8-18-2008

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

IN THE SUPREME COURT OF THE STATE OF IDAHO

PATRICK GARDINER and ADA GARDINER, husband and wife,	)	
Petitioners-Respondents,	)	
vs.	)	
BOUNDARY COUNTY BOARD OF COMMISSIONERS,	)	**SUPREME COURT NO. 35007**
Respondent-Appellant.	)	
And	)	
TUNGSTEN HOLDINGS, INC.,	)	
Intervenor-Appellant.	)	

RESPONDENT-APPELLANT'S BRIEF

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

Honorable James R. Michaud, District Judge, Presiding

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STATEMENT OF THE CASE.

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

The President of Tungsten Holding, Inc., is Rick Dinning. Rick Dinning is the brother of Dan Dinning, a member of the Boundary County Board of Commissioners. (R.O.A. p. 216) On May 19, 2005, the Boundary County Planning and Zoning Commission held a public hearing and after that hearing, made a recommendation by a 3-2 vote to the Boundary County Board of Commissioners to deny the special use permit. (R.O.A. 2006 p183-184)

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

On September 13, 2005, the Gardiners filed a Request for Regulatory Takings pursuant to

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

A new hearing took place on July 24, 2006, and additional testimony was presented both in favor of as well as in opposition against the special use permit. The applicants presented to the Board of County Commissioners two additional written documents including a letter dated July 19, 2006, written by Pat and Ada Gardiner and a letter dated July 17, 2006, from Kristine Uhlman, a registered geologist in the State of Arizona, who was hired by Pat and Ada Gardiner, providing a hydrogeology analysis of the proposed special use permit and its potential affects on the Gardiner property. In addition, the Gardiners provided a report from the Michigan State University Extension Office entitled "Getting the Cow Herd Bred." Finally, the Gardiners presented a list of approvals and disapprovals of requests from individuals for gravel pit operations in certain geographical locations. It was also stated at the July 24, 2006, public hearing by John Topp, the Attorney for the Board of County Commissioners, "The previous record of the board heard pursuant to this stipulation is part of this record as well as basically

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1 The Record prepared for the lower court was received by this Court as an exhibit on June 18, 2008, along recordings from the hearings before the Boundary Board of Commissioners (see R. Vol II, p. 288-289)

everything that you have heard before you can utilize and make in your decision, you can go back through and review that information as necessary. Also we stipulated that it would be back before the County Commissioners for a hearing and Commissioner Dan Dinning, the record needs to reflect, is not even present within this room . . ." (C.T. 7/24/06 p.2-4) At the conclusion of the hearing, the matter was taken under advisement and the hearing was rescheduled for August 7, 2006. (C.T. 8/7/06 p. 1) The commissioners approved the special use permit affirming the previous findings from the 2005 hearing as well as an additional condition. The Gardiners once again filed a request for regulatory takings analysis on August 29, 2006. On September 26, 2006, the county denied a taking had occurred.

The Gardiners filed a second petition for judicial review. The Honorable James R. Michaud heard oral argument on the petition on October 25, 2007. (Tr. p.1) The district court took the matter under advisement and subsequently issued a written opinion that is now the subject of this appeal. In the opinion, the lower court held that:

1) Boundary County Zoning and Subdivision Ordinance 99-06 violates I.C. 67-6512 pertaining to special use permits.

2) Boundary County failed to hold the applicant, Tungsten, to the burden of persuasion and thereby violated the due process rights of the Gardiners.

3) The county's written decision does not comply with I.C. 67-6535.

4) The Gardiners were entitled to attorneys fees because the county acted without a reasonable basis in fact and law. (R.Vol. II, p. 264-625)2

The lower court's ruling precluded the possibility of a remand, and rendered this matter ripe for appeal. (R. Vol. II, p. 280) The County filed a notice of appeal on February 13. 2008, (R.

Vol. II, p. 229) and an amended notice of appeal on March 5, 2008. (R. Vol II, p. 240) On June 17, 2008, this Court granted Tungsten's Petition for Leave to Intervene.

ISSUES PRESENTED ON APPEAL

1) Did the lower court err in determining Boundary County Zoning and Subdivision Ordinance 99-06 violates I.C. 67-6512 pertaining to special use permits and should be rendered void?

2) Did the lower court err in determining that Boundary's County interpretation of its ordinance was unreasonable?

3) Is the decision of the Board of Commissioners supported by substantial and competent evidence in the Record?

4) Did the lower court err in finding the county improperly shifted the burden of persuasion to the Gardiners?

5) Did the lower court err in awarding attorneys fees to the Gardiners?

ARGUMENT

I. Boundary County's Subdivision and Zoning Ordinance 99-06 does not violate Idaho Code 67-6512 and is not void either on its face or as applied in this case.

This appeal should be treated in accordance with the Idaho Administrative Procedure Act (IDAPA), Title 67, Chapter 52 of Idaho Code. The court reviews the decision of a governmental agency under the standards set forth in the IDAPA, and in accordance with Idaho Code Section 67-5270(2), which states:

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2 The lower court made additional findings found in the Memorandum Opinion and Order.

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

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

The Court shall affirm the zoning agency's action unless the Court finds that the agency's findings, inferences, conclusions or decisions are: (a) in excess of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(2)

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

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

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

Regardless of whether the petitioners or the lower court may have reached a different decision than that of the Boundary County Commissioners had they been in the board's place, the decision of the county should be upheld by this Court.

The Court should apply the same principles in construing municipal and county ordinances as it does in the construction of statutes. See *Friends of Farm to Market v. Valley County,* 137 Idaho 192, 197, 46 P.3d 9, 14 (2002). The objective in interpreting a statute or ordinance is to derive the intent of the legislative body that adopted it. *Payette River Property Owners Assn. vs. Board of Comm'rs of Valley County*, 132 Idaho at 557, 976 P.2d at 483. Such analysis begins with the literal language of the enactment. *Id.* Where the language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and there is no occasion for a court to consider rules of statutory construction. *Id.* An ordinance is ambiguous where reasonable minds might differ or be uncertain as to its meaning. *Id.* However,

ambiguity is not present merely because the parties present differing interpretations to the court. *Id.* Constructions that would lead to absurd or unreasonably harsh results are disfavored. *Id.* "Language of a particular section need not be viewed in a vacuum. And all sections of applicable statutes must be construed together so as to determine the legislature's intent." *Friends of Farm to Market,* 137 Idaho at 197, 46 P.3d at 14.

Statutory construction begins with the literal language of the statute. If a statute is unambiguous, the court need not consider rules of statutory construction and the statute will be given its plain meaning. *Hamilton ex rel. Hamilton vs. Reeder Flying Serv.,* 135 Idaho 568, 572, 21 P. 3d 890, 894 (2001). When interpreting a statute, the primary function of the court is to determine and give effect to the legislative intent. *George W. Watkins vs. Messenger,* 118 Idaho 537, 539-40 797 P. 2d 1385, 1387-88 (1990). Such intent should be derived from a reading of the whole act at issue. Id., 118 Idaho at 539, 797 P. 2d at 1387-88.

When the language of a statute is ambiguous, the court then looks to rules of construction for guidance. See *Lawless vs. Davis*, 98 Idaho 175, 560 P. 2d 497 (1977). The court should also consider reasonableness of proposed interpretations. *Umphrey vs. Sprinkel,* 106 Idaho 700, 706, 682 P. 2d 1247, 1253 (1983). Interpretations of statutes that would lead to absurd or unreasonably harsh results are disfavored. See *Gavica vs. Hansen*, 101 Idaho 58, 60, 608 P. 2d 861, 863 (1980); *Lawless*, 98 Idaho at 177, 560 P. 2d at 499. To ascertain the intent of the legislature, the court must examine not only the literal words of the statutes, but also the context of those words, the public policy behind the statute, and its legislative history. *State vs. Knott*, 132 Idaho 476, 974 P. 2d 1105 (1999).

Idaho Code Section 67-6512 provides in part in subparagraph (a): "As part of a zoning ordinance each governing board may provide by ordinance adopted, amended, or repealed in

accordance with the notice and hearing procedures provided under section 67-6509, Idaho Code, for the processing of applications for special or conditional use permits. A special use permit may be granted to an applicant if the proposed use is conditionally permitted by the terms of the ordinance, subject to conditions pursuant to specific provisions of the ordinance, subject to the ability of political subdivisions, including school districts, to provide services for the proposed use, and when it is not in conflict with the plan . . ."

The lower court decision takes the position that I.C. 67-6512 specifically provides that the special use permit may be granted to an applicant if the proposed use is eligible for a conditional use permit by the terms of the ordinance. The holding of the lower court is narrow in its scope and application. The holding basically limits Boundary County's ability to grant special use permits only if the applicant is eligible for a conditional use permit in the applicable zoning district. (R. Vol II, p. 272) This interpretation leads to an unfair and harsh result by eliminating Boundary County's ability to allow certain activities and uses that are not expressly listed as a use by right, a permitted use, or a conditional use within its zoning ordinance. The term "conditionally permitted" used in I.C. 67-6512 does not mean that special use permits must be the same as conditional use permits. The statute specifically provides that "a special use permit may be granted to an applicant if the proposed use is conditionally permitted by the terms of the ordinance..." I.C. 67-6512. If intent of the statute was to say that there must be a conditional permit, it would logically follow then that there would be no need for special use permits. The term "conditionally permitted" should be given its plain meaning and not as the lower court interpreted the term to mean "requiring a conditional use permit".

In 1999, the Idaho State Legislature amended IC 67-6512.

67-6512. SPECIAL USE PERMITS, CONDITIONS, AND PROCEDURES. (a) As part of a zoning ordinance each governing board may provide by ordinance adopted, amended, or repealed in accordance with the notice and hearing procedures pro-vided under section 67-6509, Idaho Code, for the processing of applications for special or conditional use permits. A special use permit may be granted to an applicant if the proposed use is ~~*otherwise prohibited*~~ **conditionally permitted** by the terms of the ordinance, ~~*but may be allowed with*~~ **subject to** conditions ~~*under*~~ **pursuant to** specific provisions of the ordinance, subject to the ability of political subdivisions, including school districts, to provide services for the proposed use, and when it is not in conflict with the plan.(previous wording is shown stricken, emphasis added to changes)(1999 Idaho State Legislature Session Laws)

The revised language no longer allowed landowners to attempt to put a prohibited use on their property through obtaining a special use permit. The revision closed a potential loophole in the statute. If gravel pits were a prohibited use within the agriculture/forestry zone, Boundary County could not have issued the special use permit. However, gravel pits and surface resource extraction activities are not a prohibited use within the zone and therefore, it was proper under the ordinance to grant the special use permit application subject to specific mitigating conditions being placed on the applicant, as well as all other requirements being met. "Conditionally permitted" should be given its plain meaning; permitted, with certain conditions, as opposed to the meaning interpreted by the lower court of requiring a conditional use permit. If the legislature wanted special use permits to be issued only if the subject property was eligible for a conditional use permit, it is reasonable to presume the language would have so stated.

Boundary County Zoning and Subdivision Ordinance 99-06, Chapter 7, Section 1, subparagraph (e) provides "Any use not specified in this section as a use by right or conditional use is eligible for consideration as a special use, subject to the provisions of Chapter 13." The literal language of the ordinance does not mirror that of IC 67-6512 prior to the 1999 revision. The language of the ordinance does not state that prohibited uses are eligible with a special use

permit. Therefore, the ordinance conditionally permits special use permits subject to Chapter 13 of the Boundary County Zoning and Subdivision Ordinance 99-06. Variations of special use permits are defined in Chapter 13, Section 1, subparagraph (A) "Special Uses are uses which, by their nature, are significantly more intensive than the permitted uses in a zoned district, but which can be carried out with particular safe guards to insure compatibility with surrounding land uses. Special Uses are, therefore, subject to restrictions, requirements and conditions more stringent than those applying generally within the zoned district." Idaho Code Section 67-6512 provides counties a mechanism to process applications for special or conditional use permits as part of their zoning regulations. Special use permits may be allowed with conditions attached to the extent provided in local ordinances subject to the ability of local government to provide services if appropriate for the proposed use, and when the use is, as proposed, not in conflict with the comprehensive plan, and not a prohibited use. In the matter at hand, a gravel pit is not a listed prohibited use in the agriculture/forestry zone, and is therefore conditionally permitted through the special use permit process.

The issue was addressed by Mike Weland, the Planning Director for Boundary County, at the July 24, 2006, public hearing before the Boundary County Board of Commissioners:

> "...The agriculture/forestry zone district encompasses over 85% of the land area in Boundary County and it is by far the most predominant zoning in Boundary County. Rural community commercial zoning, which allows both residential and commercial development, comprises of less than 1% of the land area in Boundary County situated primarily in community centers in areas zoned for higher density development. Industrial zoning comprises of a fraction of 1% of the land area currently situated solely at the Boundary County airport and at two locations at three mile. Further, the Boundary County Zoning and Planning Ordinance defines a commercial use as a use or structure intended primarily for conduct for retail trade of goods or services and industrial use as use of a partial or development of a structure intend primarily for the manufacture, assembly or finishing of products intended primarily for wholesale distribution. The Boundary County Comprehensive Plan identifies minerals as a natural resource and note that nonmetallic mineral resource in the county may have an economic impact greater than that of metallic.

> Same gravel and crushed rocks are produced at minimal costs at various locations in the county. Deposits of sand and gravel are found in abundance at lower elevations within the valley. Crushed rock is obtained from crushing operations at rock quarry sites with mineral deposits found at various locations throughout the county. Minerals are vital to the health and prosperity of not only to our area, but to the nation as a whole. In the first road and building rock, sand, gravel and related material have been mined here in abundance. Pits and quarries can be found throughout the county and are too numerous to list. Because the costs of roads and materials for building whatever materials were found on federal land and close to the area where to be used, they were mined. Mining for sand and gravel for road building and construction has been and remains a huge economic importance to Boundary County. Every road has gravel pits that were used during construction and remain in use as needed through the years. **Boundary County Zoning and Subdivision Ordinance does not specifically refer to mining gravel pits or rock quarry in any district. Therefore, such use may be considered as a special use in any zoned district.**
> Based upon a reference made on the importance of mining in the comprehensive plan, it is unreasonable to assume that mining would be prohibited use in all zoned districts based simply on specific mention. **It is recognized that mining is commercial as are agriculture and forestry. It is also recognized that mining is an extension of a natural resource and mining can only be accomplished where the resource exists.** (emphasis added) (R.Vol. I p. 85-86)(C.T. 7/24/06 p.10-11)

Again, it is important to stress that the narrow interpretation the lower court takes concluding the term conditionally permitted as used in Idaho Code 67-6512, would be the same as a conditional use permit. By mere definition, a conditional use permit is different from a special use permit. Had Boundary County's ordinance been silent as to allow for a special use permit in the particular zoned area, then the county would be prohibited from granting a special use permit in this matter.

II. Boundary County's decision should be upheld in the alterative because the county's interpretation that gravel pits are commercial in nature is reasonable.

It has already been discussed *supra* that under the Local Land Use Planning Act and the jurisprudence developed there from, a court must defer to a county's interpretation of its ordinances if the interpretation is reasonable. Boundary County's Comprehensive Plan and Zoning and Subdivision Ordinance 99-06 demonstrate the rural character of the county with a history of logging,

mining and farming. Zoning and Subdivision Ordinance 99-06 begins with a preface:

> "Boundary County, Idaho, is a unique place, and this ordinance was written to reflect the rural mores and lifestyle of this community.
> Those who call Boundary County home take great pride in the rugged surroundings, and work hard to make a living from the forests and farms. Most still retain a friendly neighborliness you'll find in few other places.
> Those who are contemplating purchasing rural property here or who are considering making the great outdoors of Boundary County home should be aware that life is different here than it is nearly anywhere you may be coming from. This preface is not meant to scare anyone away, merely to point out some of the differences you can expect so you can make decisions that will help you enjoy all our community has to offer.
> Because the county is predominately rural, please remember that the services you may have taken for granted elsewhere are not always available in Boundary County. Winter snows often knock out power, sometimes for days or weeks on end, and roads are often rendered impassable by snow or by flooding in the spring when the snow melts.
> Boundary County does have an extensive network of county roads, but some of those roads aren't maintained in the winter, so access is not always guaranteed. Many lots and parcels are accessible only by private road, and it's important that property owners are aware of the legal aspects of access, especially if you have to gain that access across someone else's property. It's also important to remember that maintaining a private road, and that includes plowing it in winter and repairing it in the spring, is the responsibility of the property owners, not the county.
> Winter conditions are extremely hard on roads, both paved and graveled. Boundary County spends a considerable amount each year maintaining its roads, but very often it takes much of the summer just to repair all the damage from the previous winter. Therefore, even when the weather is nice, road conditions often aren't...
> ...Be sure to check out the neighborhood, too. Businesses are located throughout the county; some are noisy, some bring increased traffic and dust; but as they were there first, you'll have no room to complain if you choose to build nearby. Agriculture is prevalent throughout the county, and if you buy next to a hog farm, you can expect the breeze will be a little less than sweet when it blows your way. Farmers work around the clock, and the dust and noise can certainly disrupt your peace and quiet.
> Another economic mainstay is forestry. Over 75 percent of the land base in Boundary County is managed by the Idaho Department of Lands, the Bureau of Land Management and the U.S. Forest Service. If you buy a parcel because the trees across the road make for a pretty view, don't be too disappointed if sometime in the future loggers move in and begin turning them into boards and other products. Burning is an integral part of both farming and forestry; fields and slash-piles are burned each year, resulting in a wide-spread smoky haze...
> ...Many people coming into Boundary County consider the contents of this ordinance lenient. While the State of Idaho does require adherence to the Idaho Building Code, there are no additional restrictions imposed by Boundary County and no additional local building inspections. The procedures set down here are fairly straight-forward and the fees are lower than nearly any place else. It is the belief of the county that people who

buy and build a here have the right to build the home that best suits them with minimal intrusion; if the roof caves in under the weight of the snow, they'll know better next time. Conversely, you may build a beautiful home that meets the most stringent building codes, but your next door neighbor may not. County government will not intercede on your behalf to make your neighbor live up to your standards.
The information provided here is by no means complete, nor is it intended to be. It's our goal to provide you food for thought; it's your responsibility to take into consideration the things that are important to you." (Boundary County Zoning and Subdivision Ordinance 99-06)

The Boundary County Comprehensive Plan further shows the importance of mining and the logical recognition that mining must take place where the resource is located. The Plan identifies non-metallic mining as being economically critical to Boundary County. Section V. of the Plan specifically addresses this issue:

V. NATURAL RESOURCES

"The abundance and variety of natural resources in Boundary County is the foundation of the county's economy and the basis for the quality of life enjoyed by its citizens. All public policy must be shaped to protect these natural resources to provide for the economic needs of the citizenry while sustaining the health and diversity of the environment to ensure that these resources will be enjoyed and cared for by succeeding generations.
Boundary County has traditionally been home to a proud, independent people who worked with what was available to eke a living in an isolated and often inhospitable land. Their legacy continues today, and people here ask and expect little from government except the freedom and independence to pursue their livelihoods and happiness. Boundary County policy makers will recognize and respect this spirit of independence...

Minerals: With one exception, the Idaho Continental Mine, metallic mineral extraction has had a discouraging history in Boundary County. Small ore bodies, geologic structure and the necessity of large capital investments for plant facilities before sufficient evaluation of mineral properties have been made serve to impede the development of the mineral resources.
The generally favorable geologic environment of the county, however, warrants further exploration using more modern techniques. Minerals found within Boundary County include gold, silver, copper, lead and zinc, along with small amounts of molybdenum, nickel and tungsten.
Non-metallic mineral resources in the county may have an economic potential greater than that of metallics. Sand, gravel and crushed rock are produced at

minimal cost at various locations in the county. Deposits of sand and gravel are found in abundance at lower elevations and within the valleys. Crushed rock is obtained from crushing operations at rock quarry sites, with deposits found in various locations throughout the county. Mining of any and all materials should be done with respect for and recognition of its impact on adjacent land, water resources and public services." (Boundary County Comprehensive Plan)(emphasis added)

This section shows the intent of the county to allow gravel pits throughout the county. The county's interpretation that gravel pits are commercial in nature is reasonable given Boundary County's rural character. "Commercial" in Boundary County is different from "commercial" in Ada County. The economic impact to the county of non-metallic mineral resource extraction is far greater in Boundary County than other jurisdictions as is evidenced by the Comprehensive Plan. Commercial development hinges on the ability to provide roads and other infrastructure. While a commercial enterprise might be associated with a strip mall in Kootenai County, in Boundary County it is a gravel pit.

The purpose of the Idaho Local Land Use Planning Act is set forth in I.C. 67-6502. It states:

"The purpose of this act shall be to promote the health, safety, and general welfare of the people of the state of Idaho as follows:
(a) To protect property rights while making accommodations for other necessary types of development such as low-cost housing and mobile home parks.
(b) To ensure that adequate public facilities and services are provided to the people at reasonable cost.
(c) To ensure that the economy of the state and localities is protected.
(d) To ensure that the important environmental features of the state and localities are protected.
(e) To encourage the protection of prime agricultural, forestry, and mining lands for production of food, fibre, and minerals.
(f) To encourage urban and urban-type development within incorporated cities.
(g) To avoid undue concentration of population and overcrowding of land.
(h) To ensure that the development on land is commensurate with the physical characteristics of the land.
(i) To protect life and property in areas subject to natural hazards and disasters.
(j) To protect fish, wildlife, and recreation resources.

(k) To avoid undue water and air pollution.
(l) To allow local school districts to participate in the community planning and development process so as to address public school needs and impacts on an ongoing basis."

The Idaho State Legislature recognized the importance of protecting local economies and further recognized that planning decisions should be made on a local level. Chapter 65, Title 67 of the Idaho Code is but a general framework for local governments to follow and fill in the gaps as they see fit. Boundary County, as expressly stated in its zoning ordinance, has purposely chosen to set forth "lenient" codes when judged from the prism of other larger, more urban jurisdictions. The county is not required by the Local Land Use Planning Act to adopt onerous, complicated and restrictive land use ordinances. Likewise, it is not unreasonable for the county to interpret gravel pit operations to be commercial as opposed to industrial where the county has less than one percent of its land area zoned for industrial use. Conversely, commercial use is allowed in the vast majority of the county's land area. It is an illogical to presume that the county on one hand valued non-metallic mining and recognized that it takes place in various locations throughout the county, and on the other, intended the same activity to solely be permitted in the small, urban industrial zones.

III. The Boundary County Board of Commissioners decision is supported by substantial and competent evidence on the record

The highly contentious nature of this particular application gave rise to a great deal of evidence put forth before the Board of Commissioners to support its decision. The requirements for approving a special use permit are significantly more intensive than other land use applications. Specifically, in approving a special use permit, the commissioners are directed to make appropriate conditions in a special use permit that would protect the consistency of the comprehensive plan. Therefore, the commissioners attached specific conditions to the approval

of the special use permit, which included roads and access that must be approved by the Boundary County Road and Bridge; dust abatement; operations of the pit that follow the best management practices for mining for Idaho, published by the Idaho Department of Lands on November 16, 1992, or as updated; blasting conditions which require 15 day notification in advance specifying the date, time and length of blasting, and that all blasting must meet OSHA requirements established at 29 CFR, subpart U; that the pit must comply with all Idaho Department of Lands Reclamation Plan; all persons employed to blast must be qualified, licensed and insured; and any persons employed to conduct blasting operations shall be notified prior to blasting of the concerns expressed during the hearing process of the potential damage to area water systems including Trow Creek Water Association. Both the written documentation and oral testimony taken substantially support the decision made by the commissioners to approve the special use permit. (R.O.A. 2006, Findings and Decision, SUP 0505)

IV. The Board of Commissioners did not shift the burden of persuasion to the Gardiners, and thereby engage in an unlawful procedure.

The lower court held that because of a few statements by the chairman of the board of commissioners the county had shifted the burden of persuasion from Tungsten and onto the Gardiners. (R. Vol II p. 275) This is simply unsupported by the record and transcripts of the multiple hearings. Chairman Smith is of course only one member of the Board. At the July 26, 2005, hearing, all three members of the board were present. Chairman Smith was simply questioning an opponent of the project and requesting if they had any documentation to support their concerns. This same type questioning is practiced on a daily basis by Idaho's judiciary without concern that the burden of persuasion has been shifted. As the Court is aware the record

of proceedings at the county level is extensive. Several public hearing dates were held in the course of over a year. It is not reasonable to pick out a few statements and questions out of context and find the entire hearing process to be deficient.

The lower court further alludes to statements made by Chairman Smith that appear to show bias. The timing of these statements is critical. These statements by which the lower court reasoned were grounds for overturning the decision of the board were made on August 8, 2005, *after* the public hearing on July 26, 2005. Chairman Smith began the August 8th hearing explaining that he had made his mind up on granting the permit at the previous public hearing, but had continued the hearing to allow for more proposed conditions to be brought forth. (See C.T. 8/8/05 p. 1)

The lower court concludes this section of its opinion by stating the county's written findings are fatally defective because they fail to show that the burden of persuasion is on the applicants. Idaho Code 67-6535 specifically sets forth the applicable standards relating to the necessary written findings and decision of local governments in land use decisions. It states:

> APPROVAL OR DENIAL OF ANY APPLICATION TO BE BASED UPON STANDARDSAND TO BE IN WRITING. (a) The approval or denial of any application provided for in this chapter shall be based upon standards and criteria which shall beset forth in the comprehensive plan, zoning ordinance or other appropriate ordinance or regulation of the city or county.
>
> (b) The approval or denial of any application provided for in this chapter shall be in writing and accompanied by a reasoned statement that explains the criteria and standards considered relevant, states the relevant contested facts relied upon, and explains the rationale for the decision based on the applicable provisions of the comprehensive plan, relevant ordinance and statutory provisions, pertinent constitutional principles and factual information contained in the record.
>
> (c) It is the intent of the legislature that decisions made pursuant to this chapter should be founded upon sound reason and practical application of recognized principles of law. In reviewing such decisions, the courts of the state are directed to consider the proceedings as a whole and to evaluate the adequacy of procedures and resultant decisions in light of practical considerations with an emphasis on fundamental fairness and the essentials of

> reasoned decision-making. Only those whose challenge to a decision demonstrates actual harm or violation of fundamental rights, not the mere possibility thereof, shall be entitled to a remedy or reversal of a decision. Every final decision rendered concerning a site-specific land use request shall provide or be accompanied by notice to the applicant regarding the applicant's right to request a regulatory taking analysis pursuant to section 67-8003, Idaho Code.

The statute does not state that the applicable burden(s) must be stated on the record nor included in the written findings and decision. On the contrary, the statute contemplates the reality of the public hearing process and directs a reviewing court to "consider the proceedings as a whole and to evaluate the adequacy of procedures and resultant decisions in light of practical considerations with an emphasis on fundamental fairness and the essentials of reasoned decision-making."

V. The district court erred in awarding attorneys fees

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

The Court has declined to award attorney fees, despite the government's erroneous interpretation of a statute or ordinance. In *Payette River Property Owners Assoc,* the Court stated that the Valley County Board of Commissioners erroneously interpreted its ordinance, but

nevertheless "acted in a way that fairly and reasonably addressed the issue." Further, the Court quoted from the district court's decision, which stated that the "literal language of § 4.02.03(6) (of the Valley County Zoning Ordinance) is unambiguous and does not need interpretation or construction." *Id.* at 557, 976 P.2d at 483. The Court stated that to adopt the Board's interpretation would require a "stretch of logic unsupported by any section [of] the Ordinance." *Id* Despite the Board's erroneous interpretation of its unambiguous ordinance, the Court held "that the district court did not err by denying the Association's request for attorney fees under I.C. § 12-117." *Id.* at 558, 976 P.2d at 484; *see also Urrutia v. Blaine County*,134 Idaho 353, 361, 2 P.3d 738, 746(2000) ("Although the Board erred in retroactively applying the 1994 comprehensive plan to the Urrutias *[sic]* subdivision application, the Board did not act without a reasonable basis in fact or law. The Board acted in a way that fairly and reasonably addressed the district judge's instructions on remand.").

In *Fischer v City of Ketchum,* 141 Idaho 349, 109 P.3d 1091 (2005), this Court overturned the City of Ketchum's approval of a conditional use permit, stating that the city "wholly ignored the provision of its avalanche zone district ordinance requiring the certification by an Idaho licensed engineer 'prior to the granting of a conditional use permit.' " *Fischer,* 141 Idaho at 356, 109 P.3d at 1098. The Court also stated that the city's Planning and Zoning Commission "ignored the plain language of the ordinance" in approving the conditional use permit application. *Id.* Based upon this foundation, the Court ordered the city to pay attorney fees. *See id.* However, the Court found that the "City wholly ignored the provision of its avalanche zone district ordinance requiring the certification by an Idaho licensed engineer 'prior to the granting of a conditional use permit' " and that the City Planning and Zoning Commission "ignored the plain language of the ordinance." *Id.*

Additionally, the Court does not order attorney fees when the non-prevailing party's actions, while erroneous, are a reasonable interpretation of an ambiguous statute. For example, in *Idaho Potato Commission v. Russet Valley Produce,* 127 Idaho 654, 659-661, 904 P.2d 566, 571-573 (1995), the Court refused to order the Idaho Potato Commission to pay attorney fees under I.C. § 12-117 even though the Commission's finding that Russet Valley committed two "continuing" violations of rules regarding the use of the "Grown in Idaho" trademark on potatoes was in error. This Court held Russet Valley's interpretation of the relevant statute was the "more reasonable interpretation." *Id.* at 659, 904 P.2d at 571. The Court refused to order attorney fees because the "Commission's interpretation regarding continuing violations was a 'reasonable, but erroneous interpretation of an ambiguous statute.' " *Id.* at 661, 904 P.2d at 573 (quoting *Cox v. Department of Ins.,* 121 Idaho 143, 148, 823 P.2d 177, 182 (Ct. App. 1991)).

In *Ralph Naylor Farms, LLC v. Latah County*, 144 Idaho 806, 172 P.3d 1081 (2007), this Court looked at an ordinance Latah County had erroneously adopted. The Court reasoned that Latah County's actions, while erroneous, were reasonable because provisions of Local Land Use Planning Act as well as Latah County's Comprehensive Plan gave the county authority over much of the same material that was eventually deemed to be pre-empted by state law.

In the case at hand, the lower court erred by awarding attorneys fees against Boundary County. The county acted reasonably even if this Court agrees with the lower court that Boundary County's Zoning and Subdivision Ordinance 99-06 is void pertaining to special use permits. This is not an action the county never should have taken. The county was processing a special use permit in the same manner as it has done many times before. The county is mandated under the Local Land Use Planning Act to make such determinations.

This case is easily distinguishable from the cases where this Court has upheld the award

of attorneys fees against a governmental entity. Those cases involved entities that simply ignored both substantive and procedural aspects of their ordinances. That is not the case here.

CONCLUSION

The lower court in this matter found that the Boundary County Board of Commissioners improperly granted a special use permit for a gravel pit. The testimony and evidence submitted to the board both in support of, as well as against the application was extensive for a small county hearing process. There is clearly substantial and competent evidence in the record to support the decision. The district court held that Boundary County's zoning ordinance pertaining to special use permits is void, and in the alternative, if it is not, it is void as applied in this case. This holding by the lower court should be reversed. The ordinance does not conflict with I.C. 67-6512. In the alternative, the county's interpretation of its ordinance and definitions therein was reasonable, and the decision of the board should stand.

If this court upholds the lower court's decision, it should reverse the award of attorney's fees to the Gardiners. The county acted in good faith to process a special use permit. The county's interpretation of the Local Land Use Planning Act as well as its own ordinances was reasonable even if this Court finds the interpretation was erroneous.

Respectfully submitted this 13 day of August.

By _____
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CERTIFICATE OF MAILING

I hereby certify that on the 14 day of August 2008, I caused to be served a true and correct copy of the foregoing by the U.S. Mail, postage prepaid, to the following:

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