 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). A county has no authority to act on an ordinance that conflicts with I.C. 67-6512. *Fischer v. City of Ketchum*, 141 Idaho 349, 356 (2005). It is fundamental that a county ordinance

may not conflict with general laws. *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 section 2 of article 12 of the Idaho Constitution, counties may not enact regulations that are in conflict with the general laws).

I.C. § 67-6512 is applicable to this case. Because a gravel pit, rock quarry or surface mining operation is not listed as a conditional use, and cannot be deemed a commercial use, a special use permit cannot be lawfully issued under the regulations for the agricultural/forestry zone of the Boundary County zoning ordinance.

In purporting to make a property use that is not conditionally permitted eligible for permit as a special use, Section 1E of Chapter 7 of the zoning ordinance conflicts with I.C. 67-6512. Therefore that section of the ordinance is void. The special use permit granted to Tungsten by the county board was predicated upon a section of the zoning ordinance which is in conflict with Idaho law. I.C. 67-5279 prohibits the granting of permits under an ordinance in violation of statutory provision or in excess of the authority of the county board. Because the permit was issued pursuant to a void ordinance the county board exceeded its statutory authority which is limited by I.C. § 67-6512. The Tungsten permit is prejudicial to the interests of petitioners within the meaning of I.C. § 67-5279(4) as explained below. Even if the ordinance did not conflict with the statute, the use proposed by Tungsten is not a conditional use or activity permitted under the ordinance because the use proposed is not a commercial use or activity.

The county board's decision to issue the Tungsten permit is therefore reversed. The permit was issued pursuant to a void ordinance. Alternatively, if the ordinance is not void the permit was issued violation of that ordinance. Therefore, there is no occasion for this court to remand this matter to the county board for further hearing.

C. Petitioner's were not prejudiced by lack of adequate notice prior to the hearing or by the refusal of the county board to grant a continuance.

The Zoning Office gave petitioners 15 days' notice of the hearing to be held in 2005 as required by Chapters 13 and 16 of the ordinance. The petitioners claim that in view of the county board's requirement that a petitioners needed expert evidence to prove that the applicant failed to comply with the plan and ordinance, rather than the other way around, the abbreviated 15 day notice period was completely inadequate to protect appellants' rights.

Petitioners contend that through its road superintendent, the county knew about Tungsten's intentions long before the zoning commission hearing in May 2005. They argue that the county did not mail notice of the application to petitioners or otherwise provide public notice until May 2, 2005, only two weeks before the hearing. R.O.A. 2005, p. 98. Petitioners' request for continuance of that hearing to submit expert evidence was denied. Petitioners' subsequent request for continuance of the county board hearing was denied on the basis that appellants had not obtained their expert evidence for the zoning hearing. They claim this is a Catch 22 and the county's hearing process deprived Petitioners of due process.

Decisions by zoning commissions are "quasi-judicial" in nature. *Cowan v. Board of Commissioners of Fremont County,* Docket No. 30061, 2006 Opinion No. 107, 2006 Ida. LEXIS 151 (November 29, 2006,), p. 16 of Opinion, quoting from *Chambers v. Kootenai County Bd. Of Comm'rs*, 125 Idaho 115, 118 (1994). Land use hearings that are quasi-judicial are subject to due process constraints. *Id.* Procedural due process requires some process to ensure the individual is not arbitrarily deprived of his rights in violation of the state or federal constitutions. *Id.* Due process issues are generally questions of law over which the court exercises free review. *Id.* p. 17.

Notice for special use permit hearings is governed by I.C. 67-6512. I.C. 67-6512(b) provides for published notice 15 days before the hearing, and that specific notice be given to property owners within 300 feet of the property being considered, and to "any additional area that may be substantially impacted by the proposed special use" as determined by the zoning commission. Chapter 13, Section 4(B) and Chapter 16 of the zoning ordinance requires only 15 days' notice be given to property owners within 300 feet of the land being considered. R.O.A. 2006, p. 259.

Petitioners claim that the notice provisions in the zoning ordinance are inadequate to provide due process to impacted rural communities. Farm and ranch properties generally exceed 300 feet from all but their adjacent neighbors. They also argue:

- that in rural areas such as Porthill, the 300 foot limitation essentially restricts notice to all but the two or three neighboring farms.
- the impact of a gravel pit/rock quarry operation affects the entire community, not just the two adjacent neighbors. Such limited notice conflicts with I.C. section 67-6512(b).
- with only the nearest property owners notified, special use permits can be granted more or less in secret. Property owners or the county can quietly impose non-compatible uses without the impacted community being aware, as happened with the prior two special use permit applications in Porthill.
- notice by publication is insufficient to directly notice all of the impacted property owners in a rural area.
- these limitations prevent due process and fair hearings.

In planning and zoning decisions, due process requires an opportunity to present and rebut evidence. *Cowan v. Board of Commr's,* supra. The petitioners got notice as provided by law. Petitioners sought a continuance in order to obtain expert testimony. The county board's denial of petitioner's motion for continuance prior to the 2005 hearing was an abuse of discretion especially because the county board placed (albeit unlawfully) upon petitioners the burden to show the permit should not be issued to Tungsten. Such an abuse of discretion would operate to deny a fair hearing. However, petitioners were not prejudiced by the denial since they were able to obtain expert hydrological evidence to present at the hearing in 2006.

Petitioners do not have standing to complain about lack of notice to other landowners who did not get notice in a case where petitioners seek a petition for judicial review. In an appeal proceeding such as these petitioners cannot seek relief for others because the procedural rules do not permit a claim for others. Other persons claiming entitlement to

notice would have to bring their own petition for review to this court and therein show their own entitlement to standing.

D. The county board, by failing to hold Tungsten to the burden of persuasion, made their decision in violation of the county zoning ordinance and engaged in engaged in an unlawful procedure resulting in a decision which must be set aside.

At the hearing held July 26, 2005 Chairman Smith asked appellants for "any fact" or "documentation" that dynamiting could affect somebody's water, or if that was "just a fear" appellants had. C.T. 7/26/05, p.15:23-25, p.16:2-12. During that same hearing Chairman Smith said that Rick Dinning had a "right" to have a gravel pit. C.T. 7/26/05, p. 43:11. Board chairman Smith also directed the staff to "come up with" conditions to "ease the pain" on the community. His directive to staff was that one of the conditions could not be to not have a gravel pit. C.T. 7/26/05, p. 43:15-21. At the hearing on August 8, 2005 Chairman Smith said he "definitely want[ed] to approve the pit," and did not want "delaying tactics" or "road blocks" to "put off the inevitable."

The burden of persuasion is upon the applicant to show that all of the requirements for a special use permit are satisfied. *Fischer v. City of Ketchum*, 141 Idaho 349, 109 P.3rd 1091 (Idaho 2005). The statements by board chair Smith indicate that the burden was upon the Gardiners. There is no indication of any change between the 2005 and 2006 county board proceeding as regards the statements related to the proper allocation of the burden of persuasion. There is no indication at 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 county board failed to impose upon Tungsten the burden of persuasion required by the ordinance provisions concerning special use permits or conditional use permits. Instead the county board unlawfully placed the burden of showing that the permit could not be issued upon Gardiners who opposed the application of Tungsten. The decision of the county board has thus been rendered upon an unlawful procedure.

Therefore pursuant to I.C. 67-5279 the decision granting the permit to Tungsten is set aside in it entirety.

E. The written decision of the county board does not comply with I.C. 67-6535 because it is not a reasoned statement that explains the criteria and standards considered relevant. The decision does not fairly resolve all relevant contested facts. The decision lacks a rationale based upon applicable ordinance and statutory provisions.

Assuming that the Boundary County Zoning Ordinance authorizes a special use permit in an agricultural/forestry zone, the board's decision must comply with I.C. 67-6535. Under I.C. 67-6535 the issuance of a written decision regarding a local land use agency's approval or denial of a land use application is required. *Evans v. Teton County*, 139 Idaho 71, 80 (2003). I.C. 67-6535 requires the findings to be in writing explaining the relevant criteria and standards, the relevant contested facts, and the rationale for the decision based on the applicable provisions of the comprehensive plan and ordinance and factual information contained in the record. The decision must demonstrate that the agency applied the criteria prescribed by the law, and did not act arbitrarily or on an ad-hoc basis. *Workman Family Partnership v. City of Twin Falls*, 104 Idaho 32 (1982).

Under I.C. 67-6535, land use decisions are to be founded upon sound reason and practical application of recognized principles of law. In reviewing such decisions, courts are directed to consider the proceedings as a whole and to evaluate the adequacy of procedures and resultant decisions in the light of practical considerations, fundamental fairness and the essentials of reasoned decision-making. The decision of the county board in this case violates petitioners' rights.

Petitioners contend that no meaningful discussion took place in the August 7, 2006 hearing and that Chairman Smith simply parroted a document prepared in advance to bring the matter to a close. The use of a document, prepared in advance by staff, identifying alternative findings or choices can be useful as a checklist to guide decision makers. As such a properly prepared document can be a useful part of the quasi-judicial process, assuming relevant choices or alternatives are listed and assuming it is understood not to limit the decision makers but to guide them as to all the issues for decision. The

focus should be upon the board's written decision. The transcript of the board proceeding has also been reviewed in detail and considered by this court.

This court must review the record to determine whether the relevant issues were identified and factual conflicts determined upon the available evidence. The court's task is to determine whether the rationale of the written decision is supported by the proper evaluation of evidence and application of the standards provided by law. In this case both the written decision issued August 14, 2006 and the 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. The colloquy between Smith and Kirby at the board proceeding of August 7, 2006 does not address or resolve the material factual issues concerning the contentions regarding well dewatering and the impact of noise upon the cattle operation. The same is true as regards the impact upon the petitioners enjoyment of their residential rural property. There is no indication of a proper allocation of the burden of persuasion to contradict the statements by Chair Smith mentioned July 26, 2005. The county board discounted the expert opinion of the hydrologist without basis for doing so. The county board 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 the peaceful enjoyment of petitioners' 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 written decision ultimately issued August 14, 2006 was likewise conclusory and lacks evidence of considered deliberation. As previously discussed incorrect criteria and standards were applied. The county board's decision must be set aside because it violates I.C. 67-6535.

F. Petitioners substantial rights have been prejudiced and they are entitled to relief.

The Board's action granting the special use permit to Tungsten prejudices petitioners because the gravel pit operation would likely cause actual harm by disrupting

the use and the peaceful enjoyment of petitioners property. Petitioners have also shown prejudice to their substantial rights to proper application of both procedural and substantive law. Therefore, they have shown entitlement to relief from this court as required by I.C. 67-6259 and I.C. 67-6535.

G. Petitioners are entitled to recovery of attorney fees and costs.

Appellants claim entitlement to an award of attorney fees and costs pursuant to I.C. 12-117 (1) which states, in part, that:

> (1) Unless otherwise provided by statute, in any administrative or civil judicial proceeding involving as adverse parties a . . . county . . . and a person, the court shall award the prevailing party reasonable attorney's fees, witness fees and reasonable expenses, if the court finds that the party against whom the judgment is rendered acted without a reasonable basis in fact or law.

Idaho Supreme Court cases are instructive on this issue of attorney fees involving government action. The standard for awarding attorney fees under I.C. 12-117 requires focusing on the overall action of the agency. *Rincover v. State Dep't of Fin.*, 129 Idaho 442 (1996).

In *Reardon v. City of Burley*, 140 Idaho 115 (2004), the Idaho Supreme Court quoted prior case law and stated:

> 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 or attempting to correct mistakes agencies never should have made.

Under the statute, attorney fees must be awarded if the court finds in favor of the appellant and further finds that the county acted without a reasonable basis in fact or law.

In *Reardon* attorney fees were awarded to the plaintiff on the basis that the court determined that the county acted without a reasonable basis in fact or law where an agency had no authority to take a particular action. In that case, a county ordinance was enacted contrary to the provisions of Idaho's Local Land Use Planning Act. 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. Idaho Const. Art. XII, § 2.

While the county ordinance in *Reardon* involved areas of city impact, the argument is applicable in this case because respondent Boundary County enacted Chapter 7 Section 1(E) in December, 2001 at a point in time after the Legislature repealed similar language in the earlier version of I.C. 67-6512. The county board is charged with knowledge that at time of enactment of the ordinance that the language contained therein had been expressly disapproved by the Legislature. In this case appellants' original Petition for Judicial Review, filed October 3, 2005, raised this issue. The issue was reasserted in appellants' Petition for Judicial Review filed September 11, 2006.

In *Fischer v. City of Ketchum,* 141 Idaho 349 (2004), the Idaho Supreme Court awarded attorney fees against the City of Ketchum. The basis was that the city wholly ignored a provision of its ordinance requiring certification by an Idaho licensed engineer prior to granting of a conditional use permit. The Boundary County ordinance provisions of Chapter 13: Special Uses Section 4: Application Procedure: subparagraph C.4) require the county to find that the proposed special use will not create noise, traffic, odors, dust or other nuisances substantially in excess of permitted uses within the zone district. Idaho law clearly places the burden of persuasion upon the applicant for a special use permit. The failure of the county board to place the burden upon the applicant

is prohibited conduct because the county ignored the provisions of its own zoning ordinance and violated state law.

The issue of attorney fees was present in *County Residents Against Pollution from Septic Sludge (CRAPSS) v. Bonner County*, 138 Idaho 585 (2003). The Idaho Supreme Court in that case upheld the decision of the District Court awarding attorney fees against the respondent county. The Idaho Supreme Court stated that when the county failed to follow its ordinance, it acted without a reasonable basis in fact or law. In that Bonner County case, the county arbitrarily dismissed plaintiffs' administrative appeal with no basis. In this case concerning the Tungsten application, the county board arbitrarily granted the special use permit with no basis under the ordinance for doing so.

The court concludes that the overall action of the county board warrants this courts's determination that the county board acted without a reasonable basis in fact or law. Therefore, petitioners are entitled to attorney fees and costs on appeal. Attorney fees are limited to proceedings subsequent to the stipulation of the parties that each would bear their own fees incurred prior to April 30, 2006.

V. Conclusion

Petitioner's request that the agency action be set aside is granted. Under the provisions of I.C. 67-5279(3) the decision of the county board was:

a. In violation of constitutional and statutory provisions;

b. In excess of the statutory authority of the agency; and

c. Made upon unlawful procedure.

Defects in hearing procedure in some cases warrant remand for further proceedings to be held in conformity with the law. However, in this case there shall be no remand. The county board acted either upon an invalid ordinance or failed to comply with the ordinance if the ordinance is considered valid. The county board acted in excess of their lawful authority.

VI. Order

The county board decision to issue the special use permit to Tungsten is set aside. Petitioners are entitled to an award of attorney fees and costs against the respondent.

Done and dated this 3rd day of January, 2008.

James R. Michaud
Senior district Judge

Certificate of Delivery

I hereby certify that on this 3rd day of January, 2008, I delivered a true and correct copy of the foregoing MEMORANDUM OPINION AND ORDER via U.S. first class mail, postage prepaid or by deposit in the courthouse mailbox, , addressed to:

Phillip Robinson
Louis Marshall
Attorneys for Boundary County
% of Bonner County Prosecutors Office
Sandpoint, Idaho COURT MAIL

Boundary County Prosecutor's Office
P.O. Box 3136
Bonners Ferry, ID 83805

Paul Vogel
Attorney at Law
PO Box 1828
Sandpoint, Idaho 83860

Cherie Moore
~~Deputy Clerk of Court~~
Secretary to Judge