

6-18-2008

# Gardiner v. Boundary County Bd. Of Com'rs Clerk's Record v. 2 Dckt. 35007

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## Recommended Citation

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VOLUME II OF II 2 of 4

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 X for Respondent

Filed this \_\_\_\_\_ day of \_\_\_\_\_

FILED - COPY  
JUN 18 2008

Clerk

By \_\_\_\_\_ Supreme Court \_\_\_\_\_ Court of Appeals \_\_\_\_\_ Deputy

Entered in ATS by: \_\_\_\_\_

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SUPPLEMENTAL OBJECTION TO AMENDED NOTICE OF LODGING OF TRANSCRIPT AND RECORD Filed November 3 <sup>rd</sup> , 2006	17

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

FILED

2008 JAN 14 P 3:11

STATE OF IDAHO  
COUNTY OF BOUNDARY  
GLENDA POSTON, CLERK

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

*Plammond*

PATRICK GARDINER and ADA  
GARDINER, husband and wife,

CASE NO. CV-2006-339

Petitioners,

MEMORANDUM AND AFFIDAVIT RE:  
ATTORNEY FEES AND COSTS

vs.

BOUNDARY COUNTY BOARD OF  
COMMISSIONERS,

Respondent.

STATE OF IDAHO )  
 )  
 ) ss.  
County of Bonner )

Paul William Vogel, being duly sworn on oath, deposes and states as follows:

1. Affiant submits this Memorandum and Affidavit Re: Attorney Fees and Costs pursuant to I.R.C.P. 54 and I.A.R. 40(b). The attorney fees in this action were charged based on consideration of the following:

- A. The time and labor required.
- B. The novelty and difficulty of the questions of law involved therein.
- C. The skill requisite to perform the legal service properly and the experience and ability of Affiant in the particular field of law.

Paul William Vogel, P.A.  
Attorney-at-Law  
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*1826*

- D. The prevailing charges for like work.
- E. The fact that the fee was based on Affiant's hourly rate.
- F. The results obtained.
- G. The reasonable cost of computer assisted legal research.

2. At the time these proceedings commenced, in June, 2006, Affiant charged for his services the rate of \$150.00 per hour. This rate increased to \$160.00 per hour in January, 2007. The hourly rate increased to \$170.00 per hour in July, 2007. The rate increased to \$180.00 per hour commencing in January, 2008.

3. Petitioners are entitled to recovery of attorney fees and costs pursuant to the Court's Memorandum Opinion and Order Setting Aside Special Use Permit.

4. To the best of Affiant's knowledge and belief, the items contained below are correct and the costs are claimed in compliance with the applicable rules set forth below.

5. Affiant provided the following legal services:

DATE	SERVICE	TIME	HOURLY RATE
6/12/06	Phone conference with clients; letter to clients	.10	\$150.00
6/26/06	Review letter from clients and Notice; messages for clients	.10	150.00
7/6/06	Review letter from clients; message for clients; letter to Topp	.20	150.00
7/6/06	Phone conference with Ada	.10	150.00
7/10/06	Review letter from clients, code section and ordinance	.10	150.00
7/11/06	Review letter from Topp to Dinning; letter to clients	.10	150.00
7/11/06	Phone conference with Ada; Tungsten is working today	.10	150.00
7/11/06	Phone conference with Topp	.10	150.00



DATE	SERVICE	TIME	HOURLY RATE
7/17/06	Letter to Douglas	.20	150.00
7/18/06	Phone conference with Douglas; message for clients	.10	150.00
7/18/06	Phone conference with Pat	.20	150.00
7/18/06	Legal research re: <u>Regan v. Kootenai County</u>	.20	150.00
7/19/06	Phone conference with Pat	.10	150.00
7/21/06	Phone conference with Ada	.10	150.00
7/24/06	Travel time to and from Bonners	1.8	75.00
7/24/06	Attendance at Commissioners meeting	1.5	150.00
7/27/06	Phone conference with clients	.10	150.00
7/27/06	Letter to: Rohrwasser	.10	150.00
7/31/06	Review letter from Rohrwasser; letter to clients	.10	150.00
8/2/06	Phone conference with Pat; letter to Weland	.30	150.00
8/7/06	Travel time to and from Bonners	1.8	75.00
8/7/06	Attendance at Commissioners meeting	1.1	150.00
8/10/06	Phone conference with Ada; phone conference with Rohrwasser	.20	150.00
8/10/06	Letter to Rohrwasser	.20	150.00
9/6/06	Review Takings Analysis Request; phone conference with Rohrwasser to request a copy of the Findings; preparation of rough draft of Petition	.40	150.00
9/8/06	Phone message for clients; revision of Petition	.20	150.00
9/8/06	Letter to Clerk; to Commissioners	.10	150.00
9/21/06	Review Order Governing Judicial Review; letter to clients	.10	150.00
9/26/06	Letter to clients; messages for clients	.10	150.00

DATE	SERVICE	TIME	HOURLY RATE
10/3/06	Review letter from Ada; phone conference with Pat; review I.R.C.P. 84(j), (k) and (l)	.20	150.00
10/3/06	Preparation of Objection to Record	.80	150.00
10/3/06	Phone conference with Ada	.10	150.00
10/4/06	Review message from clients and 7-19-06 submission; message for clients	.10	150.00
10/4/06	Phone conference with Ada	.20	150.00
10/4/06	Revision of: Objection; letter to Rohrwasser	.30	150.00
10/23/06	Phone conference with Amy Bistline; with Pat; with Amy	.10	150.00
10/24/06	Phone conference with Ada re: attorney fees and cost issues; discuss briefing schedule	.20	150.00
10/26/06	Review stipulation and letter from Bistline; letter to Bistline; phone conference with Della re: 10-5-06 filing error; phone conference with Michelle re: Amended Notice; phone conference with Pat	.40	150.00
11/1/06	Conference with clients; preparation of Objection; letter to Rohrwasser; to Topp; preparation of stipulation	.40	150.00
11/2/06	Conference with clients; preparation of Supplemental Objection	.70	150.00
11/3/06	Review pleadings from Bistline; letter to Douglas	.20	150.00
11/3/06	Phone conference with clients	.10	150.00
11/7/06	Review letter from Ada; letter to Douglas	.30	150.00
11/7/06	Phone conference with Tammy re: she wants to talk to John about all this before Jack takes action	.10	150.00
11/7/06	Phone conference with Pat; with Tammy at Douglas's office; letter to Bistline	.20	150.00
11/10/06	Review stipulation; message for Bistline	.10	150.00

DATE	SERVICE	TIME	HOURLY RATE
11/14/06	Review letter from Bistline; letter to Douglas	.10	150.00
11/16/06	Letter to Clerk; to Bistline and Topp	.10	150.00
11/27/06	Review letter from clients and enclosure; letters to client; to Topp and Bistline; preparation of stipulation	.20	150.00
11/30/06	Phone message for Hull; phone conference with Ada	.30	150.00
12/4/06	Conference with clients re: settling the record	.10	150.00
12/5/06	Phone conference with Hull re: record; he has all objections and will file a notice once record is settled	.10	150.00
12/8/06	Phone conference with client re: proposed amendments to Comp Plan and her desire to proceed without delay	.10	150.00
12/26/06	Phone conference with Topp; run everything through Hull	.20	150.00
1/4/07	Phone conference with clients; letter to clients	.10	160.00
1/5/07	Phone conference with clients; letter to Hull	.20	160.00
1/10/07	Revision of letter to Hull	.10	160.00
1/22/07	Phone conference with Ada	.10	160.00
2/12/07	Phone conference with Hull's secretary; review file; fax letter to Hull	.10	160.00
2/20/07	Letter to clients	.10	160.00
2/21/07	Phone conference with clients.	.10	160.00
3/1/07	Phone conference with clients; with Hull; preparation of stipulation; letter to Hull	.10	160.00
4/10/07	Phone conference with clients	.10	160.00
4/13/07	Review clients' brief; preparation of attorney fee section and conclusion	2.90	160.00
4/16/07	Revision of Memorandum	.40	160.00

DATE	SERVICE	TIME	HOURLY RATE
4/26/07	Phone conference with Ada; message for Bistline	.10	160.00
5/16/07	Phone conference with clients	.20	160.00
5/17/07	Phone message for Hull; phone conference with Court Clerk; phone conference with Ada	.20	160.00
5/22/07	Phone conference with Hull; he hopes to have the brief done this week	.10	160.00
6/4/07	Review Hull's memorandum; letter to clients	.60	160.00
6/25/07	Phone conference with clients; need an extension	.10	160.00
6/26/07	Review clients' brief	.70	160.00
7/9/07	Phone conference with clients	.10	160.00
7/26/07	Review reply brief; phone conference with Ada; revision of brief; legal research re: substantial rights; phone conference with Ada re: Appendix 1 and the record; only mining portions were included	2.70	170.00
7/30/07	Phone message for Court Clerk; phone conference with Pat; message for Robnette; for Marshall; review clients' research on substantial rights; review revised standing argument	.70	170.00
7/30/07	Phone conference with clients	.10	170.00
7/31/07	Letter to Bistline and Robnette; letter to clients	.50	170.00
8/2/07	Phone conference with Pat; clients will not stipulate to allow intervention	.20	170.00
8/13/07	Phone conference with clients re: intervention	.10	170.00
8/31/07	Review letter from Bistline; letter to Bistline	.10	170.00
10/23/07	Phone conference with Judge Michaud and Robinson; phone conference with Pat	.20	170.00
10/23/07	Legal research re: Fox v. Boundary County	.30	170.00
10/24/07	Phone conference with client	.20	170.00

DATE	SERVICE	TIME	HOURLY RATE
10/25/07	Preparation of Oral Argument	2.50	170.00
10/25/07	Court hearing re: Oral Argument	1.60	170.00
10/25/07	Travel time to and from Bonners	1.80	85.00
10/30/07	Phone conference with legislative service	.10	170.00
10/30/07	Review legislative history; letter to clients	.20	170.00
1/3/08	Review Memorandum Opinion; phone conference with clients	.7	180.00
1/7/08	Preparation of Attorney Fee and Cost Memorandum	2.0	180.00
	<b>TOTAL ATTORNEY FEES</b>		<b>\$5,222.00</b>

6. The following costs as a matter of right are submitted pursuant to I.R.C.P. 54(d)(1):

ITEM	AMOUNT
Court filing fee for Petition for Judicial Review	\$82.00

7. The following costs are allowed pursuant to Idaho Appellate Rule 40(b):

ITEM	AMOUNT
Certified copies of hearing transcripts, July 23, 2006 and audio CD of hearing, certified copies of hearing minutes	\$128.75
Certified copies of hearing transcripts, August 7, 2006	118.50
Certified copies of record beginning May 30, 2006	55.00

8. Petitioners seek discretionary costs pursuant to I.R.C.P. 54(d)(1)(D).

ITEM	AMOUNT
A. Petitioner's expert witness fees paid to Kristine Uhlman, R.G.	\$5,000.00
B. Lexpert Research Services referral fee	1,250.00
C. Air fare – expert's travel to Idaho to view property	<u>168.00</u>
TOTAL RE: EXPERT WITNESS	\$6,418.00

Although this discretionary cost is not a cost as a matter of right under I.R.C.P. 54(d)(1)(C)(8); and although said cost exceeds \$2,000.00, said cost should be awarded to Petitioners because Petitioners reduced legal fees in this matter by conducting their own research as set forth in paragraph 9 below. Petitioners are licensed attorneys in the State of California and devoted approximately 200 hours of time in research and Memorandum preparation in this case. Petitioners do not seek to recover for their time and the time they devoted to this matter results in direct savings to Respondent on the basis that, had Petitioners requested Affiant to do all the legal research, Affiant's attorney fees would be substantially in excess of those claimed above. Further, it is apparent from the record in this case that retention of an expert witness by Petitioners was reasonable and necessary under the circumstances of the case.

9. Petitioners incurred costs for automated legal research which are recoverable under I.R.C.P. 54(e)(3)(K). The initial research in this case was conducted by Petitioners. Affiant reviewed cases located and briefed by Petitioners and, as a result thereof, Affiant did not incur any direct legal research costs.

Legal research costs are based on Petitioners' utilization of LexisNexis for the time period June 3, 2006 through December 31, 2007. The total cost for electronic research, sought to be recovered, is \$8,114.00. Attached hereto and incorporated herein as Exhibit A are true and accurate copies of the computer assisted research bills charged by Lexis and paid by Petitioners.

10. Summary.

Attorney fees	\$5,222.00
Costs as a matter of right	82.00
Costs as a matter of right	302.25
Discretionary costs	6,418.00
Automated legal research costs	<u>8,114.00</u>
<b>TOTAL</b>	<b>\$20,138.25</b>

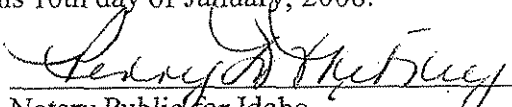
11. This Memorandum and Affidavit Re: Attorney Fees and Costs is supplemented by the Affidavit of Petitioner, Ada Gardiner, dated January 9, 2008, attached hereto as Exhibit B and incorporated herein.

Dated this 10th day of January, 2008.

  
\_\_\_\_\_  
PAUL WILLIAM VOGEL

Subscribed and sworn to before me this 10th day of January, 2008.




  
\_\_\_\_\_  
Notary Public for Idaho  
Residing at Kootenai County  
My Commission Expires: 5/31/2012.

**CERTIFICATE OF DELIVERY**

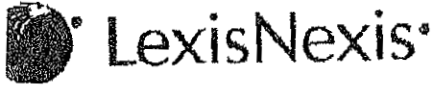
I hereby certify that on this 10th day of January, 2008, I delivered a true and correct copy of the foregoing MEMORANDUM AND AFFIDAVIT RE: ATTORNEY FEES AND COSTS via U.S. first class mail, postage prepaid, addressed to:

Boundary County Prosecuting Attorney  
P.O. Box 1148  
Bonners Ferry, ID 83805

Phil Robinson  
Bonner County Prosecuting Attorney  
P.O. Box 1486  
Sandpoint, ID 83864

  
\_\_\_\_\_  
Bonnie Stout





INVOICE NO.	INVOICE DATE
0606322737	30-JUN-06

ACCOUNT NUMBER
129S9K

BILLING PERIOD 01-JUN-06 - 30-JUN-06

US FEDERAL TAX ID 52-1471842  
CANADIAN GST REGISTRATION NUMBER 123297457RT  
DUN AND BRADSTREET NUMBER 87-767-2683

\*\*\*FOR INQUIRIES REGARDING THIS INVOICE  
PLEASE CALL 800-262-2391 AND PRESS 3\*\*\*

INVOICE TO:  
ATTENTION: ADA GARDINER  
GARDINER LAW FIRM  
HC 80 BOX 228  
PORTHILL ID 83853-9701  
UNITED STATES

### INVOICE SUMMARY

DESCRIPTION	TOTAL AMOUNT
CURRENT PERIOD CHARGES LEXISNEXIS ONLINE CHARGES	\$45.01
CURRENT PERIOD TOTAL	\$45.01

196



INVOICE NO.	INVOICE DATE
0607311018	31-JUL-06

ACCOUNT NUMBER
12959K

BILLING PERIOD 01-JUL-06 - 31-JUL-06

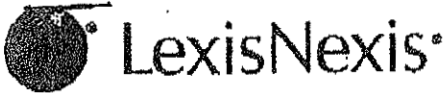
US FEDERAL TAX ID 52-1471842  
 CANADIAN GST REGISTRATION NUMBER 123397457RT  
 DUN AND BRADSTREET NUMBER 87-767-2683

\*\*\*FOR INQUIRIES REGARDING THIS INVOICE  
 PLEASE CALL 800-262-2391 AND PRESS 3\*\*\*

**INVOICE TO:**  
 ATTENTION: ADA GARDINER  
 GARDINER LAW FIRM  
 HC 80 BOX 226  
 PORTHILL ID 83853-9701  
 UNITED STATES

**INVOICE SUMMARY**

DESCRIPTION	TOTAL AMOUNT
ACCOUNT BALANCE 30-JUN-06	\$45.01
CURRENT CHARGES AND CREDITS \$2,148.00	
CURRENT TAX \$0.00	\$2,148.00
TOTAL PAYMENTS RECEIVED	(\$45.01)
PRIOR PERIOD CREDITS \$0.00	
PRIOR PERIOD CREDIT TAX \$0.00	\$0.00
TOTAL ADJUSTMENTS APPLIED	\$0.00
<b>ACCOUNT BALANCE 31-JUL-06</b>	<b>\$2,148.00</b>



US FEDERAL TAX ID #2-1471642  
 CANADIAN GST REGISTRATION NUMBER 123997457RT  
 DUN AND BRADSTREET NUMBER 87-787-2893

INVOICE NO.	INVOICE DATE
0608349809	31-AUG-06

ACCOUNT NUMBER
12959K

BILLING PERIOD 01-AUG-06 - 31-AUG-06

FOR INQUIRIES REGARDING THIS INVOICE  
 PLEASE CALL 800-262-2391 AND PRESS 3

INVOICE TO:  
 ATTENTION: ADA GARDINER  
 GARDINER LAW FIRM  
 HC 60 BOX 228  
 PORTHILL ID 83853-9701  
 UNITED STATES

**INVOICE SUMMARY**

DESCRIPTION		TOTAL AMOUNT
ACCOUNT BALANCE 31-JUL-06		\$2,148.00
CURRENT CHARGES AND CREDITS	\$336.00	
CURRENT TAX	\$0.00	\$336.00
TOTAL PAYMENTS RECEIVED		<del>(\$270.00)</del>
PRIOR PERIOD CREDITS	\$0.00	\$0.00
PRIOR PERIOD CREDIT TAX	\$0.00	\$0.00
TOTAL ADJUSTMENTS APPLIED		\$0.00
<b>ACCOUNT BALANCE 31-AUG-06</b>		<b>\$2,214.00</b>

*how  
 did this  
 go up*



INVOICE NO.	INVOICE DATE
0609321437	30-SEP-06

ACCOUNT NUMBER
12959K

BILLING PERIOD 01-SEP-06 - 30-SEP-06

VOICE TO:  
 GARDINER LAW FIRM  
 C 60 BOX 228  
 DRYHILL ID 83853-9701  
 ATTENTION: ADA GARDINER

**MONTHLY ACTIVITY**  
**CURRENT PERIOD CHARGES, CREDITS AND TAX**

**LEXISNEXIS ONLINE CHARGES**

CONTRACT	CONTRACT AMOUNT	CAP AMOUNT
ALL SERVICES USE & PRINT	\$336.00	

CONTRACT USE	GROSS AMOUNT	ADJUSTMENT AMOUNT	NET AMOUNT
ALL SERVICES USE & PRINT	\$0.00	\$336.00	\$336.00
SUBTOTAL			

TOTAL CONTRACT INFORMATION

TOTAL LEXISNEXIS ONLINE CHARGES

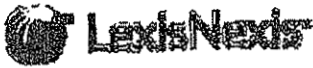
TOTAL AMOUNT
\$336.00
\$336.00
\$336.00
\$336.00

CURRENT PERIOD CHARGES, CREDITS AND TAX TOTAL

PAYMENTS\*  
 18 SEP 2006: INVOICE: 0608349809 : 4527 (\$336.00)  
 PAYMENT TOTAL

(\$336.00)
------------

\*PAYMENTS IN TRANSIT MAY NOT BE REFLECTED ON THIS STATEMENT



INVOICE NO.	INVOICE DATE	ACCOUNT NUMBER
0810315222	31-OCT-06	12859K

BILLING PERIOD 01-OCT-06 - 31-OCT-06

US FEDERAL TAX ID 62-1471842  
 CANADIAN GST REGISTRATION NUMBER 123397467RT  
 DUN AND BRADSTREET NUMBER 87-767-2603

\*\*\*FOR INQUIRIES REGARDING THIS INVOICE  
 PLEASE CALL 800-262-2981 AND PRESS 1.\*\*\*

**INVOICE TO:**  
 ATTENTION: ADA GARDINER  
 GARDINER LAW FIRM  
 HC 80 BOX 228  
 PORTHILL ID 83853-8701  
 UNITED STATES

**INVOICE SUMMARY**

DESCRIPTION	TOTAL AMOUNT
ACCOUNT BALANCE 30-SEP-06	\$ 2,214.00
CURRENT CHARGES AND CREDITS	\$ 524.00
CURRENT TAX	\$ 0.00
TOTAL PAYMENTS RECEIVED	(\$ 935.00)
PRIOR PERIOD CREDITS	\$ 0.00
PRIOR PERIOD CREDIT TAX	\$ 0.00
TOTAL ADJUSTMENTS APPLIED	\$ 0.00
ACCOUNT BALANCE 31-OCT-06	\$ 2,402.00



INVOICE NO.	INVOICE DATE	ACCOUNT NUMBER
0810315222	31-OCT-06	12858K

BILLING PERIOD 01-OCT-06 - 31-OCT-06

US FEDERAL TAX ID 62-1471842  
 CANADIAN GST REGISTRATION NUMBER 123397467RT  
 DUN AND BRADSTREET NUMBER 87-767-2603

CUR PER CHG	\$ 524.00
AMT DUE USD	\$ 2,402.00

PAYMENT TERMS: NET 10 DAYS FROM RECEIPT

LEXISNEXIS  
 PO BOX 2314  
 CAROL STREAM, IL 60132-2314

**INVOICE TO:**

ATTENTION: ADA GARDINER  
 GARDINER LAW FIRM  
 HC 80 BOX 228  
 PORTHILL ID 83853-8701  
 UNITED STATES

AMOUNTS WHICH HAVE NOT BEEN PAID WITHIN 30 DAYS AFTER  
 THE INVOICE DATE WILL THEREAFTER, UNTIL PAID, BE  
 SUBJECT TO A LATE PAYMENT CHARGE AT A RATE EQUAL TO  
 15.000% PER ANNUM (OR, IF LESS, THE MAXIMUM RATE  
 PERMITTED UNDER APPLICABLE LAW).

12859K0200610310610315222000000524004



INVOICE NO.	INVOICE DATE
0611316854	30-NOV-06

ACCOUNT NUMBER
12959K

BILLING PERIOD 01-NOV-06 - 30-NOV-06

US FEDERAL TAX ID 52-1471842  
 CANADIAN GST REGISTRATION NUMBER 123297457RT  
 DUN AND BRADSTREET NUMBER 87-767-2883

\*\*\*FOR INQUIRIES REGARDING THIS INVOICE  
 PLEASE CALL 800-262-2391 AND PRESS 3.\*\*\*

INVOICE TO:  
 ATTENTION: ADA GARDINER  
 GARDINER LAW FIRM  
 HC 60 BOX 228  
 PORTHILL ID 83863-8701  
 UNITED STATES

**INVOICE SUMMARY**

DESCRIPTION	TOTAL AMOUNT
ACCOUNT BALANCE 31-OCT-06	\$2,402.00
CURRENT CHARGES AND CREDITS	\$336.00
CURRENT TAX	\$0.00
TOTAL PAYMENTS RECEIVED	(\$336.00)
PRIOR PERIOD CREDITS	\$0.00
PRIOR PERIOD CREDIT TAX	\$0.00
TOTAL ADJUSTMENTS APPLIED	\$0.00
<b>ACCOUNT BALANCE 30-NOV-06</b>	<b>\$2,402.00</b>

1878 + 336 + 188



INVOICE TO:  
 GARDINER LAW FIRM  
 PO BOX 228  
 MORTHILL ID 83853-9701  
 ATTENTION: ADA GARDINER

INVOICE NO.	INVOICE DATE
0612320607	31-DEC-06

ACCOUNT NUMBER
12959K

BILLING PERIOD 01-DEC-06 - 31-DEC-06

**MONTHLY ACTIVITY**  
**CURRENT PERIOD CHARGES, CREDITS AND TAX**

**LEXISNEXIS ONLINE & RELATED CHARGES**

CONTRACT	CONTRACT AMOUNT	CAP AMOUNT
ALL SERVICES USE & PRINT	\$336.00	

CONTRACT USE	GROSS AMOUNT	ADJUSTMENT AMOUNT	NET AMOUNT
ALL SERVICES USE & PRINT	\$617.00	(\$281.00)	\$336.00
SUBTOTAL	\$617.00	(\$281.00)	

TOTAL CONTRACT INFORMATION

TOTAL LEXISNEXIS ONLINE & RELATED CHARGES

CURRENT PERIOD CHARGES, CREDITS AND TAX TOTAL

TOTAL AMOUNT	\$336.00
	\$336.00
	\$336.00
	\$336.00
	(\$336.00)

**PAYMENTS\***

19 DEC 2006: INVOICE: 0611316854

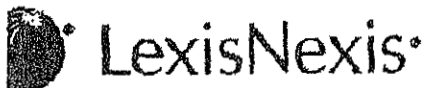
: 4558

(\$336.00)

PAYMENT TOTAL

\*PAYMENTS IN TRANSIT MAY NOT BE REFLECTED ON THIS STATEMENT

202  
2



INVOICE NO.	INVOICE DATE
0701321343	31-JAN-07

ACCOUNT NUMBER
12959K

BILLING PERIOD 01-JAN-07 - 31-JAN-07

5 FEDERAL TAX ID 52-1471842  
 ANADIAN GST REGISTRATION NUMBER 123397407RT  
 UN AND BRADSTREET NUMBER 87-767-2883

\*\*\*FOR INQUIRIES REGARDING THIS INVOICE  
 PLEASE CALL 800-782-8391 AND PRESS 3.\*\*\*

INVOICE TO:  
 ATTENTION: ADA GARDINER  
 GARDINER LAW FIRM  
 4C 80 BOX 228  
 MORTHILL ID 83853-9701  
 UNITED STATES

**INVOICE SUMMARY**

DESCRIPTION		TOTAL AMOUNT
ACCOUNT BALANCE 31-DEC-06		\$2,402.00
CURRENT CHARGES AND CREDITS	\$336.00	
CURRENT TAX	\$0.00	\$336.00
TOTAL PAYMENTS RECEIVED		(\$524.00)
PRIOR PERIOD CREDITS	\$0.00	
PRIOR PERIOD CREDIT TAX	\$0.00	\$0.00
TOTAL ADJUSTMENTS APPLIED		\$0.00
ACCOUNT BALANCE 31-JAN-07		\$2,214.00

203





**LexisNexis**

US FEDERAL TAX ID 52-1471842  
 CANADIAN GST REGISTRATION NUMBER 123357457RT  
 DUN AND BRADSTREET NUMBER 07-767-2863

INVOICE NO.	INVOICE DATE
0702311348	28-FEB-07

ACCOUNT NUMBER
129S9K

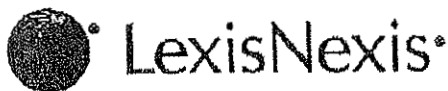
BILLING PERIOD 01-FEB-07 - 28-FEB-07

FOR INQUIRIES REGARDING THIS INVOICE  
 PLEASE CALL 800-282-2381 AND PRESS 3

**INVOICE TO:**  
 ATTENTION: ADA GARDINER  
 GARDINER LAW FIRM  
 HC 60 BOX 228  
 PORTHILL ID 83853-9701  
 UNITED STATES

**INVOICE SUMMARY**

DESCRIPTION	TOTAL AMOUNT
ACCOUNT BALANCE 31-JAN-07	\$2,214.00
CURRENT CHARGES AND CREDITS	\$576.00
CURRENT TAX	\$0.00
TOTAL PAYMENTS RECEIVED	(\$2,007.00)
PRIOR PERIOD CREDITS	(\$207.00)
PRIOR PERIOD CREDIT TAX	\$0.00
TOTAL ADJUSTMENTS APPLIED	\$0.00
<b>ACCOUNT BALANCE 28-FEB-07</b>	<b>\$576.00</b>



US FEDERAL TAX ID 52-1471842  
CANADIAN GST REGISTRATION NUMBER 126397457RT  
DUN AND BRADSTREET NUMBER 87-767-2683

INVOICE NO.	INVOICE DATE
0704334174	30-APR-07

ACCOUNT NUMBER
12959K

BILLING PERIOD 01-APR-07 - 30-APR-07

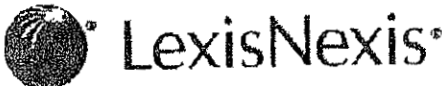
FOR INQUIRIES REGARDING THIS INVOICE  
PLEASE CALL 800-262-2391 AND PRESS 3

INVOICE TO:  
ATTENTION: ADA GARDINER  
GARDINER LAW FIRM  
HC 80 BOX 228  
PORTHILL ID 83853-0701  
UNITED STATES

INVOICE SUMMARY

DESCRIPTION	TOTAL AMOUNT
ACCOUNT BALANCE 31-MAR-07	\$336.00
CURRENT CHARGES AND CREDITS	\$336.00
CURRENT TAX	(\$336.00)
TOTAL PAYMENTS RECEIVED	\$0.00
PRIOR PERIOD CREDITS	\$0.00
PRIOR PERIOD CREDIT TAX	\$0.00
TOTAL ADJUSTMENTS APPLIED	\$0.00
<b>ACCOUNT BALANCE 30-APR-07</b>	<b>\$336.00</b>

*paid  
5-14-07*



INVOICE NO.	INVOICE DATE
0705338288	31-MAY-07

ACCOUNT NUMBER
2989K

BILLING PERIOD 01-MAY-07 - 31-MAY-07

INVOICE TO:  
 GARDINER LAW FIRM  
 HC 60 BOX 228  
 PORTHILL ID 83853-0701  
 ATTENTION: ADA GARDINER

**MONTHLY ACTIVITY**  
**CURRENT PERIOD CHARGES, CREDITS AND TAX**

**LEXISNEXIS ONLINE & RELATED CHARGES**

CONTRACT		CONTRACT AMOUNT	CAP AMOUNT
ALL SERVICES	USE & PRINT	\$336.00	
CONTRACT USE		GROSS AMOUNT	ADJUSTMENT AMOUNT
ALL SERVICES	USE & PRINT	\$573.00	(\$237.00)
	SUBTOTAL	\$573.00	(\$237.00)

NET AMOUNT	\$336.00
TOTAL AMOUNT	\$336.00
	\$336.00
	\$336.00
	\$336.00
	(\$336.00)

TOTAL CONTRACT INFORMATION

TOTAL LEXISNEXIS ONLINE & RELATED CHARGES

CURRENT PERIOD CHARGES, CREDITS AND TAX TOTAL

PAYMENTS\* : 4610 (\$336.00)  
 21 MAY 2007: INVOICE: 0704334174  
 PAYMENT TOTAL

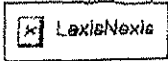
\*PAYMENTS IN TRANSIT MAY NOT BE REFLECTED ON THIS STATEMENT

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### INVOICE SUMMARY

DESCRIPTION
ACCOUNT BALANCE 31-MAY-07
CURRENT CHARGES AND CREDITS
CURRENT TAX
TOTAL PAYMENTS RECEIVED
PRIOR PERIOD CREDITS
PRIOR PERIOD CREDIT TAX
TOTAL ADJUSTMENTS APPLIED
ACCOUNT BALANCE 30-JUN-07

**\*\*DETACH AND RETURN THIS PORTION WITH PAYMENT\*\***



INVOICE NO.	INVOICE DATE
0706293553	30-JUN-07

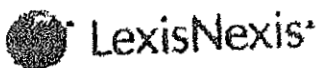
BILLING PERIOD 01-JUN-07 - 30-JUN-07

US FEDERAL TAX ID 52-1471642  
CANADIAN GST REGISTRATION NUMBER 123397457RT

*\$ 336*

file:///C:/Documents%20and%20Settings/LocalService/My%20Documents/AdaGardiner.htm

7/20/2007



INVOICE NO.	INVOICE DATE	ACCOUNT NUMBER
0707330557	31-JUL-07	12859K

BILLING PERIOD 01-JUL-07 - 31-JUL-07

US FEDERAL TAX ID 02-1471842  
 CANADIAN GST REGISTRATION NUMBER 123397457RT  
 DUN AND BRADSTREET NUMBER 07-787-2883

\*\*FOR INQUIRIES REGARDING THIS INVOICE  
 PLEASE CALL 800-262-2391 AND PRESS 3\*\*

**INVOICE TO:**  
 ATTENTION: ADA GARDINER  
 GARDINER LAW FIRM  
 HC 80 BOX 228  
 PORTHILL ID 83853-9701  
 UNITED STATES

**INVOICE SUMMARY**

DESCRIPTION	TOTAL AMOUNT
ACCOUNT BALANCE 30-JUN-07	\$ 336.00
CURRENT CHARGES AND CREDITS	\$ 720.00
CURRENT TAX	\$ 0.00
TOTAL PAYMENTS RECEIVED	(\$ 336.00)
PRIOR PERIOD CREDITS	\$ 0.00
PRIOR PERIOD CREDIT TAX	\$ 0.00
TOTAL ADJUSTMENTS APPLIED	\$ 0.00
ACCOUNT BALANCE 31-JUL-07	\$ 720.00



INVOICE NO.	INVOICE DATE	ACCOUNT NUMBER
0707330557	31-JUL-07	12859K

BILLING PERIOD 01-JUL-07 - 31-JUL-07

US FEDERAL TAX ID 02-1471842  
 CANADIAN GST REGISTRATION NUMBER 123397457RT  
 DUN AND BRADSTREET NUMBER 07-787-2883

LEXISNEXIS  
 PO BOX 2314  
 CAROL STREAM, IL 60192-2314

CUR PER CHG	\$ 720.00
AMT DUE USD	\$ 720.00

PAYMENT TERMS: NET 10 DAYS FROM RECEIPT

**INVOICE TO:**

ATTENTION: ADA GARDINER  
 GARDINER LAW FIRM  
 HC 80 BOX 228  
 PORTHILL ID 83853-9701  
 UNITED STATES

AMOUNTS WHICH HAVE NOT BEEN PAID WITHIN 30 DAYS AFTER  
 THE INVOICE DATE WILL THEREAFTER, UNTIL PAID, BE  
 SUBJECT TO A LATE PAYMENT CHARGE AT A RATE EQUAL TO  
 15.000% PER ANNUM (OR, IF LESS, THE MAXIMUM RATE  
 PERMITTED UNDER APPLICABLE LAW).

12859K0200707310707330557000000720008

Tax Sheet For Library / File For Public Goods Use: **Ada Gardner**  
 Phone: **208-267-4825**

User Name	Total Dollar Amount	Month of Service	Library File
Ada Gardner	\$384.00	July	Restatement Property - Case Citations
Ada Gardner	\$175.00	July	Combined Business and Corporation Information
Ada Gardner	\$1,035.00	July	Federal & State Cases, Combined
Ada Gardner	\$284	July	State Court Cases, Combined
Ada Gardner	\$53.00	Oct	CFR - Code of Federal Regulations
Ada Gardner	\$135.00	Oct	9th Circuit - Federal & State Cases, Combined

*Handwritten notes:*  
 July 16, 19, 23  
 20, 25  
 11, 15, 20, 26  
 18, 19

Now, you may need to convert Library File by using the "File a Source" tab in Lexis.com

209

Subj: LexisNexis - September 2007 Invoice Notification  
Date: 10/5/2007 10:30:45 P.M. Pacific Standard Time  
From: einvoice.notification@lexisnexis.com  
To: adagardiner@aol.com



This is your LexisNexis® **INVOICE** for the month of September 2007

To view your **INVOICE** for this month's billing, or for any Online Account Management options, click on the following link to take you into PowerInvoice™:

<https://www.lexisnexis.com/PowerInvoice>

Current account information as of October 5, 2007 for **GARDINER LAW FIRM.**

Account Number	<b>12959K</b>
Invoice Number	<b>0709296271</b>
Invoice Date	<b>September 30, 2007</b>
Invoice Amount	<b>\$336.00</b>
Account Balance	<b>\$336.00</b>

You can **PAY YOUR BALANCE ONLINE** through the PowerInvoice link above. If you would like to send your payment through the mail, please print your invoice from PowerInvoice and mail to the address indicated on the invoice statement. The invoice statements are downloadable as a printable image file supported and viewable using Adobe Acrobat®. If you do not have Adobe Acrobat®, please find a link to a free downloadable file at the end of this e-mail.

If you have **questions about your invoice**, please contact LexisNexis at 1-800-262-2391, option 3.

If you would like to **contact your Account Manager**, please contact LexisNexis at 1-800-262-2391, option 2.

Please add this domain @email.lexisnexismail.com to your safe senders list.

Adobe Acrobat® free downloadable file available at : <http://www.adobe.com/products/acrobat/readstep2.html>

EXHIBIT A – Page 15

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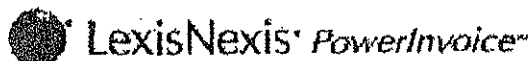
Monday, October 15, 2007 America Online: Adagardiner

FORMERly: 11/11/07 10:30:45 P.M. PST

3788/37887

10:30 8007/10/15

Subj: Invoice Notification for November 2007 - LexisNexis  
Date: 12/10/2007 10:42:34 P.M. Pacific Standard Time  
From: einvoice.notification@lexisnexis.com  
To: adagardiner@aol.com



This is your LexisNexis® INVOICE for the month of November 2007

To view your INVOICE for this month's billing, or for any Online Account Management options, click on the following link to take you into PowerInvoice™:

<https://www.lexisnexis.com/PowerInvoice>

Current account information as of December 11, 2007 for **GARDINER LAW FIRM.**

Account Number	12959K
Invoice Number	0711337569
Invoice Date	November 30, 2007
Invoice Amount	\$336.00
Account Balance	\$336.00

*paid 12-14-07*

You can **PAY YOUR BALANCE ONLINE** through the PowerInvoice link above. If you would like to send your payment through the mail, please print your invoice from PowerInvoice and mail to the address indicated on the invoice statement. The invoice statements are downloadable as a printable image file supported and viewable using Adobe Acrobat®. If you do not have Adobe Acrobat®, please find a link to a free downloadable file at the end of this e-mail.

You can also print this e-mail and send your payment to:

**LexisNexis  
PO BOX 7247-7090  
Philadelphia, PA 19170-7090**

If you have **questions about your invoice**, please contact LexisNexis at 1-800-262-2391, option 3.

If you would like to **contact your Account Manager**, please contact LexisNexis at 1-800-262-2391, option 2.

Please add this domain @email.lexisnexismail.com to your safe senders list.

Adobe Acrobat® free downloadable file available at : <http://www.adobe.com/products/acrobat/readstep2.html>

EXHIBIT A – Page 16

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Thursday, December 13, 2007 America Online: Adagardiner





SEE REVERSE SIDE FOR IMPORTANT INFORMATION

Invoice # 30539927 Invoice Date 07-06-06 P.O.# Order Date 06-23-06 Acct. Mgt 293 Payment Terms 30 Days Ship Method UPS Ground

BILL TO ACCOUNT 0099284996 SHIP TO ACCOUNT 0099284996

GARDINER LAW OFFICE  
 ADA GARDINER  
 HCR 60 BOX 228 10 MAIN ST  
 PORTHILL ID 83853

GARDINER LAW OFFICE  
 ADA GARDINER  
 HCR 60 BOX 228 10 MAIN ST  
 PORTHILL ID 83853

INE

Thank you for your order. We're confident you will find this to be a valuable addition to your library. Please refer all inquiries to our Customer Services Department. Our services are available Monday-Friday 8AM-6PM EST. Phone (800)833-9844, Fax (518)487-3584.

QUANTITY	ISBN	UNIT PRICE	MAINTENANCE	DISCOUNT	NET PRICE	SHIPPING	TAX/FEES	EXTENDED PRICE
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Authorized By: ADA GARDINER

1	0820513032	2864.00		286.40-	2577.60	133.00	128.88	2839.48
Service Period: 07-06 06-07 AGRICULTURAL LAW FULL SET W/EVC								

TOTAL		2864.00		286.40-	2577.60	133.00	128.88	2839.48
-------	--	---------	--	---------	---------	--------	--------	---------

Payment 01 Amount Due 236.62

CALL YOUR ACCT MGR, JERRY COHEN, AT FOR INFO ABOUT OUR PUBLICATIONS

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INVOICE NO.	INVOICE DATE	ACCOUNT NUMBER
0708328088	31-AUG-07	12888K

BILLING PERIOD 01-AUG-07 - 31-AUG-07

US FEDERAL TAX ID 62-1471842  
CANADIAN GST REGISTRATION NUMBER 123307457RT  
CUN AND BRADSTREET NUMBER 67-767-2885

INVOICE TO:  
ATTENTION: ADA GARDINER  
GARDINER LAW FIRM  
HC 80 BOX 228  
PORTHILL ID 83883-8701  
UNITED STATES

*paid*

\*\*\*FOR INQUIRIES REGARDING THIS INVOICE  
PLEASE CALL 800-282-2381 AND PRESS 5.\*\*\*

INVOICE SUMMARY

DESCRIPTION	TOTAL AMOUNT
ACCOUNT BALANCE 31-JUL-07	\$ 730.00
CURRENT CHARGES AND CREDITS	\$ 336.00
CURRENT TAX	\$ 0.00
TOTAL PAYMENTS RECEIVED	(\$ 720.00)
PRIOR PERIOD CREDITS	\$ 0.00
PRIOR PERIOD CREDIT TAX	\$ 0.00
TOTAL ADJUSTMENTS APPLIED	\$ 0.00
ACCOUNT BALANCE 31-AUG-07	\$ 336.00



INVOICE NO.	INVOICE DATE	ACCOUNT NUMBER
0708328088	31-AUG-07	12888K

BILLING PERIOD 01-AUG-07 - 31-AUG-07

US FEDERAL TAX ID 62-1471842  
CANADIAN GST REGISTRATION NUMBER 123307457RT  
CUN AND BRADSTREET NUMBER 67-767-2885

LEXISNEXIS  
PO BOX 2314  
CAROL STREAM, IL 60132-2314

CUR PER CHG	\$ 336.00
AMT DUE USD	\$ 336.00

PAYMENT TERMS: NET 10 DAYS FROM RECEIPT

INVOICE TO:

ATTENTION: ADA GARDINER  
GARDINER LAW FIRM  
HC 80 BOX 228  
PORTHILL ID 83883-8701  
UNITED STATES

AMOUNTS WHICH HAVE NOT BEEN PAID WITHIN 30 DAYS AFTER  
THE INVOICE DATE WILL THEREAFTER, UNTIL PAID, BE  
SUBJECT TO A LATE PAYMENT CHARGE AT A RATE EQUAL TO  
18.000% PER ANNUM (OR, IF LESS, THE MAXIMUM RATE  
PERMITTED UNDER APPLICABLE LAW).

12888K020070831070832808890000000336007

0-1

213

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,

CASE NO. CV-2006-339

Petitioners,

AFFIDAVIT OF ADA GARDINER

vs.

BOUNDARY COUNTY BOARD OF  
COMMISSIONERS,

Respondent.

STATE OF IDAHO            )  
  ss.  
County of Boundary        )

Ada Gardiner, being duly sworn on oath, deposes and states as follows:

1. Affiant submits this Affidavit pursuant to I.R.C.P. 54
2. Petitioner seeks recovery for the reasonable cost of automated legal research in the amount of \$8,114.00.
3. My husband, Pat Gardiner, and I subscribed to LexisNexis electronic research to assist us in researching the legal issues involved in this case. Our contract was for \$336.00 per month so long as we did not exceed our parameters of Idaho and federal Ninth Circuit

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

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limits. The charges in excess of \$336.00 per month were incurred for research outside these parameters. However, the research was for this case as follows:

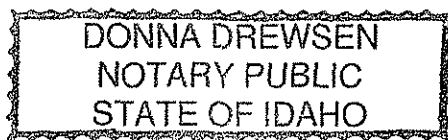
- A. Restatement of property (\$384.00);
- B. Business and corporation information (\$175.00);
- C. Combined federal and state cases (\$1,035.00);
- D. State court cases (\$284.00);
- E. C.F.R. regulations (OSHA) (\$53.00);
- F. Ninth Circuit federal and state cases (\$135.00).

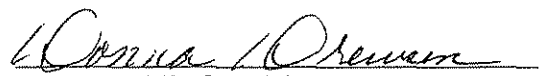
4. We conducted legal research over a period of 18 months at a cost of \$336.00 per month, for \$6,048.00. The additional costs total \$2,066.00, for a total of \$8,114.00.

Dated this 9<sup>th</sup> day of January, 2008.

  
\_\_\_\_\_  
ADA GARDINER

Subscribed and sworn to before me this 9<sup>th</sup> day of January, 2008.



  
Notary Public for Idaho  
Residing at Boundary Idaho  
My Commission Expires: 8-18-11

BOUNDARY COUNTY CIVIL ATTORNEY  
Philip H. Robinson (ISBN 1323)  
PO Box 1405  
Sandpoint, Idaho 83864  
(208) 263-6714  
(208) 263-6726 (Fax)

FILED

2008 JAN 24 P 1:59

STATE OF IDAHO  
COUNTY OF BOUNDARY  
GLENDIA POSTON, CLERK  
BY Hammond  
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,

Petitioners,

vs.

BOUNDARY COUNTY BOARD OF  
COMMISSIONERS,

Respondent.

Case No.: CV 2006-339

OBJECTION TO ATTORNEY FEES  
AND COSTS

COMES NOW, BOUNDARY COUNTY BOARD OF COMMISSIONERS, the Respondent, by and through its attorney, Phil Robinson, and hereby objects to attorney fees and costs submitted to the Court, pursuant to IRCF 54 and moves this Court to disallow part or all attorney fees and costs stated in the Respondent's Memorandum and Affidavit Re: Attorney Fees and Costs. Petitioner objects to the amount of fees and costs as follows.

Specifically, Petitioner objects to the time expended by Respondents' attorney, Mr. Vogel. Petitioner does not doubt Mr. Vogel's time keeping only that the efforts put forth by Mr. Vogel were necessary. As stated in the Court's

Memorandum and Opinion, the boundary county subdivision ordinance 99-06, chapter 7, pertaining to special use permits is void. Therefore, Respondents or Mr. Vogel could have simply filed a Petition for Declaratory Judgment. If that avenue had been taken by the Respondents the attorney's fees would have been considerably less.

The total expert fees should not be allowed. They are far above the allowed amount of Two Thousand Dollars (\$2000.00) Furthermore, these fees are unreasonably and extremely high for the services needed and even the services performed by Ms. Uhlman. Ms. Uhlman was never even required to testify before the Board of Commissioners. She simply submitted a short report. Petitioner objects to the Lexpert Research services referral fee of One Thousand Two Hundred Fifty Dollars (\$1250.00). The Petitioners, well educated attorneys, should have been able to find an expert through other less expensive means or for a lesser fee.

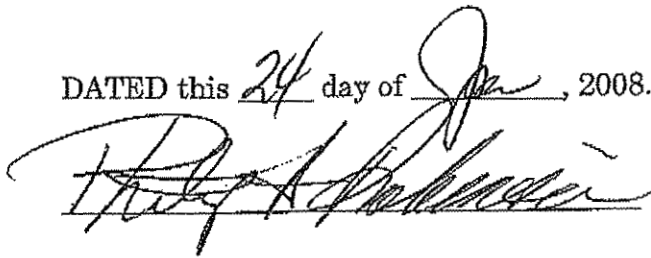
Petitioners argue that they should be given a greater allowance for discretionary fees since as licensed attorneys they did not bill for their some Two Hundred (200) hours of work on their own case. As they are not licensed in the state, have not filed for *pro hac vice* status, and have not entered a notice of appearance in this Court, they are not entitled to attorneys fees. They are not entitled to attorneys fees, whether disguised as discretionary costs or not.

The Petitioner also objects to the research fees of Eight Thousand One Hundred Fourteen Dollars (\$8,114). According to IRCP 54(e)(3)(K), research fees are classified as part of attorney fees and as petitioners are not licensed attorneys in the state of Idaho they are not entitled to the recover legal research fees. Even if the Court finds that they are entitled to some research fees, these fees are excessive, unreasonable and unnecessary. The tax payers of Boundary County should not be required to fund the legal research of the petitioners on their own case. While eight thousand dollars may be reasonable in California for legal research, it is not in Boundary County, Idaho. Furthermore, with the internet available, most case law

is available for free on each state's web site. The relevant cases cited by the Court were almost solely from the Idaho Supreme Court and Court of Appeals.

Respondent respectfully requests argument on these issues.

DATED this 24 day of Jan, 2008.

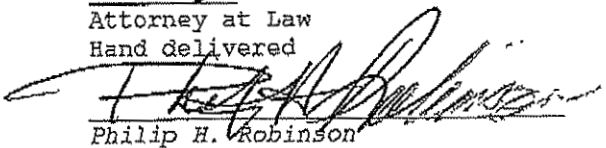


Attorney for Respondent

**CERTIFICATE OF DELIVERY**

I hereby certify that on the 24<sup>th</sup> day of January, 2008, I caused to be served a true and correct copy of the foregoing document as addressed to the following:

Paul Vogel  
Attorney at Law  
Hand delivered

  
Philip H. Robinson

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

FILED

2008 JAN 30 P 12:08

STATE OF IDAHO  
COUNTY OF BOUNDARY  
GLENDA POSTON, CLERK  
BY [Signature]  
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,

Petitioners,

vs.

BOUNDARY COUNTY BOARD OF  
COMMISSIONERS,

Respondent.

CASE NO. CV-2006-339

MEMORANDUM AND ARGUMENT IN  
SUPPORT OF PETITIONERS' FEE AND  
COST MEMORANDUM

Patrick Gardiner and Ada Gardiner, husband and wife, through their attorney, Paul William Vogel, hereby submit this Memorandum and Argument in Support of Petitioners' Fee and Cost Memorandum. This Argument is based on the files and pleadings herein, together with the Declaration of Ada Gardiner dated January 23, 2008, attached hereto and incorporated herein.

The sole purpose of petitioners' contract with Lexis was to prepare for this case. They had no contract with Lexis or any other automated legal research service prior to these proceedings. They are retired from their California law practice, do not practice law in Idaho,

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Attorney-at-Law  
120 East Lake Street  
Suite 313  
P.O. Box 1828  
Sandpoint, ID 83864-0903  
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and had no need for this service except to prepare for this case. The Gardiners contracted for the most minimal cost service that would be adequate to prepare for this case, which service was limited to Idaho law and Federal Ninth Circuit cases.

The Gardiners are attorneys in good standing, members of the California State Bar, and admitted to practice in the federal courts and courts of appeal, and in the United States Supreme Court. They are trained and experienced in automated legal research. They used the research service to efficiently assist my office in the preparation of their case. They have not charged anything for their time spent on research.

Automated legal research was necessary, given that the respondent is a government agency with its own legal staff with virtually unlimited resources for litigation and research, especially considering the fact that the County does not have to pay an hourly rate for legal services.

Given the number of hearings that were involved, the documentary evidence, the large administrative record, and the breadth of public issues in this case, legal research was necessary.

Although it was necessary to exceed the basic, monthly parameters to research certain issues, the agency's actions involved all of the issues researched outside of the basic service provided. For example, the basic service did not include federal statutes such as OSHA, federal mining, clean air and environmental laws or Supreme Court decisions on the subject of equal protection, condemnation and government takings of property. Particularly, since Idaho law provides for requests for takings analysis as a relatively new administrative remedy to claims involving the effect of government actions on private property, it was necessary to research these areas.

The only reason OSHA became an issue was because the Commissioners put it in issue. They relied on 29 C.F.R., subpart U, as a condition of mitigation in its decision granting the special use permit. The County did not provide a copy of the regulations to anyone or explain how those regulations assisted adjacent property owners. In fact, the regulation did not relate to adjacent owners and, without the legal research, my clients would have simply had to accept the erroneous statements of the Zoning Administrator.

It was only through a review of OSHA regulations that my clients were able to determine that there was no evidence supporting the County's proposition that OSHA protected adjacent property owners' property underground water from blasting in Tungsten's gravel pit. The research revealed that: the regulations were not cited correctly, and that there is no 29 C.F.R. subpart U. The proper citation is 29 C.F.R. (labor, ch. XVII (OSHA), part 1926.900 (safety and health regulations for construction), subpart U (blasting and the use of explosives). The improper cite required extra time to locate and there are no OSHA provisions concerning precautions for safety to adjacent properties or water resources.

OSHA, a workplace safety statute, has nothing to do with adjacent property rights or property owners, or safe blasting practices. Furthermore, OSHA does not require blasters to be qualified.

This research was important because it clearly demonstrated that the Commissioners did not know or understand OSHA regulations, had no knowledge whether or not they applied to the Gardiners' property concerns, and were not concerned about their lack of such knowledge. Accordingly, this research supported Petitioners' contention that the decision was arbitrary and capricious.

Sound and thorough legal research was critical because this case concerned government action and the abuse of government power over individuals subject to the government's jurisdiction. Individuals would be deterred from pursuing meritorious claims against government agencies if they are prevented from access to the same automated legal research that attorneys for government agencies routinely access. If governments are allowed to escape the costs of automated legal research of successful challenges to their decisions, this would have the undesirable effect of encouraging government abuse.

The Gardiners should also be able to recover their expert witness fees. If the County had properly applied the burden of persuasion to the applicant, the Commissioners could and should have required Tungsten to present expert evidence that the blasting, crushing, and trucking activities associated with this gravel pit would not injure adjacent properties or adversely impact current uses of surrounding properties.

By turning the burden of persuasion around and placing it on appellants, the Commissioners forced appellants to obtain an expert witness in an effort to, essentially, do the job that was required of Tungsten. In fact, Chairman Smith challenged the Gardiners by stating:

Is there anything, do you have anything that says blasting can cause water to quit running, or is that just a fear that you have . . . because we have a comment here (from Rick Dinning, a non-expert) that said there was no affect . . . all I'm interested in is the fact. If there is some fact out there, or there is some documentation that says dynamiting can have an affect on somebody's water, then I'd like to hear it . . . the only thing I am hearing that we've had dynamiting . . . and there was no effects. So I have it one way, but I don't have it the other way. C.T.  
7/26/05 15:22-25 - 16:1-12.

Based upon this comment, appellants obtained the services of a registered hydrologist who visited the site, studied the facts, and prepared a report that appellants submitted for the record in the July 26, 2006 hearing.

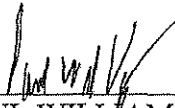
Since the Commissioners caused appellants to incur this expense, they should reimburse appellants in full. The expert's fees are reasonable for the time spent in physical inspection of the property, the study of the facts and preparation of a written opinion. It was contrary to the applicable burden of proof for Commissioners to require adjacent property owners, not the applicant development corporation, to incur the cost of an expert as a result of the corporation's application. Ordering payment of these costs would deter such misconduct in the future.

Finally, it needs to be kept in mind that the purpose of I.C. 12-117 is two-fold: to serve as a deterrent to groundless and illegal agency action; and to provide a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies should never have made. Reardon v. City of Burley, 140 Idaho 115 (2004). Both of these reasons apply in the instant case.

At all stages of the proceedings, the County maintained that appellants' case was frivolous and without merit and refused to give appellants' arguments and evidence due consideration. This compelled appellants to research a wide variety of issues to prepare for the record and judicial review, including due process, procedural and substantive issues involving the Local Land Use Planning Act, spot zoning, takings analysis and issues, state water rights, state zoning and variance laws, state agency rules and regulations, state open meeting and competitive bidding laws, state and federal mining, environmental, safety and emissions standards and regulations and state and federal constitutional issues.

The Idaho Legislature, by enacting the LLUPA, placed a duty of reasoned decision-making in zoning cases on local and planning zoning commissions and, ultimately, the County Commissioners. Accordingly, the Legislature adopted a local administrative process that would quickly settle local land use disputes, de-clog the court system of such cases and minimize litigation costs overall. These purposes are thwarted when, as in the instant case, the County abandons its duty, fails to follow its ordinances and basically challenges the objectors to take it to court. Full costs and fees must be awarded to deter such arbitrary agency action and to provide a remedy to appellants who bore these costs to correct actions and mistakes the County never should have made.

Dated this 24<sup>th</sup> day of January, 2008.

  
\_\_\_\_\_  
PAUL WILLIAM VOGEL  
Attorney for Petitioners

#### CERTIFICATE OF DELIVERY

I hereby certify that on this 29 day of January, 2008, I delivered a true and correct copy of the foregoing MEMORANDUM AND ARGUMENT IN SUPPORT OF PETITIONERS' FEE AND COST MEMORANDUM as follows:

##### VIA HAND DELIVERY

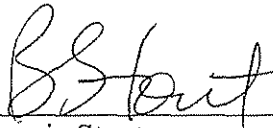
Phil Robinson  
Bonner County Prosecuting Attorney  
Courthouse Mail

##### VIA FACSIMILE DELIVERY

Louis Marshall  
Bonner County Prosecutor's Office  
Fax: 263-6726

##### VIA U.S. MAIL

Boundary County Prosecuting Attorney  
P.O. Box 1148  
Bonners Ferry, ID 83805

  
\_\_\_\_\_  
Bonnie Stout

DECLARATION OF ADA GARDINER

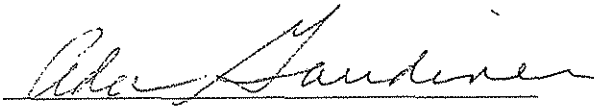
I, Ada Gardiner, declare as follows:

1. I am one of the appellants in this action. My husband, Patrick J. Gardiner, is the other appellant.
2. I have personal knowledge of the facts stated herein, and if called as a witness could and would competently testify to these facts.
3. I make this declaration in support of appellants' affidavit re: attorney fees and costs.
4. On July 5, 2006, Patrick and I contracted with LexisNexis for automated legal research services at the cost of \$336 per month. The sole purpose of this contract was to prepare for this case.
5. Neither Patrick or I had any contract with LexisNexis or any other automated legal research service prior to these proceedings.
6. Patrick and I are attorneys in good standing and members of the California State Bar. We are also admitted to practice in the federal courts and courts of appeal and in the United States Supreme Court. We are trained and experienced in automated legal research.
7. Patrick and I reside in the State of Idaho. We retired from our California law practice, do not practice law in Idaho and have no current need for an automated legal research service except to prepare for this case. The monthly rate we received from Lexis was its small firm rate for research in one state (Idaho) and federal 9<sup>th</sup> circuit cases. This was the lowest cost service we could get that would be adequate to prepare for this case.

8. Patrick and I used this research service exclusively to assist our attorney, Paul W. Vogel, in his preparation of our case. Neither Patrick nor I claim any attorney fees for our time spent in such research.

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

Executed this 23<sup>rd</sup> day of January, 2008, at Porthill, Idaho.

A handwritten signature in cursive script, reading "Ada Gardiner", written over a horizontal line.

Ada Gardiner

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

COURT MINUTES

JUDGE: JAMES R MICHAUD  
REPORTER: ANNE MACMANUS  
CLERK: LINDA OPPELT  
DIVISION: DISTRICT

CASE NO. CV-06-339 (BOUNDARY COUNTY CASE)  
DATE: 01-31-08 TIME: 03:30 PM  
CD: 08-16

PATRICK GARDINER, ETAL

vs BOUNDARY COUNTY BOARD OF  
COMMISSIONERS

Plaintiff / Petitioner

Defendant / Respondent

Atty: PAUL VOGEL

Atty: PHILIP ROBINSON

SUBJECT OF PROCEEDINGS

PETITIONER'S MEMORANDUM AND AFFIDAVIT RE: ATTORNEY  
FEES AND COSTS AND RESPONDENT'S OBJECTION

INDEX	SPEAKER	PHASE OF CASE
201	J	<b>Calls Case</b>
		<b>Present:</b> PAUL VOGEL, PHILIP ROBINSON , LOUIS MARSHALL
	J	I DON'T HAVE COMPLETE FILE. CITES WHAT DOES HAVE. THAT IS ALL THE DOCUMENTS THAT PERTAIN TO THIS ISSUE?
	PV LM	YES
	J	HOW TO PROCEED? ANY PROBLEM ABOUT HIM GOING FIRST?
	LM	NO
204	PV	MR. ROBINSON SUGGESTS IF MY EFFORTS WERE NECESSARY. I HAD TO WORK WITH VARIOUS PEOPLE (CITES). MULTIPLE PHONE CALLS AND LETTERS.
206		TOOK 3.3 HOURS TO WRITE THE BRIEF. I SERVED IN A CONSULTING POSITION.
207		SOME COSTS ARE DISCRETIONARY. 8 ISSUES WERE TO BE DECIDED BY THE COURT AND 6 WERE IN FAVOR OF MY CLIENTS. THE \$2000.00 CAP WAS EXCEEDED.
209		LEGAL RESEARCH IS UNDER THE ATTORNEY SECTION. WE RESEARCHED THE ISSUES OF THE CASE. MONTHLY FEE IS A GIVEN THAT SHOULD BE RECOVERED.
210		IN CONCLUSION. WE GAVE BOUNDARY COUNTY A BREAK.
211		I BEGAN CHARGING THE GARDINERS A LOWER FEE BECAUSE THEY DID MOST THE WORK THEMSELVES.
211	LM	HAVE A ADDITIONAL CASE NALOR V. LATAH COUNTY.
	PV	THIS IS TRYING TO ARGUE THE DECISION. NOT APPROPRIATE TO ARGUE THIS.
212	LM	MS. OLMAN IS NOT A LICENSE GEOLOGIST IN IDAHO BUT IN ARIZONA. SHE DID NOT TESTIFY ONLY FILED BRIEFS.
214		CAP IS \$2000.00. I DON'T SEE THAT.
		LEGAL RESEARCH \$8114.00 IS TOO MUCH FOR RETIRED ATTORNEYS IN CALIFORNIA. EXPLAINS.
215		SHOULD LOOK AT THE PREVIOUS 2 CASES. TALKS ABOUT CASES.
		MOST PEOPLE THINK THERE SHOULD HAVE BEEN A GRAVEL PIT BY PORTHILL. ADJUST THE AMOUNT OF FEES AND COSTS.
218	PV	WITH REGARD TO THE NAYLOR. THE DISTRICT COURT DENIED ATTORNEY FEES. NAYLOR WAS A STATE STATUTE NOT A COUNTY ORDINANCE LIKE



		THIS CASE IS.
220		WE SHOWED FACTS IN THIS CASE.
	J	DON'T HAVE ANY QUESTIONS. IF YOU WANT TO BRIEF THE QUERIES FURTHER.
	PV	DON'T NEED TO
	J	HAVEN'T HEARD MY QUERIES. CITES QUERIES. TAKE THE OBJECTION SIGNED BY MR. ROBINSON. PAGE 2. EXPERT FEES SHOULD NOT BE PAID.
224		<b>WILL ISSUE A WRITTEN DECISION.</b>
		CITES D1D. WHAT IS EXCEPTIONAL? FIRST HAVE TO ADDRESS ISSUES ABOUT EXPERT FEES.
	J	ANYTHING FURTHER?
227	PV	YES WOULD LIKE TO RESPOND.
	LM	WOULD LIKE TO RESPOND.
	J	HOW LONG DO YOU WANT TO RESPOND?
	PV LM	2 WEEKS.
	J	2 WEEKS. 14 DAYS.
228	PV	I WASN'T TRYING TO ALLEGED THE WRONG DOING OF THE COMMISSIONERS.
229		END



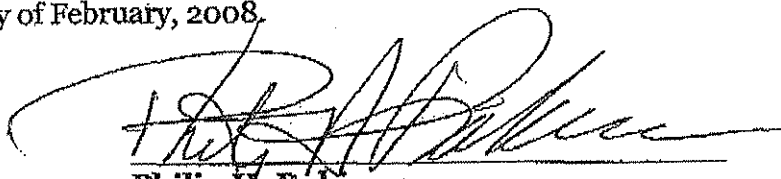
Appeal on the 3<sup>rd</sup> day of January, 2008, improperly overruling a land-use decision of the Board of County Commissioners concerning the approval of a special use permit for a gravel pit.

2. This appeal is taken from the District Court of the First Judicial District of the State of Idaho, in and for the County of Boundary.
3. This appeal is taken to the Supreme Court of the State of Idaho from the Honorable James Michaud's Decision on Appeal which determined that the County improperly granted a special use permit for a gravel pit. The Court's Memorandum Opinion and Order Setting Aside Special Use Permit was entered on the 3<sup>rd</sup> day of January, 2008 at the Boundary County Courthouse, Boundary County, Idaho, by the Honorable James Michaud, District Judge presiding.
4. The County has the right to appeal to the Idaho Supreme Court and the judgment or order described in paragraph 1 is an appealable order under and pursuant to Rule 11(a)(2) I.A.R. in that the order referenced in paragraph 1. is a final order of the District Court on judicial review reversing the decision of the County.
5. A preliminary statement of the issues on appeal are:
  - A. Did the district court err in holding that, Boundary County's Subdivision Ordinance 99-06, Chapter 7, pertaining to special use permits is void?
  - B. Did the district court err, in its determination that the County improperly shifted the burden of persuasion to the Petitioners?
  - C. Did the district court err in determining the county's decision was arbitrary and capricious because it failed to comply with I.C. 67-6535?

- D. Is Boundary County Ordinance Zoning and Subdivision Ordinance 99-06 in conflict with Idaho Code 67-6512 and void on its face?; and
- E. Did the District Court err in awarding attorneys fees and costs to the Petitioners?
6. A reporter's transcript of all oral arguments of the District Court is requested.
7. Appellant Boundary County requests that the following documents be included in the Court's record in addition to those automatically included under Rule 28, I.A.R.: the parties' motions, briefs and memorandum below with any briefs, memoranda and affidavits concerning all issues appealed from herein should be included and allowed into the clerk's record.
8. I certify:
- A. That a copy of this Notice of Appeal has been served on the Reporter.
- B. That the Appellant is exempt from paying the estimated transcript fee because the Appellant is a governmental entity, that being Boundary County, Idaho.
- C. That the Appellant is exempt from paying the estimated fee for the preparation of the record because the appellant is a governmental entity, that being Boundary County, Idaho.
- D. That the Appellant is exempt from paying the Appellant filing fee because the aopellant is a governmental entity, that being Boundary County, Idaho.

E. That service has been made upon all parties required to be served pursuant to Rule 20.

DATED this 13 day of February, 2008.



**Philip H. Robinson**  
Attorney for Boundary County

**CERTIFICATE OF MAILING**

I hereby certify that on this 13 day of February, 2008, I caused to be served a true and correct copy of the foregoing as addressed to the following:

Paul Vogel  
Attorney at Law  
PO Box 1828  
Sandpoint ID 83864

Glenda Poston, County Clerk  
Boundary County  
Courthouse Mailbox

James Michaud  
District Judge  
Courthouse Mailbox

Idaho Supreme Court  
Attn: Stephen Kenyon  
Clerk of the Courts  
P.O. Box 83720  
Boise, ID 83720-0101



Philip H. Robinson

ORIGINAL

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ISB NO. 2504

FILED

2008 FEB 15 P 3:58

STATE OF IDAHO  
COUNTY OF BOUNDARY  
GLENDA POSTON, CLERK

BY J. Ames  
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,

CASE NO. CV-2006-339

Petitioners,

ATTORNEY FEE MEMORANDUM

vs.

BOUNDARY COUNTY BOARD OF  
COMMISSIONERS,

Respondent.

**Court May Order Payment of Expert Witness Costs  
Incurred in Administrative Proceedings**

Courts may award expert witness fees in administrative proceedings pursuant to I.C. 12-117(1). This provision states that unless otherwise provided by statute, the court "shall award the prevailing party reasonable attorney fees, witness fees and reasonable expenses" in "any administrative proceeding or civil judicial proceeding involving as adverse parties. . . a county. . . and a person," if the courts finds that the party against whom the judgment was rendered "acted without a reasonable basis in fact or law." This statute which is specific to county administrative proceedings makes such awards mandatory.

Additionally, appellants may be awarded expert witness costs under I.R.C.P. 54(d)(1). See World Cup Ski Shop, Inc. v. City of Ketchum, 118 Idaho 294 (1990). In

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World Cup, the District Court awarded the full amount of expert witness costs that were incurred in a conditional use permit proceeding before a City Planning and Zoning Commission. The full, requested amount of \$1,500.00 was \$1,000.00 in excess of the then \$500 maximum expert witness cost authorized by I.R.C.P. 54(d)(1)(C)(8).

The District Court had awarded the excess \$1,000.00 portion under Rule 54(d)(1)(D) providing that "*additional items of cost not enumerated in, or in an amount in excess of [costs allowed as a matter of right] listed in subparagraph (C) may be allowed upon a showing that said costs were necessary and exceptional costs reasonably incurred, and should in the interest of justice be assessed against the adverse party.*" (Italics added.) Under this language, even if expert witness costs were not otherwise authorized under Rule 54(d)(1)(C), such award is still proper as an "additional item of cost" under Rule 54(d)(1)(D) according to the criteria in that provision. Conversely, even if expert witness costs are authorized by Rule 54(d)(1)(C), the court has discretion to award fees in excess of the maximum amount as "necessary and exceptional costs" under Rule 54(d)(1)(D).

In World Cup, supra, the District Court had failed to make the findings in Rule 54(d)(1)(D) supporting the \$1,000.00 award. Because the record failed to provide adequate findings to explain the award, the Supreme Court could not discern whether the District Court abused its discretion in making the award. On this basis, the Supreme Court vacated the discretionary costs award and remanded it for reconsideration under Rule 54(d)(1)(D) guidelines. World Cup, supra, 118 Idaho at p. 296. Accordingly, the District Court may exercise its discretion to award expert witness costs in administrative proceedings under Rule 54(d)(1)(D), and the standard of review of such order and judgment is abuse of discretion.

The procedures followed in World Cup are similar to the instant matter. The action commenced with an application to a City Planning and Zoning Commission for a conditional use permit, in that case for the purpose of expanding a bar near the Sun Valley Ski Resort in Ketchum, Idaho. The Zoning Commission granted the permit over the objections of adjacent business owners. The business owners appealed to the City Council which affirmed the Zoning Commission's decision. The business owners then filed a petition for judicial review in District Court, and also sought a preliminary injunction against the proposed expansion. The District Court denied the petition and injunction, and awarded the bar owner the full amount of his expert witness fees under Rule 54(d)(1).<sup>1</sup>

In *World Cup*, the expert witness was an appraiser who had "offered testimony" about the effects of expanding the prevailing party's building. (World Cup, supra, 118 Idaho, at 296.) The decision does not specify whether the appraiser actually testified, or whether the appraiser's offer of testimony was written or oral. It appears from this case and the public utility cases that written testimony is proper and typical in administrative proceedings and that awards for such costs do not depend on the form of testimony.

This is consistent with the Idaho Administrative Procedure Act, Idaho Code 67-5251(2) which states that "[a]ny part of the evidence may be received in written form if doing so will expedite the hearing without substantially prejudicing the interests of any party." Clearly, if expert witness fees could only be ordered as costs for experts who testify orally in the proceeding, the costs for expert witnesses would be substantially increased, and valuable agency, court time and public resources would be wasted.

---

<sup>1</sup> The District Court also awarded attorney fees to the city and adjacent owners under I.C. 12-121. This award was vacated because attorney fees could not be awarded under that statute for cases initiated before an administrative agency.



Further, in R.T. Nahas Co. v. Hulet, 106 Idaho 37 (1984), the District Court awarded costs to the prevailing party in a water rights case, including expert witness fees for a hydrologist/geologist as an extraordinary cost under I.R.C.P 54(d)(i)(D). The District Court denied the non-prevailing party's motion to disallow costs, and made the required findings that the expert costs were: (1) actually incurred and paid; (2) clearly necessary and reasonably incurred, in that the expert's testimony was not only critical but of preemptive importance and value to the court in the determination of the matter; and (3) that justice demanded these exceptional costs should be assessed against the non-prevailing party. Id., 106 Idaho at p. 43.

On appeal, the non-prevailing party argued that it was unfair to allow recovery of extraordinary costs in actions to adjudicate water rights. The Supreme Court found "no merit" in this argument because "[r]ule 54(d)(1) *does not indicate any limitations, as to the type of actions or costs, in its application.* We are unpersuaded that the trial court abused its discretion in allowing recovery of the expert witness fee as a cost." R.T. Nahas Co., *supra*, 106 Idaho at p. 43 (italics added). While this case does not appear to involve an administrative proceeding, the Supreme Court addressed the issue of whether Rule 54(d)(1) is limited to a specific type of action, and determined that it is not. It follows that administrative proceedings are not excluded from this statute.

Of note, Idaho Appellate Rule 28(b) states: "The clerk's *or agency's* record shall also include all additional documents requested by any party in the notice of appeal . . . including, but not limited to. . . statements or affidavits considered by the court *or administrative agency in the trial of the action or proceeding.* . . ." (Italics added.) Thus, no distinction is made in the Idaho Appellate Rules between a "trial" in a civil court or

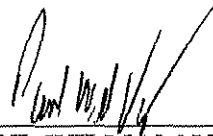
before an administrative agency with respect to preparation of the record of the proceeding on appeal. Clearly, an administrative proceeding with the right of judicial review, as the instant matter, constitutes a "trial" within the meaning of Rule 54(d)(1)(C)(8). Regardless, "additional items of cost not enumerated" in subparagraph C may be allowed under Rule 54(d)(1)(D).

It is fundamental that local government agencies sit in a quasi-judicial capacity when applying general rules or policies to specific individuals, and that such individuals are entitled to due process, including judicial review of the agency's decision. Turner v. City of Twin Falls, 159 P.3d 840 (2007), quoting Cooper v. Board of County Comm'rs, 101 Idaho 407, 410 (1980). See also Comer v. County of Twin Falls, 130 Idaho 433 (1997) (due process requirements apply to proceedings of local land use boards, including decisions on applications for conditional land use permits). The statutory scheme for fees and costs in civil and administrative proceedings involving counties clearly indicates that the court's discretion under the court's general jurisdiction applies.

An award of the entire amount of expert witness fees incurred by appellants here is clearly warranted under Idaho Code 12-117 and I.R.C.P Rule 54(d)(1)(D). The costs were actually incurred and paid. They were necessary and reasonably incurred because of the County Board's position that appellants bore the burden of "documenting" harm from blasting and intensive mining operations, rather than requiring Tungsten to "document" that no harm would result. The Board's position compelled appellants to bear the costs for such expert testimony. This Court made the finding that the Board acted without a reasonable basis in fact or law.

The costs are clearly reasonable for the expert's time in traveling to and visiting the location, researching and studying the issues, and writing a seven page opinion assessing the potential for water loss to appellants' property from the proposed rock quarry (R.O.A. 79-84). This testimony is supported by the expert's sworn declaration documenting her special knowledge, education, training and experience in hydrology and geology. (R.O.A. 85-87.) It is undisputed that appellants' expert is qualified to render an opinion. Since the County Board's actions required appellants to produce such expert documentation, the County should pay these fees in the interests of justice. Not to pay such legitimate costs would have a chilling effect on members of the public exercising their legal rights against arbitrary government action, and would allow the County to profit by its own wrong.

Dated this 14th day of February, 2008.



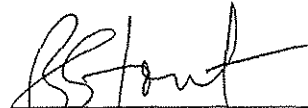
PAUL WILLIAM VOGEL  
Attorney for Petitioners

#### CERTIFICATE OF DELIVERY

I hereby certify that on this 14th day of February, 2008, I delivered a true and correct copy of the foregoing ATTORNEY FEE MEMORANDUM, addressed to:

Boundary County Prosecuting Attorney  
P.O. Box 1148  
Bonners Ferry, ID 83805  
Via U.S. Mail

Phil Robinson  
Bonner County Prosecuting Attorney  
Courthouse Mail  
Via Hand Delivery

  
Bonnie Stout

In the Supreme Court of the State of Idaho

FILED

2008 FEB 22 A 11: 38

PATRICK GARDINER and ADA GARDINER, )  
husband and wife, )

Plaintiffs-Respondents, )

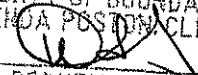
v. )

BOUNDARY COUNTY BOARD OF )  
COMMISSIONERS, )

Defendant-Appellant.

ORDER

NO. 35007

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

The Notice of Appeal in the above captioned matter filed in this Court February 19, 2007, requested that a Reporter's Transcript be prepared. However, the Notice of Appeal failed to comply with Idaho Appellate Rule 17 in that it did not specify by date and title the hearings required to be prepared for purposes of this Appeal: therefore, good cause appearing,


IT HEREBY IS ORDERED that Appellant shall file an AMENDED NOTICE OF APPEAL which complies with Idaho Appellate Rule 17, and shall specify by date and title the hearing(s) required to be prepared for purposes of this Appeal.

IT FURTHER IS ORDER that Appellant shall serve the Reporter(s) with a copy of the Amended Notice of Appeal and shall indicate in the Amended Notice of Appeal which reporter(s) was served.

IT FURTHER IS ORDERED the Amended Notice of Appeal shall be filed with the District Court within fourteen (14) days from the date of this Order. In the event an Amended Notice of Appeal is not filed, this appeal may proceed on the Clerk's Record ONLY.

DATED this 20<sup>th</sup> day of February 2008.

For the Supreme Court



Dorothy Beaver, Deputy Clerk for  
Stephen W. Kenyon, Clerk

cc: Counsel of Record  
District Court Clerk  
District Court Reporter

FILED

2008 MAR -5 P 1:18

STATE OF IDAHO  
COUNTY OF BOUNDARY  
GLENDA POSTON, CLERK  
BY [Signature]  
DEPUTY CLERK

**Boundary County Civil Attorney  
Philip H. Robinson (ISB#1323)**  
PO Box 1405  
Sandpoint, Idaho 83864  
(208) 263-6714  
(208) 263-6726 (Fax)

**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,** )

Case No. **CV-2006-00000339**

Plaintiffs-Respondents, )

vs )

**AMENDED  
NOTICE OF APPEAL**

**BOUNDARY COUNTY BOARD  
OF COMMISSIONERS,** )

Defendant- Appellant. )

**TO:** The above-named Plaintiffs **Ada and Patrick Gardiner** and their attorney, Paul Vogel PO Box 1828, Sandpoint, ID 83864, the Honorable James Michaud, District Judge, Courthouse Mail, Sandpoint, ID 83864, and the Clerk of the above-entitled Court.

**NOTICE IS HEREBY GIVEN THAT:**

1. The above-named Appellant, Boundary County (hereinafter "County"), through the Boundary County Board of Commissioners, appeals from a decision made by the Honorable James Michaud, District Judge for the First Judicial District of the

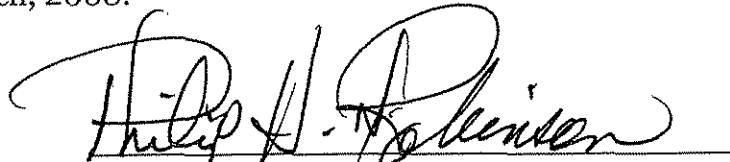
State of Idaho, in and for the County of Boundary, who entered his Decision on Appeal on the 3<sup>rd</sup> day of January, 2008, improperly overruling a land-use decision of the Board of County Commissioners concerning the approval of a special use permit for a gravel pit.

2. This appeal is taken from the District Court of the First Judicial District of the State of Idaho, in and for the County of Boundary.
3. This appeal is taken to the Supreme Court of the State of Idaho from the Honorable James Michaud's Decision on Appeal which determined that the County improperly granted a special use permit for a gravel pit. The Court's Opinion was entered on the 3<sup>rd</sup> day of January, 2008 at the Boundary County Courthouse, Boundary County, Idaho, by the Honorable James Michaud, District Judge presiding.
4. The County has the right to appeal to the Idaho Supreme Court and the judgment or order described in paragraph 1 is an appealable order under and pursuant to Rule 11(a)(2) I.A.R. in that the order referenced in paragraph 1. is a final order of the District Court on judicial review reversing the decision of the County.
5. A preliminary statement of the issues on appeal are:
  - A. Did the district court err in holding that, Boundary County's Subdivision Ordinance pertaining to special use permits is void?
  - B. Did the district court err in its determination that the County improperly shifted the burden of persuasion to the Plaintiffs?
  - C. Is Boundary County Ordinance in conflict with Idaho Code 67-6512 and void on its face?; And
  - D. Did the District Court err in awarding attorneys fees and costs to the

Plaintiffs?

6. A reporter's transcript of oral arguments of the District Court that took place on October 25, 2007 regarding the appeal of the decision of the Boundary County Board of Commissioners and the February 1, 2008 regarding Respondent's Objection to Costs and Fees is requested.
7. Appellant Boundary County requests that the following documents be included in the Court's record in addition to those automatically included under Rule 28, I.A.R.: the parties' motions, briefs and memorandum below with any briefs, memoranda and affidavits concerning all issues appealed from herein should be included and allowed into the clerk's record.
8. I certify:
  - (a) That a copy of this Notice of Appeal has been served on the Reporter.
  - (b) That the Appellant is exempt from paying the estimated transcript fee because the Appellant is a governmental entity, that being Boundary County, Idaho.
  - (c) That the Appellant is exempt from paying the estimated fee for the preparation of the record because the appellant is a governmental entity, that being Boundary County, Idaho.
  - (d) That the Appellant is exempt from paying the Appellant filing fee because the appellant is a governmental entity, that being Boundary County, Idaho.
  - (e) That service has been made upon all parties required to be served pursuant to Rule 20.

DATED this 5<sup>th</sup> day of March, 2008.

  
**Philip H. Robinson**  
Attorney for Boundary County (Appellant)

**CERTIFICATE OF MAILING**

I hereby certify that on this 5<sup>th</sup> day of March, 2008, I caused to be served a true and correct copy of the foregoing as addressed to the following:


Paul Vogel  
Attorney at Law  
PO Box 1828  
Sandpoint ID 83864

Glenda Poston, County Clerk  
Boundary County  
Courthouse Mailbox

James Michaud  
District Judge  
Courthouse Mailbox

Idaho Supreme Court  
Attn: Stephen Kenyon  
Clerk of the Courts  
P.O. Box 83720  
Boise, ID 83720-0101

Court Reporters:  
Anne MacManus  
Valerie Nunemacher

  
Philip H. Robinson



FILED

2008 APR -4 P 12: 53

STATE OF IDAHO  
COUNTY OF BOUNDARY  
CLERK P. STON, CLERK  
BY *Hammond*  
DEPUTY CLERK  
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,

CASE NO. CV-2006-339

Petitioners,

Order Correcting  
Memorandum Opinion and Order

vs.

BOUNDARY COUNTY BOARD OF  
COMMISSIONERS,

Respondent.

The court previously entered a Memorandum Opinion and Order Setting Aside Special Use Permit which contained several grammatical, clerical, and word choice errors. Those errors shall be corrected by issuing in accordance with I.R.C.P. 60 (a) a separate Memorandum Opinion and Order Setting Aside Special Use Permit (Corrected). Attached hereto is a copy showing the corrections in ***bold italics***. The clerk of court shall furnish copies of this order and the corrected opinion and order to counsel of record.

IT IS SO ORDERED at Bonners Ferry this 3<sup>rd</sup> day of April, 2008.

*James R. Michaud*  
James R. Michaud  
Senior district Judge

**Certificate of Delivery**

I hereby certify that on this 3<sup>rd</sup> day of April, 2008, I delivered a true and correct copy of the foregoing Order Correcting 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

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

Paul Vogel  
Attorney at Law  
PO Box 1828  
Sandpoint, Idaho 83860

  
\_\_\_\_\_  
Deputy Clerk of Court

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  
(Corrected)*

**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 *Gardiners* 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 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 *constitute* 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 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 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 I.C. 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 not 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 commercial uses* 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 in 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 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 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.3<sup>rd</sup> 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 its 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 court'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 3<sup>rd</sup> day of January, 2008, with corrections made April 3, 2008.*

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James R. Michaud  
Senior district Judge

## Certificate of Delivery

I hereby certify that on this \_\_\_\_\_ day of April, 2008, I delivered a true and correct copy of the foregoing Memorandum Opinion and Order Setting Aside Special Use Permit (Corrected) via U.S. first class mail, postage prepaid or by deposit in the courthouse mailbox, , addressed to:

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Deputy Clerk of Court

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STATE OF IDAHO  
COUNTY OF BOUNDARY  
GLENDIA TOSTON, CLERK  
BY Hammond  
DEPUTY CLERK

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

Memorandum Opinion and Order  
Setting Aside Special Use Permit  
(Corrected)

**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 Gardiners 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 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 constitute 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 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 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 I.C. 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 not 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 commercial uses 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 in 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 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 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.3<sup>rd</sup> 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 court'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.

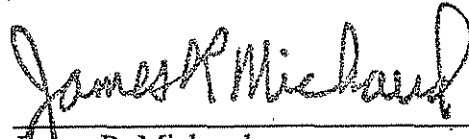
Defects in hearing procedure in some cases warrant remand for further proceedings to be held in conformity with the law. However, in this case there shall be no remand. The county board acted either upon an invalid ordinance or failed to comply with the

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 3<sup>rd</sup> day of January, 2008, with corrections made April 3, 2008.



James R. Michaud  
Senior district Judge

**Certificate of Delivery**

I hereby certify that on this 3<sup>rd</sup> day of April, 2008, I delivered a true and correct copy of the foregoing Memorandum Opinion and Order Setting Aside Special Use Permit (Corrected) 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

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


Paul Vogel  
Attorney at Law  
PO Box 1828  
Sandpoint, ID 83864



Deputy Clerk of Court

FILED

2008 APR 16 P 3:46

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,

Petitioners,

vs.

BOUNDARY COUNTY BOARD OF  
COMMISSIONERS,

Respondent.

CASE NO. CV-2006-339

Memorandum Opinion and Order  
Awarding Attorney Fees and Costs

The court previously awarded attorney fees and costs in favor of petitioners and against respondent. Such award was made because the overall action of the county board warranted this court's determination that the county board acted without a reasonable basis in fact or law. Attorney fees were limited by the stipulation of the parties that each would bear their own fees incurred prior to April 30, 2006. The court has considered the briefing submitted on behalf of the parties and the arguments presented in open court.

**OBJECTIONS BY RESPONDENT**

The respondent county objects to attorney fees and costs making the following contentions:

1. The amount of time for Mr. Vogel's professional services was not reasonable because an alternate remedy of a petition for declaratory judgment should have been

utilized instead of assisting his clients at the county administrative level and then seeking judicial review of the commissioners' decision to grant the Tungsten permit.

2. The expert fees of Kristine Uhlman are excessive and the Lexpert Research services referral fee is unreasonable under the circumstances of this case where petitioners are attorneys and could have located an expert at a lesser referral cost.

3. The petitioners should not be given more liberal consideration by the court as regards discretionary fees because petitioners reduced the overall attorney fees by performing 200 hours of their own research for which no billing is made.

4. Automated legal research cost of \$8,114 are not recoverable under I.R.C.P. 54 (e) (3) (K) and are unreasonable and excessive.

### DISCUSSION

Respondents contend that petitioners should have sought the alternative of a petition for declaratory judgment which would have been less costly. Such contention is an invitation that the court speculate as to the time and effort required, as well as the efficacy, of alternative litigation never undertaken. The court declines to do so because to determine whether the county would have resisted such declaration, what defenses might have been employed, and the professional attorney services needed to litigate would be pure guesswork. There is no basis upon which this court could determine the outcome of litigation which was never undertaken. What about petitioners' duty to exhaust administrative remedies? Was the respondent willing to stay the administrative proceedings and proceed with declaratory judgment? Did the respondent ever consider petitioning for declaratory judgment? After all, the petitioner made very clear, and in a very timely manner, to respondent that the Boundary County Zoning Ordinance precluded issuance of the Tungsten permit.

Speculation is not appropriate and the court declines to consider what might have been in hindsight where there is no showing that the county, at any relevant point in time, sought or suggested a more efficient means to resolve the case. It bears remembering that this courts award of costs and attorney fees was predicated upon the overall action of the county board which was that the county board acted without a reasonable basis in fact or



law. The attorney fee time, rate and services performed were reasonably and necessarily incurred considering the factors provided in I.R.C.P. 54 (e) (3) and the sum of \$5,222.00 shall be awarded against respondent.

The expert fees of Kristine Uhlman are awarded in the sum of \$5000. This court recognizes the interplay of costs of right and discretionary costs as regards expert fees under I.R.C.P. 54 (d) (1). The expert fees claimed were necessarily incurred and were exceptional for reasons set forth in this court's prior Memorandum and Order. Such costs were actually incurred and paid, necessary, reasonable, and exceptional under the circumstances of the county commissioner's procedure. Justice demands that such an exceptional cost be assessed against respondent. The Lexpert Research Services Referral fee of \$1250.00 has not been demonstrated to have been necessary or exceptional and shall not be awarded. Airfare is not an exceptional cost and is not awarded. *See, Fish v. Smith, 131 Idaho 492, 960 P.2d175 (1998)*

The court agrees with respondent that the petitioners should not be given more liberal consideration by the court as regards discretionary fees because petitioners reduced the overall attorney fees by performing 200 hours of their own research for which no billing is made. That however does not end the inquiry.

Under I.R.C.P. 54 (e) (3) (K) this court must consider the reasonable cost of automated legal research when awarding reasonable attorney fees. Mr. Vogel's affidavit proves that his attorney fees were lessened by the use of automated legal research. That fact warrants consideration of an award of the reasonable and necessary cost of automated legal research as a discretionary cost not included in his attorney fees if they are exceptional. Such costs of automated legal research fees could be awarded under I.R.C.P. 54 (e) (3) (K) if performed by Mr. Vogel. That they were not performed by him personally should not preclude an award as an exceptional cost if the costs were necessary, reasonable, actually incurred and exceptional. Such costs are determined to be exceptional because they reduced significantly Mr. Vogel's attorney fees. Petitioners were able to provide competent legal research as shown by the briefing which

demonstrates the same. The affidavits of Mr. Vogel and Ada Gardiner show the cooperation between the research by Gardiners and the review and finalization of briefing by Mr. Vogel. The research was certainly necessary in this case. The court is mindful that the research was accomplished by the petitioners who are lawyers and parties. Pro se attorneys may not collect attorney fees but that is not the circumstance here present.

Under I.R.C.P. 54 (e)(1) paralegal fees may be awarded. Paralegals often perform automated legal research. The affidavits of Mr. Vogel and Ada Gardiner show that the Gardiners briefing could be considered in the nature of paralegal work. That Gardiners can be deemed paralegals is another exceptional circumstance justifying consideration of an award of a reasonable and necessary cost as a discretionary cost. However, paralegal time cannot be awarded in this case even though Mr. Vogel's affidavit shows 200 hours of research by Gardiners. No time records are provided to demonstrate the reasonableness of the cost requested. Thus the petitioners shall not be awarded fees against the county for paralegal services. The question remains may the cost of subscribing for automated legal research be awarded as a discretionary cost.

A reasonable cost should in fairness be awarded to petitioners for the cost of automated legal research. Although performed by Gardiners and not by Mr. Vogel such cost is determined by this court to be reasonable and necessary. The cost should be awarded considering the combined purposes and effect of I.R.C.P. 54 (e)(1) and I.R.C.P. 54 (e) (3) (K). Incurring that cost reduced the attorney fees of Mr. Vogel. The circumstance of the performance of legal research by Gardiners in this case is ruled exceptional as stated above. However, the subscription costs set forth in the affidavit of Ada Gardiner are not shown to be reasonable because the affidavit and associated billings are not sufficiently detailed as regards the detail of issues researched. The monthly subscription cost by itself is not a reasonable basis for an award because it is a monthly cost without regard to the requirements of this case. A reasonable award should be made based upon the need to focus primarily upon existing Idaho statutes, case law and the relevant ordinances of Boundary County. Idaho statutory and case law existed on all aspects of this case. This court is experienced with automated legal research and utilizes the same in performing duties as a senior district judge. I have experience with both Casemaker provided as a result of Idaho State Bar Membership and with Westlaw. It is

this judge's practice to utilize automated legal research so as not to burden the law clerks of the judges over whose cases I preside. I know from personal experience the value, efficiency, speed and cost of automated legal research. An award of \$2000 for the cost to access automated legal research is appropriate as a discretionary cost in this case. The briefing submitted on behalf of petitioners shows excellent legal research which was of invaluable assistance to the court. The court emphasizes that no award is made for any work performed by Gardiners as either attorneys or paralegals as no such professional fees are claimed nor sufficiently detailed. Only the cost of accessing automated legal research is awarded.

### CONCLUSION

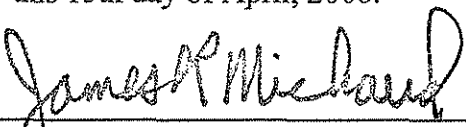
Petitioner's request for attorney fees and costs should be awarded as follows:

Attorney fees:	\$5200.00
Costs as a matter of Right	\$ 82.00
Costs under Appellate Rule 40(b)	\$ 302.25
Discretionary Costs	
Expert fees	\$5000.00
Automated Legal Research	<u>\$2000.00</u>
TOTAL	\$12,584.25

### ORDER

Petitioners are entitled to an award of attorney fees and costs against the respondent as set forth above.

IT IS SO ORDERED at Bonners Ferry this 15th day of April, 2008.

  
\_\_\_\_\_  
James R. Michaud  
Senior district Judge

**Certificate of Delivery**

I hereby certify that on this 15<sup>th</sup> day of April, 2008, I delivered a true and correct copy of the foregoing Memorandum Opinion and Order Awarding Attorney Fees and Costs via U.S. first class mail, postage prepaid or by deposit in the courthouse mailbox, addressed to:

Philip Robinson  
Louis Marshall  
Attorneys for Boundary County  
% of Bonner County Prosecutors Office  
Sandpoint, ID 83864

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

Paul Vogel  
Attorney at Law  
PO Box 1828  
Sandpoint, ID 83864

  
Secretary/Deputy Clerk of Court

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

I, Della A. Armstrong, Deputy Clerk of the District Court of the First Judicial District, of the State of Idaho, in and for the County of Boundary, do hereby certify that the foregoing Record in this cause was compiled and bound under my direction and is a true, correct and complete Record of the pleadings and documents requested by Appellate Rule 28.

I further certify that, in addition to the exhibits identified in the Reporter's Transcript, the following will be submitted as exhibits to this Record on Appeal:

1. Agency's Transcript and Certified Copy of Commissioner Minutes and CD of 7/24/06 and 8/7/06 Hearings before Commissioners Filed March 14<sup>th</sup>, 2007
2. Agency's Transcript and Certified Copy of Minutes of 8/7/06 Filed March 14<sup>th</sup>, 2007
3. Amendment to Record Filed March 14<sup>th</sup>, 2007
4. Supplemental Amendment to Transcript (August 7<sup>th</sup>, 2006) Filed March 14<sup>th</sup>, 2007

.....

1. CLERK'S CERTIFICATE

288

# In the Supreme Court of the State of Idaho

PATRICK GARDINER and ADA GARDINER, )  
husband and wife, )

Petitioners-Respondents, )

v. )

BOUNDARY COUNTY BOARD OF )  
COMMISSIONERS, )

Respondent-Appellant, )

and )

TUNGSTEN HOLDINGS, INC., )

Intervenor-Appellant. )

## ORDER GRANTING REQUEST FOR JUDICIAL NOTICE

Supreme Court Docket No. 35007-2008  
Boundary County Case No. 2006-339

Ref. No. 08-201

A REQUEST FOR JUDICIAL NOTICE; MOTION TO AUGMENT RECORD with attachments, AFFIDAVIT IN SUPPORT OF REQUEST FOR JUDICIAL NOTICE, MEMORANDUM OF POINTS AND AUTHORITIES and CERTIFICATE OF UNCONTESTED MOTION were filed by counsel for Respondents on October 10, 2008. The Court is fully advised; therefore, good cause appearing,

IT HEREBY IS ORDERED that Respondents' REQUEST FOR JUDICIAL NOTICE be, and hereby is, GRANTED and this Court shall take JUDICIAL NOTICE of the following chapters of the Boundary County, Idaho Zoning and Subdivision Ordinance 99-06, as amended through March, 2006, copies of which accompanied this Request as Exhibits 1 and 2, and shall be placed in this Record on Appeal as EXHIBITS:

1. Chapter 8, "Non-Conforming Uses."
2. Chapter 9, "Variances."

DATED this 13<sup>th</sup> day of November 2008.

By Order of the Supreme Court

  
\_\_\_\_\_  
Stephen W. Kenyon, Clerk

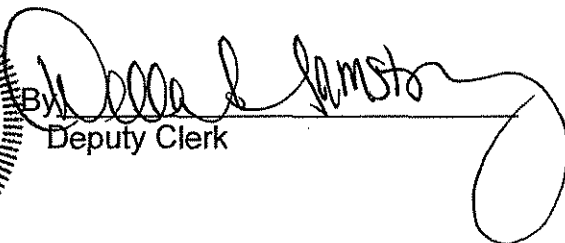
cc: Counsel of Record

5. Amendment to Transcript (August 7<sup>th</sup>, 2006) Filed March 14<sup>th</sup>, 2007
6. Amendment to Transcript (July 24<sup>th</sup>, 2006) Filed March 14<sup>th</sup>, 2007
7. Administrator's Record Filed March 14<sup>th</sup>, 2007
8. Administrator's Record Filed March 14<sup>th</sup>, 2007
9. Copy of Boundary County file CV-2005-380
10. Record Filed in CV-2005-380 October 31<sup>st</sup>, 2005
11. Administrator's Transcript of May 19<sup>th</sup>, 2005 hearing Filed in CV-2005-380  
October 31<sup>st</sup>, 2005
12. Clerk's Transcript of July 26<sup>th</sup>, 2006 Hearing Filed in CV-2005-380 October  
17<sup>th</sup>, 2005
13. Clerk's Transcript of August 8<sup>th</sup>, 2005 Hearing Filed in CV-2005-380 October  
17<sup>th</sup>, 2005
14. Clerk's Transcript of September 6<sup>th</sup>, 2005 Hearing Filed in CV-2005-380 Filed  
October 17<sup>th</sup>, 2005.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of  
said Court this 16<sup>th</sup> day of May, 2008.

GLENDIA POSTON  
CLERK OF THE DISTRICT COURT



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

I, GLENDA POSTON, Clerk of the District Court of the First Judicial District, of the State of Idaho, in and for the County of Boundary, do hereby certify that the foregoing Record in this cause was compiled and bound under my direction and is a true, correct and complete Record of the pleadings and documents requested by Appellate Rule 28.

I do further certify that all exhibits, offered or admitted in the above entitled cause, will be duly lodged with the Clerk of the Supreme Court along with the Court Reporter's Transcript and Clerk's Record as required by Rule 31 of the Idaho Appellate rules).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 16<sup>th</sup> day of May, 2008.

GLENDA POSTON  
 CLERK OF THE DISTRICT COURT



By [Signature]  
 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	)	SUPREME COURT NO. 35007
	)	
Plaintiffs/Respondents,	)	District Court No. CV 2006 339
vs.	)	
	)	
BOUNDARY COUNTY BOARD OF COMMISSIONERS,	)	
	)	
Defendants/Appellants.	)	

I, Della A. Armstrong, Deputy Clerk of the District Court of the First Judicial District, of the State of Idaho, in and for the County of Boundary, do hereby certify that I have personally served or mailed, by United States Mail, postage prepaid, one copy of the Clerk's Record and any Reporter's Transcript to each of the parties or their Attorney of Record as follows:

Paul William Vogel  
PO Box 1828  
Sandpoint, ID 83864

Philip H. Robinson  
PO Box 1405  
Sandpoint, ID 83864

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 16<sup>th</sup> day of May, 2008.

GLENDIA POSTON  
CLERK OF THE DISTRICT COURT

By *Della A. Armstrong*  
Deputy Clerk

