2-25-2009

# Dry Creek Partners, LLC, v. Ada County Com'rs, ex rel. State Respondent's Brief Dckt. 35641

IN THE SUPREME COURT OF THE STATE OF IDAHO

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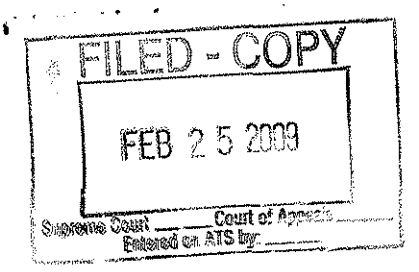
| DRY CREEK PARTNERS, LLC,<br><br>Appellant,<br><br>vs.<br><br>ADA COUNTY COMMISSIONERS, ex rel. State of Idaho, and John Does I through X,<br><br>Respondents. | ) | **Docket No. 35641-2008** |




**RESPONDENTS' BRIEF**

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Appeal from the District Court, Fourth Judicial District,
County of Ada, State of Idaho

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HONORABLE D. DUFF MCKEE,
Fourth District Senior Judge, Presiding

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## I. STATEMENT OF THE CASE

The Ada County Ordinance provides for one and only one time extension for the finalization of a final plat. Ada County granted Dry Creek Partners, LLC (hereinafter "Dry Creek") a one time extension for the second phase of the Redhawk Estates Subdivision, but Dry Creek failed to finalize its final plat during that timeframe. Dry Creek applied for a second time extension and the application was denied. In an effort to obtain more time, Dry Creek also asked the Board of County Commissioners (hereinafter "Board") to order mediation, because mediation tolls time limitations relevant to the application. Because Dry Creek was not successful in obtaining additional time for approval of its final plat for the second phase of the subdivision, it has filed this appeal.

### A. Factual Background.

In 1993, Harold and Patricia Brush decided to develop their property. Agency R. p. 307-08 at Agency Tr. pp. 23-26.[1] In 2000, the Brushes found a developer and a preliminary concept plan was developed for their property. Agency R. p. 9 and p. 307 at Agency Tr. p. 24, ll. 19-21. On April 3, 2001, the Brushes carved out 20 acres from their property and conveyed it to HiYeld, Inc., who three days later on April 6, 2001, conveyed the 20 acres to Rockwood Distinctive Homes, LLC, Dale Frazell, and Kathleen Keys

[1] The Agency Record and Agency Transcripts can be found in the Clerk's Record on Appeal, Exhibit 1, and will be referenced herein as the "Agency R." and "Agency Tr."

(hereinafter "Frazell"). Agency R. pp. 9, 26. In addition to the 20-acre conveyance to Frazell, HiYeld, Inc. also granted Frazell an air, light and view easement over a portion of the property that would become the Redhawk Estates Subdivision.[2] Agency R. p. 15. An application for a preliminary plat for the Redhawk Estates Subdivision was submitted to Ada County on February 4, 2002 and the Board of Ada County Commissioners approved the Redhawk Estates Subdivision preliminary plat on April 24, 2002. Agency R. pp. 9, 106. In late 2002, the Brushes and Dry Creek entered into a Development Agreement. Agency R. p. 5. Dry Creek applied to Ada County for a time extension for final plat approval of the first phase of the Redhawk Estates Subdivision and received the time extension on May 19, 2004. Agency R. p. 106. The final plat for the first phase of Redhawk Estates plat was approved on July 27, 2005. Agency R. p. 106.

Dry Creek's second phase or Subdivision No. 2, which is at issue here, is to contain 18 single-family residential lots, one common lot and a variance from the minimum lot width and depth requirements of the Rural Residential (RR) zone. Agency R. p. 96. Dry Creek applied for and received approval for a time extension which gave

[2]Appellant Dry Creek's repeated references to the air, light and view easement attempts to link this unrelated issue to the hearing before the Board. The air, light and view easement granted to Frazell by Dry Creek's predecessor in interest was not an issue before the Board nor was it an issue that the Board had any authority over. At the time of the July 25, 2007 hearing, the ambiguous terms of the air, light and view easement were being litigated in district court in Case No. CV OC 0709163.

Dry Creek until July 27, 2007 to file its final plat for phase two of the Redhawk Estates Subdivision. Agency R. p. 96. The Ada County Code provides that "[t]he applicant or owner for an approved final plat may apply for one (and only one) time extension for each phase of the final plat. The time extension shall be for a period not to exceed one year." Ada County Code § 8-7-6.

**B. Chronology of Proceedings.**

Dry Creek submitted an application for a second time extension on June 20, 2007 for filing the final plat for phase two of the Redhawk Estates Subdivision. Agency R. p. 1. Ada County Development Services ("Development Services") notified Dry Creek by letter dated June 25, 2007, that the application for a second time extension was being denied.[3] Agency R. p. 95. The June 25, 2007 letter from Development Services further explained that Dry Creek could appeal to the Board and that "to the extent a final decision

[3] Dry Creek argues that staff rather than the Director denied the second time extension. Appellant's Brief p. 2. The Ada County Code defines "Director" as "[t]he director of the Ada County development services department or an authorized representative." Ada County Code 8-1A-1 (emphasis added). Chapter 7 of the Ada County Code, which governs time extensions, states: "Director of Development Services: It shall be the duty of the director, or his or her authorized agent, to administer the regulations of this title." Ada County Code § 8-7-2:A (emphasis added). Based on Ada County's own ordinance, it was appropriate for Richard Beck to sign the letter notifying Dry Creek of the denial of a second time extension.

has been made on a site-specific land use request," Dry Creek could request a regulatory takings analysis.[4] *Id.*

In a letter to the Board dated July 3, 2007, Dry Creek appealed the Director's denial of a second time extension. Agency R. p. 101. Dry Creek's appeal of the Director's denial of a second time extension for filing a final plat was scheduled to be heard at a public hearing before the Board on July 25, 2007. Agency R. p. 105. On the day before the public hearing, legal counsel for Dry Creek hand-delivered a letter to the Board asserting that Dale Frazell and Philip H. Dater were affected persons objecting to the Subdivision. Agency R. p. 230. The letter further requested mediation between Dry Creek and Frazell and Dater. *Id.* At the July 25, 2007 public hearing, the Board tabled a decision regarding the appeal of the Director's denial of the request for a second time extension until September 12, 2007 and ordered mediation. Agency R. p. 317 at Agency Tr. pp. 64-64. By letter dated September 4, 2007, Mr. Dater stated that he had "no objections to the Redhawk Estates subdivision" and had "no desire or need to participate in any mediation." Agency R. p. 260. Legal counsel for Mr. Frazell notified the Board

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[4] Even though Dry Creek finds the staff report objectionable because it was signed by Richard Beck rather than the Director, Dry Creek relies on it for the proposition that there might have been justification for a second time extension. *See* Appellant's Brief p. 2. The staff report states: The Director finds that the applicant's statement dated June 19, 2007 along with supplementary materials submitted, might provide sufficient justification for approval of a time extension, but do not override the onetime, time extension limitation." Agency R. p. 98 (emphasis added).

by letter dated September 4 that his clients did "not oppose the subdivision" and did "not desire to participate in any mediation." Agency R. p. 259. Ada County provided copies of the letters by facsimile to Tom Chalberg of Dry Creek on September 7, 2007. Agency R. p. 258.

On September 12, 2007, the Board took up the matter of the appeal of the Director's denial of a second time extension. Agency R. p. 318 at Agency Tr. p. 66. The Board upheld the Director's denial of a second time extension. Agency R. 319 at Agency Tr. p. 71, ll. 18-25, p. 72. Two days later, by letter dated September 14, 2007, Dry Creek requested that the Board reconsider its decision to uphold the Director's denial of a second time extension and requested that the Board appoint a mediator. Agency R. p. 281. On October 3, 2007, counsel for Dry Creek, counsel for Dale Frazell, and Philip Dater were notified by facsimile of the October 9, 2007 hearing regarding Dry Creek's request for reconsideration of the denial of the time extension and Dry Creek's request that a mediator be selected so that mediation could be scheduled. Agency R. pp. 271-74. The Board took up both requests on October 9, 2007. Agency R. p. 320 at Agency Tr. p. 74. The Board denied the request for the appointment of a mediator and rescinded its July 25, 2007 Order of Mediation. Agency R. p. 323 at Agency Tr. pp. 86-87. Further, the Board denied the request for reconsideration of its September 12, 2007 decision which upheld the Director's denial of a second time extension. *Id.*

Dry Creek filed an *Amended Complaint for Appeal* [sic] *of From 12 September 2007 Ada County Decision Denying Extension of Time Request* on October 10, 2007. R. p. 11. Dry Creek's *Amended Complaint* was dismissed on November 1, 2007; but Dry Creek was given 14 days to amend its complaint. R. p. 20. An *Amended Notice of Appeal and Petition for Judicial Review* was filed on November 14, 2007. R. p. 23. Dry Creek's attorney moved to withdraw from the case on November 27, 2007, and on December 5, 2007, the *Motion* was granted with the action being stayed for 20 days. R. p. 3. A *Notice of Appearance* was filed by newly secured counsel for Dry Creek on December 19 2007. *Id.* Ada County lodged the Record and Transcript on January 2, 2008. No objections were made to the record,[5] and Ada County filed the Record and Transcript with the Court on January 17, 2008. *Id.* After, the district court heard argument on Dry Creek's request for judicial review on July 21, 2008, the district court affirmed the Board's final decisions in all respects. R. p. 39.

## II. ISSUES ON APPEAL

Appellant Dry Creek's Brief lists the issues on appeal as:

A. Did Ada County violate statutory provisions by failing to fulfill its statutory duties after ordering mediation?

[5] Dry Creek argues that a July 3, 2007 letter is missing from the record. Appellant's Brief p. 3. After the agency record was lodged on January 2, 2008, Dry Creek had fourteen days to object to the record but did not. *See* IRCP 84(j); R. p. 3.

B. Did Ada County violate Appellant's procedural due process by failing to allow a meaningful opportunity to be heard and rebut documentation presented during a closed hearing?

C. Is Ada County Article 8-7-6 arbitrary, capricious, and an abuse of discretion?

D. Did the District Court err in finding that Ada County complied with statutory provisions and procedural due process requirements?

E. Did Ada County cause actual harm or violation of fundamental rights to the appellant?

## III. ADDITIONAL ISSUES ON REVIEW

A. Whether Ada County is entitled to an award of attorney fees on appeal?

## IV. ISSUES RAISED BY APPEAL BUT NOT ARGUED BELOW

A. Whether the holders of the air, light and view easement should have appealed Dry Creek's preliminary plat?

B. Whether ACHD and other persons should have been ordered into mediation with Dry Creek?

## V. STANDARD OF REVIEW

When the district court's decision regarding a petition for judicial review is appealed, the Court "reviews the agency record independently of the district court's decision." *Spencer v. Kootenai County*, 145 Idaho 448, 452, 180 P.3d 487, 491 (2008) (citing *Cowan v. Bd. of Comm'rs of Fremont County*, 143 Idaho 501, 508, 148 P.3d 1247, 1254 (2006)). On questions of fact, the Court defers to the agency findings "unless [the

findings] are clearly erroneous." *Id.* (other citations omitted). "In other words, the agency's factual determinations are binding on the reviewing court, even when there is conflicting evidence before the agency so long as the determinations are supported by substantial competent evidence in the record." *Price v. Payette County Bd. of County Comm'rs.*, 131 Idaho 426, 429, 958 P.2d 583, 586 (1998).

In addition, the Court must defer to the zoning agency and "affirm the zoning agency's action unless the Court finds the agency's finding, 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.

*Neighbors for a Healthy Gold Fork v. Valley County*, 145 Idaho 121, 126, 176 P.3d 126, 131 (2007) (citing Idaho Code § 67-5279(3); *Cowan v. Bd. of Comm'rs of Fremont County*, 143 Idaho 501, 508, 148 P.3d 1247, 1254 (2006)). In addition, there is a strong presumption of validity favoring the actions of the zoning authority when applying and interpreting its own zoning ordinances. *Marcia T. Turner, L.L.C. v. City of Twin Falls*, 144 Idaho 203, 209, 159 P.3d 840, 846 (2007) (other citations omitted).

When attacking the action of a zoning board pursuant to Idaho Code § 67-5279, the attacking party must first show that the zoning board erred in a manner specified in

the statute, and further "must then show that a substantial right of the party has been prejudiced." *Payette River Prop. Owners Ass'n v. Bd. of Comm'rs*, 132 Idaho 551, 554, 976 P.2d 477, 480 (1999) (other citations omitted).

## VI. ARGUMENT OF ISSUES ON APPEAL

### A. The Board Did Not Violate the Statutory Requirements of Idaho Code § 67-6510 Because There Were No Affected Persons to Engage in the Requested Mediation.

Idaho Code § 67-6510 provides that upon written request an applicant, an affected person, the planning and zoning commission or the board may request mediation. If the mediation is requested by the board "the applicant and any other affected persons objecting to the application shall participate in at least one (1) mediation session" Idaho Code § 67-6510 (emphasis added). The statute requires participation "in at least one (1) mediation session if directed to do so by the governing board." *Id.*

By letter to the Board of July 24, 2007, and at the public hearing on July 25, 2007, Dry Creek's legal counsel represented that "[t]wo individuals have objected to various components of the development — a Mr. Dale Frazell and Philip H. Dater."[6] Agency R. p. 230; p. 305 at Agency Tr. p. 14, ll. 13-16. Further, the letter that was read into the

[6] Beth Shurfee objected to a time extension for the Redhawk Estates Subdivision Phase II at the public hearing on July 25, 2007. Dry Creek did not ask that she be included in the mediation because Dry Creek's request was for "affected persons objecting to the application of Dry Creek Partners in the development of Redhawk Estates Subdivision."

record at the July 25, 2007 public hearing asserted that Mr. Frazell and Mr. Dater[7] "are affected persons objecting to the application of Dry Creek Partners in the development of Redhawk Estates Subdivision." Agency R. p. 305 at Agency Tr. p. 14, ll. 16-19. Both Commissioners Fred Tilman and Paul Woods asked about the lack of attendance at the hearing by Mr. Frazell and Mr. Dater. Agency R. p. 310 at Agency Tr. p. 37, ll. 18-20; Agency R. p. 313 at Agency Tr. p. 48, ll. 12-15. Dry Creek's counsel initially asserted that the two chose not to attend (Agency R. p. 310 at Agency Tr. p. 37, ll. 21-24) but later in the July 25, 2007 proceeding acknowledged that they might not have received the letter requesting meditation since the letter had been submitted only the day before.[8] Agency R. p. 313 at Agency Tr. p. 49, ll. 15-23. The Board ordered mediation on July 25, 2007, and specifically identified Dry Creek Partners, the Frazells and Daters as the parties to be involved in the mediation. Agency R. p. 317 at Agency Tr. pp. 63-64. Subsequent to the Order of Mediation, Mr. Frazell and Mr. Dater notified the Board they did not object to the Redhawk Estates Subdivision and declined to participate in mediation. Agency R. 259-60.

[7] Like Beth Shurfee, Philip Dater indicated by letter that he supported the decision not to grant a second time extension. The letter does not indicate that he objected to the development of the Redhawk Estate Subdivision. Agency R. p. 215.

[8] Appellant's Brief p. 5, erroneously indicates that Dale Frazell and Kathleen Keys were in attendance at the July 25, 2007 hearing.

Dry Creek argues that Idaho Code § 67-6510 states that the parties "shall participate in at least one (1) mediation session;" therefore, the statute requires one (1) mediation session no matter the circumstances. Appellant's Brief p. 12. "[T]he plain meaning of a statute will be given effect unless it leads to absurd results." *Department of Health & Welfare v. Hudelson*, 146 Idaho 439, 443, 196 P.3d 905, 909 (2008) (citing *Driver v. SI Corp.*, 139 Idaho 423, 427, 80 P.3d 1024, 1028 (2003)). Requiring mediation in this case is not a rational meaning of the statute and would lead to an absurd result. Mr. Frazell and Mr. Dater did not object to the development of the Redhawk Estates Subdivision and declined to participate in mediation over the issue, yet Dry Creek argues that Ada County violated Idaho Code because it failed to set up the mediation and explain "to Mr. Frazell and Mr. Dater that they were required to participate." Appellant's Brief p. 13. Mediation requires "disputing parties." BLACK'S LAW DICTIONARY 996 (7th ed. 1999). As long as Mr. Dater and Mr. Frazell state that they do not object to the Redhawk Estates Subdivision, as the District Court noted: "What is there to mediate?" Tr. p.10 l. 3. Requiring mediation between Dry Creek, Frazell and Dater would be an absurd result since there is nothing to mediate.

Courts interpret statutes to determine legislative intent. "To ascertain the intent of the legislature, not only must the literal words of the statute be examined, but also the context of those words, the public policy behind the statute and its legislative history."

*State v. Mubita*, 145 Idaho 925, 940, 188 P.3d 867, 882 (2008) (citing *State v. Rhode*, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999)). The mediation statute was introduced during the 2000 Legislature as House Bill 601. http://www3.state.id.us/oasis/2000/HO601.html. When the bill was introduced to the House Local Government Committee, Jerry Mason testified that "using mandatory language without penalty is just words. There is no penalty involved in this legislation." *Minutes H.B. 601*, House Local Government Comm., 2000 Leg. (Feb. 24, 2000) (statement of Jerry Mason). Alex LaBeau's notes, attached to the Minutes as Attachment A, indicate the purpose of the legislation was to offer "greater flexibility for property owners and governing bodies to resolve differences in a less formal and more flexible environment." *Minutes H.B. 601*, House Local Government Comm., 2000 Leg. (Feb. 24, 2000). Further, Mr. LaBeau's notes indicate that only the ultimate agreement that results from mediation would "be subject to the already established public hearing process." *Id.* Clearly, the purpose of the legislation was to provide an informal mechanism to resolve differences. In this case, there are no differences to resolve and there is no mediated agreement that needs to be subject to the public hearing process.

The record indicates that there is a lack of an affected party objecting to an application. Without objectors, mediation cannot occur because there is not an issue to

mediate. Since there was not an issue to mediate, the Board rightly declined to appoint a mediator, and did not violate the statute.

### B. Ada County Did Not Violate Dry Creek's Rights to Due Process Because Dry Creek Had an Opportunity to be Heard During The Hearing Process.

Dry Creek also argues that its procedural due process rights were violated. In the planning and zoning context, procedural due process requires: "(a) notice of the proceedings; (b) a transcribable verbatim record of the proceedings; (c) specific written findings of fact; and (d) an opportunity to present and rebut evidence." *Neighbors*, 145 Idaho at 127, 176 P.3d at 132 (citing *Cowan*, 143 Idaho at 510, 148 P.3d at 1256). There is no argument from Dry Creek that it did not receive notice, a record, or specific written findings of fact. Dry Creek does argue that it was denied the opportunity to present and rebut evidence by not opening the public hearing on September 12, 2007. Appellant's Brief p. 15.

To understand why Dry Creek's rights to due process were not violated, it is necessary to understand the two different issues that came before the Board on the evening of July 25, 2007. The issue that was formally noticed and was an agenda item before the Board on July 25, 2007 was an appeal of the denial by the Director of Development Services of a second time extension. Agency R. p. 302 at Agency Tr. p. 4, ll. 9-13. By letter the day before, and at the July 25, 2007 hearing, Dry Creek raised the

issue of mediation.[9] Because Idaho Code § 67-6510(5) provides that mediation "shall not be part of the official record regarding the application," it was not improper to address the mediation issue as the Board did.

Dry Creek also argues that "the Board chose to grant an extension"[10] on the evening of July 25, 2007; and that action indicated the Board could go outside the ordinance and grant a second extension. Appellant's Brief p. 13. Dry Creek misunderstands the Board's action on the evening of July 25, 2007. The Board did not grant Dry Creek an extension; rather the Board ordered mediation, and because of the tolling provision in the mediation statute, the time limitation for filing a final plat was tolled. When the issue of mediation was raised at the July 25, 2007 hearing, counsel for Dry Creek specifically raised the issue of the tolling of the application time limitations.[11] Agency R. p. 305 at Agency Tr. p. 16, ll. 9-11. Legal counsel to the Board noted that "the statute provides that the period relevant to the application shall be tolled during the period

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[9] Pursuant to statute, "[m]ediation may occur at any point during the decision-making process or after a final decision has been made." Idaho Code § 67-6510(1). In addition, "[t]he mediation process shall not be part of the official record regarding the application." Idaho Code § 67-6510(5).

[10] Dry Creek argued a different position at the district court. During the argument, Dry Creek stated: "the Commissioners decided that they would table the decision about the extension." Tr. p. 5, ll. 1-3.

[11] Dry Creek also notes in its brief that "Appellant requested that the Board order mediation and explained that such an order would toll the expiration of the first extension of the plat." Appellant's Brief p. 4.

of time the mediation is under way." Agency R. p. 315 at Agency Tr. p. 56, ll. 8-15. He further noted that tolling would keep the existing time extension question "alive and well." *Id.* The Chairman of the Board was specifically asked whether the Board was "actually granting an extension or just tabling." Agency R. p. 317 at Agency Tr. p. 64, ll. 9-11. Chairman Tilman responded: "By mediations that automatically grants the extension, also by law." *Id.* at ll. 12-13. Clearly, the Commissioners did not grant a time extension to Dry Creek. Rather, pursuant to Dry Creek's request, the Commissioners ordered mediation which tolled the relevant time periods. Idaho Code § 67-6510.

Dry Creek argues that the public hearing was closed on July 25, 2007; and therefore it was improper for the Board to consider the September 4, 2007 letter from Mr. Dater and the September 6, 2007 letter from legal counsel on behalf of Mr. Frazell.[12] Appellant's Brief p. 18. Dry Creek also argues that it should have had the opportunity to rebut the letters on September 12, 2007. Appellant's Brief p. 13-14. Again, Dry Creek misunderstands the proceeding on July 25, 2007. The issue before the Board was the appeal of the Director's denial of a second time extension, and the public hearing was closed on that issue. Agency R. pp. 235, 238, 252-55. Mr. Frazell and Mr. Dater were

[12] The separate litigation over the terms of the air, light and view easement between Dry Creek and Mr. Frazell did not make Mr. Frazell an objector.

ordered into mediation with Dry Creek, and their letters specifically address mediation, not the second time extension. Agency R. pp. 259-60.

The record illustrates that Dry Creek had the opportunity to present and rebut evidence. At the public hearing on July 25, 2007, Dry Creek had the opportunity to argue for a second time extension, and rebut the testimony of a neighbor who specifically objected to the time extension. Agency R. pp. 303-15 at Agency Tr. pp. 8-23, 37, 39-54. Dry Creek requested reconsideration of the Board's decision to uphold the Director's denial of the extension by letter of September 14, 2007. Agency R. pp. 297-99. Dry Creek had notice of the hearing and took the opportunity to present and rebut evidence at the hearing on October 9, 2007.[13] Agency R. pp. 284-287; pp. 320-322 at Agency Tr. pp. 75-84. On the separate issue of mediation, Dry Creek had the opportunity to rebut the letters of Mr. Frazell and Mr. Dater at the hearing on October 9, 2007 but failed to do so. *Id.*

The record provides substantial evidence that Dry Creek was provided with procedural due process regarding the second time extension because Dry Creek received notice, there is a transcribable record, specific written findings were provided, including

[13] Appellant's Brief at pages 7 and 17 states that the "hearing was reopened on October 9, [sic] 2008." There was no hearing to reopen. The hearing on October 9, 2007 was held to address Dry Creek's request for reconsideration of the Board's decision to uphold the denial of the second time extension and to consider Dry Creek's request to appoint a mediator.

information regarding a regulatory takings analysis, and Dry Creek had the opportunity to present and rebut evidence. In addition, when Dry Creek requested reconsideration of the Board's decision to uphold the Director's denial and requested appointment of a mediatory, Dry Creek received due process.

### C. Ada County Article 8-7-6 is Not Arbitrary, Capricious, Nor an Abuse of Discretion Because the Board has the Authority to Enact Lawful Ordinances.

The Idaho legislature, under police power authority, may enact laws that regulate the public health, safety and welfare. *Van Orden v. State Dept. Health and Welfare*, 102 Idaho 663, 637 P.2d 1159 (1981). In 1975, the legislature enacted the Local Land Use Planning Act which gave local governing boards the power to regulate land use. *Naylor Farms v. Latah County*, 144 Idaho 806, 811, 172 P.3d 1081, 1086 (2007). Pursuant to its authority, the Board in 1988 adopted a limitation on time extensions to one extension with a duration of one year. Ada County Ordinance Number 196, adopted December 15, 1988. The current Ada County Code provides that "[t]he applicant or owner for an approved final plat may apply for one (and only 1) time extension for each phase of the final plat. The time extension shall be for a period not to exceed one year." Ada County Code § 8-7-6:B.2.

To understand the rationale behind time limitations, and their importance to the public, health, safety and welfare, one must look to the subdivision process. The term

"preliminary plat" is actually a misnomer because there is very little that is preliminary about the plat.[14] As the Ada County Code states: "A preliminary plat is a final document and is not considered to be of a preliminary nature and is used as a guide for the preparation of the final plat." Ada County Code § 8-1A-1. It is prior to the approval of the preliminary plat that the details of a subdivision are studied, discussed, and ultimately approved.[15] After approval of the preliminary plat, the landscape is permanently altered with grading and infrastructure for the development.

Timelines are extremely important to both the applicant and the County. The applicant wants the County to make decisions within specified timeframes so the applicant can determine costs and a construction timetable. The applicant also wants his interests protected from changes in zoning laws. The County's interest is in ensuring that an applicant intends to carry out his subdivision plans and to ensure that there is timely

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[14] *See generally, Rural Kootenai Organization, Inc. v. Board of Comm'rs*, 133 Idaho 833, 837-39, 993 P.2d 596, 600-02 (1999).

[15] In order to approve a preliminary plat, the Board must find the design conforms to standards, the design complies with required improvements, there is compliance with overlays such as hillside and flood plain if applicable; the design conforms to topography and natural features; the development does not cause undue damage; the street system is efficient and safe; community facilities are provided; it complies with the zoning district dimension standards, and the overall plan is in compliance with the applicable plans. Ada County Code § 8-6-5:A.

completion of construction so a particular area is not torn up for unlimited periods of time.[16]

Timeline restrictions for submission of final plats are the norm in southwestern Idaho, and a failure to obtain a time extension may result in the preliminary plat becoming null and void.[17] Time restrictions are also the norm nationwide.[18] Obviously, the Ada County Code's limitation is not an aberration of how subdivisions are regulated; yet Dry Creek is asking this Court to supplant the Board's decision, arguing the ordinance is arbitrary because it does not give the Board discretion. Appellant's Brief p. 21.

In *Spencer v. Kootenai County*, Spencer argued that the Board "failed to follow the clear language of its own ordinance" when the Board used one hearing officer rather than five hearing officers as the Kootenai County Ordinance required. 145 Idaho at 452-53, 180 P.3d at 491-92. The Court found that Kootenai County employed "unlawful procedure." *Id.* Here the Board adhered to its duly enacted ordinance that limits time extensions for final plats to one. "A governmental entity cannot act arbitrarily and

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[16] *See generally* discussion on Subdivision Controls, DANIEL R. MANDELKER & ROGER A. CUNNINGHAM, PLANNING AND CONTROL OF LAND DEVELOPMENT (Bobbs-Merrill Co., Inc., 1979).

[17] *See* Canyon County Code § 7-17-19; Gem County Code §§ 12-3-7-6 and 12-3-7-7; Meridian City Code § 11-6B-7; Star City Code § 9-3-3; Garden City Code § 9-3A-12; Eagle City Code § 9-2-3; Kuna City Code § 6-2-3 and Boise City § Code 9-20.

[18] A search of the terms "subdivision" and "time extension" on Google brings up municipal codes nationwide with timeline restrictions.

capriciously in enforcing its legitimate regulations." *Lindstrom v. Dist. Bd. of Health Panhandle Dist. 1*, 109 Idaho 956, 961, 712 P.2d 657, 662 (App. 1985) (citing *Schmidt v. Village of Kimberly*, 74 Idaho 48, 62, 256 P.2d 515, 523 (1953)).

There is nothing in the record to indicate the Board acted in an arbitrary manner in enacting[19] or adhering to its own legitimate ordinance.

### D. The District Court Did Not Err in Finding that Ada County Complied with Statutory and Due Process Requirements.

The district court must defer to the Board and affirm its decision unless the Board's decisions were made upon unlawful procedure or were arbitrary, capricious, or an abuse of discretion. *See* Idaho Code § 67-5279(3). Based on the evidence before the district court, it did not err in determining that the Board had not violated Idaho Code nor due process requirements. *See* Sections A and B of this brief, *supra*.

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[19] *See Moon v. North Idaho Farmers Ass'n*, 140 Idaho 536, 545, 99 P.3d 637, 646 (2004) ("'The existence of facts supporting the legislative judgment is to be presumed.' *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938). The legislature's judgment is 'well-nigh conclusive.' *Berman v. Parker*, 348 U.S. 26, 32 (1954); *see also Sweet v. Rechel*, 159 U.S. 380, 392 (1895); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926 ('If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.') Plaintiffs challenging the constitutionality of a statute are required to provide 'some factual foundation of record' that contravenes the legislative findings.' *O'Gorman & Young v. Hartford Fire Ins. Co.*, 282 U.S. 251, 258 (1931). In the absence of such proof, 'the presumption of constitutionality must prevail.' *Id.* at 257'").

## E. Ada County Did Not Violate the Fundamental Rights of Dry Creek Because Dry Creek Was Provided With Due Process.

Dry Creek cites Idaho Code § 67-6535 as the basis for its argument that Ada County caused actual harm or violated a fundamental right of Dry Creek. Appellant's Brief p. 25. Idaho Code §§ 67-6535(a) and (b) refer to "the approval or denial of any application provided for in this chapter." The applications provided for by the chapter are for amendments to the zoning ordinance, special use permits, conditional use permits, subdivisions, planned unit developments and variances. The statute is not applicable because the issue before the Board was not the approval or denial of an application. The issue before the Board was an appeal of the Director's decision denying a second time extension.

Even if Idaho Code § 67-6535 were applicable, Ada County has complied with due process requirements. Idaho Code § 67-6535(a) requires that the approval or denial of an application be based upon standards set forth in the ordinance. Ada County's has set forth its standards for time extensions in its ordinance. *See* Ada County Code § 8-7-6. As stated in Section B of this Brief, *supra*, there is nothing in the record to suggest that Ada County was not complying with its own duly enacted ordinances.

The statute that Dry Creek relies on also requires that the approval or denial of an application must be in writing and must explain the rationale for the decision and the

ordinance relied upon. Idaho Code § 67-6535(b). The Findings of Fact are in writing and explain the decision of the Board and the ordinances relied upon. Agency R. pp. 95-98; pp. 264-69; pp. 278-280; pp. 291-299.

Dry Creek specifically focuses on subsection c of Idaho Code § 67-6535 and argues that the Board violated a fundamental right by not reopening the public hearing on September 12, 2007 to discuss the Frazell and Dater mediation letters. Appellant's Brief pp. 25-27. Dry Creek argues that the public hearing was closed on July 25, 2007; and therefore it was improper for the Board to consider the September 4, 2007 letter from Mr. Dater and the September 6, 2007 letter[20] from legal counsel on behalf of Mr. Frazell. Dry Creek misunderstands the proceeding on July 25, 2007. The issue before the Board was the appeal of the Director's denial of a second time extension, and the public hearing was closed on that issue on July 25, 2007. Agency R. pp. 235, 238, 252-55. Mr. Frazell and Mr. Dater were ordered into mediation with Dry Creek and their letters specifically address mediation. Agency R. 259-60. Since the letters were in regard to the mediation procedure, it was not necessary to reopen the hearing on September 12, 2007 regarding the application for a second time extension. *Also, see* Section B of this Brief, *supra*.

[20] The separate litigation over the terms of the air, light and view easement between Dry Creek and Mr. Frazell did not make Mr. Frazell an objector.

Dry Creek also argues that "Ada County's arbitrary ordinance in allowing only one extension caused actual harm to the Applicant." Appellant's Brief p. 26. The current Ada County Code provides that "[t]he applicant or owner for an approved final plat may apply for one (and only 1) time extension for each phase of the final plat. The time extension shall be for a period not to exceed one year." Ada County Code § 8-7-6:B.2. As more fully argued in Section C of this Brief, *supra*, Ada County had good reasons to enact an ordinance that limited time extensions. In addition, as is argued in Section C of this Brief, *supra*, all of the other local governments with planning and zoning authority in the Treasure Valley also have time limitations in their ordinances. Dry Creek may not like the time limitation because it will require Dry Creek to start a new application for phase 2 of its subdivision, but disliking a time limitation of a duly enacted ordinance does not equate to Ada County causing harm to Dry Creek.

## VII. ADDITIONAL ISSUES ON APPEAL

The Board asserts an entitlement to attorney fees under Idaho Code § 12-117. If the Board is deemed the prevailing party and judgment is entered against Dry Creek, attorney fees shall be awarded to the Board upon a showing that Dry Creek acted without a reasonable basis in law or fact in the pursuit of its appeal. The challenges brought by Dry Creek to the Board's decisions are not reasonably founded in fact or law. There is nothing in the record to support the assertions that the Board violated the statute and/or

failed to provide Dry Creek with due process. Further, asking that the Board force mediation on parties who have nothing to mediate is a frivolous request.

## VIII. ISSUES RAISED BY APPEAL BUT NOT ARGUED BELOW

The two issues of:

A. Whether the holders of the air, light and view easement should have appealed Dry Creek's preliminary plat; and

B. Whether ACHD and other persons should have been ordered into mediation with Dry Creek,

were not raised before the district court and cannot be raised before the Court for the first time on appeal.

"It is well established in Idaho that review on appeal is limited to those issues raised before the lower tribunal and that an appellate court will not decide issues presented for the first time on appeal." *Neighbors*, 145 Idaho at 131, 176 P.3d at 136 (citing *Balser v. Kootenai County Bd. of Comm'rs*, 110 Idaho 37, 40, 714 P.2d 6, 9 (1986)). Further, in order for an issue to be properly before the Court, issues must have been presented by "pleadings or evidence touching upon particular questions." *Marchbanks v. Roll*, 142 Idaho 117, 119, 124 P.3d 993, 995 (2005). In addition, there should be an opportunity to respond to theories in the district court and establish a record. *See Lewis v. Dept. of Transp.*, 143 Idaho 418, 424, 146 P.3d 684, 690 (2006).

### A. Whether the holders of the air, light and view easement should have appealed Dry Creek's preliminary plat?

The issue of whether the holders of the air, light and view easement should have appealed Dry Creek's preliminary plat appears for the first time in Appellant's Brief to the Court on pages 21 and 26. Because the issue was not raised before the district court, it is not an issue for appeal.

### B. Whether ACHD and other persons should have been ordered into mediation with Dry Creek?

In the pleadings and at argument before the district court, Dry Creek made remarks regarding ACHD and other objectors, but offered no argument or evidence that the Board should have ordered them into mediation with Dry Creek, along with Mr. Frazell and Mr. Dater.[21] In briefing before the Court, Dry Creek is now asserting that ACHD is an affected person "and should have been included in the mediation process as well." Appellant's Brief p. 11. In addition to raising the issue for the first time before this Court that ACHD should have been included in the mediation, it is rather disingenuous of Dry Creek to now be asserting that other entities should have been included in the mediation requested by Dry Creek when Dry Creek specifically requested mediation with only two

[21] In Appellant's Reply Brief (p. 3) at the District Court, Dry Creek states only: "Respondent also argues that Mr. Dater and Mr. Frazell were the only affected parties objecting to the mediation. However, it is uncertain how Respondent concluded there were no other affected parties in light of the pending civil litigation, the other adjacent landowners and the Ada County Highway District issues."

parties, Frazell and Dater.[22] Since Dry Creek did not present any evidence or argument on these two issues before the district court, it should not be allowed to raise these issues before the Court for the first time on appeal.

## IX. CONCLUSION

The record before the Court is clear that the Board followed its own procedures and provided the applicant with due process. The record is also clear that the Board did not violate Idaho Code § 67-6510. The Board respectfully asks this Court to find that its decisions were made upon lawful procedure; are supported by substantial evidence on the record as a whole; are not arbitrary, capricious, or an abuse of discretion and ask that the Court decline to substitute its judgment for that of the Board.[23] Ada County also requests that it be awarded attorney fees.

DATED this 25th day of February, 2009.

GREG H. BOWER
Ada County Prosecuting Attorney

Lorna K. Jorgensen
Deputy Prosecuting Attorney

[22] By letter of July 24, 2007, Dry Creek specifically asked for mediation between Dry Creek, Frazell and Dater. At the public hearing on July 25, 2007, Dry Creek's legal counsel stated that the mediation was to be between Dry Creek Partners, Mr. Dale Frazell and Mr. Philip Dater. Agency R. p. 310 at Agency Tr. p. 37, ll. 8-17.

[23] *See Lane Ranch Partnership v. City of Sun Valley*, 145 Idaho 87, 91, 75 P.3d 776, 780 (2007). (The Supreme Court declines to "substitute its judgment for that of a [county] when it acts within the bounds of its discretion.)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of February, 2009, I served a true and correct copy of the foregoing RESPONDENTS' BRIEF to the following person by the following method:

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