

1-4-2010

Giltner Dairy, LLC. V. Jerome County Clerk's Record v. 1 Dckt. 36528

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LAW CLERK 1 of 2

IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

GILTNER DAIRY

PLAINTIFF and

APPELLANT

VS.

JEROME COUNTY

DEFENDANT and

RESPONDENT

Appealed from the District Court of the FIFTH
Judicial District for the State of Idaho, in and
for JEROME County

Hon. JOHN K BUTLER District Judge

DAVIS VANDERVELDE

Attorney for Appellant

MIKE SEIB

GARY SLETTE

Attorney for Respondent

FILED - COPY

Filed this _____ day of _____, 20____

JAN - 4 2010

Clerk

Deputy

Supreme Court By Court of Appeals
Entered on ATS by _____

36528

IN THE SUPPREME COURT OF THE STATE OF IDAHO

GILTNER DAIRY,)
)
 Plaintiff/Appellant,)
)
 vs.)
)
 JEROME COUNTY,)
)
 Defendants/Respondents,)
)
 _____)

CLERK'S RECORD ON APPEAL

Supreme Court Docket No. 36528-2009

Fifth Judicial District
Jerome County

Honorable John K. Butler
District Judge

Davis F Vandervelde
5700 E Franklin Road
Nampa, ID 83687

Gary D Slette
P.O. Box 1906
Twin Falls, ID 83303

Attorney for Appellant

Attorney for Respondents

TABLE OF CONTENTS

ROA Report dated 7/27/09	1
Petition for Judicial Review filed 12/04/08	4
Amended Petition for Judicial Review filed 01/15/09	10
Notice of Lodging Agency Record and Transcript filed 01/30/09	16
Notice of Filing and Lodging Supplemental Agency Record with the Court filed 02/26/09	18
Court minutes dated 03/02/09	20
Intervenor's Motion to Dismiss filed 03/13/09	21
Notice of Hearing on Intervenor's Motion to Dismiss filed 03/13/09	23
Opposition to Motion to Dismiss and Counter Motion to Stay Proceedings filed 03/30/09	25
Supplemental Authority in Support of Motion to Dismiss filed 04/03/09	35
Motion for Leave to File and Serve Second Amended Petition for Judicial Reviewed filed 04/06/09	46
Motion to Shorten Time for Hearing filed 04/06/09	55
Court minutes dated 04/06/09	58
Order Shortening Time for Hearing filed 04/06/09	59
Memorandum in Support of Motion for Leave to File and Serve Second Amended Petition for Judicial Review filed 04/10/09	61
Memorandum in Opposition to Motion for Leave to File and Serve Second Amended Petition for Judicial Review filed 04/10/09	68
Second Amended Petition for Judicial Review filed 04/13/09	76

Memorandum Decision and Order re: (1) Petitioner’s Motion for Leave to File Second Amended Petition for Judicial Review; Petitioner’s Motion for Stay of Proceedings; and (3) Intervenor’s Motion to Dismiss filed 04/13/09	82
Notice of Appeal filed 05/22/09	96
Clerk’s Certificate of Appeal dated 6/11/02	83
Bond for Transcript dated 01/20/09	101
Bond for Record dated 01/20/09	102
Certificate of Exhibits	103
Certificate of Service	104
Clerk’s Certificate	105

INDEX

Amended Petition for Judicial Review filed 01/15/09.....	10
Bond for Record dated 01/20/09.....	102
Bond for Transcript dated 01/20/09.....	101
Certificate of Exhibits.....	103
Certificate of Service.....	104
Clerk's Certificate of Appeal dated 6/11/02.....	83
Clerk's Certificate.....	105
Court minutes dated 03/02/09.....	20
Court minutes dated 04/06/09.....	58
Intervenor's Motion to Dismiss filed 03/13/09.....	21
Memorandum Decision and Order re: (1) Petitioner's Motion for Leave to File Second Amended Petition for Judicial Review; Petitioner's Motion for Stay of Proceedings; and (3) Intervenor's Motion to Dismiss filed 04/13/09.....	82
Memorandum in Opposition to Motion for Leave to File and Serve Second Amended Petition for Judicial Review filed 04/10/09.....	68
Memorandum in Support of Motion for Leave to File and Serve Second Amended Petition for Judicial Review filed 04/10/09.....	61
Motion for Leave to File and Serve Second Amended Petition for Judicial Reviewed filed 04/06/09.....	46
Motion to Shorten Time for Hearing filed 04/06/09.....	55
Notice of Appeal filed 05/22/09.....	96

Notice of Filing and Lodging Supplemental Agency Record with the Court filed 02/26/09 18

Notice of Hearing on Intervenor’s Motion to Dismiss filed 03/13/09..... 23

Notice of Lodging Agency Record and Transcript filed 01/30/09 16

Opposition to Motion to Dismiss and Counter Motion to Stay Proceedings filed 03/30/09 25

Order Shortening Time for Hearing filed 04/06/09 59

Petition for Judicial Review filed 12/04/08 4

ROA Report dated 7/27/09 1

Second Amended Petition for Judicial Review filed 04/13/09 76

Supplemental Authority in Support of Motion to Dismiss filed 04/03/09 35

Other Claims

Date		Judge
12/4/2008	New Case Filed	John K. Butler
	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: White Peterson Receipt number: 8011334 Dated: 12/5/2008 Amount: \$88.00 (Check) For: Giltner Dairy (plaintiff)	John K. Butler
12/5/2008	Petition for judicial review.	John K. Butler
12/8/2008	Procedural Order Governing Judicial Review of Agency Action by District Court	John K. Butler
	Certificate Of Mailing	John K. Butler
12/12/2008	Stipulation to allow 93 Golf Ranch, LLC to intervene.	John K. Butler
	Order allowing 93 Golf Ranch llc to intervene.	John K. Butler
	Amended procedural order governing judicial review of agency action by district court.	John K. Butler
12/18/2008	Clerk's motion for extension of time to lodge record transcript and order.	John K. Butler
1/15/2009	Amended Petition for judicial review.	John K. Butler
1/20/2009	Bond Posted for Transcript (Receipt 9000644 Dated 1/20/2009 for 500.00)	John K. Butler
	Bond Posted for Transcript (Receipt 9000645 Dated 1/20/2009 for 250.00)	John K. Butler
1/23/2009	2nd clerk's motion for extension of time to lodge record transcript and order.	John K. Butler
1/30/2009	Notice of lodging agency record and transcript.	John K. Butler
2/11/2009	Objection to Clerk's Record	John K. Butler
2/12/2009	Order re: objection to record.	John K. Butler
	intervenor's response to objection to clerk's record.	John K. Butler
2/17/2009	Bond Converted (Transaction number 9000108 dated 2/17/2009 amount 152.75)	John K. Butler
	Bond Converted (Transaction number 9000109 dated 2/17/2009 amount 43.80)	John K. Butler
	Respondent's motion to reconsider.	John K. Butler
	Respondent's memorandum in support of its motion to reconsider.	John K. Butler
	Hearing Scheduled (Motion 03/02/2009 01:30 PM) mtn to reconsider	John K. Butler
	Notice Of Hearing	John K. Butler
2/23/2009	Petitioner's Memorandum in Opposition to Motion for Reconsideration (via fax)	John K. Butler
2/24/2009	Request to obtain approval to video/audio record or broadcast or photograph a court proceeding--KMVT	John K. Butler
2/26/2009	Notice of filing and lodging supplemental agency record with the court---by Michelle Emerson.	John K. Butler
3/2/2009	Court Minutes Hearing type: Motion to Reconsider Hearing date: 3/2/2009 Time: 1:30 pm Court reporter: Candace Childers	John K. Butler
	Hearing result for Motion held on 03/02/2009 01:30 PM: District Court Hearing Held Court Reporter: Candace Childers Number of Transcript Pages for this hearing estimated: mtn to reconsider	John K. Butler

Other Claims

Date		Judge
3/13/2009	Intervenor's motion to dismiss.	John K. Butler
	Notice Of Hearing on intervenor's motion to dismiss.	John K. Butler
	Hearing Scheduled (Motion to Dismiss 04/06/2009 01:30 PM)	John K. Butler
3/30/2009	Opposition To motion to dismiss and counter motion to stay proceedings.	John K. Butler
4/3/2009	Supplemental authority in support of motion to dismiss.	John K. Butler
	Supplemental Authority in Support of Motion to Dismiss	John K. Butler
4/6/2009	Motion to shorten time for hearing.	John K. Butler
	Motion for leave to file and serve second amended petition for judicial review.	John K. Butler
	Court Minutes Hearing type: Motion to Dismiss Hearing date: 4/6/2009 Time: 1:30 pm Court reporter: Candace Childers	John K. Butler
	Hearing result for Motion to Dismiss held on 04/06/2009 01:30 PM: District Court Hearing Held Court Reporter:Candace Childers Number of Transcript Pages for this hearing estimated:	John K. Butler
	Order shortening time for hearing.	John K. Butler
4/10/2009	Memorandum in support of motion for leave to file and serve 2nd amended petition for judicial review.	John K. Butler
	Memorandum in opposition to motion for leave to file and serve second amended petition for judicial review.	John K. Butler
4/13/2009	Memorandum decision and order re: (1) petitioner's motion for leave to file second amended petition for judicial review; petitioner's motion for stay of proceedings; and(3) intervenor's motion to dismiss.	John K. Butler
	Petitioner's Exhibit A--second amended petition for judicial review.	John K. Butler
4/15/2009	Bond Converted (Transaction number 9000235 dated 4/15/2009 amount 89.70)	John K. Butler
	Bond Converted (Transaction number 9000236 dated 4/15/2009 amount 213.75)	John K. Butler
	Bond Converted (Transaction number 9000237 dated 4/15/2009 amount 121.00)	John K. Butler
	Transcript Bond Exonerated (Amount 129.00)	John K. Butler
5/1/2009	Motion for relief from judgment awarding attys fees to Golf Ranch 93.	John K. Butler
	Affidavit of Davis F Vandervelde in support of motion for relief from judgment awarding attys fees to Golf Ranch 93.	John K. Butler
	Memorandum in support of petitioner's motion for relief from judgment awarding attys fees to Golf Ranch 93.	John K. Butler
	Notice Of Hearing	John K. Butler
	Hearing Scheduled (Motion 05/18/2009 01:30 PM) mtn for relief of attys fees	John K. Butler
5/8/2009	Response to motion for relief from judgment awarding attys fees to Golf Ranch 93.	John K. Butler
5/13/2009	Request to obtain approval to video record, broadcast or photograph a court proceeding--KMVT	John K. Butler

Other Claims

Date		Judge
5/14/2009	Notice of withdrawal of petitioner's motion for relief from judgment awarding attys' fees to Golf Ranch 93	John K. Butler
	Petitioner's request to vacate hearing.	John K. Butler
	Affidavit of Davis F Vandervelde in support of withdrawal of petitioner's motion for relief from judgment awarding attys' fees to Golf Ranch 93 and request to vacate hearing.	John K. Butler
5/15/2009	Reply memorandum in support of petitioner's motion for relief from judgment awarding attys' fees to Golf Ranch 93.	John K. Butler
5/18/2009	Hearing result for Motion held on 05/18/2009 01:30 PM: Hearing Vacated mtn for relief of attys fees	John K. Butler
5/22/2009	Appealed To The Supreme Court	John K. Butler
	Notice of appeal.	John K. Butler
	money and cert. notice mailed to SC	John K. Butler
	Filing: T - Civil Appeals To The Supreme Court (\$86.00 for the Supreme Court to be receipted via Misc. Payments. The \$15.00 County District Court fee to be inserted here.) Paid by: White, Terrence R (attorney for Giltner Dairy) Receipt number: 9005848 Dated: 6/3/2009 Amount: \$15.00 (Check) For: Giltner Dairy (plaintiff)	John K. Butler
	Bond Posted for Transcript (Receipt 9005849 Dated 6/3/2009 for 100.00)	John K. Butler

Terrence R. White
 Davis F. VanderVelde
 WHITE, PETERSON, GIGRAY, ROSSMAN,
 NYE & NICHOLS, P.A.
 5700 East Franklin Road, Suite 200
 Nampa, Idaho 83687-7901
 Telephone: (208) 466-9272
 Facsimile: (208) 466-4405
 ISB No.: 1351, 7314
 trw@whitepeterson.com
 dvandervelde@whitepeterson.com

2008 OCT 4 PM 1 58
 Michelle Emerson
 J. Brandeher

Attorneys for Petitioner

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

GILTNER DAIRY, LLC, an Idaho limited liability company,	)	CASE NO. <u>CV 2008-1269</u>
)	
Petitioner,)	
	)	PETITION FOR JUDICIAL REVIEW
vs.)	
	)	Fee Category: R-2
JEROME COUNTY, a political subdivision of the State of Idaho,	)	Fee: \$88.00
)	
Respondent.)	

COMES NOW, Giltner Dairy, LLC ("Petitioner"), by and through its counsel of record, the law firm of WHITE PETERSON GIGRAY ROSSMAN NYE & NICHOLS, P.A., and submits this Petition for Judicial Review as follows:

I.

COURSE OF PROCEEDINGS

2. Petitioner owns and operates a dairy located at 450 East 100 South, Jerome, Idaho 83338.

3. Respondent is a governmental agency located in Jerome County, State of Idaho.

4. On November 10, 2008, Respondent issued a *Memorandum Decision* approving an application by 93 Golf Ranch, LLC, requesting a rezone which would result in amendments to the Jerome County Planning and Zoning Map. The affect of the amendment is to change various property from A-1 to A-2 agricultural zoning.

5. Attached as *Exhibit A* is a true and correct copy of the above mentioned *Memorandum Decision*.

6. This *Memorandum Decision* constitutes final agency action under Idaho Code § 67-5270 *et seq.*

7. This Petition for Judicial Review is being made pursuant to Idaho Code §§ 67-5273, 67-6521, and Idaho Rule of Civil Procedure 84.

II.

PETITION FOR REVIEW

1. Petitioner owns and operates a dairy which is directly adjacent to the subject property. The Petitioner's operation, known as the Giltner Dairy, is approved for approximately 5,880 animal units and is fully operational. Several of the Giltner Dairy, LLC members reside on the dairy. The Petitioner is affected and aggrieved by the Jerome County Board of Commissioners' ("Commissioners") *Memorandum Decision*.

2. The value of the Petitioner's property; the quality of life for Petitioner's members; and the Petitioner's ability to operate a dairy is negatively affected and aggrieved by the Commissioners' decision for the following, non-inclusive, list of reasons:

- a. The amendment changing the property from A-1 Agricultural to A-2 Agricultural does not conform to Idaho Code § 67-6508 and the previously adopted Jerome County Comprehensive Plan Map.
- b. The subject property will be neither compatible nor harmonious with surrounding zones and existing uses under the existing Comprehensive Plan.
- c. The Comprehensive Plan relied upon when entering the *Memorandum Decision* changing the zoning was never validly adopted and approved by the Commission.
- d. The change in zoning sets an inappropriate and incompatible precedence for future uses that are incompatible with the existing uses in the area.
- e. The change in zoning changes the essential character of neighboring uses and will impede Petitioner's ability to continue to operate its dairy in violation of Petitioner's private property rights.
- f. The change in zoning leaves insufficient buffer area between uses which are incompatible.

3. The 1997 Special Use Permit issued for 93 Golf Ranch, LLC on the subject property does not include housing. The amendment to the zoning is inconsistent with the Special Use Permit issued to 93 Golf Ranch.

4. Respondent's actions are in excess of the statutory authority of the Jerome County Commissioners, were made upon unlawful procedure, and are arbitrary, capricious, and an abuse of discretion.

III.

HEARING AND RECORD

1. The following hearings and recordings were held and made in this matter and a transcript of each hearing is necessary for judicial review and is requested by Petitioner and Petitioner's counsel has made arrangements to pay the estimated transcription fees:

- a. *August 25, 1997* - Hearings on the application for conditional use permit, as well as the permit granted to 93 Golf Ranch, LLC.
- b. *November 28, 2005* -- Hearing by Planning and Zoning - two tapes: Tape 1 = 93 Golf Ranch C Plan; Tape 2 = 93 Golf Ranch P & Z Discussion;
- c. *December 27, 2005* -- Planning and Zoning, Rezone from A1 to A2;
- d. *January 20, 2006* -- Committee unknown -- Discussion on Rezoning;
- e. *January 30, 2006* -- Discussion by Commissioners;
- f. *February 27, 2006* -- Hearing, 93 Golf Ranch;
- g. *July 28, 2008* -- Transcript and records of hearing on request of 93 Golf Ranch, LLC for a Zoning Map Amendment; and
- h. *August 25, 2008* -- Transcript and records of hearing on request of 93 Golf Ranch, LLC for a Zoning Map Amendment.

2. The following documents are necessary for judicial review and are requested by

Petitioner:

- a. Committee Recommendation on Zoning Map Amendment;

- b. Memorandum Decision of November 10, 2008; and
- c. The entire appellate record in this matter, denominated as Idaho Supreme Court Docket No. 34020 (appeal from the District Court of the Fifth Judicial District of Idaho, in and for the County of Jerome, Jerome County Case No. CV-2006-319).

IV.

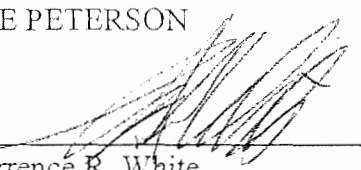
PRAYER

WHEREFORE, the Petitioner requests this Court to issue an order requiring the following:

- 1. This Court reverse Respondent's *Memorandum Decision* granting the Amendment Zoning;
- 2. That this Court remand the *Memorandum Decision* with instruction to deny 93 Golf Ranch, LLC's Application for a change in zoning;
- 3. That Petitioner be awarded reasonable attorneys fees and costs incurred in connection with this action; and
- 4. Petitioner be awarded such other and further relief as the Court deems just and appropriate.

DATED this 3rd day of December, 2008.

WHITE PETERSON

By: 
Terrence R. White

Attorneys for Giltner Dairy, LLC

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 3rd day of December, 2008, a true and correct copy of the above and foregoing instrument was served upon the following by the method indicated below:

Board of Commissioners	<input checked="" type="checkbox"/>	U.S. Mail
Jerome County Clerk	<input type="checkbox"/>	Overnight Mail
300 N. Lincoln, Room 300	<input type="checkbox"/>	Hand Delivery
Jerome, ID 83338	<input type="checkbox"/>	Facsimile
Jerome County Prosecutor's Office	<input checked="" type="checkbox"/>	U.S. Mail
233 W. Main	<input type="checkbox"/>	Overnight Mail
Jerome, ID 83338	<input type="checkbox"/>	Hand Delivery
	<input type="checkbox"/>	Facsimile: 208-644-2639


for WHITE PETERSON

W:\Work\G\Giltner Dairy, LLC 21980 000 93 Golf Ranch\2nd Judicial Review 2008\PLEADINGS\Petition 12-02-08 lh.doc

2008 JUN 15 PM 12 50

Terrence R. White
Davis F. VanderVelde
WHITE, PETERSON, GIGRAY, ROSSMAN,
NYE & NICHOLS, P.A.
5700 East Franklin Road, Suite 200
Nampa, Idaho 83687-7901
Telephone: (208) 466-9272
Facsimile: (208) 466-4405
ISB No.: 1351, 7314
trw@whitepeterson.com
dvandervelde@whitepeterson.com

BY *D. VanderVelde*
DEPUTY CLERK

Attorneys for Petitioner

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

GILTNER DAIRY, LLC, an Idaho limited liability company,)	
	)	CASE NO. CV-08-1269
)	
Petitioner,)	
	)	AMENDED PETITION FOR
vs.	)	JUDICIAL REVIEW
)	
JEROME COUNTY, a political subdivision of the State of Idaho,)	
)	
Respondent.)	

COMES NOW, Giltner Dairy, LLC ("Petitioner"), by and through its counsel of record, the law firm of WHITE PETERSON GIGRAY ROSSMAN NYE & NICHOLS, P.A., and submits this Petition for Judicial Review as follows:

I.

COURSE OF PROCEEDINGS

1. Petitioner owns and operates a dairy located at 450 East 100 South, Jerome, Idaho 83338.
2. Respondent is a governmental agency located in Jerome County, State of Idaho.
3. On November 10, 2008, Respondent issued a *Memorandum Decision* approving an application by 93 Golf Ranch, LLC, requesting a rezone which would result in amendments to the Jerome County Planning and Zoning Map. The affect of the amendment is to change various property from A-1 to A-2 agricultural zoning.
4. Attached as *Exhibit A* is a true and correct copy of the above mentioned *Memorandum Decision*.
5. This *Memorandum Decision* constitutes final agency action under Idaho Code § 67-5270 *et seq.*
6. This Petition for Judicial Review is being made pursuant to Idaho Code §§ 67-5273, 67-6521, and Idaho Rule of Civil Procedure 84.

II.

PETITION FOR REVIEW

1. Petitioner owns and operates a dairy which is directly adjacent to the subject property. The Petitioner's operation, known as the Giltner Dairy, is approved for approximately 5,880 animal units and is fully operational. Several of the Giltner Dairy, LLC members reside on the dairy. The Petitioner is affected and aggrieved by the Jerome County Board of Commissioners' ("Commissioners") *Memorandum Decision*.

2. The value of the Petitioner's property; the quality of life for Petitioner's members; and the Petitioner's ability to operate a dairy is negatively affected and aggrieved by the Commissioners' decision for the following, non-inclusive, list of reasons:

- a. The amendment changing the property from A-1 Agricultural to A-2 Agricultural does not conform to Idaho Code § 67-6508 and the previously adopted Jerome County Comprehensive Plan Map.
- b. The subject property will be neither compatible nor harmonious with surrounding zones and existing uses under the existing Comprehensive Plan.
- c. The Comprehensive Plan relied upon when entering the *Memorandum Decision* changing the zoning was never validly adopted and approved by the Commission.
- d. The change in zoning sets an inappropriate and incompatible precedence for future uses that are incompatible with the existing uses in the area.
- e. The change in zoning changes the essential character of neighboring uses and will impede Petitioners ability to continue to operate its dairy in violation of Petitioner's private property rights.
- f. The change in zoning leaves insufficient buffer area between uses which are incompatible.

3. The 1997 Special Use Permit issued for 93 Golf Ranch, LLC on the subject property does not include housing. The amendment to the zoning is inconsistent with the Special Use Permit issued to 93 Golf Ranch.

4. Respondent's actions are in excess of the statutory authority of the Jerome County Commissioners, were made upon unlawful procedure, and are arbitrary, capricious, and an abuse of discretion.

III.

HEARING AND RECORD

1. The following hearings and recordings were held and made in this matter and a transcript of each hearing is necessary for judicial review and is requested by Petitioner and Petitioner's counsel has made arrangements to pay the estimated transcription fees:

- a. *August 25, 1997* - Hearings on the application for conditional use permit, as well as the permit granted to 93 Golf Ranch, LLC.
- b. *November 28, 2005* -- Hearing by Planning and Zoning - two tapes: Tape 1 = 93 Golf Ranch C Plan; Tape 2 = 93 Golf Ranch P & Z Discussion;
- c. *December 27, 2005* - Planning and Zoning, Rezone from A1 to A2;
- d. *January 20, 2006* - Committee unknown - Discussion on Rezoning;
- e. *January 30, 2006* - Discussion by Commissioners;
- f. *February 27, 2006* - Hearing, 93 Golf Ranch;
- g. *July 28, 2008* - Transcript and records of hearing on request of 93 Golf Ranch, LLC for a Zoning Map Amendment; and
- h. *August 25, 2008* - Transcript and records of hearing on request of 93 Golf Ranch, LLC for a Zoning Map Amendment.
- i. *December 15, 2008* - **Discussion by Commissioners regarding rezoning and passage of ordinance regarding same.**

2. The following documents are necessary for judicial review and are requested by
Petitioner:

- a. Committee Recommendation on Zoning Map Amendment;
- b. Memorandum Decision of November 10, 2008; and
- c. The entire appellate record in this matter, denominated as Idaho Supreme Court Docket No. 34020 (appeal from the District Court of the Fifth Judicial District of Idaho, in and for the County of Jerome, Jerome County Case No. CV-2006-319).
- d. **Request for takings analysis to County Prosecutor by Petitioner; and**
- e. **Denial of Request for Takings Analysis from County Prosecutor to Petitioner.**

IV.

PRAYER

WHEREFORE, the Petitioner requests this Court to issue an order requiring the following:

1. This Court reverse Respondent's *Memorandum Decision* granting the Amendment Zoning;
2. That this Court remand the *Memorandum Decision* with instruction to deny 93 Golf Ranch, LLC's Application for a change in zoning;
3. That Petitioner be awarded reasonable attorneys fees and costs incurred in connection with this action; and

4. Petitioner be awarded such other and further relief as the Court deems just and appropriate.

DATED this 12 day of January, 2009.

WHITE PETERSON

By: 

Terrence R. White

Attorneys for Giltner Dairy, LLC

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 12th day of January, 2009, a true and correct copy of the above and foregoing instrument was served upon the following by the method indicated below:

Board of Commissioners
Jerome County Clerk
300 N. Lincoln, Room 300
Jerome, ID 83338

U.S. Mail
 Overnight Mail
 Hand Delivery
 Facsimile

Jerome County Prosecutor's Office
233 W. Main
Jerome, ID 83338

U.S. Mail
 Overnight Mail
 Hand Delivery
 Facsimile: 208-644-2639



for WHITE PETERSON

W:\Work\G\Giltner Dairy, LLC 21980.000 93 Golf Ranch\2nd Judicial Review 2008\PLEADINGS\Petition Amended.01-09-09 lh.doc

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

DISTRICT COURT
FIFTH JUDICIAL DISTRICT
JEROME COUNTY, IDAHO
JAN 30 AM 11 03
BY *[Signature]*
DEPUTY CLERK

GILTNER DAIRY, LLC. an Idaho)
Limited Liability Company,)
)
Petitioner,)
-----)
)
JEROME COUNTY, a political)
Subdivision of the State of Idaho,)
)
Respondent.)
-----)
)
93 GOLF RANCH, LLC.,)
)
Intervenor.)
-----)

Case No. CV2008-1269

NOTICE OF LODGING
AGENCY RECORD AND
TRANSCRIPT

TO: Davis F. VanderVelde, attorney for petitioner; Mike Seib, Jerome
County Deputy Prosecutor, attorney for respondent; and Gary D. Slette,
attorney for intervenor

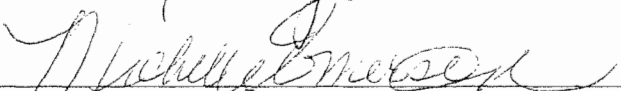
PLEASE TAKE NOTICE that on the 30 day of January, 2009, the
agency record of the proceedings in this action was prepared pursuant to I.R.C.P. 84(f).

YOU ARE FURTHER NOTIFIED that pursuant to I.R.C.P. Rule 84(j), you have
fourteen (14) days in which to pick up your copy of the record and transcripts(s) and lodge any
objections thereto. If no objection is lodged within the prescribed time the record shall be
deemed settled and filed with the District Court.

Pursuant to Rule 84(j), where there are multiple parties, they shall determine by
agreement the manner and time of use of the record by each party, or filing such agreement, such

determination shall be made by the court upon application by any party.

DATED This 30 day of January, 2009.

By 
MICHELLE EMERSON
Clerk of the District Court
Clerk of the Board of County Commissioners

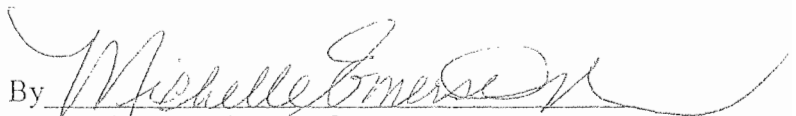
CERTIFICATE OF MAILING/DELIVERY

I, undersigned, do hereby certify that on the 30 day of January, 2009, a true and correct copy of the foregoing Notice of Lodging Agency Record and Transcript was delivered in the manner indicated to the following:

Davis F. VanderVelde
Attorney at Law
5700 East Franklin Road, Suite 200
Nampa, ID 83687
(mailed, postage paid)

Gary Slette
Attorney at Law
P. O. Box 1906
Twin Falls, ID 83303-1906
(mailed, postage paid)

Michael J. Seib
Jerome County Prosecutor
233 West Main Street
Jerome, ID 83338
(hand-delivered)

By 
MICHELLE EMERSON
Clerk of the District Court
Clerk of the Board of County Commissioners

2009 FEB 26 PM 4 08

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF JEROME

BY *Michelle Emerson*
DEPUTY CLERK

GILTNER DAIRY, LLC., an Idaho
Limited Liability Company,

Petitioner,

vs.

JEROME COUNTY, a political
Subdivision of the State of Idaho,

Respondent.

93 GOLF RANCH, LLC.,

Intervenor.

Case No. CV2008-1269

NOTICE OF FILING AND
LODGING SUPPLEMENTAL
AGENCY RECORD WITH
THE COURT

TO: The above-named parties and their attorneys:

YOU ARE HEREBY NOTIFIED PURSUANT TO I.R.C.P. 84(k) that the Supplemental Agency Record in the above-named case was filed and lodged with the District Court on the 26 day of February, 2009.

By *Michelle Emerson*
MICHELLE EMERSON
Clerk of the Board of County Commissioners
Clerk of the District Court, Jerome County, Idaho




CERTIFICATE OF MAILING/DELIVERY

I, the undersigned, do hereby certify that on the 26 day of February, 2009, a true and correct copy of the foregoing Notice of Filing and Lodging Supplemental Agency Record with the District Court was delivered in the manner indicated to the following parties:

Davis F. VanderVelde
Attorney at Law
5700 East Franklin Road, Suite 200
Nampa, ID 83687
Attorney for Petitioner
(mailed, postage paid)

Mike Seib
Deputy Prosecutor
Jerome County Judicial Annex
Jerome, ID 83338
Attorney for Respondent
(hand-delivered)

Gary D. Slette
Attorney at Law
P. O. Box 1906
Twin Falls, ID 83303-1906
Attorney for Intervenor
(mailed, postage paid)

By 
MICHELLE EMERSON
Clerk of the Board of County Commissioners
Clerk of the District Court, Jerome County, Idaho



Date: 3/2/2009
Time: 01:51 PM
Page 1 of 1

Fifth Judicial District Court - Jerome County

User: TRACI

Minutes Report

Case: CV-2008-0001269

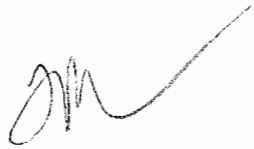
Giltner Dairy, etal. vs. Jerome County

Selected Items

Hearing type:	Motion to Reconsider	Minutes date:	03/02/2009
Assigned judge:	John K. Butler	Start time:	01:37 PM
Court reporter:	Candace Childers	End time:	01:51 PM
Minutes clerk:	Traci Brandebourg	Audio tape number:	


Parties: 93 Golf Ranch, LLC; Slette, Gary
Giltner Dairy; Vanderveldt, David
Jerome County; Seib Mike

Tape Counter: 137 This being the time and place set for a motion to reconsider, court convenes.
Tape Counter: 137 Court identifies counsels for the record. Court reviews file herein. Court notes that there has been a supplemental agency record.
Tape Counter: 139 Mr. Seib addresses the court. Commissioners held hearing last week. Reviews issues being moot. State to stand on memorandum. Court inquires of Mr. Seib. Mr. Seib responds.
Tape Counter: 144 Mr. Vanderveldt responds. Addresses the court regarding Rule 84. Moves to augment record under Rule 5256.
Tape Counter: 146 Mr. Slette addresses the court. Court inquires of Mr. Slette. Mr. Slette responds. Court is the final arbitor.
Tape Counter: 149 Mr. Vanderveldt addresses the court.
Tape Counter: 149 Court denies counties motion for reconsideration. Commissioners responsibility to settle the record.
Tape Counter: 150 Mr. Slette addresses the court.
Tape Counter: 151 Court in recess.
Attest.



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Gary D. Slette
ROBERTSON & SLETTE, PLLC
P.O. Box 1906
Twin Falls, Idaho 83303-1906
Telephone: (208) 933-0700
Facsimile: (208) 933-0701
ISB #3198
frm\gds\93 Golf Ranch\mtn to dismiss

DISTRICT COURT
FIFTH JUDICIAL DISTRICT
JEROME COUNTY, IDAHO
2009 MAR 13 PM 3 32
BY: 
FBI

IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

GILTNER DAIRY, LLC, an Idaho)
Limited Liability Company,)
)
Petitioner,)
)
v.)
)
JEROME COUNTY, a political subdivision of)
the State of Idaho,)
)
Respondent.)
)
)
93 GOLF RANCH, L.L.C.,)
)
Intervenor.)
)

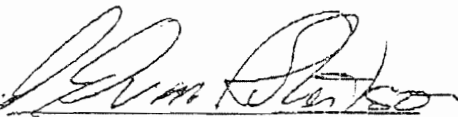
Case No. CV-08-1269

INTERVENOR'S MOTION
TO DISMISS

COMES NOW the Intervenor, 93 GOLF RANCH, L.L.C., by and through the undersigned, and moves this Court for an order dismissing this case, with prejudice, for the reason that no permit authorizing development in accordance with Idaho Code §67-6521 has been issued, and therefore a judicial review of this matter is unavailable and improper.

DATED this 13th day of March, 2009.

ROBERTSON & SLETTE, PLLC

BY: 
GARY D. SLETTE

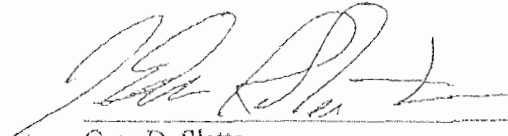
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CERTIFICATE OF SERVICE

The undersigned certifies that on the 13 day of March, 2009, he caused a true and correct copy of the foregoing instrument, to be served upon the following persons in the following manner:

Jerome County Prosecutor's Office	<input type="checkbox"/>	Hand Deliver
Michael Seib	<input type="checkbox"/>	U.S. Mail
233 W. Main	<input type="checkbox"/>	Overnight Courier
Jerome, ID 83338	<input checked="" type="checkbox"/>	Facsimile Transmission (208) 644-2639

Terrence R. White	<input type="checkbox"/>	Hand Deliver
Davis F. VanderVelde	<input type="checkbox"/>	U.S. Mail
WHITE PETERSON PA	<input type="checkbox"/>	Overnight Courier
5700 E. Franklin Rd. Ste. 200	<input checked="" type="checkbox"/>	Facsimile Transmission (208) 466-4405
Nampa, ID 83687-7901		


for Gary D. Slette

2009 APR 13 PM 3 32

[Handwritten Signature]
BY _____

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Gary D. Slette
ROBERTSON & SLETTE, PLLC
P.O. Box 1906
Twin Falls, Idaho 83303-1906
Telephone: (208) 933-0700
Facsimile: (208) 933-0701
ISB #3198
lrm\gds\93 Golf Ranch\dismiss_NOH

IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

GILTNER DAIRY, LLC, an Idaho)
Limited Liability Company,)
)
Petitioner,)
)
v.)
)
JEROME COUNTY, a political subdivision of)
the State of Idaho,)
)
Respondent.)
_____)
93 GOLF RANCH, L.L.C.,)
)
Intervenor.)
_____)

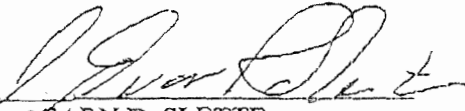
Case No. CV-08-1269
NOTICE OF HEARING
ON INTERVENOR'S MOTION
TO DISMISS

TO: The above-named Petitioner and Respondent, and their respective attorneys of record:
YOU WILL PLEASE TAKE NOTICE That the undersigned will bring his Motion to
Dismiss before the Honorable John K. Butler in the District Courtroom of the Jerome County
Courthouse, Jerome, Idaho, on the 6th day of April, 2009, at 1:30 p.m., or as soon thereafter as
counsel can be heard.

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DATED this 13th day of March, 2009.

ROBERTSON & SLETTE, PLLC

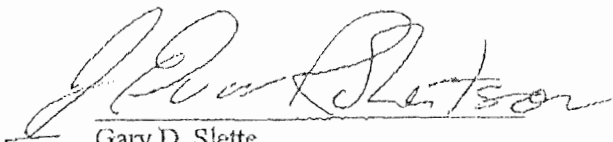
BY: 
for GARY D. SLETTE

CERTIFICATE OF SERVICE

The undersigned certifies that on the 13th day of March, 2009, he caused a true and correct copy of the foregoing instrument, to be served upon the following persons in the following manner:

Jerome County Prosecutor's Office	<input type="checkbox"/>	Hand Deliver
Michael Seib	<input type="checkbox"/>	U.S. Mail
233 W. Main	<input type="checkbox"/>	Overnight Courier
Jerome, ID 83338	<input checked="" type="checkbox"/>	Facsimile Transmission (208) 644-2639

Terrence R. White	<input type="checkbox"/>	Hand Deliver
Davis P. VanderVelde	<input type="checkbox"/>	U.S. Mail
WHITE PETERSON PA	<input type="checkbox"/>	Overnight Courier
5700 E. Franklin Rd. Ste. 200	<input checked="" type="checkbox"/>	Facsimile Transmission (208) 466-4405
Nampa, ID 83687-7901		


for Gary D. Slette

Terrence R. White
 Davis F. VanderVelde
 WHITE, PETERSON, GIGRAY, ROSSMAN,
 NYE & NICHOLS, P.A.
 5700 East Franklin Road, Suite 200
 Nampa, Idaho 83687-7901
 Telephone: (208) 466-9272
 Facsimile: (208) 466-4405
 ISB Nos.: 1351, 7314
 trw@whitepeterson.com
 dvandervelde@whitepeterson.com

RECEIVED
 FILED
 APR 2 2009
 MICHELLE CANTRELL
 J. Brian

Attorneys for Petitioner

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

GILTNER DAIRY, LLC, an Idaho limited liability company,)	CASE NO. CV-08-1269 OPPOSITION TO MOTION TO DISMISS AND COUNTER MOTION TO STAY PROCEEDINGS
Petitioner,)	
vs.)	
JEROME COUNTY, a political subdivision of the State of Idaho,)	
Respondent.)	
93 GOLF RANCH, LLC,)	
Intervenor.)	

COMES NOW, Giltner Dairy, LLC ("Petitioner"), by and through its counsel of record, the law firm of WHITE PETERSON GIGRAY ROSSMAN NYE & NICHOLS, P.A., and submits this Opposition to Intervenor's Motion to Dismiss:

RELEVANT STATEMENT OF FACTS

This matter concerns judicial review of a spot-zoning decision of the Jerome County Commissioners to change land adjacent to that owned by Petitioners from A-1 to A-2. The process was implemented through application by Golf Ranch 93 and the resulting change in zoning imposed an immediate impact on the Giltner property, by imposing 1,000 foot set back limitations, as well as preventing future ability to expand. As set forth below, this matter is ripe for judicial review.

I. JUDICIAL REVIEW IS APPROPRIATE AS THE REQUIREMENTS OF IDAHO CODE § 67-6521 HAVE BEEN MET.

The Idaho Supreme Court in its recent decisions in Highlands Development Corp. v. City of Boise, 145 Idaho 958, 188 P.3d 900 (2008) and Giltner Dairy LLC v. Jerome County, 145 Idaho 630, 181 P.3d 1238 (2008) has required that the local government action be one involving a permit, which affirmatively impacted the party requesting review. In this instance, the very nature of the Golf Ranch application and request for spot zoning, and the action taken by the Board on that application, along with the other facts of this case distinguish this matter from the Highlands and Giltner decisions. As set forth below, this matter meets the two requirements of Idaho Code § 67-6521: 1) that a permit for development be at issue; and 2) that review be requested by an affected party.

A. Golf Ranch 93's application for approval of a spot rezone falls within the plain meaning of the term "permit" allowing judicial review of the Board's decision.

The nature of the current rezone is within the plain meaning of the term "permit" as used in the LLUPA. Permit is given four meanings in Black's Law Dictionary, one as a noun and three as a verb. Black's Law Dictionary 1176 (8th Ed. 2004). The noun form of "permit" is defined as "a certificate evidencing permission; a license." Id. The definition of the verb form includes "1. To consent to formally [to agree to an event or action]... 2. To give opportunity for [to allow an event or action]... 3. To allow or admit of [referring to permission by law]." Id. The definitions provided by a

non-legal dictionary are essentially the same. See Merriam-Webster's Collegiate Dictionary 866 (10th Ed. 1999).

Both the Giltner and Highlands decisions indicate that Idaho Code § 67-6521 only allows for judicial review of "permit" actions under the LLUPA. See Highlands, 145 Idaho 958, 188 P.3d 900 (stating "Idaho Code § 67-6519 applies to applications for a permit required or authorized under Chapter 65 of Title 67, Idaho Code") (quoting Giltner, 145 Idaho 630, 181 P.3d 1238, (2008)). Unfortunately, the term "permit" is not defined within in the LLUPA. This thereby requires that the word "permit" be interpreted under its plain meaning.

The term "permit," as used in the LLUPA and discussed in the Highlands and Giltner decisions has dual meanings. The term is discussed as both a noun and verb. The permits "required or authorized" under the LLUPA are both official licenses to carry out a given action (the noun form), as well as formal consent to change in condition (one of the verb forms). Approval of the current spot zone request meets both the noun and verb definition of "permit."

Within the documentation submitted by Golf Ranch to the Board of Commissioners, the application itself is characterized as a "permit" thereby meeting the noun form of the term:

The undersigned hereby applies to amend the Jerome County Zoning Ordinance Map. All representations are, to the best knowledge of the undersigned, fully accurate. This application is submitted on the express understanding that any inaccuracy in the information submitted in the application may be grounds for rejection of the permit.

(*Record on Review*, p.2)¹ (*emphasis added*). This language affirmatively shows that Jerome County considers such an application a request for a "permit." Thus, by Jerome County's own classification the application made by Golf Ranch 93 was for a permit for a spot zone change from A-1 to A-2. As to the verb form, permission to perform the requested action and a subsequent change in zoning

¹ A true and correct copy of Page 2 of the *Record on Review* is attached hereto as Exhibit A.

resulting in a 1,000 foot set-back on Giltner land meets and satisfies the verb form of "permit" as used in the LLUPA.

Additionally, the Idaho Supreme Court has repeatedly characterized the request to change zoning as an application for a "zoning permit." See Highlands, 145 Idaho at 963, 188 P.3d at 905 (citing Ralph Naylor Farms, LLC v. Latah County, 144 Idaho 806, 808, 172 P.2d 1081, 1083 (2007); In the Matter of the Approval of the Zoning of Idaho Frozen Foods, 109 Idaho 1072, 1073-74, 712 P.2d 1180, 1181-82 (1986)). The current situation does not concern a change to a Comprehensive Plan, or initial zoning action upon annexation, as in Giltner and Highlands. Instead this concerns an affirmative request for change of existing zoning within the County of Jerome and the same should be characterized as a zoning "permit" as has been previously done in other instances by the Idaho Supreme Court.

Consequently, the actions undertaken by the Board in approving Golf Ranch 93's request for rezone constitute a permit for the purposes of the LLUPA, allowing judicial review of the Board action granting them under Idaho Code § 67-6521 according to the rule announced in Giltner and Highlands.

B. The Giltners are affected parties within the meaning of Idaho Code § 67-6521.

In addition to requiring a "permit" judicial review may only be brought by an affected party. In the Giltner decision, Idaho Supreme Court held that the appellant lacked standing to challenge actions of the Jerome County Commissioners because it failed to meet the definition of "affected person" as provided by Idaho case law. See Id. 145 Idaho 630, 633, 181 P.3d 1238, 1241, 1242.

Specifically, Idaho Code § 67-6521 grants the right of judicial review of decisions made under the LLUPA to "affected persons" who were not parties to the requested action. "Affected person" is defined as "one having an interest in real property which may be adversely affected by the issuance or denial of a permit authorizing the development." Evans v. Teton County, 139 Idaho 71,

75, 73 P.3d 84, 88 (2003) (*quoting* Idaho Code Ann. § 67-6521(a)) (*emphasis omitted*). Thus, in order to gain review of an action under the LLUPA, the property owner must show that they could be affected by the action due to land proximity, and that the questioned action has actually been authorized.

In Evans, the court noted that proximity is a very important factor in determining the adverse affects of a permitting decision, finding that ownership of land within 300 feet of a planned unit development was sufficient to render the owners of that property affected persons. Id. at 75-76, 73 P.3d at 88-89. The court also did not foreclose the possibility that landowners up to seventeen miles away could be affected parties. Id. The court has also found that parties over three miles away from a development in question may be affected parties. See Davisco Foods Int. v. Gooding County, 141 Idaho 784, 786, 118 P.3d 116, 118 (2005).

In Giltner, the main issue that the court focused on as a basis for precluding affected party status was the nature of the action taken. The court noted that “[b]ecause an amendment to the comprehensive plan map does not authorize development, Giltner Dairy is not an affected person under the statute.” Id. 145 Idaho at 633, 181 P.3d at 1241. Similarly, the issue was also raised in Highlands, with the court finding that annexation findings, and a zoning classification made in connection with annexation, did not authorize development, removing the right to judicial review. See Id.

The nature of the action by the Board in this case distinguishes this matter from the prior Giltner and Highlands decisions. Here, rather than a simple Comp Plan Map change, or the establishment of initial zoning of annexed land, the current spot rezone from A-1 to A-2 had immediate and severe impact on the Giltner Dairy. Upon passage by the Board, the spot zone imposed a 1,000 foot set back provision on the Giltner Dairy. This immediately, and substantially limited the uses to which the Giltners can use the dairy’s land. With the spot-zone in place, no

livestock may be placed within this boundary. Thus, as property owners who share a border with the subject Golf Ranch 93 property, the Giltners are "affected persons," and have a right to judicial review of this action under Idaho Code § 67-6521.

II. THE QUASI-JUDICIAL ACTION OF THE BOARD SUBJECTS THIS MATTER TO JUDICIAL REVIEW.

The premise that certain zoning decisions are subject to judicial review is a well settled principle of Idaho law. Because a board of county commissioners is "treated as an administrative agency for the purposes of judicial review," judicial review of zoning decisions is subject to the Idaho Administrative Procedures Act. Urrutia v. Blaine County, 134 Idaho 353, 357, 2 P.3d 738, 742 (2000). Zoning decisions, which are quasi-judicial in nature are subject to direct judicial review, those that are legislative are not. Burt v. City of Idaho Falls, 105 Idaho 65, 66, 665 P.2d 1075, 1076 (1983). The difference between legislative and quasi-judicial zoning action is determined by the result; legislative activity produces a rule, which is applicable to an open class of properties, while quasi-judicial activity impacts specific individuals or interests. *Id.* at 67, 665 P.2d at 1077. Once a final quasi-judicial decision has been issued under the LLUPA, that decision is subject to judicial review. *See Id.*

The cases which have subjected zoning decisions under the LLUPA to judicial review are numerous. *See* Stevenson v. Blaine County, 134 Idaho 756, 9 P.3d 1222 (2000) (indicating that judicial review of a plat approval would have been allowed had a claim been timely brought); Rural Kootenai Org., Inc. v. Board of Comm'rs. of Kootenai County, 133 Idaho 833, 993 P.2d 596 (1999); Price v. Payette County Bd. of Comm'rs., 131 Idaho 426, 958 P.2d 583 (1998); Soloaga v. Bannock County, 119 Idaho 678, 809 P.2d 1157 (1991) ("in examining zoning determinations by a county, our review is limited solely to the Idaho Administrative Procedures Act provisions"); Curtis v. City of Ketchum, 111 Idaho 27, 720 P.2d 210 (Idaho Ct. App. 1986); City of Burley v. McCaslin Lumber Co., 107 Idaho 906, 693 P.2d 1108 (Idaho Ct. App. 1984) ("we note that the proper procedure would

have been for the city to file a petition for judicial review under I.C. § 67-6521(d)"). These decisions show the long-standing rule of Idaho law that LLUPA zoning decisions, whether or not in permit form, are subject to judicial review under the Idaho Administrative Procedures Act.

In this case, the Giltners are entitled to judicial review. The decision of the Board to grant Golf Ranch 93's application did not produce a rule that applied to an open class of properties. Instead, the decision constituted improper spot zoning, designating the Subject Property as the only A-2 property in a sea of A-1 land. Because the decision only applied to one parcel, it is a quasi-judicial decision under Burt. Furthermore, the decision of the Board was final. There was no other action that could have been taken by the Giltners to appeal the decision, and, under the myriad cases cited above, the Giltners are entitled to judicial review conducted according to the Idaho Administrative Procedures Act.

III. THE IDAHO LEGISLATURE INTENDED TO ALLOW JUDICIAL REVIEW OF ZONING ACTIONS IN SITUATIONS SUCH AS THE CURRENT MATTER.

Legislative intent to allow review of zoning decision is expressed in the LLUPA. As noted by Justice J. Jones in his dissent to Highlands, Idaho Code § 67-6535 demonstrates legislative intent to allow judicial review of zoning decisions made under the LLUPA. *See Highlands*, 145 Idaho at 963, 188 P.3d 900 (J. Jones, J., *dissenting*). Specifically, Idaho Code § 67-6535(c) states in part:

that *decisions made pursuant to [the LLUPA]* should be founded upon sound reason and practical application of recognized principles of law. [and] *In reviewing such decisions*, the courts of the state are directed"

Id. (*emphasis added*). Thus, this statement contextualized by Idaho Code § 67-6535(a) and (b), clearly indicates that decisions made under LLUPA are intended for the potential of judicial review.

A similar legislative intent to ensure that judicial review is freely available is found in the legislative history of the bill that gave rise to the current form of the Idaho Administrative Procedures Act. One of the purposes of the bill was to clarify the procedures that must be followed to obtain judicial review. Statement of Purpose, H.B. 712, 51st Leg., 2d Reg. Sess. (Idaho 1992). This is

expanded upon in the minutes to a Senate hearing on the bill, which noted that "the bill opens up the administrative process by ensuring that judicial review is available." Minutes, Senate Judiciary and Rules Committee, Mar. 30, 1992. Id. An intent for judicial review of LLUPA decisions is also evidenced in the statement of purpose to the LLUPA, which notes that it seeks to provide "due process in local land use decisions." Statement of Purpose, S.B. 1094, 43d Leg., 1st Reg. Sess. (Idaho 1975).

The sentiments of the legislature in the above legislation are echoed in the Idaho Constitution. Art. I, § 18 of the Idaho Constitution provides:

[c]ourts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property or character, and right and justice shall be administered without sale, denial, delay, or prejudice.

Id. (*emphasis added*). This indicates a fundamental policy of Idaho law that the courts of the state should be open to parties who have suffered injury to property. (*emphasis added*). Furthermore, the magnitude of the injury suffered is immaterial to this provision, as this Court has noted that that the right to court assistance is not infringed simply because the injury suffered may be small. Ward v. Kidd, 87 Idaho 216, 227, 392 P.2d 183, 190 (1964). This provision of the constitution "cannot be abridged or modified by any legislative or judicial act." State v. Montroy, 37 Idaho 684, 692, 217 P. 611, 614 (1923). Even though the provision has been interpreted by this Court not to create substantive rights, it does admonish the courts of the state to secure citizens the rights and remedies afforded by the legislature. Hawley v. Green, 117 Idaho 498, 501, 788 P.2d 1321, 1324 (1990). Idaho Code § 67-6535 expresses legislative intent to allow review of all application decisions under the LLUPA, including the one in the case at bar. The Motion to Dismiss should therefore be denied.

COUNTER-MOTION TO STAY DECISION ON MOTION TO DISMISS

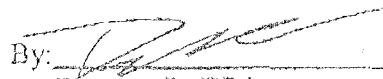
Currently pending before the Idaho Supreme Court is the case of Vickers v. Canyon County Board of Commissioners, Supreme Court Docket No. 34809. The case involves the right of judicial

review where there is a conditional rezone and development plan in place under I.C. § 67-6521. One of the primary considerations on appeal is the determination of what constitutes a "permit" under the LLUPA.

The Vickers case was argued before the Idaho Supreme Court on Friday, January 16, 2009. A decision is expected from the Supreme Court at any time. Due to the similarities of issues in the present matter, it is appropriate that this matter be stayed by this Honorable Court pending release of the Vickers decision, as it precisely addresses the issues presented by Idaho Code § 67-6521 and should resolve any uncertainty with respect to the ability for judicial review under the same. Granting such a stay will not result in prejudice to the parties and will promote judicial economy as an appeal may be potentially avoided.

DATED this 30TH day of March, 2009.

WHITE PETERSON

By: 
Terrence R. White
Attorneys for Giltner Dairy, LLC

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 30TH day of March, 2009, a true and correct copy of the above and foregoing instrument was served upon the following by the method indicated below:

- | | | | |
|--|---|--|---|
| Board of Commissioners
JEROME COUNTY CLERK
300 N. Lincoln, Room 300
Jerome, ID 83338 | <input checked="" type="checkbox"/> U.S. Mail
<input type="checkbox"/> Overnight Mail
<input type="checkbox"/> Hand Delivery
<input type="checkbox"/> Fax | Michael J. Seib
JEROME COUNTY
PROSECUTOR
233 West Main Street
Jerome, ID 83338 | <input checked="" type="checkbox"/> U.S. Mail
<input type="checkbox"/> Overnight Mail
<input type="checkbox"/> Hand Delivery
<input checked="" type="checkbox"/> Fax: 208-644-2639 |
| Gary D. Slette
ROBERTSON & SLETTE
134 Third Avenue East
P.O. Box 1906
Twin Falls, ID 83303 | <input checked="" type="checkbox"/> U.S. Mail
<input type="checkbox"/> Overnight Mail
<input type="checkbox"/> Hand Delivery
<input checked="" type="checkbox"/> Fax: 208-933-0701 | | |


for WHITE PETERSON

W:\Work\G\Giltner Dairy, LLC 21980.000 93 Golf Ranch\2nd Judicial Review 2008\PLEADINGS\Dismiss. Opp Brief 03-30-09 lh.doc

ZONING ORDINANCE MAP AMENDMENT APPLICATION

Jerome County Zoning Ordinance Map Amendment Hearing will not be advertised until all of the items have been submitted to and accepted by the Planning and Zoning Administrator.

Application must be received in the office of the Planning and Zoning Administrator 30 days prior to the next scheduled meeting date of the Planning and Zoning Commission (unless otherwise directed by the Planning and Zoning Administrator).

The undersigned hereby applies to amend the Jerome County Zoning Ordinance Map. All representations are, to the best knowledge of the undersigned, fully accurate. This application is submitted on the express understanding that any inaccuracy in the information submitted in the application may be grounds for rejection of the permit. The applicant shall bear all cost of publication notice in addition to the NON-REFUNDABLE application fee of \$640.00. The application is made in accordance with Chapter 21 of the Jerome County Zoning Ordinance.

A. NAME, COMPLETE ADDRESS AND TELEPHONE # OF APPLICANT:

Name: 93 GOLF RANCH, LLC Phone# (208)324-9693
Address: 406 East 200 South Jerome, ID 83338

B. LEGAL DESCRIPTION & COMMONLY KNOWN ADDRESS OF PROPERTY MUST BE WRITTEN HERE. A REAL PROPERTY SUMMARY SHEET AND PARCEL MAP MUST BE ATTACHED: (Summary Sheet & Parcel Map may be obtained from the Assessors office 300 N Lincoln, Room 205)

(See attached summary sheets)

C. PRESENT LAND USE:

Golf course / Residences / Abandoned CAFO
Commercial Business (Elks Lodge)

D. WHAT IS THE CURRENT ZONING OF THE LAND?

A-1 A-2 CG IL IH PR IMP AR CO

E. WHAT ZONE DO YOU WISH TO CHANGE THE LAND TO?

A-1 A-2 CG IL IH PR IMP AR CO

JEROME COUNTY PLANNING AND ZONING 300 N LINCOLN ROOM 307 * JEROME IDAHO 83338 * (208) 324-9262 * FACSIMILE (208) 324-9263

Issued 11/09/2005



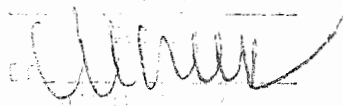
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Exhibit: A

Exhibit A

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Gary D. Slette
ROBERTSON & SLETTE, PLLC
P.O. Box 1906
Twin Falls, Idaho 83303-1906
Telephone: (208) 933-0700
Facsimile: (208) 933-0701
ISB #3198
H:\mvgds\93 Golf Ranch\dismiss_supp autho

DISTRICT COURT
FIFTH JUDICIAL DISTRICT
JEROME COUNTY, IDAHO
2009 APR 3 PM 8 35


IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

GILTNER DAIRY, LLC, an Idaho Limited Liability Company,	)	Case No. CV-08-1269
)	
Petitioner,	)	<u>SUPPLEMENTAL</u>
	)	<u>AUTHORITY IN SUPPORT</u>
	)	<u>OF MOTION TO DISMISS</u>
v.)	
)	
JEROME COUNTY, a political subdivision of the State of Idaho,)	
)	
Respondent.)	
<hr/>		
93 GOLF RANCH, L.L.C.,)	
)	
Intervenor.)	
<hr/>		

COMES NOW the Intervenor, 93 GOLF RANCH, L.L.C., by and through the undersigned attorney of record, and hereby provides supplemental authority regarding its Motion to Dismiss scheduled to be heard by this court on April 6, 2009, at 1:30 p.m. A copy of the Idaho Supreme Court case entitled *Black Labrador Investing, LLC v. Kuna City Council*

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entered April 2, 2009, is attached hereto as Exhibit "A", and by this reference incorporated herein.

DATED this 2 day of April, 2009.

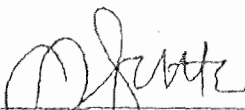
ROBERTSON & SLETTE, PLLC

BY: 
GARY D. SLETTE

CERTIFICATE OF SERVICE

The undersigned certifies that on the 2 day of April, 2009, he caused a true and correct copy of the foregoing instrument, to be served upon the following persons in the following manner:

- | | | |
|-----------------------------------|-----|--|
| Jerome County Prosecutor's Office | [] | Hand Deliver |
| Michael Seib | [] | U.S. Mail |
| 233 W. Main | [] | Overnight Courier |
| Jerome, ID 83338 | [x] | Facsimile Transmission
(208) 644-2639 |
| Terrence R. White | [] | Hand Deliver |
| Davis F. VanderVelde | [] | U.S. Mail |
| WHITE PETERSON PA | [] | Overnight Courier |
| 5700 E. Franklin Rd. Ste. 200 | [x] | Facsimile Transmission
(208) 466-4405 |
| Nampa, ID 83687-7901 | | |


Gary B. Slette

IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 34513

BLACK LABRADOR INVESTING, LLC,)	
)	
Petitioner-Respondent,	)	Boise, June 2008 Term
)	
v.	)	2009 Opinion No. 42
)	
KUNA CITY COUNCIL and the CITY OF	)	Filed: April 2, 2009
KUNA, IDAHO, a political subdivision of the)	
State of Idaho,	)	Stephen Kenyon, Clerk
)	
<u> Respondents-Appellants.</u>)	

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, Ada County. Honorable D. Duff McKee, District Judge.

The decision of the district court is vacated and the case is remanded with directions to dismiss the petition for judicial review.

Grove Legal Services, Nampa, for appellants. Randall Grove argued.

Real Estate Law Group, Eagle, for respondent. Eric Clark argued.

HORTON, Justice

This appeal arises from a petition for judicial review from a city council's denial of an application for annexation. The Kuna City Council (the Council) denied an application for annexation by Respondent Black Labrador Investing, LLC (Black Labrador). Appellant City of Kuna (the City) appeals the district court's decision reversing and remanding the case to the Council for further proceedings. We hold that no statute authorizes judicial review in the instant case. Accordingly, we vacate the district court's order and remand to the district court for dismissal of the petition for judicial review.

I. FACTUAL AND PROCEDURAL BACKGROUND

Black Labrador owns a 1.79-acre lot adjacent to the City in Ada County. Black Labrador initially planned to subdivide the property into two separate .89-acre lots and build a single-family home on each lot. Black Labrador sought permission from the City to annex and subdivide the property. Although the property had access to City water service, sewer lines were

located about a mile away. At the time of Black Labrador's application, the parties anticipated that City sewer service would be available to the property in about two years.

In lieu of connecting the two homes to the City's sewer service, Black Labrador planned to use an existing septic system and install an additional nitrate reducing septic system. Black Labrador also sought to enter into a development agreement with the City whereby Black Labrador would fit each home with "dry lines" to connect to the City sewer system once that service was available. The homeowners would then abandon the septic systems after connecting to City sewer.

The City Planning and Zoning Commission found that the annexation and lot split complied with the City Code, the City Comprehensive Plan, and I.C. § 50-222. On October 24, 2006, after a public hearing, the Planning and Zoning Commission recommended that the Council approve the annexation. On November 22, 2006, Black Labrador amended the development proposal to subdivide and develop the property into three lots of approximately .65 acre each. Black Labrador planned to install an additional nitrate reducing septic system to accommodate the third home. Black Labrador did not submit the amended development plan to the Planning and Zoning Commission for comment and recommendation.

The Council scheduled Black Labrador's annexation application for consideration on November 21, 2006. The Planning and Zoning Commission, however, asked that the Council table the matter until the December 5, 2006 meeting. During the November 21, 2006 meeting, Diane Sanders, the Planning and Zoning Director, and the Council discussed two proposed annexations that were similar to Black Labrador's application. Sanders indicated that the owners of properties near Meadow View and Ash streets, where City water service was available but City sewer service was not, had asked to install septic tanks on half-acre lots that would subsequently be annexed into the City. The property owners would install "dry lines" in the subdivisions for use when sewer service became available. Sanders asked the Council for its position regarding septic tanks on property the City would subsequently annex. The Council indicated that it did not want new developments installing septic tanks for use within City limits.

On December 1, 2006, the Central District Health Department (Health Department) sent the Council an opinion letter. The Health Department indicated that it was possible to put a septic system on a half-acre lot without a water well. Additionally, the Health Department indicated that a subdivision near Black Labrador's property conducted a nutrient pathogen study

a number of years ago under criteria that was more lenient than the standards in effect at the time of the instant controversy. That study resulted in a requirement for a minimum lot size of one acre due to the level of nitrates in the septic effluent. The Health District does not require a nutrient pathogen study unless a subdivision will discharge more than 600 gallons of effluent per day. Black Labrador's subdivision would not meet this threshold.

At the December 5, 2006 Council meeting, the Council indicated that it was concerned with the level of nitrates and phosphates Black Labrador's septic tanks would discharge. Steve Rule, a distributor of the AdvanTex septic systems Black Labrador hoped to install, addressed the Council at the meeting. Rule indicated that the AdvanTex septic systems could reduce nitrate discharge to acceptable levels. However, Rule indicated the system could not reduce the level of phosphates discharged from the septic systems.

The Council also indicated that the City was attempting to build a \$30 million wastewater treatment facility in order to reduce its wastewater nitrate and phosphate footprints. The Council was wary of approving Black Labrador's application while also asking its citizens connected to the sewer system to pay for a treatment plant that would reduce waste levels below that of the AdvanTex septic systems. The Council was also wary of the fact that Black Labrador would use an existing septic tank on the property that would not reduce nitrates or phosphates. Based on this discussion, the Council voted unanimously to deny Black Labrador's proposed annexation.

The Council subsequently released its findings of fact and conclusions of law denying the application. The Council found that annexation without connection to the City sewer system was not in the public interest pursuant to Kuna City Code (KCC) 6-4-2-H. On December 7, 2006, Black Labrador filed a petition for judicial review asking the district court to set aside the decision of the Council and issue an order approving the annexation and lot split. On July 10, 2007, the district court issued its written decision reversing the Council's denial and remanding the case to the Council for further consideration. The district court ordered the Council to provide Black Labrador with a new hearing on its application, reconsider the application, and issue written findings of fact and conclusions of law based upon the record. The City timely appealed to this Court.

II. STANDARD OF REVIEW

In an appeal from a district court's decision where the district court was acting in its appellate capacity under the Idaho Administrative Procedure Act (APA), this Court reviews the

agency record independently of the district court's decision. *Castenada v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). This Court will defer to the agency's findings of fact unless those findings are clearly erroneous. *Id.* When supported by evidence in the record, the agency's factual determinations are binding on the reviewing court even when there is conflicting evidence before the agency. *Id.*

III. ANALYSIS

In order to obtain judicial review of the City's decision regarding annexation, there must be a statute granting the right of judicial review. *Highlands Dev. Corp. v. City of Boise*, 145 Idaho 958, 960-61, 188 P.3d 900, 902-03 (2008) (citing *Gibson v. Ada County Sheriff's Dep't.*, 139 Idaho 5, 8, 72 P.3d 845, 848 (2003)). Black Labrador argues that the APA, KCC, and the Local Land Use Planning Act (LLUPA) authorize judicial review of the City's denial of its annexation application. We disagree.

A. There is no statutory right of judicial review of the City's denial of Black Labrador's application for annexation under the APA.

The APA generally does not authorize judicial review of decisions made by counties or cities. *Highlands*, 145 Idaho at 960, 188 P.3d at 902; *Petersen v. Franklin County*, 130 Idaho 176, 182, 938 P.2d 1214, 1220 (1997). The judicial review standards found within the APA only apply to agency actions. *Gibson*, 139 Idaho at 7, 72 P.3d at 847. "Counties and city governments are considered local governing bodies rather than agencies for purposes of the [APA]." *Giltner Dairy, LLC v. Jerome County*, 145 Idaho 630, 632, 181 P.3d 1238, 1240 (2008) (quoting *Gibson*, 139 Idaho at 7, 72 P.3d at 847); *see also Idaho Historic Preservation Council, Inc. v. City Council of City of Boise*, 134 Idaho 651, 653, 8 P.3d 646, 648 (2000) (stating "[t]he language of the [APA] indicates that it is intended to govern the judicial review of decisions made by state administrative agencies, and not local governing bodies." (emphasis in original)).

Historically, this Court has characterized annexation decisions as legislative decisions by cities and therefore not subject to judicial review. *See Crane Creek Country Club v. City of Boise*, 121 Idaho 485, 487, 826 P.2d 446, 448 (1990) (holding that annexation is a legislative act of city government accomplished by the enactment of an ordinance and therefore not subject to writ of prohibition); *Burt v. City of Idaho Falls*, 105 Idaho 65, 68, 665 P.2d 1075, 1078 (1983).

Idaho Rule of Civil Procedure 84(a)(1) provides, in pertinent part, that "[a]ctions of state agencies or officers or actions of a local government, its officers or its units are not subject to

judicial review unless expressly authorized by statute." Thus, we must determine whether there is express statutory authorization for a party to obtain judicial review of a city's decision to deny a request for annexation.

1. Idaho Code § 50-222 does not authorize judicial review of the denial of Black Labrador's application for annexation.

The legislature has specifically authorized judicial review under the APA of a city council's annexation decision under certain circumstances. I.C. § 50-222(6). Idaho Code § 50-222 divides annexations into three categories: category A, B, and C.¹ Category A annexations are defined as follows:

Category A: Annexations wherein all private landowners raise no objection to annexation, or annexations of any residential enclaved lands of less [than] one hundred (100) privately-owned parcels, irrespective of surface area, which are surrounded on all sides by land within a city or which are bounded on all sides by lands within a city and by lands for which owner approval must be given pursuant to subsection (5)(b)(v) of this section, or which are bounded on all sides by lands within a city and by the boundary of the city's area of city impact.

I.C. § 50-222(3)(a) (emphasis added).² Category B annexations involve lands that contain less than one hundred separate private ownerships where not all landowners consent to annexation, or lands that contain more than one hundred separate private ownerships where landowners owning more than fifty percent of the area of the lands consent to annexation, or lands that are subject to a development moratorium or a water or sewer connection restriction imposed by state or local health or environmental agencies. I.C. § 50-222(3)(b). Category C annexations involve lands that contain more than one hundred separate private ownerships where landowners owning more than fifty percent of the area of the lands have not consented to annexation. I.C. § 50-222(3)(c).

Idaho Code § 50-222(6) authorizes judicial review under the APA of a city council's decision to annex lands in category B and C annexations only. Idaho Code § 50-222(6) provides in relevant part:

The decision of a city council to annex and zone lands as a category B or category C annexation shall be subject to judicial review in accordance with the

¹ The legislature made minor changes to these categories during the 2008 legislative session. 2008 S.L. ch. 118, § 1, p. 327. The changes reflect technical changes to provide for better organization of the statute and to eliminate implied consent annexations after July 1, 2008. Statement of Purpose, 2008 S.L. ch. 118, § 1.

² The version of I.C. § 50-222(3)(a) in effect at the time of the filing of this case contained a typographical error, and the word "that" was included in the place of the word "than."

procedures provided in chapter 52, title 67, Idaho Code, and pursuant to the standards set forth in section 67-5279, Idaho Code.

I.C. § 50-222(6) (emphasis added). Idaho Code § 50-222(6) also contains a broad grant of judicial review that applies to all annexations authorized by a city council: "All cases in which there may arise a question of the validity of any annexation under this section shall be advanced as a matter of immediate public interest and concern, and shall be heard by the district court at the earliest practicable time." I.C. § 50-222(6).

If the City had annexed Black Labrador's property, the action would have been a category A annexation as Black Labrador, the only private landowner involved, did not raise an objection to annexation. However, I.C. § 50-222(6) does not authorize judicial review of a category A annexation under the APA. The structure of I.C. § 50-222(6) clearly reflects that the right of judicial review is dependent upon an affirmative decision to annex property; the legislature did not provide for judicial review when a city has decided not to annex property.

Based upon its interpretation of the legislative intent behind I.C. § 50-222, Black Labrador argues that I.C. § 50-222 permits judicial review in cases involving a landowner that has initiated an annexation application as opposed to a city. We do not find it necessary to address Black Labrador's interpretation of the legislative intent behind I.C. § 50-222. Our inquiry begins and ends with the plain language of the statute. When this Court interprets a statute, it begins with the literal words of the statute, giving those words their plain, usual, and ordinary meaning. *McLean v. Maverik Country Stores, Inc.*, 142 Idaho 810, 813, 135 P.3d 756, 759 (2006). Additionally, this court must construe the statute as a whole. *Id.* The plain language of I.C. § 50-222 does not distinguish between annexations initiated by a city or a landowner. Therefore, it is improper for this Court to read this distinction into the statute.

Black Labrador also argues that the last sentence of I.C. § 50-222(6) authorizes judicial review of an annexation decision when there is a dispute concerning the annexation. That sentence provides: "All cases in which there may arise a question of the validity of any annexation under this section shall be advanced as a matter of immediate public interest and concern, and shall be heard by the district court at the earliest practicable time." I.C. § 50-222(6). However, judicial review under that sentence requires an affirmative decision by a city to annex property. The instant case does not involve an affirmative decision by the City to annex property. Therefore, we conclude that I.C. § 50-222(6) does not expressly authorize judicial review in the instant case.

2. The Kuna City Code does not create a right of judicial review of Black Labrador's application for annexation.

Black Labrador argues that KCC 5-1A-7 authorizes judicial review in accordance with I.R.C.P. 84(a)(1). Kuna City Code 5-1A-7, subsection E provides in relevant part: "The council shall provide the applicant written findings of fact and conclusions of law in accord with Idaho Code sections 67-6519 and 67-6535 stating the reasons for the decision." Idaho Code § 67-6519, in turn, provides in relevant part: "An applicant denied a permit or aggrieved by a decision may within twenty-eight (28) days after all remedies have been exhausted under local ordinance seek judicial review under the procedures provided by [the APA]."

Black Labrador's implicit assertion that a city ordinance can authorize judicial review is incorrect. This Court decided whether a county ordinance may authorize judicial review pursuant to the APA in *Gibson v. Ada County Sheriff's Department*. In *Gibson*, we determined the answer to this question depended on whether the county was empowered to enact a law providing for judicial review under the Idaho State Constitution. 139 Idaho at 8, 72 P.3d at 848.

We determined that a county's power to enact such a law was outside the scope of local police regulations delegated to counties under Article XII, § 2 of the Idaho State Constitution. Consequently, the county ordinance providing judicial review under the APA conflicted with the general laws of this State. *Id.* Article XII, § 2 of the Idaho State Constitution provides: "Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws." Because Article XII, § 2 applies to both cities and counties, our reasoning in *Gibson* applies to the instant case. Consequently, to the extent that the Kuna City Code may be interpreted as purporting to authorize judicial review under the APA, it conflicts with the general laws of this State, as did the county ordinance in *Gibson*. Accordingly, we conclude that KCC 5-1A-7 is not a basis for judicial review of the City's annexation decision.

3. LLUPA does not authorize judicial review of the City's denial of Black Labrador's application for annexation.

Black Labrador argues that the City's decision denying annexation did not satisfy the requirements of the Local Land Use Planning Act, I.C. § 67-6501 *et seq.* Specifically, Black Labrador asserts that the City's decision was inconsistent with the requirements of I.C. § 67-6535, which provides in relevant part:

(a) The approval or denial of any application provided for in this chapter shall be based upon standards and criteria which shall be set forth in the comprehensive plan, zoning ordinance or other appropriate ordinance or regulation of the city or county.

(b) The approval or denial of any application provided for in this chapter shall be in writing and accompanied by a reasoned statement that explains the criteria and standards considered relevant, states the relevant contested facts relied upon, and explains the rationale for the decision based on the applicable provisions of the comprehensive plan, relevant ordinance and statutory provisions, pertinent constitutional principles and factual information contained in the record.

Black Labrador argues that its application for annexation complied with the City's comprehensive plan, and all zoning ordinances, and therefore it was an abuse of discretion for the Council to deny the application. Additionally, Black Labrador argues that the City did not provide a reasoned statement explaining the rationale for the decision based on the applicable provisions of the comprehensive plan, relevant ordinances and statutory provisions, pertinent constitutional principles, and facts contained in the record.

Before we can address the merits of Black Labrador's claim, we must first consider whether LLUPA authorizes judicial review in this case. LLUPA authorizes judicial review in cases where a person has applied for and been denied a permit that is required or authorized under LLUPA. *Highlands*, 145 Idaho at 961, 188 P.3d at 903; I.C. § 67-6519. LLUPA specifically mentions special use permits, I.C. § 67-6512; subdivision permits, I.C. § 67-6513; planned unit development permits, I.C. § 67-6515; variance permits, I.C. § 67-6516; and building permits, I.C. § 67-6517. *Giltner Dairy*, 145 Idaho at 633, 181 P.3d at 1241. LLUPA also authorizes judicial review in cases where a person's interest in real property may be adversely affected by the issuance or denial of a permit authorizing development. I.C. § 67-6521. LLUPA does not mention any permit that relates to the annexation of land by a city. Black Labrador does not argue that the City denied it any permit required or authorized under LLUPA. Accordingly, we conclude that LLUPA does not authorize judicial review in the instant case.

B. Black Labrador is not entitled to an award of attorney fees incurred on appeal.

Black Labrador seeks an award of attorney fees on appeal pursuant to I.C. § 12-117. Since Black Labrador has not prevailed in this appeal, it is not entitled to attorney fees under I.C.

§ 12-117. *Neighbors for a Healthy Gold Fork v. Valley County*, 145 Idaho 121, 138, 176 P.3d 126, 143 (2007).

IV. CONCLUSION

We hold that no statute authorizes judicial review in the instant case. We vacate the district court's order and remand the matter to the district court with directions to dismiss the petition for judicial review.

Chief Justice EISMANN and Justices BURDICK, J. JONES and W. JONES CONCUR.

DISTRICT COURT
FIFTH JUDICIAL DISTRICT
JEROME COUNTY, IDAHO

2009 APR 6 PM 12 45

[Signature]
DEPUTY CLERK

Terrence R. White
Davis F. VanderVelde
WHITE, PETERSON, GIGRAY, ROSSMAN,
NYE & NICHOLS, P.A.
5700 East Franklin Road, Suite 200
Nampa, Idaho 83687-7901
Telephone: (208) 466-9272
Facsimile: (208) 466-4405
ISB No.: 1351, 7314
trw@whitepeterson.com
dvandervelde@whitepeterson.com

Attorneys for Petitioner

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

_____)	
GILTNER DAIRY, LLC, an Idaho limited)	
liability company,	)	CASE NO. CV-08-1269
)	
Petitioner,)	
)	
vs.)	
	)	MOTION FOR LEAVE TO FILE
JEROME COUNTY, a political subdivision of	)	AND SERVE SECOND AMENDED
the State of Idaho,	)	PETITION FOR JUDICIAL
	)	REVIEW
Respondent.)	
_____)	
)	
93 GOLF RANCH, LLC,)	
)	
Intervenor.)	
_____)	

COMES NOW the Petitioner, Giltner Dairy, LLC, by and through its counsel of record, Davis F. VanderVelde of the firm, WHITE, PETERSON, GIGRAY, ROSSMAN, NYE & NICHOLS, P.A., and hereby moves this Court for the following Orders:

1. **REQUESTED ORDERS:**

1.1 Granting leave to Petitioner to file and serve their Second Amended Petition for Judicial Review, which is attached to this Motion as *Exhibit A*; and

2. **DOCUMENTS AND RECORDS SUPPORTING THIS MOTION:**

2.1 This Motion;

2.2 Attached *Second Amended Petition for Judicial Review* marked *Exhibit A* to this Motion;

2.3 The Record in this matter.

3. **GOOD CAUSE FOR GRANTING THIS MOTION:**

3.1 Leave to amend to be freely given under Rule 15 of the Idaho Rules of Civil Procedure.

4. **AUTHORITY FOR THIS MOTION:**

4.1 This Motion is made pursuant to Rule 15(a) of the Idaho Rules of Civil Procedure and Idaho Code §§ 67-5273, 67-6521, and 31-1506.

5. **ORAL ARGUMENT IS REQUESTED.**

DATED this 6th day of April, 2009.

WHITE PETERSON

By: 

Davis F. VanderVelde
Attorneys for Giltner Dairy, LLC

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 6th day of April, 2009, a true and correct copy of the above and foregoing instrument was served upon the following by the method indicated below:

Board of Commissioners
JEROME COUNTY CLERK
300 N. Lincoln, Room 300
Jerome, ID 83338

U.S. Mail
 Overnight Mail
 Hand Delivery
 Facsimile

Michael J. Seib
JEROME COUNTY PROSECUTOR
233 West Main Street
Jerome, ID 83338

U.S. Mail
 Overnight Mail
 Hand Delivery
 Facsimile: (208) 644-2639

Gary D. Slette
ROBERTSON & SLETTE, PLLC
134 Third Avenue East
P.O. Box 1906
Twin Falls, ID 83303-1906
Attorneys for Intervenor

U.S. Mail
 Overnight Mail
 Hand Delivery
 Facsimile: (208) 933-0701



for WHITE PETERSON

W:\Work\G\Gilmer Dairy, LLC 21980.000 93 Golf Ranch\2nd Judicial Review 2008\PLEADINGS\Amend 2nd Petition MOT 04-06-09.doc

Terrence R. White
 Davis F. VanderVelde
 WHITE, PETERSON, GIGRAY, ROSSMAN,
 NYE & NICHOLS, P.A.
 5700 East Franklin Road, Suite 200
 Nampa, Idaho 83687-7901
 Telephone: (208) 466-9272
 Facsimile: (208) 466-4405
 ISB No.: 1351, 7314
 trw@whitepeterson.com
 dvandervelde@whitepeterson.com

FILED
 DISTRICT COURT
 JEROME COUNTY, IDAHO
 2008 JUN 13 10:00 AM
 Michelle Emerson
 CLERK

Attorneys for Petitioner

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

GILTNER DAIRY, LLC, an Idaho limited liability company,)	
	)	CASE NO. CV-08-1269
)	
Petitioner,)	
	)	SECOND AMENDED PETITION
vs.	)	FOR JUDICIAL REVIEW
)	
JEROME COUNTY, a political subdivision of the State of Idaho,)	
)	
Respondent.)	

COMES NOW, Giltner Dairy, LLC ("Petitioner"), by and through its counsel of record, the law firm of WHITE PETERSON GIGRAY ROSSMAN NYE & NICHOLS, P.A., and submits this *Second Amended Petition for Judicial Review* as follows:



I.

COURSE OF PROCEEDINGS

1. Petitioner owns and operates a dairy located at 450 East 100 South, Jerome, Idaho 83338.
2. Respondent is a governmental agency located in Jerome County, State of Idaho.
3. On November 10, 2008, Respondent issued a *Memorandum Decision* approving an application by 93 Golf Ranch, LLC, requesting a rezone which would result in amendments to the Jerome County Planning and Zoning Map. The affect of the amendment is to change various property from A-1 to A-2 agricultural zoning.
4. Attached as *Exhibit A* is a true and correct copy of the above mentioned *Memorandum Decision*.
5. This *Memorandum Decision* constitutes final agency action under Idaho Code § 67-5270 *et seq.*
6. This Petition for Judicial Review is being made pursuant to Idaho Code §§ 67-5273, 67-6521, 31-1506 and Idaho Rule of Civil Procedure 84.

II.

PETITION FOR REVIEW

1. Petitioner owns and operates a dairy which is directly adjacent to the subject property. The Petitioner's operation, known as the Giltner Dairy, is approved for approximately 5,880 animal units and is fully operational. Several of the Giltner Dairy, LLC members reside on the dairy. The Petitioner is affected and aggrieved by the Jerome County Board of Commissioners' ("Commissioners") *Memorandum Decision*.

2. The value of the Petitioner's property; the quality of life for Petitioner's members; and the Petitioner's ability to operate a dairy is negatively affected and aggrieved by the Commissioners' decision for the following, non-inclusive, list of reasons:

- a. The amendment changing the property from A-1 Agricultural to A-2 Agricultural does not conform to Idaho Code § 67-6508 and the previously adopted Jerome County Comprehensive Plan Map.
- b. The subject property will be neither compatible nor harmonious with surrounding zones and existing uses under the existing Comprehensive Plan.
- c. The Comprehensive Plan relied upon when entering the *Memorandum Decision* changing the zoning was never validly adopted and approved by the Commission.
- d. The change in zoning sets an inappropriate and incompatible precedence for future uses that are incompatible with the existing uses in the area.
- e. The change in zoning changes the essential character of neighboring uses and will impede Petitioner's ability to continue to operate its dairy in violation of Petitioner's private property rights.
- f. The change in zoning leaves insufficient buffer area between uses which are incompatible.

3. The 1997 Special Use Permit issued for 93 Golf Ranch, LLC on the subject property does not include housing. The amendment to the zoning is inconsistent with the Special Use Permit issued to 93 Golf Ranch.

4. Respondent's actions are in excess of the statutory authority of the Jerome County Commissioners, were made upon unlawful procedure, and are arbitrary, capricious, and an abuse of discretion.

III.

HEARING AND RECORD

1. The following hearings and recordings were held and made in this matter and a transcript of each hearing is necessary for judicial review and is requested by Petitioner and Petitioner's counsel has made arrangements to pay the estimated transcription fees:

- a. *August 25, 1997* - Hearings on the application for conditional use permit, as well as the permit granted to 93 Golf Ranch, LLC.
- b. *November 28, 2005* - Hearing by Planning and Zoning - two tapes: Tape 1 = 93 Golf Ranch C Plan; Tape 2 = 93 Golf Ranch P & Z Discussion;
- c. *December 27, 2005* - Planning and Zoning, Rezone from A1 to A2;
- d. *January 20, 2006* - Committee unknown - Discussion on Rezoning;
- e. *January 30, 2006* - Discussion by Commissioners;
- f. *February 27, 2006* - Hearing, 93 Golf Ranch;
- g. *July 28, 2008* - Transcript and records of hearing on request of 93 Golf Ranch, LLC for a Zoning Map Amendment; and
- h. *August 25, 2008* - Transcript and records of hearing on request of 93 Golf Ranch, LLC for a Zoning Map Amendment.
- i. *December 15, 2008* - Discussion by Commissioners regarding rezoning and passage of ordinance regarding same.

2. The following documents are necessary for judicial review and are requested by
Petitioner:

- a. Committee Recommendation on Zoning Map Amendment;
- b. Memorandum Decision of November 10, 2008; and
- c. The entire appellate record in this matter, denominated as Idaho Supreme Court Docket No. 34020 (appeal from the District Court of the Fifth Judicial District of Idaho, in and for the County of Jerome, Jerome County Case No. CV-2006-319).
- d. Request for takings analysis to County Prosecutor by Petitioner; and
- e. Denial of Request for Takings Analysis from County Prosecutor to Petitioner.

IV.

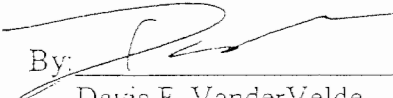
PRAYER

WHEREFORE, the Petitioner requests this Court to issue an order requiring the following:

1. This Court reverse Respondent's *Memorandum Decision* granting the Amendment Zoning;
2. That this Court remand the *Memorandum Decision* with instruction to deny 93 Golf Ranch, LLC's Application for a change in zoning;
3. That Petitioner be awarded reasonable attorneys fees and costs incurred in connection with this action; and
4. Petitioner be awarded such other and further relief as the Court deems just and appropriate.

DATED this 3rd day of April, 2009.

WHITE PETERSON

By: 
Davis F. VanderVelde
Attorneys for Giltner Dairy, LLC

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 3RD day of April, 2009, a true and correct copy of the above and foregoing instrument was served upon the following by the method indicated below:

Board of Commissioners
JEROME COUNTY CLERK
300 N. Lincoln, Room 300
Jerome, ID 83338

_____ U.S. Mail
_____ Overnight Mail
 Hand Delivery
_____ Facsimile

Michael J. Seib
JEROME COUNTY PROSECUTOR
233 West Main Street
Jerome, ID 83338

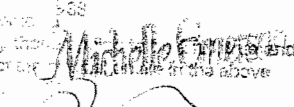
_____ U.S. Mail
_____ Overnight Mail
 Hand Delivery
_____ Facsimile: (208) 644-2639

Gary D. Slette
ROBERTSON & SLETTE, PLLC
134 Third Avenue East
P.O. Box 1906
Twin Falls, ID 83303-1906
Attorneys for Intervenor

_____ U.S. Mail
_____ Overnight Mail
 Hand Delivery
_____ Facsimile: (208) 933-0701


for WHITE PETERSON

W:\Work\Giltner Dairy, LLC 21980.000 93 Golf Ranch\2nd Judicial Review 2008\PLEADINGS\Petition Amended Second 04-03-09 1h.doc

Received by
County Clerk
I do hereby certify
under penalty of law
at _____


County Clerk of the District Court
4/13/09

Terrence R. White
 Davis F. VanderVelde
 WHITE, PETERSON, GIGRAY, ROSSMAN,
 NYE & NICHOLS, P.A.
 5700 East Franklin Road, Suite 200
 Nampa, Idaho 83687-7901
 Telephone: (208) 466-9272
 Facsimile: (208) 466-4405
 ISB No.: 1351, 7314
 trw@whitepeterson.com
 dvandervelde@whitepeterson.com

DISTRICT COURT
 FIFTH JUDICIAL DIST
 JEROME COUNTY IDAHO

2009 APR 6 PM 12 44

BY Michelle Emmons
 DEPUTY CLERK

Attorneys for Petitioner

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

_____)	
GILTNER DAIRY, LLC, an Idaho limited)	
liability company,	)	CASE NO. CV-08-1269
)	
Petitioner,)	
)	
vs.)	
	)	MOTION TO SHORTEN TIME
JEROME COUNTY, a political subdivision of	)	FOR HEARING
the State of Idaho,)	
)	
Respondent.)	
_____)	
)	
93 GOLF RANCH, LLC,)	
)	
Intervenor.)	
_____)	

COMES NOW the Petitioner, Giltner Dairy, LLC, by and through its counsel of record,
 Davis F. VanderVelde of the firm, WHITE, PETERSON, GIGRAY, ROSSMAN, NYE & NICHOLS, P.A.,
 and hereby moves this Court for the following Orders:

1. REQUESTED ORDER:

1.1 Allowing Petitioner's *Motion for Leave to File and Serve Second Amended Petition for Judicial Review* to be heard by the Honorable John K. Butler at 1:30 p.m. on the 6th day of April, 2009.

2. DOCUMENTS AND RECORDS SUPPORTING THIS MOTION:

2.1 This *Motion*.

3. GOOD CAUSE FOR GRANTING THIS MOTION:

3.1 There is not sufficient time to give the usual notice of hearing of said motion and the subject of said motion should be heard prior to the time of Intervenor's Motion to Dismiss, which is set for April 6, 2009.

4. AUTHORITY FOR THIS MOTION:

4.1 This Motion is made pursuant to Rule 7(b)(3) of the Idaho Rules of Civil Procedure.

5. ORAL ARGUMENT IS NOT REQUESTED.

5.1 Oral Argument is not requested as this motion may be granted without further notice as provided by the express terms of Rule 7(b)(3) of the Idaho Rules of Civil Procedure.

DATED this 6th day of April, 2009.

WHITE PETERSON

By: 

Davis F. VanderVelde
Attorneys for Giltner Dairy, LLC

CERTIFICATE OF SERVICE

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Gary D. Slette
ROBERTSON & SLETTE, PLLC
134 Third Avenue East
P.O. Box 1906
Twin Falls, ID 83303-1906
Attorneys for Intervenor

U.S. Mail
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 Hand Delivery
 Facsimile: (208) 933-0701



for WHITE PETERSON

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Date: 4/8/2009
Time: 11:54 AM
Page 1 of 1

Fifth Judicial District Court - Jerome County

User: TRACI

Minutes Report

Case: CV-2008-0001269

Giltner Dairy, etal. vs. Jerome County

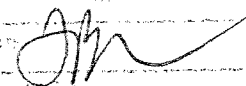
Selected Items

Hearing type:	Motion to Dismiss/Mtn to Amend Comp	Minutes date:	04/06/2009
Assigned judge:	John K. Butler	Start time:	01:32 PM
Court reporter:	Candace Childers	End time:	02:07 PM
Minutes clerk:	Traci Brandebourg	Audio tape number:	

Parties: Giltner Dairy; Vanderveldt, David
93 Golf Ranch; Slette, Gary
no one on behalf of Jerome County

Tape Counter: 132 This being the time and place set for motions, court convenes.
Tape Counter: 132 Court identifies parties; court reviews file herein. Court inquires of counsels.
Tape Counter: 133 Mr. Slette addresses the court. Mtn to Dismiss.
Tape Counter: 133 Mr. Vanderveldt responds. Mtn to Amend.
Tape Counter: 136 Court will hear argument on motion to leave to amend and motion to dismiss. Will take decision under advisement. Will grant motion on order shorten time on leave to amend. Will allow intervenor additional time.
Tape Counter: 137 Mr. Vanderveldt addresses the court regarding motion on leave to amend. Requests motion to be granted.
Tape Counter: 142 Mr. Slette responds.
Tape Counter: 148 Mr. Vanderveldt responds.
Tape Counter: 151 Court will take motion to amend under advisement and issue written order.
Tape Counter: 152 Mr. Slette addresses court with motion to dismiss. Also responds to Mr. Vanderveldt's motion. Dismissal is appropriate.
Tape Counter: 154 Mr. Vanderveldt responds.
Tape Counter: 156 Court addresses Mr. Vanderveldt.
Tape Counter: 159 Mr. Vanderveldt responds.
Tape Counter: 202 Mr. Slette responds.
Tape Counter: 206 Court will take matter under advisement. Inquires of Mr. Slette. Mr. Slette responds. Court gives until 4-10-09.
Tape Counter: 206 Mr. Vanderveldt responds.
Tape Counter: 207 Court allows both sides to file by April 10.
Tape Counter: 207 Court in recess.
Attest.



Filed _____
 District Court
 District of Idaho, Boise
 Clerk's Office
 Date: APR 6 2009
 Time: 10:58 AM
 Sign: 
 Deputy Clerk

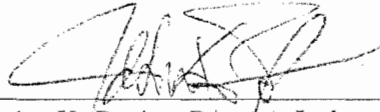
IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

_____)	
GILTNER DAIRY, LLC, an Idaho limited)	
liability company,	)	CASE NO. CV-08-1269
)	
Petitioner,)	
)	
vs.)	
	)	ORDER SHORTENING TIME
JEROME COUNTY, a political subdivision of	)	FOR HEARING
the State of Idaho,)	
)	
Respondent.)	
_____)	
)	
93 GOLF RANCH, LLC,)	
)	
Intervenor.)	
_____)	

This action having come on pursuant to Giltner Dairy, LLC's Motion to Shorten Time required for notice of hearing, and good cause appearing therefore;

IT IS HEREBY ORDERED AND THIS DOES ORDER that said motion to shorten time is hereby granted and that the hearing on Petitioner's *Motion for Leave to File and Serve Second Amended Petition for Judicial Review* shall be held at 1:30 P.M., on the 6th day of April, 2009.

IT IS HEREBY ORDERED this 6 day of April, 2009.



John K. Butler, District Judge

CLERK'S CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 6 day of April, 2009, a true and correct copy of the above and foregoing instrument was served upon the following by the method indicated below:

Board of Commissioners
JEROME COUNTY CLERK
300 N. Lincoln, Room 300
Jerome, ID 83338

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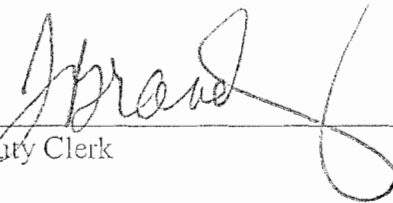
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Gary D. Slette
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Attorneys for Intervenor

U.S. Mail
____ Overnight Mail
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____ Facsimile: (208) 933-0701

Davis F. VanderVelde
WHITE PETESON
5700 E. Franklin Rd., Ste. 200
Nampa, ID 83687-7901
Attorneys for Petitioner

U.S. Mail
____ Overnight Mail
____ Hand Delivery
____ Facsimile: (208) 466-4405



Deputy Clerk

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Terrence R. White
Davis F. VanderVelde
WHITE, PETERSON, GIGRAY, ROSSMAN,
NYE & NICHOLS, P.A.
5700 East Franklin Road, Suite 200
Nampa, Idaho 83687-7901
Telephone: (208) 466-9272
Facsimile: (208) 466-4405
ISB No.: 1351, 7314
trw@whitepeterson.com
dvandervelde@whitepeterson.com

Attorneys for Petitioner

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

GILTNER DAIRY, LLC, an Idaho limited liability company,)	
	)	CASE NO. CV-08-1269
)	
Petitioner,)	
)	
vs.)	
	)	MEMORANDUM IN SUPPORT OF
JEROME COUNTY, a political subdivision of the State of Idaho,	)	MOTION FOR LEAVE TO FILE
	)	AND SERVE SECOND AMENDED
	)	PETITION FOR JUDICIAL
Respondent.	)	REVIEW
)	
)	
93 GOLF RANCH, LLC,)	
)	
Intervenor.)	

COMES NOW the Petitioner, Giltner Dairy, LLC, by and through its counsel of record, Davis F. VanderVelde of the firm, WHITE, PETERSON, GIGRAY, ROSSMAN, NYE & NICHOLS, P.A., and hereby files this Memorandum in support of its Motion to Amend:

MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE AND SERVE SECOND AMENDED PETITION FOR JUDICIAL REVIEW - 1

I. LEAVE TO AMEND IS TO BE FREELY GIVEN.

Idaho Rules of Civil Procedure 15(a) requires that leave to amend "shall be freely given when justice so requires." I.R.C.P. 15(a). When a pleading is amended, the amendment relates back to the date of initial filing so long as the action arose out of the same conduct, transaction, or occurrence set forth, "or attempted to be set forth" in the original pleading. I.R.C.P. 15(c).

As set forth below, the rules concerning judicial review make no requirement that a petition contain a basis of authority for review. Rule 84 of the Idaho Rules of Civil Procedure has specific requirements concerning what must be included in a Petition for Judicial Review. Specifically, the Petition must include: (1) the title of the underlying agency; (2) the title of the court to which the petition is taken; (3) the date and heading of the agency from which the appeal is taken; (4) a statement of whether the agency held a hearing and whether any recordings or transcripts exist; (5) a statement of the issues for judicial review which may be modified as issues are discovered; and (6) various procedural steps concerning service and payment of costs. Nowhere within the Rules does it require that a Petition contain a statement of the statute under which Judicial Review is sought. The same is true of Idaho Code § 67-5270 *et al.*

Idaho Code § 31-1506 concerns jurisdiction upon this Court to review the County's zoning decision pursuant to the provisions of I.C. § 67-5270 *et al.* Petitioner must be allowed to make the requested amendment so that this case may proceed forward on its merits.

II. IDAHO CODE § 31-1506 GRANTS THE COURT WITH SUBJECT MATTER JURISDICTION TO REVIEW COUNTY ZONING DECISIONS BY THE COUNTY COMMISSION.¹

The initial Petition for Judicial Review contained a statement that review was sought under Idaho Code § 67-6521, 67-5273, and Rule 84. Petitioner has now learned that Idaho Code

¹ Petitioner continues to believe that jurisdiction is appropriate under the statutes cited in the original Petition. Idaho Code § 31-1506 is an alternative basis for jurisdiction.

§ 31-1506 provides jurisdiction of this Court to review any acts or orders made by County Commissioners.²

Prior to the current version of I.C. § 31-1506, the statute was designated as I.C. § 31-1509 and in part, read as follows:

(A)ny time within twenty (20) days after the first publication or posting of the statement, as required by section 31-819, an appeal may be taken from any act, order or proceeding of the board (of county commissioners), by any person aggrieved thereby, or by any tax payer of the county when he deems any such act, order or proceeding illegal or prejudicial to the public interests.

V-1 Oil Co. v. Bannock County, 97 Idaho 807, 809, 554 P.2d 1304, 1306 (1976) (citing prior version of I. C. § 31-1509 renumbered as I.C. § 31-1506 in 1995). Considering this prior version of I.C. § 31-1509, the Idaho Court of Appeals held:

At first glance, I.C. § 31-1509 might appear to be specifically tailored to appeals from the Board of County Commissioners' decisions on county finances and claims against the county. However, a close reading discloses no language explicitly limiting the statute to such appeals. Indeed, the case-law history of the statute reveals that appeals have been allowed from a broad spectrum of decisions and orders. Because the statute on its face does not exclude any particular subject matter of appeal, and because it has been given broad construction by our Supreme Court, we are constrained to view I.C. § 31-1509 [renumbered as 31-1506] as providing a county taxpayer with the right to appeal any act, order or proceeding of the commissioners when any such act, order or proceeding is illegal or prejudicial to public interests.

Fox v. Board of County Commissioners, 114 Idaho 940, 763 P.2d (1988) (overruled in part on other grounds in 121 Idaho 684, 827 P.2d 697).

² At the time of the hearing, counsel believed that the code had simply been renumbered through the years. Further research has shown that the language of the statute has been amended. The Court has continued to construe Idaho Code § 31-1506 as a broad grant of authority for judicial review.

The language of I.C. § 31-1509 was thereafter amended to read in its current form in 1993 or 1994 which set forth:

JUDICIAL REVIEW OF BOARD DECISIONS.

- (1) Unless otherwise provided by law, judicial review of any act, order or proceeding of the board shall be initiated by any person aggrieved thereby within the same time and in the same manner as provided in chapter 52, title 67, Idaho Code, for judicial review of actions.
- (2) Venue for judicial review of board actions shall be in the district court of the county governed by the board.

See S.L. 1995, ch. 61, § 11. The statute was renumbered to I.C. § 31-1506 in 1995. See Id. Despite the change in statutory language made by the legislature, the Idaho courts have continued to construe Idaho Code § 31-1506, in its current form, as a broad grant of authority for review of county actions.

In 2003, in the case Sandpoint Independent Highway District v. Board of County Commissioners of Bonner County, 138 Idaho 887 (2003), the Idaho Supreme Court confirmed the current version of I.C. § 31-1506 is a broad grant of authority for judicial review. The Court held that although "Chapter 18, Title 40 of the Idaho Code which concerns dissolution of highway districts, makes no provision for the review of the Commissioners' decision," a petition for judicial review was proper in the District Court pursuant to I.C. § 31-1506. Sandpoint Highway District, 138 Idaho at 890 (finding subject matter jurisdiction under I.C. § 31-1506). Similarly, in Allen v. Blaine County, 131 Idaho 138 (1998), the Idaho Supreme Court recognized a broad grant of authority for review under I.C. § 31-1506:

Under the Idaho Administrative Procedure Act (IDAPA), a party who has been aggrieved by a final agency action may file a petition for review or declaratory judgment in the district court of the appropriate county after exhausting all administrative remedies. I.C. §§ 67-5270 – 5272. Under the IDAPA, "agency" is defined as

"each state board, commission, department or officer authorized by law to make rules or to determine contested cases." I.C. § 67-5201(2). Although a county board of commissioners does not fall within this definition, a decision by a county board of commissioners is subject to judicial review "in the same manner as provided in [Idaho's Administrative Procedure Act]." I.C. § 31-1506(1). Thus, a county board of commissioners is treated as an administrative agency for purposes of judicial review.

Allen, 131 Idaho at 140 (*citations and quotations in original*).

The Supreme Court has further indicated that judicial review provides subject matter jurisdiction for review of any county action. In Gibson v. Ada County Sheriff, a county employee was discharged by the sheriff's department for misconduct. Id. 139 Idaho 5 (2003). After administrative review by the department, she sought judicial review of her termination. Id. The court found that the petitioner had no right of review of the administrative decision made by the sheriff's department. Id. The court then went on to hold:

Notably, had Gibson appealed the county personnel hearing officer's decision to the Ada County Board of Commissioners (board), the board's decision would be an appropriate subject for judicial review and the IAPA standard of review would apply. I.C. § 31-1506(1). Without action of the board, however, the judicial review provisions of I.C. § 31-1506(1) are inapplicable.

Id. at 8 (*citations in original*). See also I.C. § 31-3505G (requiring additional specific appellate proceeding before board before judicial review under I.C. § 31-1506).

This finding was subsequently affirmed in a second appeal made by Gibson where the Court once again recognized:

Idaho Code § 31-1506 provides that a person is entitled to initiate judicial review of any "act, order or proceeding" of the Board and the merits of the subject matter would be subject to review of and the IAPA standard of review would apply.

Gibson v. Ada County, 142 Idaho 746, 756 (2006). The court found that the provisions of I.C. § 31-1506(1) were not applicable to the petitioner's case because there was no authority of the

"Board of County Commissions to review the personnel decision of other elected County officers." Id. Had the County Commissioners had authority to take action, the court indicated that jurisdiction would have been appropriate.

CONCLUSION

Idaho Code § 31-1506 provides a broad grant of authority for judicial review of actions taken by County Commissioners. There is no question that the Commissioners took action to rezone the subject property in this matter and judicial review pursuant to I.C. § 31-1506 is appropriate and Petitioner's motion should be granted.

DATED this 10th day of April, 2009.

WHITE PETERSON

By: 

Davis F. VanderVelde

Attorneys for Giltner Dairy, LLC

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 10th day of April, 2009, a true and correct copy of the above and foregoing instrument was served upon the following by the method indicated below:

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for WHITE PETERSON

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P.O. Box 1906
Twin Falls, Idaho 83303-1906
Telephone: (208) 933-0700
Facsimile: (208) 933-0701
ISB #3198
\\rln\gds\93 Golf Ranch\memo oppos mtn for leave

IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

GILTNER DAIRY, LLC, an Idaho
Limited Liability Company,

Petitioner,

v.

JEROME COUNTY, a political subdivision of
the State of Idaho,

Respondent.

93 GOLF RANCH, L.L.C.,

Intervenor.

Case No. CV-08-1269

MEMORANDUM IN
OPPOSITION TO MOTION
FOR LEAVE TO FILE AND
SERVE SECOND AMENDED
PETITION FOR JUDICIAL
REVIEW.

Intervenor, 93 GOLF RANCH, L.L.C. ("Golf Ranch"), by and through its undersigned attorney of record, hereby submits its Memorandum in Opposition to Giltner Dairy, LLC's ("Giltner") Motion for Leave to File and Serve Second Amended Petition for Judicial Review.

A. The Local Land Use Planning Act and the Idaho Administrative Procedures Act.

Based upon the Idaho Supreme Court's recent decision in *Black Labrador Investing, LLC v. Kuna City Council*, Docket No. 34513 (April 2, 2009), Giltner apparently concedes that it is not entitled to judicial review of this rezoning action pursuant to Idaho Code § 67-6521 as

1 alleged in its Petition and its Amended Petition. In *Black Labrador*, the Idaho Supreme Court
2 stated:

3 ~~LLUPA authorizes judicial review in cases where a person has~~
4 ~~applied for, and been denied a permit that is required or authorized~~
5 ~~under LLUPA.~~

6 In discussing "permits", the Idaho Supreme Court stated the following in *Johnson v. Blaine*
7 *County*, Docket No. 34524 (Id. Sup. Ct. March 5, 2009):

8 The granting of a permit authorizes the development, and is
9 therefore appealable, if it "places a developer in a position to take
10 immediate steps to permanently alter the land." *Payette River*
11 *Property Owners Association v. Board of County Commissioners*
12 *of Valley County*, 132 Idaho 551, 555, 976 P.2d 477, 481 (1999).

13 In *Johnson*, the neighboring property owner filed a petition for judicial review as a result of
14 Blaine County's issuance of a conditional use permit and a planned unit
15 development/subdivision permit authorizing construction on the intervenor/developer's
16 property. Unlike the rezone in the instant case, those permits fell within the ambit of permits
17 identified in LLUPA, and clearly placed the intervenor/developer in a position to take
18 immediate steps to permanently alter the land. In the instant case, a rezone is not a permit, and
19 does not authorize any such development; rather, it allows a subsequent application for permit
20 to be made consistent with the zoning designation.

21 Giltner's further suggestion that Idaho Code § 67-5273 of the Idaho Administrative
22 Procedures Act ("IAPA") authorizes its filing of the petition is equally untenable. As stated by
23 the Idaho Supreme Court in *Highlands Development Corporation v. City of Boise*, 145 Idaho
24 958, 188 P.3d 900 (2008):

25 Idaho Code § 67-5273 is part of the Idaho Administrative
26 Procedures Act (IAPA). That Act does not grant the right to review
27 decisions made by counties or cities. As we explained recently in
28 *Giltner Dairy, LLC v. Jerome County*, 145 Idaho 630, 632, 181
29 P.3d 1238, 1240 (2008):

30 "The IAPA and its judicial review standards apply to
31 agency actions." *Gibson v. Ada County Sheriff's Dept.*, 139
32 Idaho 5, 7, 72, P.2d 845, 847 (2003). "Counties and city
33 governments are considered local governing bodies rather
34 than agencies for purposes of the IAPA." *Id.* "The language
35 of the IAPA indicates that it is intended to govern the

1 judicial review of decisions made by state administrative
2 agencies, and not local governing bodies." *Idaho Historic*
3 *Preservation Council, Inc. v. City Council of City of Boise*,
134 Idaho 651, 653, 8 P.3d 646, 648 (2000).

4 Giltner's assertion that I.R.C.P. Rule 84 also provides an independent source of jurisdiction is
5 also without merit. I.R.C.P. Rule 84(a) provides, in pertinent part, as follows:

6 The procedures and standards of review applicable to judicial
7 review of state agency and local government actions shall be as
8 provided by statute. . . . Actions of . . . a local government, its
9 officers or its units are not subject to judicial review unless
10 expressly authorized by statute.

11 (Emphasis added).

12 **B. Idaho Code § 31-1506.**

13 Giltner now seeks to amend its petition a second time on the basis of Idaho Code § 31-
14 1506(1). That section, as codified in Chapter 15 entitled "*County Finances and Claims Against*
15 *Counties*", provides:

16 Unless otherwise provided by law, judicial review of any act, order
17 or proceeding of the board shall be initiated by any person
18 aggrieved thereby within the same time and in the same manner as
19 provided in chapter 52, title 67, Idaho Code, for judicial review of
20 actions.

21 Giltner argued at the hearing of this matter on April 6, 2009, that the predecessor of this statute
22 was Idaho Code § 31-1509, and that such statute had been part of Idaho's law for decades. The
23 LLUPA, which was adopted in 1977, came into effect many years after that law. Golf Ranch
24 can find no instance where the Idaho Supreme Court has ever sanctioned or acknowledged the
25 use of this code section as the basis for an appeal of a rezone or any other land use decision.
26 Giltner has directed this court to *Fox v. Board of County Commissioners of Boundary County*,
121 Idaho 686, 827 P.2d 699 (Ct.App. 1991) in support of its position. *Fox* involved an appeal
of the Boundary County Board of Commissioners' renewal of two beer licenses. In construing
Idaho Code § 31-1509, the predecessor to Idaho Code § 31-1506, the Idaho Court of Appeals
stated:

As stated by this Court in *Fox I* [*Fox v. Board of County Comm'rs*
of Boundary County, 114 Idaho 940, 763 P.2d 313 (Ct.App. 1988)]

1 . . . [W]e are constrained to view I.C. § 31-1509 as
2 providing a county taxpayer with the right to appeal any act,
3 order or proceeding of the commissioners **when any such**
4 ~~act, order or proceeding is illegal or prejudicial to the~~
5 **public interest.**

6 (Emphasis added). 114 Idaho at 943. It is obvious in this case that there can be no allegation
7 that the rezone decision of Jerome County is illegal or prejudicial to the public interest. Idaho
8 Code § 67-6511 expressly provides governing boards with the discretion and authority to
9 amend their zoning districts. However, such an amendment does not constitute a "permit" that
10 allows a property owner to take immediate steps to permanently alter the land. Golf Ranch
11 suggests that the instant rezone decision does not meet the Court of Appeals' standard of an
12 "act, order or proceeding [that] is illegal or prejudicial to the public interest."

13 Giltner also suggested that the case of *Eastern Idaho Health Services, Inc. v.*
14 *Burtenshaw*, 122 Idaho 904, 841 P.2d 434 (1992), somehow supports its position that an
15 appeal of a rezone or land use decision can be challenged under Idaho Code § 31-1506. That
16 decision dealt with a taxpayer's appeal of a board of county commissioners' refusal to grant a
17 refund of penalty and interest on delinquent *ad valorem* taxes. Golf Ranch does not believe that
18 the *Eastern Idaho* case supports Giltner's arguments. Had the Idaho Legislature intended that an
19 amendment of a zoning district under LLUPA could be appealed pursuant to a code section in
20 the county finance portion of the Idaho Code, the legislature presumably would have so stated.
21 Had the Idaho Supreme Court ever interpreted Idaho Code § 31-1506 as being the appropriate
22 mechanism for review of a zoning decision, there certainly would have been prior reported case
23 law setting forth that proposition. However, if that had been the interpretation accorded to that
24 statute by the Idaho Supreme Court, it would have presented an untenable inconsistency, since
25 the LLUPA provides that each "governing board" is entitled to adopt, amend or repeal its
26 zoning ordinance and districts. *See* Idaho Code § 67-6511. Idaho Code § 67-6504 expressly
states:

A city council or board of county commissioners, hereafter
referred to as a governing board, may exercise all of the powers
required and authorized by this chapter in accordance with this
chapter.

Idaho Code § 31-1506(1), by its own terms, is limited strictly to a county board of

1 commissioners to the exclusion of a city council. Under Giltner's interpretation of Idaho Code §
2 31-1506, a rezone decision of a county board would be amenable to judicial review, but a
3 similar decision by a city council would not be reviewable.

4 **C. Statutory Construction.**

5 In *City of Sandpoint v. Sandpoint Independent Highway District*, 139 Idaho 65, 72 P.3d
6 905 (2003), the Idaho Supreme Court discussed statutory construction relative to a
7 determination of what the legislature intended a statute to mean. The Court stated:

8 To determine that [statutory] intent, we examine not only the literal
9 words of the statute, but also the reasonableness of proposed
10 constructions, the public policy behind the statute, and its
11 legislative history. (Citations omitted). Statues [sic-statutes] that
12 are *in pari materia* must be construed together to effect legislative
13 intent. *Gooding County v. Wybenga*, 137 Idaho 201, 46 P.3d 18
14 (2002). Statutes are *in pari materia* if they relate to the same
15 subject.

16 *Id.* 139 Idaho at 69. Continuing, the *Sandpoint* Court stated:

17 Where a statute with respect to one subject contains a
18 certain provision, the omission of such provision from a similar
19 statute concerning a related subject is significant to show that a
20 different intention existed. *Kopp v. State*, 100 Idaho 160, 595 P.2d
21 309 (1979).

22 *Id.* The concept of the Local Land Use Planning Act, or the regulation of land use under that set
23 of laws, doubtlessly was never in the contemplation of the Idaho Legislature at the time of the
24 adoption of Idaho Code § 31-1509. The fact that the LLUPA did not include a provision
25 regarding judicial review of a zoning district amendment should be regarded as purposeful, and
26 evidences a different legislative intention than that which is advocated by Giltner relative to the
applicability of Idaho Code § 31-1509, and now codified as Idaho Code § 31-1506.

In discussing statutes that are *in pari materia*, the Idaho Supreme Court discussed two
different statutory provisions relating to "conflict of interest" in *Gooding County v. Wybenga*,
137 Idaho 201, 46 P.3d 18 (2002). In that case, the Court stated:

Statutes are *in pari materia* if they relate to the same
subject. *Grand Canyon Dories v. Idaho State Tax Commission*, 124
Idaho 1, 855 P.2d 462 (1993). Such statutes are construed together
to effect legislative intent. *Id.* Where two statutes appear to apply
to the same case or subject matter, the specific statute will control

1 over the more general statute. *State v. Barnes*, 133 Idaho 378, 987
2 P.2d 290 (1999).

3 137 Idaho at 204. *See also V-1 Oil Company v. Idaho Transportation Department*, 131 Idaho
4 482, 959 P.2d 463 (1998).

5 In the instant case, the specific statute, i.e., LLUPA, describes all the land use actions
6 which a "governing board" is entitled to take, and further describes which of those actions
7 constitutes a "permit" that is subject to a judicial review. There can be no doubt but that the
8 LLUPA is the more specific statute when it comes to land use issues, and the judicial review of
9 a local governing body's decision in that regard. Since a zoning district change does not
10 constitute a "permit", as defined in LLUPA, the legislature apparently intended to omit that
11 governing board action from the scope of a judicial review. Clearly, a neighbor such as Giltner
12 has been approved consistent with the zoning amendment.

13 Because Idaho's adoption of the LLUPA came decades after Idaho Code § 31-1509, the
14 predecessor statute to Idaho Code § 31-1506, and because the LLUPA articulated those land use
15 decisions which were reviewable pursuant to a petition for judicial review, Golf Ranch asserts
16 that a zoning district amendment is *ejusdem generis*. That term relates to statutory construction
17 where general words follow an enumeration of persons or things specifically mentioned. In
18 addition, the maxim of statutory interpretation of *expressio unius est exclusio alterius* denotes
19 that the expression of one thing is the exclusion of another. The LLUPA specifically identifies
20 those land use actions which are amenable to a judicial review, but did not include a zoning
21 district amendment which does not result in the issuance of a "permit". To the extent that courts
22 of this state may have previously extended a judicial review under LLUPA to a zoning district
23 amendment, the courts may have to acknowledge that such review is not statutorily appropriate,
24 not unlike the Idaho Supreme Court's recent statement in *Neighbors for Responsible Growth v.*
25 *Kootenai County*, Docket Nos. 34591/34592 (Id. Sup. Ct. April 6, 2009) where the Court
26 stated:

We take this opportunity to observe that the award [of attorney
fees] to Golf Ranch was improvidently granted.

Id. at fn. 1.

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Assuming, *arguendo*, that Idaho Code § 31-1506 presents a basis for a review of a county's rezoning action, the holding set forth in *Sullivan v. Board of County Commissioners of Lemhi County*, 22 Idaho 202, 125 P. 191 (1912), is instructive as to the limitation of a court's review. In construing the statute that was the predecessor to Idaho Code § 31-1509, the *Sullivan* Court stated:

We are rather inclined to construe this statute as conferring the power on the district court to review any question as to the legality of the action of the board and to determine any question of law which may have been involved in the application and action taken by the board thereon.

22 Idaho at 207-8. That earlier statement by the Court seems to square with the *Fox* holding allowing a review of only those orders that are "illegal or prejudicial to the public interest." If a board properly exercised its discretion in taking an action, the Idaho Supreme Court has determined that a district court is not entitled to pass on the facts upon which the board exercised its discretion. A similar outcome was reached with regard to the consideration of the incorporation of the village of Chubbuck in the case of *In Re: Chubbuck*, 71 Idaho 60, 226 P.2d 484 (1950). By no means does Golf Ranch agree that Idaho Code § 31-1506 can serve as the basis for an appeal of a zoning district amendment which is specifically authorized under the LLUPA. Even if it was, the scope of such review would necessarily be limited solely to questions of law.

CONCLUSION

Based upon the foregoing, Giltner's motion should be denied, and Golf Ranch's Motion to Dismiss the Petition for Judicial Review should be granted.

DATED this 10th day of April, 2009.

ROBERTSON & SLETTE, PLLC

BY: 
GARY D. SLETTE

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 10th day of April, 2009, he caused a true and correct copy of the foregoing instrument, to be served upon the following persons in the following manner:

Jerome County Prosecutor's Office	<input type="checkbox"/>	Hand Deliver
Michael Seib	<input type="checkbox"/>	U.S. Mail
233 W. Main	<input type="checkbox"/>	Overnight Courier
Jerome, ID 83338	<input checked="" type="checkbox"/>	Facsimile Transmission (208) 644-2639
Terrence R. White	<input type="checkbox"/>	Hand Deliver
Davis F. VanderVelde	<input type="checkbox"/>	U.S. Mail
WHITE PETERSON PA	<input type="checkbox"/>	Overnight Courier
5700 E. Franklin Rd. Ste. 200	<input checked="" type="checkbox"/>	Facsimile Transmission (208) 466-4405
Nampa, ID 83687-7901		



Gary B. Slette

Terrence R. White
 Davis F. VanderVelde
 WHITE, PETERSON, GIGRAY, ROSSMAN,
 NYE & NICHOLS, P.A.
 5700 East Franklin Road, Suite 200
 Nampa, Idaho 83687-7901
 Telephone: (208) 466-9272
 Facsimile: (208) 466-4405
 ISB No.: 1351, 7314
 trw@whitepeterson.com
 dvandervelde@whitepeterson.com

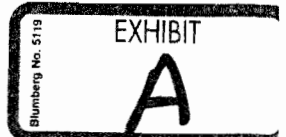
FILED
 10/13/08
 Michelle Emerson

Attorneys for Petitioner

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

GILTNER DAIRY, LLC, an Idaho limited liability company,)	
	)	CASE NO. CV-08-1269
)	
Petitioner,)	
	)	SECOND AMENDED PETITION
vs.	)	FOR JUDICIAL REVIEW
)	
JEROME COUNTY, a political subdivision of the State of Idaho,)	
)	
Respondent.)	

COMES NOW, Giltner Dairy, LLC ("Petitioner"), by and through its counsel of record, the law firm of WHITE PETERSON GIGRAY ROSSMAN NYE & NICHOLS, P.A., and submits this *Second Amended Petition for Judicial Review* as follows:



I.

COURSE OF PROCEEDINGS

1. Petitioner owns and operates a dairy located at 450 East 100 South, Jerome, Idaho 83338.

2. Respondent is a governmental agency located in Jerome County, State of Idaho.

3. On November 10, 2008, Respondent issued a *Memorandum Decision* approving an application by 93 Golf Ranch, LLC, requesting a rezone which would result in amendments to the Jerome County Planning and Zoning Map. The affect of the amendment is to change various property from A-1 to A-2 agricultural zoning.

4. Attached as *Exhibit A* is a true and correct copy of the above mentioned *Memorandum Decision*.

5. This *Memorandum Decision* constitutes final agency action under Idaho Code § 67-5270 *et seq.*

6. This Petition for Judicial Review is being made pursuant to Idaho Code §§ 67-5273, 67-6521, 31-1506 and Idaho Rule of Civil Procedure 84.

II.

PETITION FOR REVIEW

1. Petitioner owns and operates a dairy which is directly adjacent to the subject property. The Petitioner's operation, known as the Giltner Dairy, is approved for approximately 5,880 animal units and is fully operational. Several of the Giltner Dairy, LLC members reside on the dairy. The Petitioner is affected and aggrieved by the Jerome County Board of Commissioners' ("Commissioners") *Memorandum Decision*.

2. The value of the Petitioner's property; the quality of life for Petitioner's members; and the Petitioner's ability to operate a dairy is negatively affected and aggrieved by the

Commissioners' decision for the following, non-inclusive, list of reasons:

- a. The amendment changing the property from A-1 Agricultural to A-2 Agricultural does not conform to Idaho Code § 67-6508 and the previously adopted Jerome County Comprehensive Plan Map.
- b. The subject property will be neither compatible nor harmonious with surrounding zones and existing uses under the existing Comprehensive Plan.
- c. The Comprehensive Plan relied upon when entering the *Memorandum Decision* changing the zoning was never validly adopted and approved by the Commission.
- d. The change in zoning sets an inappropriate and incompatible precedence for future uses that are incompatible with the existing uses in the area.
- e. The change in zoning changes the essential character of neighboring uses and will impede Petitioners ability to continue to operate its dairy in violation of Petitioner's private property rights.
- f. The change in zoning leaves insufficient buffer area between uses which are incompatible.

3. The 1997 Special Use Permit issued for 93 Golf Ranch, LLC on the subject property does not include housing. The amendment to the zoning is inconsistent with the Special Use Permit issued to 93 Golf Ranch.

4. Respondent's actions are in excess of the statutory authority of the Jerome County Commissioners, were made upon unlawful procedure, and are arbitrary, capricious, and an abuse of discretion.

III.

HEARING AND RECORD

1. The following hearings and recordings were held and made in this matter and a transcript of each hearing is necessary for judicial review and is requested by Petitioner and Petitioner's counsel has made arrangements to pay the estimated transcription fees:

- a. *August 25, 1997* - Hearings on the application for conditional use permit, as well as the permit granted to 93 Golf Ranch, LLC.
- b. *November 28, 2005* - Hearing by Planning and Zoning - two tapes: Tape 1 = 93 Golf Ranch C Plan; Tape 2 = 93 Golf Ranch P & Z Discussion;
- c. *December 27, 2005* - Planning and Zoning, Rezone from A1 to A2;
- d. *January 20, 2006* - Committee unknown - Discussion on Rezoning;
- e. *January 30, 2006* - Discussion by Commissioners;
- f. *February 27, 2006* - Hearing, 93 Golf Ranch;
- g. *July 28, 2008* - Transcript and records of hearing on request of 93 Golf Ranch, LLC for a Zoning Map Amendment; and
- h. *August 25, 2008* - Transcript and records of hearing on request of 93 Golf Ranch, LLC for a Zoning Map Amendment.
- i. *December 15, 2008* - Discussion by Commissioners regarding rezoning and passage of ordinance regarding same.

2. The following documents are necessary for judicial review and are requested by
Petitioner:

-
- a. Committee Recommendation on Zoning Map Amendment;
 - b. Memorandum Decision of November 10, 2008; and
 - c. The entire appellate record in this matter, denominated as Idaho Supreme Court Docket No. 34020 (appeal from the District Court of the Fifth Judicial District of Idaho, in and for the County of Jerome, Jerome County Case No. CV-2006-319).
 - d. Request for takings analysis to County Prosecutor by Petitioner; and
 - e. Denial of Request for Takings Analysis from County Prosecutor to Petitioner.

IV.

PRAYER

WHEREFORE, the Petitioner requests this Court to issue an order requiring the following:

1. This Court reverse Respondent's *Memorandum Decision* granting the Amendment Zoning;
2. That this Court remand the *Memorandum Decision* with instruction to deny 93 Golf Ranch, LLC's Application for a change in zoning;
3. That Petitioner be awarded reasonable attorneys fees and costs incurred in connection with this action; and
4. Petitioner be awarded such other and further relief as the Court deems just and appropriate.

DATED this 3rd day of April, 2009.

WHITE PETERSON

By: 

Davis F. VanderVelde
Attorneys for Giltner Dairy, LLC

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 3RD day of April, 2009, a true and correct copy of the above and foregoing instrument was served upon the following by the method indicated below:

Board of Commissioners
JEROME COUNTY CLERK
300 N. Lincoln, Room 300
Jerome, ID 83338


U.S. Mail
 Overnight Mail
 Hand Delivery
 Facsimile

Michael J. Seib
JEROME COUNTY PROSECUTOR
233 West Main Street
Jerome, ID 83338

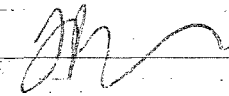
U.S. Mail
 Overnight Mail
 Hand Delivery
 Facsimile: (208) 644-2639

Gary D. Slette
ROBERTSON & SLETTE, PLLC
134 Third Avenue East
P.O. Box 1906
Twin Falls, ID 83303-1906
Attorneys for Intervenor

U.S. Mail
 Overnight Mail
 Hand Delivery
 Facsimile: (208) 933-0701


for WHITE PETERSON

W:\Work\G\Giltner Dairy, LLC 21980.000 93 Golf Ranch\2nd Judicial Review 2008\PLEADINGS\Petition Amended.Second 04-03-09 1h.doc

FILED
 DISTRICT COURT
 FIFTH JUDICIAL DISTRICT
 JEROME COUNTY
 APR 13 2009
 MICHELLE EMERSON


**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME**

GILTNER DAIRY, LLC, an Idaho)	
Limited Liability Company,)	
)	
Petitioner,)	
	)	Case No. CV-2008-1269
vs.)	
)	
JEROME COUNTY, a political)	
subdivision of the State of Idaho,)	
)	
Respondent,)	
)	
And)	
)	
93 Golf Ranch, LLC,)	
)	
Intervenor.)	
)	
)	

**MEMORANDUM DECISION AND ORDER RE: (1) PETITIONER'S MOTION FOR
 LEAVE TO FILE SECOND AMENDED PETITION FOR JUDICIAL REVIEW;
 PETITIONER'S MOTION FOR STAY OF PROCEEDINGS; AND (3) INTERVENOR'S
 MOTION TO DISMISS**

On April 3, 2009, the Motion to Dismiss came on regularly for hearing together with the
 Petitioner's Motion for Leave to File a Second Amended Petition for Judicial Review. Counsel
 Davis F. VanderVelde, appeared and argued on behalf of the Petitioner and Counsel Gary D.

1 - MEMORANDUM DECISION AND ORDER RE: (1) PETITIONER'S MOTION FOR LEAVE TO FILE
 SECOND AMENDED PETITION FOR JUDICIAL REVIEW; (2) PETITIONER'S MOTION FOR STAY OF
 PROCEEDINGS; AND (3) INTERVENOR'S MOTION TO DISMISS

Slette appeared and argued on behalf of the Intervenor. There was no appearance on behalf of the Respondent.

I.

FACTUAL AND PROCEDURAL BACKGROUND

On November 4, 2005 the 93 Golf Ranch, LLC, (Intervenor) which is owned by Ed and Sharon Peterson, submitted an Application for a Comprehensive Plan Amendment seeking to amend the comprehensive plan map from Agricultural Zone A-1 to Agricultural Zone A-2.

On February 27, 2006 the Commissioners approved and signed the Memorandum Decision approving the comprehensive plan map amendment.

The Comprehensive Plan Map Amendment was adopted pursuant to Jerome County Resolution 2006-10 on March 13, 2006. On March 24, 2006 the Petitioner, Giltner Dairy, LLC filed a timely Petition for Judicial Review. The district court subsequently dismissed the petition after oral argument. On March 28, 2008 the Idaho Supreme Court issued its published opinion affirming the district court. *Giltner Dairy v. Jerome County*, 145 Idaho 630, 181 P.3d 1238 (2008). (*Giltner I*).

On or about July 24, 2008 the Intervenor filed its application with the Jerome County Planning and Zoning Commission (Commission) requesting the following rezone of its property:

1. A rezone from A-1 to Commercial Overlay for property adjacent to and ¼ quarter mile east of Highway 93;
2. A rezone from A-1 to A-2 for the golf course property lying east of the proposed Commercial Overlay property and adjacent to and south of the petitioner's dairy;
3. A rezone from A-1 to A-2 for a portion of a former dairy which the Intervenor had under contract to purchase.

The Respondent owns a dairy consisting of adjacent to intervenor's property and opposed the application for rezone. The Commission held several public hearings on the application for rezone and on August 25, 2008 the Commission voted to recommend to the Jerome County Board of Commissioners (Board) that the application for rezone be denied.

The Board conducted a public hearing on the application for rezone on October 7, 2008 and on October 21, 2008 the Board granted the application for rezone. On November 10, 2008 the Board entered its findings of fact and conclusion of law approving the rezone.

On December 4, 2008 the petitioner filed a timely petition for Judicial Review.

On December 15, 2008 the Board again approved its prior decision on November 10, 2008 and further approved the adoption of Ordinance No. 2008-9 rezoning the intervenor's property as set forth in its application.

On January 15, 2009 the petitioner filed an amended petition for judicial review.

On January 30, 2009 the agency record and transcripts were lodged with the district court. On February 26, 2009 the supplemental agency records and transcripts were lodged with the court.

On March 13, 2009 the intervenor filed its Motion to Dismiss on the basis that the action of the Board approving the rezone did not result in a permit authorizing development and therefore judicial review of the Board's action was not authorized by statute. The petitioner filed its memorandum in opposition as well as a Motion to Stay Proceedings.

On April 6, 2009 the petitioner filed its Motion for Leave to file a Second Amended Petition for Judicial Review. The only material difference in the amended petition is that the petitioner seeks to add I.C. § 31-1506 as a jurisdictional basis for Judicial Review of the approval

of the rezone application. Both parties were granted additional time to provide additional authority to the court as to the motion to amend and such briefing was filed on April 10, 2009.

II.

PETITIONER'S MOTION TO STAY PROCEEDINGS

The petitioner's have filed a motion to stay further proceedings in this matter pending the Idaho Supreme Court's decision in *Vickers v. Canyon County Board of Commissioners, Supreme Court Docket No. 34809*. According to the petitioner, the pending appeal concerns the judicial reviewed of a conditional rezone and development agreement in place under I.C. § 67-6521. The petitioner asserts that one of the primary considerations is what constitutes a "permit" under the LLUPA.

The stay of proceedings for judicial review is governed by I.R.C.P. 84(m). Clearly whether this court should stay these proceedings is a matter of discretion and this court must exercise its discretion with in its outer bounds through an exercise of reason. The court has reviewed the Supreme Court's summary of the issues on appeal in *Docket No. 34809*. It would appear that the issues concern the approval of an amendment to the Comprehensive Plan Map; the approval of a Conditional Rezone; and the approval of a Development Agreement. The summary of facts in the *Vicker's* pending appeal do not appear to be similar to the issues pending in the matter sought to be stayed. For the reasons set forth below, the court must find that there is no basis to stay these proceedings pending the outcome of the *Vicker's* appeal.

Therefore the Motion to Stay Proceedings is DENIED.

III.
STANDARD

A. Motion to Dismiss

The motion of the intervenor does not set forth the procedural rule for dismissal and the court assumes that the motion is pursuant to I.R.C.P. Rule 12(b)(1) [lack of subject matter jurisdiction]. “Failure to exhaust administrative remedies is a subset of errors of "subject matter jurisdiction," and can also be brought under a 12(b)(1) motion. 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1350 (2004) (stating that a "Rule 12(b)(1) motion to dismiss for a lack of subject matter jurisdiction also may be appropriate when the plaintiff has failed to exhaust administrative procedures that have been established ... as a prerequisite to his bringing suit."). *Owsley v. Idaho Industrial Commission*, 141 Idaho 129, 106 P.3d 455 (2005). “Where an appeal is taken from a non-appealable order, the appeal should be dismissed, even by the court sua sponte, for lack of jurisdiction over the particular appeal.” *Highlands Development Corp. v. City of Boise*, 145 Idaho 958, 960 (2008). “In order to obtain judicial review of final agency action under the Local Land Use Planning Act (LLUPA), I.C. §§ 67-6501 *et seq.*, there must be a statute granting the right of judicial review.” *Johnson v. Blaine County*, 09.6 ISCR 254, 255 (2009).

IV.

ANALYSIS

A. **Motion to Amend Petition for Judicial Review.**

The petitioner seeks to file a second amended petition for judicial review and assert in that amended petition that this court has jurisdiction and that judicial review is authorized by the provisions of I.C. § 31-1506. The intervenor objects on the basis that a lack of “subject matter jurisdiction” cannot relate back to the filing of the original petition for judicial review. However, whether the petitioner has a statutory basis for judicial review or whether this court has jurisdiction to hear a petition for judicial review is to be distinguished from what is required to be contained in a petition for judicial review, the content of which is governed by IRCP Rule 84 (d). Rule 84(d) does not require that the petition set forth the statutory basis for judicial review. The failure to reference I.C. § 31-1506 in the petition for judicial review is not fatal to jurisdiction, irrespective of whether the statute confers jurisdiction to this court. *Eastern Idaho Health Services, Inc. v. Burtenshaw*, 122 Idaho 904, 907, 841 P.2d 434, 437 (1992).

The motion for leave to file the Second Amended Petition for Judicial Review is granted.

B. **Is the granting of an application for rezone subject to judicial review?**

To answer the question presented this court must first determine whether there is any statute that authorizes judicial review. This court would note that applications for rezone are governed by the Local Land Use Planning Act (LLUPA) and specifically I.C. §§ 67-6511 & 67-6509. Neither of these statutes expressly authorize judicial review of the granting or denial of a rezone application. The petitioner in their original petition and their first amended petition sought judicial review pursuant to I.C. § 67-6521.

In *Giltner Dairy v. Jerome County*, 145 Idaho 630, 633-634, 181 P.3d 1238, 1240-1241 (2008) the Idaho Supreme Court held that I.C. § 67-6521 did not grant the right of judicial review as to the granting or denial of an application to amend the comprehensive plan or land use map since it did not authorize any development. The decision did not address an application for rezone. However, the court did subsequently decide *Highlands Development Corp. v. City of Boise*, 145 Idaho 958, 188 P.3d 900 (2008), which addressed an application for annexation and rezone. The court stated that, with respect to section 67-6521, the “LLUPA also grants the right of judicial review to persons having an interest in real property which may be adversely affected by the issuance or denial of a permit authorizing development.” *Highlands Development Corp., supra.*, 145 Idaho at 961, 188 P.3d at 903. The court went on to conclude that the application for annexation and rezone “does not involve the granting or denial of a permit authorizing development.” The court further indicated that absent a statute authorizing judicial review of a local government decision to annex and zone property that the court lacks jurisdiction to review such decisions. *Highlands Development Corp., supra.*, 145 Idaho at 962, 188 P.3d at 904. Subsequent to the *Highlands* decision the Idaho Supreme Court issued its decision in *Deane Johnson v. Blaine County*, 09.6 ISCR 254, 255 (2009) which involved the judicial review of the approval of an application for the final plat of a planned unit development. The court therein further discussed when an aggrieved party may seek judicial review of final action under the LLUPA and stated:

In order to obtain judicial review of final action under the Local Land Use Planning Act (LLUPA), I.C. §§ 67-6501 *et seq.*, there must be a statute granting the right of judicial review. *Highlands Development Corp. v. City of Boise*, 145 Idaho 958, 960-61, 188 P.3d 900, 902-03 (2008). Idaho Code § 67-6521 provides that a person who has “an interest in real property which may be adversely affected by the issuance or denial of a permit authorizing the development” and who is “aggrieved by a decision” granting or

denying the permit may seek judicial review, after exhausting all remedies under the county ordinance. The approval of applications for a planned unit development, a conditional use, and a subdivision all constitute decisions granting permits.^{FN1} **The granting of a permit authorizes the development, and is therefore appealable, if it “places a developer in a position to take immediate steps to permanently alter the land.”** *Payette River Property Owners Ass'n v. Board of Comm'rs of Valley County*, 132 Idaho 551, 555, 976 P.2d 477, 481 (1999).

An affected person means “one having an interest in real property which may be adversely affected by the issuance or denial of a permit authorizing the development.” I.C. § 67-6521(1)(a). Johnson owns land adjoining the proposed development. He may be adversely affected by the approval of a development that would have higher housing densities than would otherwise be permitted by the underlying zoning district. *See Cowen v. Board of Commrs. of Fremont County*, 143 Idaho 501, 509, 148 P.3d 1247, 1255 (2006) and *Evans v. Teton County, Idaho, Board of Commissioners*, 139 Idaho 71, 75, 73 P.3d 84, 88 (2003). Therefore, Johnson is an affected person entitled to seek judicial review of the County Commissioners' approval of the planned unit development.

Our court has now clarified that to seek judicial review pursuant to I.C. § 67-6521, the petitioner bears the burden to show that the final action under the LLUPA authorized the applicant (developer) “to take immediate steps to permanently alter the land” that was the subject of the application. Therefore, the petitioner Giltner would have to show that the approval of the rezone application authorized the Intervenor, 93 Golf Ranch, to take *immediate* steps to permanently alter its land.

The petitioner argues that the application for rezone was a permit because of the language used by Jerome County in its rezone application. The language in the application relied upon by Giltner states as follows:

The undersigned hereby applies to amend the Jerome County Zoning Ordinance Map. All representations are, to the best of knowledge of the undersigned, fully accurate. This application is submitted on the express understanding that any inaccuracy in the

information submitted in the application may be grounds for rejection of the **permit**. (emphasis added). . . .

(Supplemental Agency Record, pg. 2)

This court would note that Giltner is only seeking judicial review of the rezone of that property adjacent to its dairy facility from A-1 to A-2. Chapter 4 of the Jerome County Zoning Ordinance sets forth the general purposes of the various zoning designations, including the A-1 and A-2 designations and states as follows:

CHAPTER 4
GENERAL PURPOSES OF ZONES
4-1. AGRICULTURAL ZONE (A-1)

4-1.01. Areas zoned A-1 are those where all usual and presently operating agricultural activities are appropriate to the use of land and are expected to continue. Urbanization in A-1 zones generally is neither appropriate to nor compatible with the possible agricultural activities in the area. Where urbanization is considered necessary by a landowner, the landowner proposing such urbanization shall present to the Planning and Zoning Commission documentation indicating that those neighboring landowners and tenants whose real property or residence is within one-fourth (1/4) mile of any portion of the perimeter of the area proposed for urbanization have been advised of the proposed urbanization, and their responses to the proposal shall be a part of the documentation. In areas zoned A-1 Agriculture, operations, with the exception of those operations which require Special Use Permits, may be reduced, expanded, or changed at the will of the operator. The Agriculture Zone is characterized by farms and ranches engaged in the production of food, fiber, animal products and in the raising of various kinds of livestock. (Amended 4-14-86; 1-21-99; 11-9-06, 10-20-08)

4-2. AGRICULTURAL ZONE (A-2)

4-2.01. A-2 describes those areas, which have been changing from primarily agricultural activities to more urban activities because of the increased influx of residential land uses over the last fifteen (15) years. Continuing urbanization in these areas is not discouraged, provided, however, that the Planning and Zoning Commission and the Board should weigh the benefits of any proposed urbanization in these areas against any harm which might result to the quality and character of the neighborhood as a result

thereof before approving such urbanization. Urbanization is expected to increase, but the manner in which this urbanization takes place shall be the primary judgment of the Planning and Zoning Commission and of the Board. (Amended 11-9-06, 10-20-08)

4-2.02. Issuance of a Special Use Permit in A-2 shall be based upon the best possible evaluation of the operation in question and its impact upon the environment. All usual and customary agricultural pursuits which are presently active are considered to be appropriate activities in the A-2 zones as long as they operate under the conditions which prevail at the time of the adoption of this Ordinance and as long as their negative impacts upon the environment do not increase. If an existing operation expands, it may do so after it has (1) given due consideration to the adequacy of its environmental control systems and (2) obtained a Special Use Permit. Newly established commercial operations shall require issuance of a Special Use Permit under the requirements set forth in this Ordinance.

It is clear from the provisions of sections 4-2.01 and 4-2.02 as they relate to the A-2 zoning designation that any use of the property with an A-2 zoning designation beyond the “usual and customary agricultural pursuits” would require the issuance of a Special Use Permit, which are governed by the provisions of I.C. § 67-6512. The court in *Highlands* stated that (1) “LLUPA grants the right of judicial review to persons who have applied for a permit required or authorized under LLUPA and were denied the permit or aggrieved by the decision on the application for the permit. I.C. § 67-6519.” and (2) the “LLUPA also grants the right to judicial review to persons having an interest in real property which may be adversely affected by the issuance or denial of a permit authorizing development. I.C. § 67-6521.” *Highlands Development Corp.*, supra., 145 Idaho at 961, 188 P.3d at 903.

To suggest that the reference to “permit” in the application for rezone was a permit contemplated under the LLUPA would “exalt form over substance”. *Regan v. Kootenai County*, 140 Idaho 721, 725, 100 P.3d 615, 619 (2004). The mere rezone of the property is not itself a “permit authorizing development.” The intervenor must still come back to the County for either a

Special Use Permit (67-5612) or a Subdivision permit (67-6513) or a PUD permit (67-6515) before immediate development of the property would be authorized. The majority opinion in ~~Highlands~~ indicated that an adversely affected party concerning a rezone decision could seek relief through an independent action, such as a Declaratory Judgment action, but not through Judicial Review. *McCuskey v. Canyon County*, 128 Idaho 213, 912 P.2d 100 (1996).

Therefore the application for rezone is not subject to judicial review under the provisions of I.C. § 67-6521 or any other provision of the LLUPA.

C. Does I.C. § 31-1506 authorize judicial review of an application for rezone?

The petitioner at the time of oral argument on the motion to dismiss raised for the first time that judicial review of the Board's granting of the application for rezone is authorized by I.C. § 31-1506. Both sides were granted additional time to brief this new issue.

I.C. § 31-1506 provides:

Judicial review of board decisions

(1) Unless otherwise provided by law, judicial review of any act, order or proceeding of the board shall be initiated by any person aggrieved thereby within the same time and in the same manner as provided in chapter 52, title 67, Idaho Code, for judicial review of actions.

(2) Venue for judicial review of board actions shall be in the district court of the county governed by the board.

Chapter 15, Title 31 concerns county finances and claims against the county and it does not relate to or concern planning and zoning decisions which are specifically covered by the LLUPA. The two statutes would appear to conflict in that the LLUPA does not authorize judicial review under the circumstances of this case and section 31-1506 authorizes judicial review of any act, order or proceeding of the board. "It is well established that '[a] specific statute ... controls over a more general statute when there is any conflict between the two.' " *Tuttle v.*

Wayment Farms, Inc., 131 Idaho 105, 108, 952 P.2d 1241, 1244 (1998) (quoting *Ausman v. State*, 124 Idaho 839, 842, 864 P.2d 1126, 1129 (1993)). Where two statutes appear to apply to the same case or subject matter, the specific statute will control over the more general statute.

State v. Barnes, 133 Idaho 378, 987 P.2d 290 (1999). Also see, *Gooding County v. Wybenga*, 137 Idaho 201, 46 P.3d 18 (2002). As indicated above Chapter 15, Title 31 deals with “county finances and claims against the county” while Chapter 65, Title 67 deals with planning and zoning decisions at both city and county levels. It is clear that these two statutes do not apply to the “same case or subject matter.” The legislature has adopted a specific statutory scheme for cities and counties which govern planning and zoning decisions. Further, those decisions sometimes are a matter of legislative action and at other times they concern quasi-judicial actions. *Cooper v. Board of County Commissioners of Ada County*, 101 Idaho 407, 614 P.2d 947 (1980).

Section 31-1506 applies to any act, order or proceeding of the board “unless otherwise provided by law.” The legislature in its adoption of the LLUPA has expressly provided those planning and zoning decisions that are to be the subject of judicial review. To accept the petitioner’s argument that section 31-1506 allows for the judicial review of an application for rezone would also mean that any legislative act of the Board would be subject to judicial review, which is clearly contrary to the law. The petitioner cites to no case authority that has held that section 31-1506 applies to the judicial review of a planning and zoning decision covered under the LLUPA. The authorities relied upon by the petitioner do not concern planning and zoning decisions. For example, *Fox v. Board of County Commissioners*, 121 Idaho 684, 827 P.2d 697 (1992) concerned the suspension of a liquor license and not a planning and zoning decision under LLUPA.

The court hereby determines that section 31-1506 does not convey jurisdiction to the district court to judicially review planning and zoning decisions of the Board which are covered under the LLUPA.

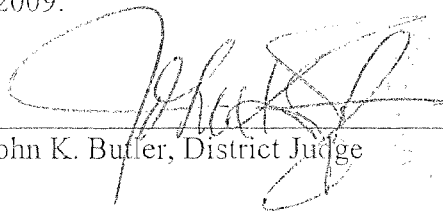
V.

CONCLUSION AND ORDER

For the reasons set forth above, the motion for leave to file a second amended petition for judicial review is GRANTED, and the Second Amended Petition for Judicial Review attached as Exhibit "A" to the petitioner's motion is deemed filed as of the date of this Memorandum Decision. Further, this court hereby determines that it does not have jurisdiction to review the approval of an application for rezone since it is not a permit that authorizes development as provided for under I.C. § 67-6521; and, further, the court determines that I.C. § 31-1506 does not apply planning and zoning decisions governed by the LLUPA. Due to the court lacking jurisdiction in the subject matter of this action, the petition's for judicial review including the second amended petition for judicial review are hereby DISMISSED.

IT IS SO ORDERED.

DATED this 13 day of April, 2009.



John K. Butler, District Judge

CERTIFICATE OF MAILING/DELIVERY

I, undersigned, hereby certify that on the 13th day of April, 2009, a true and correct copy of the foregoing MEMORANDUM DECISION AND ORDER RE: (1) ~~PETITIONER'S MOTION FOR LEAVE TO FILE SECOND AMENDED PETITION FOR~~ JUDICIAL REVIEW; (2) PETITIONER'S MOTION FOR STAY OF PROCEEDINGS; AND (3) INTERVENOR'S MOTION TO DISMISS was mailed, postage paid, and/or hand-delivered to the following persons:

Terrence R. White
Davis F. VanderVelde
Attorney at Law
5700 East Franklin Road, Ste. 200
Nampa, Idaho 83687-7901

John Horgan
Jerome County Prosecutor
Jerome County Judicial Annex
233 W. Main St.
Jerome, Idaho 83338

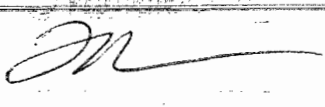
Gary Slette
Attorney at Law
P.O. Box 1906
Twin Falls, Idaho 83303-1906



Deputy Clerk

14 MEMORANDUM DECISION AND ORDER RE: (1) PETITIONER'S MOTION FOR LEAVE TO FILE SECOND AMENDED PETITION FOR JUDICIAL REVIEW; (2) PETITIONER'S MOTION FOR STAY OF PROCEEDINGS; AND (3) INTERVENOR'S MOTION TO DISMISS

Terrence R. White
 Davis F. VanderVelde
 WHITE, PETERSON, GIGRAY, ROSSMAN,
 NYE & NICHOLS, P.A.
 5700 East Franklin Road, Suite 200
 Nampa, Idaho 83687-7901
 Telephone: (208) 466-9272
 Facsimile: (208) 466-4405
 ISB Nos.: 1351, 7314
trw@whitepeterson.com
dvandervelde@whitepeterson.com

2008 JUN 11 11:11 AM
 MICHELLE S. GARDNER


Attorneys for Petitioner/Appellant

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

_____)	
GILTNER DAIRY, LLC, an Idaho limited)	
liability company,	)	CASE NO. CV-08-1269
)	
Petitioner/Appellant,)	
)	
vs.	)	NOTICE OF APPEAL
)	
JEROME COUNTY, a political subdivision of)	
the State of Idaho,	)	Fee Category: T
	)	Filing Fee: \$15.00 Jerome County
Respondent.	)	\$86.00 Idaho Supreme Court
_____)	
)	
93 GOLF RANCH, LLC,)	
)	
Intervenor.)	
_____)	

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Petitioner, GILTNER DAIRY, LLC, appeals against the above-named Defendants to the Idaho Supreme Court from the *Memorandum Decision and Order Re:*

(1) Petitioner's Motion for Leave to File Second Amended Petition for Judicial Review; Petitioner's Motion for Stay of Proceedings; and (3) Intervenor's Motion to Dismiss entered in the above-entitled action on the 13th day of April, 2009, Honorable John K. Butler, presiding.

2. These parties have 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 I.A.R. 11(a).

3. The Appellants intend to raise the following issues on appeal; provided, this list of issues is not exhaustive, and shall not prevent the Appellants from asserting other issues on appeal:

3.1. Whether District Court erred and/or abused its discretion by granting a dismissal of the petition for judicial review in its *Memorandum Decision and Order Re: (1) Petitioner's Motion for Leave to File Second Amended Petition for Judicial Review; Petitioner's Motion for Stay of Proceedings; and (3) Intervenor's Motion to Dismiss* entered in the above-entitled action on the 13th day of April, 2009, Honorable John K. Butler, presiding. Among the issues to be presented is jurisdiction of the District Court for judicial review pursuant to I.C. § 31-1506.

4. The following is the Appellant's statement on appeal:

4.1 Is an additional reporter's transcript requested? Yes.

4.2 The Appellant requests the preparation of the following portions of the reporter's transcript:

4.2.1. The entire reporter's standard transcript as defined in Rule 25(c), I.A.R. and, in addition to those, to the extent not already included:

4.2.1.1. Transcript of hearing on *Motion to Dismiss* held on April 6, 2009.

5. The Appellants request the following documents to be included in the Clerk's Record in addition to those automatically included under I.A.R. 28 and, in addition to those, to the extent not already included:

- 5.1 *Petition for Judicial Review* filed on December 5, 2008;
- 5.2 *Amended Petition for Judicial Review* filed on January 15, 2009;
- 5.3 *Bonds Posted for Transcript* on January 20, 2009;
- 5.4 Notice of lodging of agency record and transcript filed on January 30, 2009;
- 5.5 Notice of filing and lodging supplemental agency record with the Court filed on February 26, 2009;
- 5.6 *Intervenor's Motion to Dismiss* filed on March 13, 2009;
- 5.7 *Notice of Hearing on Intervenor's Motion to Dismiss* filed on March 13, 2009;
- 5.8 *Opposition to Motion to Dismiss and Counter Motion to Stay Proceedings* filed on March 30, 2009;
- 5.9 *Supplemental Authority in Support of Motion to Dismiss* filed on April 3, 2009;
- 5.10 *Motion to Shorten Time for Hearing* filed on April 6, 2009;
- 5.11 *Motion for Leave to File and Serve Second Amended Petition for Judicial Review* filed on April 6, 2009;

- 5.12 *Order Shortening Time for Hearing* filed on April 6, 2009;
- 5.13 *Memorandum in support of motion for leave to file and serve second amended Petition for Judicial Review* filed April 10, 2009
-
- 5.14 *Memorandum in opposition to motion for leave to file and serve second amended petition for judicial review* filed on April 10, 2009;
- 5.15 *Memorandum Decision and Order re: (1) petitioner's motion for leave to file second amended petition for judicial review; petitioner's motion for stay of proceedings; and (3) intervenor's motion to dismiss* filed on April 13, 2009; and
- 5.16 *Petitioner's Exhibit A - Second Amended Petition for Judicial Review* filed on April 13, 2009;

6. I certify:

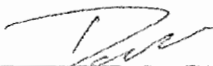
- 6.1 That a copy of this Notice of Appeal and any request for additional transcripts has been served on each reporter of whom an additional transcript has been requested as named at the address set out below:

Name and address: *Candace Childers*
Jerome County Courthouse
233 W. Main
Jerome, Idaho 83338

- 6.2 That a copy of this Notice of Appeal has been served on the reporter;
- 6.3 That the Clerk of the District Court has been paid the estimated sum of \$100.00 for preparation of the Reporter's Transcript and the Clerk's Record. The balance will be paid upon notice of the full amount due and owing.
- 6.4 That service has been made upon all parties required to be served pursuant to Rule 20.

DATED this 21 day of May, 2009.

WHITE PETERSON

By: 

Davis F. VanderVelde
Attorneys for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 21 day of May, 2009, a true and correct copy of the above and foregoing instrument was served upon the following by the method indicated below:

Board of Commissioners
JEROME COUNTY CLERK
300 N. Lincoln, Room 300
Jerome, ID 83338

U.S. Mail
 Overnight Mail
 Hand Delivery
 Facsimile

Michael J. Seib
JEROME COUNTY PROSECUTOR
233 West Main Street
Jerome, ID 83338

U.S. Mail
 Overnight Mail
 Hand Delivery
 Facsimile: (208) 644-2639

Gary D. Slette
ROBERTSON & SLETTE, PLLC
134 Third Avenue East
P.O. Box 1906
Twin Falls, ID 83303-1906
Attorneys for Intervenor

U.S. Mail
 Overnight Mail
 Hand Delivery
 Facsimile: (208) 933-0701

Candace Childers
Court Reporter to Judge Butler
Jerome County Courthouse
233 W. Main
Jerome, Idaho 83338

U.S. Mail
 Overnight Mail
 Hand Delivery
 Facsimile



for WHITE PETERSON

W:\Work\G\Giltner Dairy, LLC 21980.000 93 Golf Ranch\2nd Judicial Review 2008\PLEADINGS\Appeal SCT.NOT 05-20-09 lh.doc

Date: 1/20/2009

Fifth Judicial District Court - Jerome County

NO. 00000

Time: 04:24 PM

Receipt

Received of: Giltner Dairy

Transcript

\$ 500.00

450 E 100 S

Jerome, ID 83338

Five Hundred and 00/100 Dollars

Case: CV-2008-0001269

Plaintiff: Giltner Dairy, etal. vs. Jerome County

Cash bond:

500.00

Check: 20482

Payment Method: Check

Amount Tendered:

500.00

Michelle Emerson, Clerk Of The District Court

By: 

Deputy Clerk

Clerk: TRACI

Date: 1/20/2009

Time: 04:26 PM

Fifth Judicial District Court - Jerome County

NO. 00000000

Receipt

Record fee

Received of: Giltner Dairy

\$ 250.00

450 E 100 S

Jerome, ID 83338

Two Hundred Fifty and 00/100 Dollars

Case: CV-2008-0001269

Plaintiff: Giltner Dairy, etal. vs. Jerome County

Cash bond:

250.00

Check: 20483

Payment Method: Check

Amount Tendered: 250.00

Michelle Emerson, Clerk Of The District Court

By: _____

Deputy Clerk

Clerk: TRACI

Duplicate

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

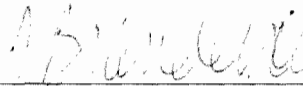
GILTNER DAIRY,)
)
Plaintiff/appellant,) Case No. CV2008-1269
) Supreme Court Docket No. 36528-2009
)
vs.) CERTIFICATE OF EXHIBIT
)
JEROME COUNTY,)
)
Defendant/respondent.)
_____)

STATE OF IDAHO)
)ss.
County of Jerome)

I, hereby certify, that there are not exhibits to provide with the record.

DATED This 4th day of August, 2009.

MICHELLE EMERSON
Clerk of the District Court

By 
Traci Brandebourg, Deputy Clerk

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

GILTNER DAIRY,)
)
 Plaintiff/appellant,) Case No. CV2008-1269
) Supreme Court Docket No. 36528-2009
 vs.) CERTIFICATE OF SERVICE
)
 JEROME COUNTY,)
)
 Defendant/respondents.)
 _____)

I, Michelle Emerson, Clerk of the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Jerome, do hereby certify that I have personally served or mailed, by United States Mail, one copy of the hearing transcript and record to each of the attorneys of record in this cause as follows:

Davis F Vandervelde
5700 E Franklin Road
Nampa, ID 83687

Mike Seib
233 W Main
Jerome, ID 83338

Gary D Slette
P.O. Box 1906
Twin Falls, ID 83303

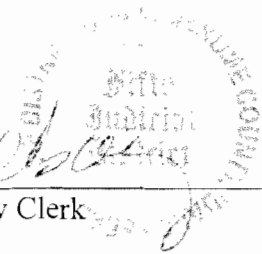
Attorney for Appellant

Attorney for Respondents

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

MICHELLE EMERSON
Clerk of the District Court

By Traci Brandebourg
Traci Brandebourg, Deputy Clerk



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME


GILTNER DAIRY,)
)
Plaintiff/appellant,) Case No. CV2008-1269
) Supreme Court Docket No. 36528-2009
)
vs.) CLERK'S CERTIFICATE
)
JEROME COUNTY,)
)
Defendant/respondent.)
_____)

STATE OF IDAHO,)
)ss.
County of Jerome)

I, Michelle Emerson, Clerk of the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Jerome, do hereby certify that the above and foregoing transcript in the above-entitled case was compiled and bound under the direction as, and is a true, full and correct transcript of all the pleadings and proceedings therein contained and according to Rule 28, Appellate Rules of the Supreme Court.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Jerome, Idaho, this 7th day of August, 2009.

MICHELLE EMERSON
Clerk of the District Court

By 
Traci Brandebourg, Deputy Clerk