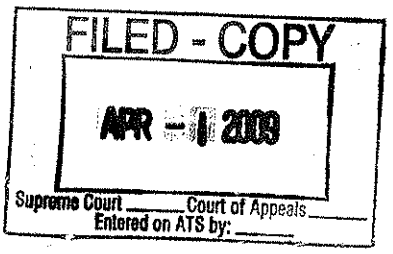
4-1-2009

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

IN THE SUPREME COURT OF THE STATE OF IDAHO

DRY CREEK PARTNERS, LLC,	)	
	)	**CASE NO.: 35641-2008**
Appellant,	)	
vs.	)	
	)	
ADA COUNTY COMMISIONERS, ex rel. State of Idaho, and John Does I through X,	)	
	)	
Respondents.	)	



REPLY BRIEF

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

Honorable Duff McKee,
Fourth District Senior Judge, presiding

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I. ARGUMENT

A. The Board Violated Idaho Code § 67-6510 Because Applicants and Affected Persons Are Required to Participate in at least One Mediation Session.

Idaho Code 67-6510 provides "an applicant may decline to participate in mediation requested by an affected person, and an affected person may decline to participate in mediation requested by the applicant, except the parties shall participate in at least one (1) mediation sessions if directed to do so by the governing board." Statutory interpretation is an issue of law over which the Supreme Court exercises free review. *In Re Daniel W.*, 145 Idaho 677, 679, 183 P.3d 765, 767, (2008). When the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and the Court need not consider rules of statutory construction. *Payette River Prop, Owners Ass'n v. Bd. Of Comm'rs of Valley County*, 132 Idaho 551, 557, 976 P.2d 477, 483 (1999). The plain meaning of a statute will be given effect unless it leads to absurd results. *Driver v. SI Corp.*, 139 Idaho 423, 427, 80 P.3d 1024, 1028 (2003).

In Respondent's Brief, p. 11, Respondent argues that the purpose of the legislation was to offer "greater flexibility for owners and governing bodies to resolve differences in a less formal and more formal flexible environment." Respondent argues that requiring mediation between Dry Creek, Frazell, and Dater would lead to absurd results since there was nothing to mediate. *Id.* Respondent is merely speculating whether there was nothing to mediate since Appellant was not even given the opportunity to enter into mediation. It was clear at the time that the request for extension was filed, that Mr. Frazell and Ms. Keys filed a lawsuit against Dry Creek Partners, LLC. and had not dismissed such action prior to the Respondents rescinding its Order for mediation. Appellant also advised the District Court that despite the September 4, 2007, letter

from Mr. Frazell, both Frazell and Keys had resolved their lawsuit with Dry Creek Partners, LLC., by agreeing to terms including entering into and participating in mediation pursuant to Idaho Code §67-6510.[1] For Respondent to suggest that there were no issues to mediate is to completely ignore the Agency Record detailing the strained relationships between the Appellant developer and the existing neighbors, Ada County Highway District, and Ada County Planning and Development Services.

In giving effect to the legislative intent, it appears that the Legislature contemplated the circumstance where parties refuse or decline to participate; stating succinctly, that "[a]n applicant may decline to participate..." except that the parties shall participate in at least one (1) mediation session if directed to do so by the governing board." If Frazell and Dater truly had nothing to mediate, then that issue would have been addressed at the first mediation session, and at that point, the mediation would have ceased. Further, Idaho Code § 67-6510, gives an applicant or affected person the ability to withdraw, after having participated in one (1) mediation session, by stating in writing that that no further participation is desired and notifies the other parties. Clearly, the legislature contemplated that such circumstances would arise, and addressed it accordingly in the statute. Rather than circumventing the intent of the statute, Respondents are mandated to follow the procedures to afford Appellant and other affected persons to resolve their differences. By allowing one affected person to effectively cancel the mediation, would foreclose an applicant the ability to resolve differences with any other affected person or agency. Respondents suggest that this Court allow them to ignore the procedure clearly announced in the statute rather than allowing the opportunity for parties go to at least one mediation session. Any or all affected persons could determine whether to continue in mediation and properly decline to participate by serving written notice. Importantly, any other affected

[1] Tr. P. 7, 10-21.

person or parties could still participate and continue to work in resolving their differences in the mediation process without those wishing to decline.

Respondents cannot assume that only Dater and Frazell are affected persons within the meaning of the statute; therefore, cannot assume that those two have the ability to thwart Appellant's attempt to resolve all of its issues with all the neighbors, opposing parties, including governmental agencies with a stake in the outcomes. The Agency record has identified other affected persons (ie. Kathleen Keys[2], Beth Surfee and her husband Mark Davis, and ACHD[3]) who also voiced concerns, obstructed the project, or had an interest in the Redhawk Phase II. These affected persons are never addressed and would not have an opportunity to resolve their differences or address their concerns through the project given the Respondents' rescission of the Order to Mediate.

Further, if this Court is persuaded that requiring mediation would lead to absurd results as claimed by the Respondents, then such precedent would undermine the entire statue as it would essentially allow any party ordered to mediation to withdraw if they decided they do not wish to participate and deprive others of the process. The consequence would be that there would be no way to facilitate communication or identify issues between the parties in hopes of resolving concerns or conflicts. In addition, if the withdraw was later contested, as it is in this case, it would require the District Court to always consider whether the ordering of mediation pursuant to I.C. § 67-6510 would lead to absurd results, or whether there were truly any affected parties. Merely because Respondent believed that in this particular case, application of the statute would lead to absurd results, that should not give any party the ability to decide that they do not want to

[2] For example, see letter dated May 25, 2007, Agency Record p. 146.
[3] July 25, 2007 Hearing Tr. p. 26, line 24-. p. 33, line 10 (Agency Record p. 308-309).

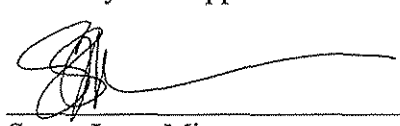
participate in mediation once it has been ordered and to ignore the mandatory provisions contained in I.C. § 67-6510.

II. ***CONCLUSION***

In consideration of the argument presented above along with the arguments presented in Appellant's Brief, the Appellant respectfully requests this Court to reverse the judgment of the District Court, remand the matter for mediation in compliance with Idaho Code § 67-6510, and find in favor of the Appellant with regard to its due process rights.

DATED this 1st day of April 2009.

MIMURA LAW OFFICES, PLLC
Attorneys for Appellant



Susan Lynn Mimura
Managing Member

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this 1st day of April, 2009, I served a true and correct copy of the foregoing REPLY BRIEF to the following person by the following method:

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