

12-14-2009

Krempasky v. Nez Perce County Planning Clerk's Record Dckt. 36943

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LAW CLERK

Vol 1 of 2

In the
SUPREME COURT
of the
STATE OF IDAHO

IN THE MATTER OF THE APPROVAL
OF A CONDITIONAL USE PERMIT
#CUP-2008-3,

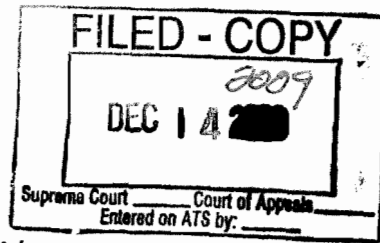
MARY KREMPASKY,

Petitioner-Appellant,

v.

NEZ PERCE COUNTY, IDAHO, ET AL.,

Respondents.



CLERK'S RECORD

Appealed from the District Court of the
Second Judicial District of the State of Idaho,
in and for the County of Nez Perce

The Honorable JEFF M. BRUDIE

Supreme Court No. 36943

EDWIN L. LITTENEKER
ATTORNEY FOR PETITIONER-APPELLANT

NANCE CECCARELLI
ATTORNEY FOR RESPONDENTS

36943

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF THE APPROVAL)	
OF A CONDITIONAL USE PERMIT)	
#CUP-2008-3,)	
)	
MARY KREMPASKY,)	
)	SUPREME COURT NO.36943
Petitioner-Appellant,)	
vs.)	
)	
NEZ PERCE COUNTY, IDAHO, ET AL.,)	
)	
Respondents.)	

CLERK'S RECORD

Appeal from the District Court of the Second Judicial District
of the State of Idaho, in and for the County of Nez Perce

BEFORE THE HONORABLE JEFF M. BRUDIE, DISTRICT JUDGE

Counsel for Appellant

Mr. Edwin L. Litteneker
P O Box 321
Lewiston, ID 83501

Counsel for Respondent

Ms. Nance Ceccarelli
P O Box 1267
Lewiston, ID 83501

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

IN THE MATTER OF THE APPROVAL)	
OF A CONDITIONAL USE PERMIT)	
#CUP-2008-3,)	
)	
MARY KREMPASKY,)	
)	SUPREME COURT NO.36943
Petitioner-Appellant,)	
vs.)	
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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

IN THE MATTER OF THE APPROVAL)	
OF A CONDITIONAL USE PERMIT)	
#CUP-2008-3,)	
)	
MARY KREMPASKY,)	
)	SUPREME COURT NO.36943
Petitioner-Appellant,)	
vs.)	
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Mary Krempasky vs. Nez Perce County Planning and Zoning

Date	Code	User	Judge
1/30/2009	NCOC	KATHY	New Case Filed-Other Claims
	ATTR	KATHY	Plaintiff: Krempasky, Mary Attorney Retained Edwin L Litteneker
	PETN	KATHY	Petition for Judicial Review
		KATHY	Filing: R2 Appeal or petition for judicial review, or cross-appeal or cross-petition, from Commission Board/ or body to the District Court Paid by: Litteneker, Edwin L (attorney for Krempasky, Mary) Receipt number: 0328800 Dated: 2/2/2009 Amount: \$88.00 (Check) For: Krempasky, Mary (plaintiff)
2/4/2009	NOTP	PAM	Notice Of Service-plaintiff
2/24/2009	NOAP	PAM	Notice Of Appearance & Request for Notice Gary Kazda and Carol Kazda
		PAM	Filing: 17 - All Other Cases Paid by: Creason, Moore & Dokken PLLC Receipt number: 0330361 Dated: 2/24/2009 Amount: \$58.00 (Check) For: Kazda, Gary (other party)
	ATTR	PAM	Other party: Kazda, Gary Attorney Retained Theodore O Creason
	ATTR	PAM	Other party: Kazda, Carol Attorney Retained Theodore O Creason
3/6/2009	MOTN	PAM	Motion of Nez Perce County Commissioners to Dismiss Petition for Judicial Review Pursuant to IRCP Rule 84
	BRFD	PAM	Brief in Support of Motion of Nez Perce County Commissioners to Dismiss Petition for Judicial Review Pursuant to IRCP Rule 84
	AFFD	PAM	Affidavit of Dee Ann Wittman
	ATTR	PAM	Defendant: Nez Perce County Planning and Zoning Attorney Retained Nance Ceccarelli
3/10/2009	NOTD	PAM	Notice Of Service-defendant
	NTHR	PAM	Notice Of Hearing--3-19-09 @ 10:00am Defendant's Motion to Dismiss Petition for Judicial Review
	HRSC	PAM	Hearing Scheduled (Motion to Dismiss 03/19/2009 10:00 AM) Defendant
3/11/2009	NOTC	PAM	Notice of Tendering Estimate Fee For Transcript & Fee
	NOTC	PAM	Supplemental Notice of Tendering Estimate Fee for Transcript & Fee
3/12/2009	MOTN	PAM	Motion of Gary Kazda Joining Nez Perce County Commissioner's Motion to Dismiss Petition for Judicial Review Pursuant to IRCP Rule84

Mary Krempasky vs. Nez Perce County Planning and Zoning

Date	Code	User		Judge
3/12/2009	NTHR	PAM	Notice Of Hearing--3-19-09 @ 10:00am Other Party Kazda's Motion Joining Nez Perce County Commissioner's Motion to dismiss Petition for Judicial Review	Jeff M. Brudie
	HRSC	PAM	Hearing Scheduled (Motion to Dismiss 03/19/2009 10:00 AM) Other Party Kazda	Jeff M. Brudie
3/17/2009	HRVC	TERESA	Hearing result for Motion to Dismiss held on 03/19/2009 10:00 AM: Hearing Vacated Other Party Kazda	Jeff M. Brudie
	MISC	TERESA	Response to Motion to Dismiss Petition for Judicial Review--petitioner	Jeff M. Brudie
	HRVC	TERESA	Hearing result for Motion to Dismiss held on 03/19/2009 10:00 AM: Hearing Vacated Defendant	Jeff M. Brudie
4/15/2009	MISC	PAM	Clerk's Record Filed (Agency Record)	Jeff M. Brudie
	NOTC	PAM	Notice of Lodging Record and Transcript Respondent	Jeff M. Brudie
4/16/2009	NOTC	PAM	Amended Notice of Lodging Record & Transcript	Jeff M. Brudie
4/24/2009	ORDR	JANET	Order Scheduling Briefs and Argument	Jeff M. Brudie
	HRSC	JANET	Hearing Scheduled (Appellate Argument 07/09/2009 10:00 AM)	Jeff M. Brudie
5/27/2009	BRFD	PAM	Petitioner's Brief on Judicial Review Filed	Jeff M. Brudie
6/24/2009	MEMO	PAM	Applicant Gary Kazda's Memorandum in Response to Petitioner's Brief on Judicial Review	Jeff M. Brudie
	BRFD	PAM	Respondent's Brief on Judicial Review	Jeff M. Brudie
7/9/2009	MINE	PAM	Minute Entry Hearing type: Appellate Argument Hearing date: 7/9/2009 Time: 10:01 am Court reporter: Linda Carlton Minutes Clerk: Pamela Schneider Plaintiff: Edwin L. Litteneker Defendant: Nance Ceccarelli Other Party Kazdas: Theodore O. Creason	Jeff M. Brudie
	HRHD	PAM	Hearing result for Appellate Argument held on 07/09/2009 10:00 AM: Hearing Held	Jeff M. Brudie
	DCHH	PAM	District Court Hearing Held Court Reporter: Linda Carlton Number of Transcript Pages for this hearing estimated: less than 100 pages	Jeff M. Brudie
8/10/2009	OPOR	JANET	Opinion & Order	Jeff M. Brudie
	CDIS	JANET	Civil Disposition entered for: Nez Perce County Planning and Zoning, Defendant; Kazda, Carol, Other Party; Kazda, Gary, Other Party; Krempasky, Mary, Plaintiff; Cup-2008-3,, Subject.	Jeff M. Brudie

Mary Krempasky vs. Nez Perce County Planning and Zoning

Date	Code	User		Judge
8/10/2009	STAT	JANET	Case Status Changed: Closed	Jeff M. Brudie
9/14/2009	APSC	DEANNA	Appealed To The Supreme Court	Jeff M. Brudie
	NTAP	DEANNA	Notice Of Appeal	Jeff M. Brudie
	BNDC	DEANNA	Bond Posted - Cash (Receipt 342219 Dated 9/14/2009 for 130.00)	Jeff M. Brudie
	BONC	DEANNA	Condition of Bond Estimate for Reporter's Transcript	Jeff M. Brudie
	BNDC	DEANNA	Bond Posted - Cash (Receipt 342220 Dated 9/14/2009 for 100.00)	Jeff M. Brudie
	BONC	DEANNA	Condition of Bond Estimate for Clerk's Record	Jeff M. Brudie
10/1/2009	SCRT	DEANNA	Supreme Court Receipt - Clerk's Record and Reporter's Transcript due at the SC by December 1, 2009	Jeff M. Brudie
	SCRT	DEANNA	Supreme Court Receipt - Clerk's Certificate filed at the SC	Jeff M. Brudie
10/2/2009	NTAP	DEANNA	Amended Notice Of Appeal	Jeff M. Brudie
10/14/2009	BNDO	DEANNA	Bond Converted to Other Party (Transaction number 217960 dated 10/14/2009 amount 123.50)	Jeff M. Brudie
	MISC	DEANNA	Check to Linda Carlton for \$123.50 for preparation of Reporter's Transcript	Jeff M. Brudie

Edwin L. Litteneker
Attorney at Law
322 Main Street
Post Office Box 321
Lewiston, Idaho 83501
Telephone: (208) 746-0344
Facsimile: (208) 798-8387
ISB No. 2297

Attorney for Petitioner

FILED

2009 JAN 30 PM 4 26

Kathy Boyer

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE**

IN THE MATTER OF THE APPROVAL)
OF A CONDITIONAL USE PERMIT)
CUP-2008-3,)
)
)
)
)
MARY KREMPASKY, Petitioner,)
)
)
v.)
)
)
NEZ PERCE COUNTY, Respondent)
_____)

Case No. CV09-00264

**PETITION FOR
JUDICIAL REVIEW**
Fee Category: G.3
Fee: \$88.00

COMES NOW, MARY KREMPASKY, Petitioner, by and through Edwin L. Litteneker, her attorney of record, and petitions this court for judicial review pursuant to Idaho Administrative Procedures Act and specifically, Idaho Code § 67-5270 et seq., of the decision of the Nez Perce County Board of Commissioners denying the appeal of the decision and ruling of the made by the Nez Perce County Planning and Zoning Commission during their meeting of January 6, 2009.

1. Petitioner, Mary Krempasky, contests the County's granting of Application for a Conditional Use Permit, CUP 2008-3.

2. The application filed by Gary and Carol Kazda for the Conditional Use Permit is an

application for The Tuscan Wedding and Event Center to allow such special events as weddings, and other similar special events outside and within a 6,500 square foot home on approximately 5 acres of land on Lapwai Road east of Pheasant Trail Estates in Lewiston.

3. The Nez Perce County Planning and Zoning Commission held a public hearing on October 21, 2008 in regards to Application, CUP 2008-3 and the application was approved by the Finding of Facts and Conclusion of Law entered on September 16, 2008.

4. Petitioner filed a Notice of Appeal from the Nez Perce County Planning and Zoning Commission to the Board of County Commissioners.

5. An Administrative Hearing was held on January 6, 2009 by the Board of County Commissions to determine whether to accept jurisdiction, based on the existing record of the appeal filed with respect to CUP 2008-3.

6. The public was invited to the Administrative Hearing on January 6, 2009, however, testimony was not considered.

7. The County Commissioners declined to hear the appeal on January 6, 2009.

8. This Petition is brought pursuant to the Idaho Local Planning Act and the Idaho Administrative Procedures Act.

8.1 A transcript of the hearing held on October 21, 2008 and on January 6, 2009, has not been prepared and is requested.

8.2 That the Nez Perce County Commissioners should prepare the Record of the Administrative Proceeding before the County Commissioners.

9. This Petition also requests leave to present additional evidence, documentary and testimonial that will assist the court in its review of the decision of the County Commissioners, pursuant to Idaho Code § 67-5276.

10. The County Commissioner's decision in denying the Appeal is not supported by

substantial evidence, is arbitrary and capricious, and is an abuse of discretion, and is not consistent with the duly adopted comprehensive plan of Nez Perce County and is in violation of constitutional and statutory provisions all contrary to Idaho Code § 67-5279.

11. Petitioner is entitled to an order of the Court remanding the Decision approving CUP 2008-3 to the County Commissioners with directions to deny the Conditional Use Application.

12. That Petitioner has retained the services of Edwin L. Litteneker, Attorney at Law, and has incurred attorney fees and costs of representation in this matter and is entitled to an award of attorney fees pursuant to Idaho Code §12-117, 12-120 & 12-121.

WHEREFORE Petitioner prays for the following:

1. For an order declaring that the approval of CUP 2008-3 should be set aside and that CUP 2008-3 should be denied;
2. For an order that the transcript of the hearings and the administrative record shall be prepared;
3. That Petitioner be awarded costs and attorney fees incurred in pursuing this matter; and
4. For such other relief as may be deemed appropriate by this court

DATED this 30 day of January 2009.



Edwin L. Litteneker
Attorney for Petitioner

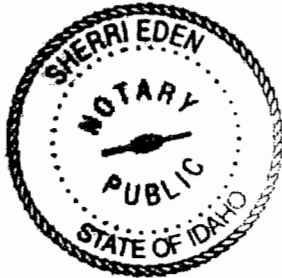
STATE OF IDAHO)
) ss.
County of Nez Perce)

MARY KREMPASKY, being first duly sworn on oath, deposes and says:

That she is the Petitioner herein; that she has read the foregoing Petition, knows the contents thereof and that the facts therein stated are true to the best of her knowledge, information and belief.

Mary Kremasky
MARY KREMPASKY

SUBSCRIBED AND SWORN to before me this 30th day of January 2009.



Sherri Eden
Notary Public in and for the State of Idaho
Residing at CK therein
My Commission Expires: 9-2-11

FILED

2009 AUG 10 AM 7 49

CLERK OF THE DIST. COURT

[Signature]
DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

IN THE MATTER OF THE APPROVAL)
OF A CONDITIONAL USE PERMIT)
CUP-2008-3,)

MARY KREMPASKY,)

 Petitioner,)

 v.)

NEZ PERCE COUNTY, IDAHO, et al.,)

 Respondents,)
_____)

CASE NO. CV09-00264

OPINION AND ORDER ON
PETITION FOR JUDICIAL
REVIEW

This matter is before the Court on Petitioner Mary Krempasky’s Petition for Judicial Review. Petitioner was represented by attorney Edwin L. Litteneker. The County of Nez Perce was represented by attorney Nance Ceccarelli. Gary Kazda Construction/Tuscan Wedding and Event Center, recipients of Conditional Use Permit CUP-2008-3, were represented by attorney Theodore O. Creason. The Court, having read the Petition, affidavits, and briefs submitted by the parties, having reviewed the clerk’s record and transcript in the matter of the application for conditional use permit # CUP-2008-3, having heard oral arguments of counsel, and being fully advised in the matter, hereby renders its decision.

FACTUAL AND PROCEDURAL BACKGROUND

On July 22, 2008, J-U-B Engineers and Gary Kazda Construction submitted an application for a conditional use permit to the Nez Perce County Planning and Zoning Commission (hereinafter "Commission").¹ The applicants sought to develop a 5-acre parcel into the Tuscan Wedding and Event Center (hereinafter "Event Center" or "Center"), where a 6,500 square foot home on the property. The home, however, would serve solely as the residence of the Kazdas and would not be used in the commercial venture.²

The application included a project narrative, site plan and other supporting documentation.³ On September 16, 2008, a public hearing regarding the application was held.⁴

Brad Marshall, senior planner for J-U-B Engineers, was the first to address the Nez Perce County Planning and Zoning Commission and other interested persons at the hearing. Mr. Marshall provided a general overview of the proposed center, noting in particular that the proposed Event Center fits within the County's comprehensive plan and desired development and that

construction of the Event Center would include a number of conditions aimed at limiting the impact of the business operation upon the adjacent residential area. Mr. Marshall discussed the steps that would be taken to mitigate the natural concerns of the Event Center's neighbors, such as noise, lights, traffic and parking. Lastly, Mr. Marshall made reference to the letters in support of the proposed Event Center, previously submitted to the Commission.

The second person to address the Commission and audience was developer Gary Kazda. Mr. Kazda explained to the Commission and audience how his plans to incorporate significant

¹ Clerk's Record and Transcript, Bates stamp 0001 (document stamped upside down making it look like 1000).

² Clerk's Record and Transcript, Bates stamp 0144 through 0145.

³ Clerk's Record and Transcript, cover letter from J-U-B Engineers, Bates stamp 0005.

⁴ Clerk's Record and Transcript, public hearing transcript, Bates stamp numbers 0122 – 0224.

landscaping would create a buffer acting to minimize light and noise coming from the Center.⁵

Mr. Kazda further informed the group how limited operating hours along with the natural limitation weather places on outdoor activities would mitigate many of the concerns of the neighbors. Finally, Mr. Kazda discussed the limitations the Event Center would have on alcohol consumption and the limitations that would be placed on music so as to assure the Event Center was a good neighbor.

Schaub Ranch, LLC and Red Pheasant Holdings, LLC currently owns the land where the proposed Event Center would be developed. In addition, they are the landowners to the northeast and west of the proposed Event Center and the initial developer of portions of the residential development to the west of the proposed Event Center.⁶ Bill Hobbs, representing the two entities, expressed his belief that the proposed Center fits into the development goals of the area. Mr. Hobbs discussed how the long-term development plans of Schaub Ranch and Red Pheasant Holdings includes developing vineyard tracks adjacent to or near the Event Center that would act as additional buffer between the Event Center and residential neighborhoods.

After hearing from the applicants and others in favor of the proposed Event Center, the Commission heard from a number of the Event Center's residential neighbors. The site for the proposed Center is bordered on three sides by open fields.⁷ However, to the west of the proposed site are a number of homes built in recent years, as well as undeveloped home sites. A number of the nearby property owners attended the hearing and spoke out against the proposed Event Center.

Joan Erickson, who lives near the proposed Event Center site, informed the Commission that a month earlier, Bill Hobbs and Gary Kazda held a neighborhood meeting where Mr. Kazda

⁵ Clerk's Record and Transcript, Bates stamp 0016.

⁶ Clerk's Record and Transcript, Bates stamp 0071.

⁷ Clerk's Record and Transcript, aerial map of site area, Bates stamp 0081.

presented the attendees with details regarding the proposed Event Center. Despite what Ms. Erickson described as a good presentation, which included architectural drawings and the opportunity to have questions answered, it was Ms. Erickson's belief that many of the neighbors left the meeting unconvinced the Event Center was a good fit for the neighborhood. As a result, Ms. Erickson drafted and circulated a petition opposing the Event Center. Ms. Erickson obtained the signatures of approximately eighty (80) nearby landowners and submitted the petition to the Commission.

The concerns expressed by the neighbors were consistent – noise and traffic. Many believed a commercial business was not compatible with the area, should not be allowed near the residential development and expressed concern that it would devalue their property. After opportunity to voice opposition was provided, the Commission allowed Mr. Kazda and Mr. Marshall to rebut the expressed concerns. Next, the Commission provided time for questions, wherein persons in opposition were allowed to ask questions of the developers and the Commission posed questions to the developers, the representative for the current landowners and to individuals opposed to the project. Finally, the Commission had a lengthy discussion regarding the County's comprehensive plan, the goals of the plan, expected growth in the surrounding area at issue and how the Event Center developers had developed a plan that fit squarely within the goals of the comprehensive plan and the purpose for which conditional use permits are intended.

The meeting ended with the Commission having an open discussion regarding the concerns raised in opposition to the Center and how those concerns could be addressed within the permit. In the end, the Commission voted unanimously to grant the conditional use permit

after imposing an additional condition relative to noise levels.⁸ On November 10, 2008, the Nez Perce County Planning and Zoning Commission approved its Findings of Fact, Conclusion of Law and Decision relative to the conditional use permit for the Tuscan Wedding and Event Center.

On November 24, 2008, Mary Krempasky filed an appeal of the decision with the Nez Perce County Commissioners.⁹ On January 6, 2009, during an administrative hearing of the County Commissioners, it was decided the County Commissioners would not accept jurisdiction to hear the appeal of the Planning and Zoning Board's decision to grant a conditional use permit to the Tuscan Wedding and Event Center conditional use permit.¹⁰ The Commissioner's were reported to have found the record supported a finding that the Planning and Zoning Board made its decision fairly, having decided the matter based on codes and testimony.¹¹

On January 30, 2009, Mary Krempasky filed the above-entitled Petition for Judicial Review. In April 2009, the Clerk's Record and Transcript was filed and on July 9, 2009 the Court heard oral arguments.

STANDARD OF REVIEW

A review of local zoning decisions is governed by the Idaho Administrative Procedures Act. *CNC v. City of Boise*, 137 Idaho 377, 379, 48 P.3d 1266 (2002).

[T]here is a strong presumption of validity of the actions of zoning boards, which includes the application and interpretation of their own zoning ordinances. *Howard*, 128 Idaho at 480, 915 P.2d at 711. This Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. I.C. § 67-5279(1). Rather, this Court defers to the agency's findings of fact unless they are clearly erroneous. *Price*, 131 Idaho at 429, 958 P.2d at 586 (citing *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998)) (citing *South*

⁸ Clerk's Record and Transcript, Bates stamp 0208 through 0209.

⁹ The appeal was also filed by Joan Erickson. However, the appellants were notified that Ms. Erickson lacked jurisdiction to appeal the decision of the Planning and Zoning Commission as she lived outside the required area of impact. Clerk's Record and Transcript, Bates stamp #0246 and #249.

¹⁰ Clerk's Record and Transcript, Bates stamp #0251 through 0253.

¹¹ Clerk's Record and Transcript, Bates stamp # 0253.

Fork Coalition v. Board of Comm'rs of Bonneville County, 117 Idaho 857, 860, 792 P.2d 882, 885 (1990)). "In other words, 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 Board's zoning decision may only be overturned where its findings: (a) violate statutory or constitutional provisions; (b) exceed the agency's statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence in the record; or (e) are arbitrary, capricious, or an abuse of discretion. *Id.* (citing I.C. § 67-5279(3)). The party attacking the Board's decision must first show that the Board erred in a manner specified in Idaho Code § 67-5279(3), and then it must show that its substantial right has been prejudiced. *Id.* (citing *Angstman v. City of Boise*, 128 Idaho 575, 578, 917 P.2d 409, 412 (Cl.App.1996)).

CNC v. City of Boise, 137 Idaho 377, 379, 48 P.3d 1266 (2002).

A court reviewing an agency action under the Administrative Procedures Act must

determine whether the agency perceived the issue in question as discretionary, acted within

the outer limits of its discretion and consistently with the legal standards applicable to the

available choices, and reached its own decision through an exercise of reason. *Haw v. Idaho*

State Board of Medicine, 143 Idaho 51, 54, 137 P.3d 438 (2006).

ANALYSIS

Petitioner Krempasky asserts the Planning and Zoning Commission's decision granting

the Event Center's requested conditional use permit was arbitrary, capricious and an abuse of

discretion. More precisely, Petitioner contends the Commission failed to perceive the decision

as a discretionary one. Petitioner further asserts an unlawful procedural process occurred when

the Commission voted to grant the conditional use permit prior to entering its written Findings of

Fact, Conclusions of Law and Decision. "The party attacking the [Planning and Zoning] Board's

decision must first show that the Board erred in a manner specified in Idaho Code § 67-5279(3),

and then it must show that its substantial right has been prejudiced.” *Friends of Farm to Market v. Valley County*, 137 Idaho 192, 196, 46 P.3d 9 (2002).

At issue in the instant matter is Nez Perce County Ordinance No. 72cc. Following public hearings on June 17, 2008 and July 21, 2008, Ordinance No. 72cc was amended on September 2, 2008 and became effective following publication of the Ordinance as required by law. The Amended Ordinance allows commercial special event centers as a conditional use in all zoning districts within the County, defines the term ‘commercial special events’ and ‘commercial special events center’, and states within the Ordinance the goal of promoting commercial opportunities and activities while controlling the effect of such facilities upon the surrounding neighborhoods.¹²

(A) ABUSE OF DISCRETION CLAIM

The record created by the Nez Perce County Planning and Zoning Commission’s administrative process in this case is extensive and includes a transcript of the public hearing regarding the permit application, along with the Commission’s written Findings of Fact, Conclusion of Law and Decision. When the record is considered as a whole, the Commission’s decision to grant the permit is supported by substantial competent evidence in the record. Prior to the public hearing, the members of the Commission reviewed the application, attachments to the application and the Commission’s staff report. At the public hearing, the Commission took testimony from the developers, the current land owner and individuals opposed to the proposed development. Documentary testimony was also admitted into the Commission record and included letters in support of the proposed development¹³ and a petition in opposition¹⁴.

¹² Clerk’s Record and Transcript, Bates stamp 0079 through 0081.

¹³ Clerk’s Record and Transcript, Bates stamp 0092 through 0102.

¹⁴ Clerk’s Record and Transcript, Bates stamp 0111 through 0117.

The Commission did more than just hear testimony, however. Individuals in attendance were allowed to ask questions of the developers. Members of the Commission also asked questions of the developers, questions that appeared directed at concerns raised by those opposed to the proposed development. Finally, the Commission asked some limited questions of individuals opposed to the development. As the conversations evolved, the developers proposed the noise decibel standard be reduced from 75 decibels to 65 decibels in hopes of alleviating some of the noise concerns expressed by the residents of the area, a condition the Commission appeared to appreciate and chose to incorporate into the permit. Evident in the exchange of questions and conversation is the Commission's understanding that it could deny the permit if it believed the development did not meet the County's comprehensive plan, would violate any statute, ordinance or other restriction, or was simply not conducive to the current land use and anticipated future development.¹⁵

Petitioner, however, directs the Court to statements made by members of the Commission that appear to indicate a belief that the Commission had no choice but to grant the permit. The Court finds the statements open to interpretation, however. It seems evident from comments made by at least one of the Commission members that denying the permit was not an option where the developer had not only met, but had exceeded the requirements of the County's comprehensive plan and where the proposed use was directly in line with the goals of the comprehensive plan. Such a statement, when read in the context of the record as a whole, does not evidence a belief that the Commission lacked discretion in the decision. It does reflect an

¹⁵ While there are a number of indicators in the record that the Commission understood it had the discretion to deny the permit, perhaps most telling is the advice the Commission received from the County's legal counsel. Following significant discussion of how the Event Center developers had met all of the criteria of the comprehensive plan and conditional use permit goals and purposes, attorney Douglass advised the Commission that, given the factual record showing complete criteria compliance, a denial of the permit would establish a "huge basis for appeal". Clerk's Record and Transcript, Bates stamp 0200.

understanding that the County's comprehensive plan was a well-thought out plan that took into

consideration the many and various needs of the County and its citizens and, that when the

restrictions of the comprehensive plan are met by a developer, it would be unfair to move the

target. An equally fair interpretation of the statement is that the Commission does not have the

discretion to change the rules once they are established.

In reviewing the record on petition for judicial review, this Court must begin with a

strong presumption that the Planning and Zoning Commission interpreted the County zoning

ordinances, amendments and comprehensive plan correctly. In addition, the Court is not to

substitute its judgment as to the weight of the evidence and must defer to the Commission's

findings of fact unless clearly erroneous. In the instant matter, the Commission made no

erroneous findings. There is substantial evidence in the record showing the Commission

understood they had the discretion to grant or deny the permit, acted within the outer limits of

that discretion and consistent with the legal standards applicable to the choices and reached its

decision through an exercise of reason.

The Commission noted that the comprehensive plan provides for human habitation and

commercial activity in a manner that restrains urban sprawl, protects human and natural

environments and insures adequate public facilities.¹⁶ The Commission, after hearing the

developer's plans, the plans of the larger landowner, and the concerns of the adjacent

homeowners, and after asking numerous questions directed at the potential negative impacts of

the development and how to mitigate those impacts, found the Event Center fit squarely within

the goals of the comprehensive plan. The Commission further found that the developers had not

only met all the requirements for a conditional use permit, but had exceeded the criteria and were

¹⁶ Findings of Fact, Conclusions of Law and Decision at page 2.

open to any additional conditions or restrictions the Commission believed necessary to mitigate the concerns of the Event Center's neighbors. Petitioner has failed to show the Commission abused its discretion in granting the permit or failed to understand it had discretion to deny the permit. In addition, Petitioner has not met the second prong of her burden, which is to show a substantial right of the Petitioner has been prejudiced by the granting of the permit.

(B) UNLAWFUL PROCEDURES CLAIM

Petitioner contends the Nez Perce County Planning and Zoning Commission's Findings of Fact, Conclusions of Law and Decision fails to describe the applicable ordinance provisions, the standards used in evaluating the permit and the reasons for approval. The record does not support Petitioner's claim.

The written Findings of the Commission specifically indicate the permit was applied for pursuant to Nez Perce County Zoning Ordinance No. 72cc and that all notice requirements were met. The Findings discuss the information presented by the developers and others favoring the proposed Event Center along with information relative to the concerns raised by those opposing the proposed development. The Commission's written Findings state that the criteria and standards used in evaluating the application were Idaho Code § 67-6501 et seq., the Nez Perce Comprehensive Plan and Nez Perce County Ordinance No. 72z. The Findings then list in detail the requirements under the County's comprehensive plan and how each of the criteria has been met by the permit applicant. Finally, the Findings list the conditions that must be met by the permit holders in order to minimize the impact of the Event Center on the surrounding neighborhood.

Petitioner's contention that the above information was not made available prior to the Commission voting at the end of the public hearing is without merit. While clearly more informally produced than in the written Findings, the record supports a finding that the

information was available and was discussed openly by the Commission with those in attendance at the public hearing.

Finally, Petitioner contends that the act of adopting the written Findings of Fact, Conclusions of Law and Decision after the decision was made was an unlawful procedure. Petitioner cites to I.C. § 67-5272 in support of her position. The code section cited by Petitioner addresses venue on petition for judicial review, not procedures applicable to administrative acts. Petitioner has provided no legal basis for her assertion that an agency must enter its findings simultaneously with its decision and may not enter written findings after reaching a decision.

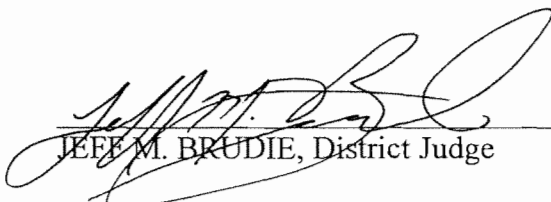
CONCLUSION

A petitioner challenging the action of a planning and zoning board must overcome the strong presumption of validity in a zoning board's application and interpretation of zoning ordinances and the validity of the actions of a planning and zoning board. In the instant case, Petitioner has failed to show the Commission abused its discretion or failed to understand that it had the discretion to deny the application for conditional use permit for the Tuscan Wedding and Event Center. Petitioner has also failed to provide any legal basis for her assertion that the Commission's act of entering written findings after voting on the application was procedurally unlawful.

ORDER

The decision of the Nez Perce Planning and Zoning Commission is hereby AFFIRMED.

Dated this 10 day of August 2009.


JEFF M. BRUDIE, District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing OPINION AND ORDER was:

hand delivered via court basket, or

mailed, postage prepaid, by the undersigned at Lewiston, Idaho, this 10 day of August 2009, to:

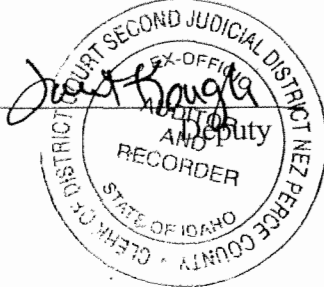
Edwin Litteneker
Lewiston, ID 83501

Nancy Ceccarelli
Lewiston, ID 83501

Theodore Creason
Lewiston, ID 83501

PATTY O. WEEKS, CLERK

By:





Edwin L. Litteneker
 Attorney at Law
 Post Office Box 321
 322 Main Street
 Lewiston, Idaho 83501
 (208) 746-0344
 ISB No. 2297

FILED

2009 SEP 14 AM 9 38

PATTY O. WEEKS
 CLERK OF THE DISTRICT COURT
Patty O. Weeks
 DEPUTY

Attorney for Petitioner/Appellant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

IN THE MATTER OF THE APPROVAL)
 OF A CONDITIONAL USE PERMIT)
 # CUP-2008-3,)
)
)
)
)
 MARY KREMPASKY, Petitioner/Appellant)
)
)
 v.)
)
)
 NEZ PERCE COUNTY, Respondent/Respondent)
 _____)

Case No. 09-00264

NOTICE OF APPEAL

**TO: Respondent, NEZ PERCE COUNTY, Idaho, et al and your attorneys, NANCE
 CECCARELLI.**

NOTICE IS HEREBY GIVEN THAT:

1. The above named Appellant, MARY KREMPASKY appeals against the above named respondent, NEZ PERCE COUNTY, IDAHO to the Idaho Supreme Court from the 2nd Judicial District Court, the Opinion and Order on Petition for Judicial Review entered by Honorable Judge Jeff M. Brudie on August 10, 2009.

- 2 That the party has a right to appeal to the Idaho Supreme Court, and the judgments or
orders described in paragraph 1 above are appealable orders under and pursuant to Rule
11(a)(2) I.A.R.
- 3 A preliminary statement of the issues on appeal which the appellant intends to assert in
the appeal;
- a. The District Court's decision to affirm the decision of the Nez Perce Planning and
Zoning Commission is in err.
 - b. Such other issues that may be asserted by the Appellant.
4. A reporter's transcript of the Oral Argument held on June 26, 2009 is requested.
5. The appellant requests the entirety of the Clerk's record pursuant to Rule 28 I.A.R. be
provided and included in the record on appeal.
6. I certify:
- a) That the Notice of Appeal has been served on the Respondent.
 - b) That the clerk of the district court has been paid the estimated fee for preparation
of the reporter's transcript in connection with the appeal from District Court to the
Idaho Supreme Court.
 - c) That the estimated fee for preparation of the clerk's record has been paid.
 - d) That the appellate filing fee is paid with the filing of this Notice of Appeal.
 - e) That service has been made upon all parties required to be served pursuant to Rule
20 I.A.R.

DATED this 11 day of September, 2009



Edwin L. Litteneker
Attorney for Petitioner/Appellant

I DO HEREBY CERTIFY that a true
And correct copy of the foregoing
Document was:

Mailed by regular first class mail,
And deposited in the United States
Post Office

Sent by facsimile

Sent by Federal Express, overnight
Delivery

Hand delivered

To:

Nance Ceccarelli
Civil Deputy Attorney
P.O. Box 1267
Lewiston, Idaho 83501

On this 11 day of September 2009.



Edwin L. Litteneker

FILED

2009 OCT 2 PM 2 20

Edwin L. Litteneker
Attorney at Law
Post Office Box 321
322 Main Street
Lewiston, Idaho 83501
(208) 746-0344
ISB No. 2297

PATTY O. WEEKS
CLERK OF THE DIST. COURT
Patty O. Weeks
DEPUTY

Attorney for Petitioner/Appellant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

IN THE MATTER OF THE APPROVAL)
OF A CONDITIONAL USE PERMIT)
CUP-2008-3,)
)
)
)
)
MARY KREMPASKY, Petitioner/Appellant)
)
v.)
)
NEZ PERCE COUNTY, Respondent/Respondent)
_____)

Case No. 09-00264

**AMENDED
NOTICE OF APPEAL**

**TO: Respondent, NEZ PERCE COUNTY, Idaho, et al and your attorneys, NANCE
CECCARELLI.**

NOTICE IS HEREBY GIVEN THAT:

1. The above named Appellant, MARY KREMPASKY appeals against the above named respondent, NEZ PERCE COUNTY, IDAHO to the Idaho Supreme Court from the 2nd Judicial District Court, the Opinion and Order on Petition for Judicial Review entered by Honorable Judge Jeff M. Brudie on August 10, 2009.

- 2 That the party has a right to appeal to the Idaho Supreme Court, and the judgments or
orders described in paragraph 1 above are appealable orders under and pursuant to Rule
11(a)(2) I.A.R.
- 3 A preliminary statement of the issues on appeal which the appellant intends to assert in
the appeal;
- a. The District Court's decision to affirm the decision of the Nez Perce Planning and
Zoning Commission is in err.
 - b. Such other issues that may be asserted by the Appellant.
4. A reporter's transcript of the Oral Argument held on July 9, 2009 is requested.
5. The appellant requests the entirety of the Clerk's record pursuant to Rule 28 I.A.R. be
provided and included in the record on appeal.
6. I certify:
- a) That the Notice of Appeal has been served on the Respondent.
 - b) That the clerk of the district court has been paid the estimated fee for preparation
of the reporter's transcript in connection with the appeal from District Court to the
Idaho Supreme Court.
 - c) That the estimated fee for preparation of the clerk's record has been paid.
 - d) That the appellate filing fee is paid with the filing of this Notice of Appeal.
 - e) That service has been made upon all parties required to be served pursuant to Rule
20 I.A.R.

DATED this 1 day of October, 2009.



Edwin L. Litteneker
Attorney for Petitioner/Appellant

I DO HEREBY CERTIFY that a true
And correct copy of the foregoing
Document was:

Mailed by regular first class mail,
And deposited in the United States
Post Office

Sent by facsimile

Sent by Federal Express, overnight
Delivery


Hand delivered

To:

Nance Ceccarelli
Civil Deputy Attorney
P.O. Box 1267
Lewiston, Idaho 83501

Linda Carlton
Certified Court Reporter
425 Warner Ave.
Lewiston, ID 83501

On this 1 day of October 2009.



Edwin L. Litteneker

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

IN THE MATTER OF THE APPROVAL)
OF A CONDITIONAL USE PERMIT)
#CUP-2008-3,)
)
MARY KREMPASKY,)
) SUPREME COURT NO.36943
Petitioner-Appellant,)
vs.)
) CERTIFICATE OF SERVICE
NEZ PERCE COUNTY, IDAHO, ET AL.,)
)
Respondents.)

I, DeAnna P. Grimm, Deputy Clerk of the District Court of the Second Judicial District of the State of Idaho, in and for the County of Nez Perce, do hereby certify that the foregoing Clerk's Record in the above-entitled cause was compiled and bound by me and contains true and correct copies of all pleadings, documents, and papers designated to be included under Rule 28, Idaho Appellate Rules, the Notice of Appeal, any Notice of Cross-Appeal, and additional documents that were requested.

I further certify:

1. That no exhibits were marked for identification or admitted into evidence during the course of this action.
2. That the following will be submitted as an exhibit to this record on appeal:

Clerk's Record filed April 15, 2009

IN WITNESS WHEREOF I have hereunto set my hand and affixed
the seal of said court this 29 day of October 2009.

PATTY O. WEEKS, Clerk

By *Debra R. Humm*
Deputy Clerk

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

IN THE MATTER OF THE APPROVAL)
OF A CONDITIONAL USE PERMIT)
#CUP-2008-3,)
)
MARY KREMPASKY,)
) SUPREME COURT NO.36943
Petitioner-Appellant,)
vs.)
) CERTIFICATE OF SERVICE
NEZ PERCE COUNTY, IDAHO, ET AL.,)
)
Respondents.)

I, DeAnna P. Grimm, Deputy Clerk of the District Court of the Second Judicial District of the State of Idaho, in and for the County of Nez Perce, do hereby certify that copies of the Clerk's Record and Reporter's Transcript were hand-delivered or delivered by Valley Messenger to Edwin L. Litteneker and Nance Ceccarelli, this 4 day of November 2009.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 4 day of November 2009.

PATTY O. WEEKS
CLERK OF THE DISTRICT COURT

By DEANNA P. GRIMM
Deputy Clerk

In the Supreme Court of the State of Idaho

IN THE MATTER OF THE APPROVAL OF)
A CONDITIONAL USE PERMIT #CUP-)
2008-3.)
-----)
MARY KREMPASKY,)
)
Petitioner-Appellant,)
)
v.)
)
NEZ PERCE COUNTY PLANNING AND)
ZONING,)
)
Respondent.)

ORDER GRANTING STIPULATION
TO AUGMENT THE RECORD

Supreme Court Docket No. 36943-2009
Nez Perce County District Court No.
2009-264

A MOTION TO AUGMENT THE RECORD with attachments and STATEMENT OF COUNSEL IN SUPPORT OF MOTION TO AUGMENT PURSUANT TO I.A.R. 30.2 were filed by counsel for Appellant on January 27, 2010. Thereafter, a STIPULATION TO AUGMENT THE RECORD was filed by counsel for the parties on February 5, 2010. Therefore, good cause appearing,

IT HEREBY IS ORDERED that the parties' STIPULATION TO AUGMENT THE RECORD be, and hereby is, GRANTED and the augmentation record shall include the documents listed below, copies of which accompanied Appellant's 1-27-10 Motion to Augment the Record, as EXHIBITS:

1. Exhibit 1: Nez Perce County Ordinance 72z: Zoning Ordinance; and
2. Exhibit 2: Nez Perce County Idaho Comprehensive Plan, December 1998.

DATED this 18th day of February 2010.

For the Supreme Court



Stephen W. Kenyon, Clerk

cc: Counsel of Record