1-24-2011

Burns Holdings, LLC v. Teton County Bd. of Com'rs Clerk's Record v. 1 Dckt. 38269

LAW CLERK Vol 1 of 2

COPY

IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

In Re: Application for a CUP Permit to Exceed 45' Height for M-1 Zone

Burns Holding s, LLC
Petitioner / Appellant

Vs.

Teton County Board of Commissioners
Respondent

Appealed from the District Court of the Seventh Judicial District of the State of Idaho, in and for Teton County

Honorable Gregory W. Moeller, District Judge

Dale W. Storer, P.O. Box 50130, Idaho Falls, Idaho 83405
Attorney-for-Petitioners/Appellants

Kathy Spitzer, 89 North Main #5, Driggs, Idaho 83422
Attorney for Respondents

Filed this _____ *day of* _____ *20*

38269

FILED - COPY
JAN 24 2011
Supreme Court Court of Appeals
State of Idaho

_____ *Clerk*

By _____ *Deputy*

Supreme Court No. 38269
Teton County No. CV 07-376

In Re: Application for a CUP Permit to Exceed 45′ Height Limit for M-1 Zone

Burns Holdings, LLC
Petitioner/Appellant

vs

Teton County Board of Commissioners
Respondents

Dale W. Storer, Esq.
P.O. Box 50130
Idaho Falls, Idaho 83405
Attorney for Petitioner

Kathy Spitzer
89 N Main, #5
Driggs, Idaho 83422
Attorney for Respondents

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Seventh Judicial District - Teton County

ROA Report

Case: CV-2007-0000376 Current Judge: Gregory W Moeller

Burns Holdings, LLC vs. Board of County Commissioners of Teton County

Burns Holdings, LLC vs. Board of County Commissioners of Teton County

)ate	Code	User		Judge
12/11/2007	NCOC	PHYLLIS	New Case Filed - Other Claims	Jon J Shindurling
		PHYLLIS	Filing: R2 - Appeals And Transfers For Judicial Review To The District Court Paid by: Holden Kidwell Receipt number: 0035110 Dated: 12/11/2007 Amount: $78.00 (Check) For: [NONE]	Jon J Shindurling
	BNDC	PHYLLIS	Bond Posted - Cash (Receipt 35111 Dated 12/11/2007 for 100.00)	Jon J Shindurling
	BNDC	PHYLLIS	Bond Posted - Cash (Receipt 35112 Dated 12/11/2007 for 100.00)	Jon J Shindurling
1/14/2008	TRAN	PHYLLIS	Transcript Filed	Jon J Shindurling
1/15/2008	MISC	GABBY	Statement Of Issue On Judicial Review	Jon J Shindurling
1/18/2008	NOTC	PHYLLIS	Notice of Lodging of Transcript	Jon J Shindurling
2/15/2008	NOTC	PHYLLIS	Notice of Settling Transcript on Appeal and Notice of Time for Hearing Oral Argument	Jon J Shindurling
	HRSC	PHYLLIS	Hearing Scheduled (Hearing 06/10/2008 03:00 PM) Oral Argument	Jon J Shindurling
3/3/2008	MOTN	GABBY	Motion To Augment Agency Record/Transcript And For Stay Of Briefing Schedule	Jon J Shindurling
	STIP	GABBY	Stipulation To Augment The Record	Jon J Shindurling
3/5/2008	ORDR	PHYLLIS	Order Granting Leave to Augment Agency Record /Transcript and Staying of Briefing Schedule; Vacating Date of Hearing for Oral Argument	Jon J Shindurling
	HRVC	PHYLLIS	Hearing result for Hearing held on 06/10/2008 03:00 PM: Hearing Vacated Oral Argument	Jon J Shindurling
5/13/2008	NOTC	GABBY	Notice Of lodging Transcript	Jon J Shindurling
5/28/2008	MOTN	GABBY	Petitioner's Motion For Extension Of Briefing Schedule And Continuance Of Oral Argument	Jon J Shindurling
6/20/2008	MOTN	GABBY	Motion To Reschedule Oral Argument	Jon J Shindurling
	AFFD	GABBY	Affidavit Of Dale W. Storer In Support Of Motion To Reschedule Oral Argument	Jon J Shindurling
7/1/2008	HRSC	PHYLLIS	Hearing Scheduled (Status Conference 10/21/2008 02:00 PM)	Jon J Shindurling
	ORDR	PHYLLIS	Order Granting Motion to Reschedule Oral Argument	Jon J Shindurling
7/11/2008	MISC	GABBY	Petitioner's Brief	Jon J Shindurling
	MISC	GABBY	Certificate Of Compliance	Jon J Shindurling
8/5/2008	MISC	SHILL	Respondents Brief	Gregory W Moeller
8/26/2008	RPLY	PHYLLIS	Petitioner's Reply Brief	Jon J Shindurling
10/21/2008	MINE	PHYLLIS	Minute Entry Hearing type: Hearing Hearing date: 10/21/2008 Time: 2:43 pm Court reporter: Nancy Marlow	Jon J Shindurling

Burns Holdings, LLC vs. Board of County Commissioners of Teton County

Date	Code	User		Judge
10/21/2008	DPHR	PHYLLIS	Hearing result for Hearing held on 10/21/2008 02:00 PM: Disposition With Hearing Oral Argument	Jon J Shindurling
10/30/2008	ORDR	PHYLLIS	Order	Jon J Shindurling
1/20/2009	MISC	GABBY	Amended Petition For Judicial Review	Jon J Shindurling
2/6/2009	MISC	GABBY	Amended Statement Of Issues On Judicial Review	Jon J Shindurling
2/10/2009	MISC	PHYLLIS	Findings of Fact	Jon J Shindurling
5/26/2009	MISC	PHYLLIS	Request for Scheduling Order	Jon J Shindurling
	MISC	PHYLLIS	Petitioner's Reply Brief	Jon J Shindurling
6/10/2009	ORDR	PHYLLIS	Order Governing Procedure on Appeal	Gregory W Moeller
6/11/2009	ORDR	AGREEN	Administrative Order	Gregory W Moeller
6/23/2009	NOTC	GABBY	Notice Of Non-Filing Of additional Brief	Gregory W Moeller
7/16/2009	MISC	PHYLLIS	Respondent's Supplemental Brief	Gregory W Moeller
7/31/2009	MISC	PHYLLIS	Petitioner's Second Reply Brief	Gregory W Moeller
	NOTH	PHYLLIS	Notice Of Hearing	Gregory W Moeller
	HRSC	PHYLLIS	Hearing Scheduled (Hearing 08/18/2009 02:00 AM) Oral Argument	Gregory W Moeller
8/12/2009	HRRS	PHYLLIS	Hearing Rescheduled (Hearing 08/18/2009 11:00 AM) Oral Argument	Gregory W Moeller
8/13/2009	NOTH	PHYLLIS	Amended Notice Of Hearing	Gregory W Moeller
8/18/2009	MINE	PHYLLIS	Minute Entry Hearing type: Motions Hearing date: 8/18/2009 Time: 11:21 am Courtroom: Court reporter: David Marlow Minutes Clerk: PHYLLIS HANSEN Tape Number: Dale Storer Atty for Applicant Dan Dansie - Atty for APplicant Kathy SPItzer - Attorney for County	Gregory W Moeller
	ADVS	PHYLLIS	Hearing result for Hearing held on 08/18/2009 11:00 AM: Case Taken Under Advisement Oral Argument	Gregory W Moeller
9/29/2009	MISC	PHYLLIS	Decision on Review	Gregory W Moeller
10/9/2009	MEMO	PHYLLIS	Memorandum of Costs	Gregory W Moeller
10/13/2009	MOTN	PHYLLIS	Motion for Reconsideration	Gregory W Moeller
	MISC	PHYLLIS	Brief In Support of Motion for Reconsideration	Gregory W Moeller
11/6/2009		GABBY	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Mike Polhamus Receipt number: 0042433 Dated: 11/6/2009 Amount: $27.00 (Cash)	Gregory W Moeller
11/13/2009	STIP	STACEY	Stipulation Regarding Motion for Reconsideration	Gregory W Moeller

Burns Holdings, LLC vs. Board of County Commissioners of Teton County

Date	Code	User		Judge
11/17/2009	ORDR	PHYLLIS	Order Re Motion for Reconsideration	Gregory W Moeller
12/4/2009	PETN	PHYLLIS	Second Amended Petition for Judicial Review	Gregory W Moeller
	MISC	PHYLLIS	Second Amended Statement of Issues on Judicial Review	Gregory W Moeller
12/17/2009	MOTN	PHYLLIS	Motion to Augment Agency Record	Gregory W Moeller
	AFFD	PHYLLIS	Affidavit of Kurt Hibbert	Gregory W Moeller
	NOTH	PHYLLIS	Notice Of Hearing	Gregory W Moeller
	HRSC	PHYLLIS	Hearing Scheduled (Motions 01/05/2010 02:00 PM)	Gregory W Moeller
12/21/2009	ORDR	PHYLLIS	Order Governing Procedure on Review	Gregory W Moeller
1/5/2010	MINE	PHYLLIS	Minute Entry Hearing type: Motion to Augment the Record Hearing date: 1/5/2010 Time: 2:50 pm Courtroom: Court reporter: David Marlow Minutes Clerk: PHYLLIS HANSEN Tape Number:	Gregory W Moeller
	DCHH	PHYLLIS	Hearing result for Motions held on 01/05/2010 02:00 PM: District Court Hearing Held Court Reporter: David Marlow Number of Transcript Pages for this hearing estimated at: Less than 50	Gregory W Moeller
1/7/2010	MINE	PHYLLIS	Minute Entry Hearing type: Motion to AUgment Record Hearing date: 1/5/2010 Time: 2:19 pm Courtroom: Court reporter: David Marlow Minutes Clerk: PHYLLIS HANSEN Tape Number: Dale Storer Attorney for Petitioner Kathy Spitzer Attorney for Respondent	Gregory W Moeller
1/12/2010	MISC	STACEY	Amended Findings of Fact and Conclusions of Law	Gregory W Moeller
	ORDR	PHYLLIS	Order Denying Motion to Augment	Gregory W Moeller
1/14/2010	NOTC	STACEY	Notice of Filing	Gregory W Moeller
2/10/2010	MISC	PHYLLIS	Breif in Support of Second Amended Petition for Judicial Review	Gregory W Moeller
3/10/2010	MISC	GABBY	Respondent's Reply Brief Second Amended Petition For Judicial Review	Gregory W Moeller
3/24/2010	NOTH	GABBY	Notice Of Hearing	Gregory W Moeller
	MISC	GABBY	Reply Brief In Support Of Second Amended Petition For Judicial Review	Gregory W Moeller
	HRSC	GABBY	Hearing Scheduled (Hearing 04/20/2010 02:00 PM)	Gregory W Moeller

Burns Holdings, LLC vs. Board of County Commissioners of Teton County

)ate	Code	User		Judge
1/20/2010	MINE	PHYLLIS	Minute Entry Hearing type: Hearing Hearing date: 4/20/2010 Time: 3:02 pm Courtroom: Court reporter: Minutes Clerk: PHYLLIS HANSEN Tape Number: Dale Storer Plaintiff's Attorney Kathy Spitzer Defendant's Attorney	Gregory W Moeller
	DCHH	PHYLLIS	Hearing result for Hearing held on 04/20/2010 02:00 PM: Court Reporter: Number of Transcript Pages for this hearing estimated at: Less than 200	Gregory W Moeller
	ADVS	PHYLLIS	Case Taken Under Advisement	Gregory W Moeller
6/10/2010	MISC	PHYLLIS	Third Decision on Review	Gregory W Moeller
6/24/2010	MOTN	GABBY	Petitioner's Motion For Reconsideration	Gregory W Moeller
6/28/2010	NOTH	GABBY	Notice Of Hearing	Gregory W Moeller
	HRSC	GABBY	Hearing Scheduled (Motions 08/03/2010 02:00 PM)	Gregory W Moeller
7/6/2010	MOTN	GABBY	Motion To Continue	Gregory W Moeller
	ORDR	PHYLLIS	Order to Continue	Gregory W Moeller
	CONT	PHYLLIS	Hearing result for Motions held on 08/03/2010 02:00 PM: Continued	Gregory W Moeller
7/8/2010	HRSC	PHYLLIS	Hearing Scheduled (Motions 08/17/2010 02:00 PM) for Reconsideration	Gregory W Moeller
8/6/2010	MISC	GABBY	Petitioner's Brief In Support Of Motion For Reconsideration	Gregory W Moeller
8/10/2010	MISC	GABBY	Respondent's Reply Brief In Opposition To Petitioner's Motion For Reconsideration	Gregory W Moeller
8/17/2010	MINE	PHYLLIS	Minute Entry Hearing type: Oral Argument Hearing date: 8/17/2010 Time: 4:02 pm Courtroom: Court reporter: David Marlow Minutes Clerk: PHYLLIS HANSEN Tape Number: Kathy SPItzer, Respondents Attorney Dale Storer, Plaintiff's Attorney	Gregory W Moeller
8/18/2010	DCHH	PHYLLIS	Hearing result for Motions held on 08/17/2010 02:00 PM: District Court Hearing Held Number of Transcript Pages for this hearing estimated at: less than 100	Gregory W Moeller
10/1/2010	MISC	PHYLLIS	Amended Third Decision on Review	Gregory W Moeller

Burns Holdings, LLC vs. Board of County Commissioners of Teton County

Date	Code	User		Judge
0/1/2010	CDIS	PHYLLIS	Civil Disposition entered for: Board of County Commissioners of Teton County, Defendant; Burns Holdings, LLC, Plaintiff. Filing date: 10/1/2010	Gregory W Moeller
	CSCP	ISC2	Case Status Closed But Pending: closed pending clerk action	Gregory W Moeller
11/10/2010		PHYLLIS	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Holden Kidwell Receipt number: 0045861 Dated: 11/10/2010 Amount: $101.00 (Check) For: Burns Holdings, LLC (plaintiff)	Gregory W Moeller
	BNDC	PHYLLIS	Bond Posted - Cash (Receipt 45862 Dated 11/10/2010 for 200.00)	Gregory W Moeller
	NOTC	PHYLLIS	Notice of Appeal	Gregory W Moeller
11/24/2010	ORDR	PHYLLIS	Order Suspending Appeal	Gregory W Moeller
11/30/2010	JDMT	PHYLLIS	Final Judgment	Gregory W Moeller

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Facsimile: (208) 523-9518

Attorneys for Petitioner, Burns Holdings, LLC

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4:33

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TETON

IN RE: Application for a CUP Permit to Exceed 45' Height Limit for M-1 Zone BURNS HOLDINGS, LLC, Petitioner and Applicant, v. TETON COUNTY BOARD OF COMMISSIONERS, Respondent.	Case No. CV07-376 **PETITION FOR JUDICIAL REVIEW** Fee Category: R.2 Fee: $72.00

Petitioner, Burns Holdings, LLC, respectfully submits this Petition for Judicial Review pursuant to the provisions of Idaho Code §§ 67-5270 and 67-6521 and Rule 84 of the Idaho Rules of Civil Procedure. In support of such Petition, Petitioner alleges as follows:

1. Petitioner is an Idaho limited liability company with its principal place of business located in Idaho Falls, Idaho.

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2. Respondent, the Teton County Board of County Commissioners (the "Board"), is a political subdivision of the state of Idaho.

3. Venue of this Petition is proper under the provisions of Idaho Code § 67-5272.

4. On or about June 14, 2007, Petitioner filed an Application for a Conditional Use Permit ("CUP") with the City of Driggs Planning and Zoning Commission, seeking to obtain a conditional use permit allowing the Applicant to exceed the forty-five (45) foot height limit applicable with respect to the M-1 Zone, as established by the Zoning Ordinance of the City of Driggs, Idaho. The subject property was described as Lot 1b, Block II, and the eastern 110' of Lot 1a, Teton Peaks View Subdivision and is located within the Area of Impact identified by the Teton County and City of Driggs Area of Impact Ordinances, Agreements and Map. Because the subject property was located within the Area of Impact, the application was brought pursuant to § 2, Chapter 4, of the Zoning Ordinance of the City of Driggs, which zoning ordinance was, by virtue of the Area of Impact ordinances and agreement, made applicable to all properties located within the Area of Impact.

5. The application was heard by the Driggs Planning and Zoning Commission on July 11, 2007, at the conclusion of which the Driggs Planning and Zoning Commission granted the application. On or about July 23, 2007, Mr. John N. Bach, filed a " Notice of Appeal" of the decision of the Commission with the Teton County Board of County Commissioners. On or about September 13, 2007, the County Commissioners conducted

a hearing, at the conclusion of which it determined to hear the matter *de novo*, rather than as an appeal.

6. On November 15, 2007, the Teton County Board of Commissioners conducted a hearing for the purpose of considering the CUP application, at the conclusion of which the Board denied the CUP application.

7. The proceedings before the Commission and the Board were recorded magnetically and a copy of the tape recording is in the possession of the Clerk of the Teton County Board of County Commissioners and the Clerk of the Driggs Planning and Zoning Commission.

8. Petitioner will file a Statement of the Issues for Judicial Review within fourteen (14) days from the date of the filing of this Petition.

9. Petitioner further requests that the Clerks of the Driggs Planning and Zoning Commission and the Board prepare and file a complete record of all pleadings, exhibits and other documents filed in conjunction with the above-referenced proceedings, together with a transcript of the proceedings before the Commission and the Board, on July 11, September 13 and November 15, 2007.

10. Petitioner further requests that it be awarded its reasonable attorneys fees and costs pursuant to Idaho Code §§ 12-117, 12-121 and 42 U.S.C. § 1988.

WHEREFORE, Petitioner prays for relief as follows:

1. For judicial review of the Board's decisions in this matter, pursuant to Idaho Code § 67-6521.

2. For an order reversing the decision of the Board issued on November 15,

2007, and remanding the matter to the Board for reconsideration consistent with the Court's direction.

3. For an order awarding Petitioner its reasonable attorneys fees and costs pursuant to Idaho Code §§ 12-117, 12-121 and 42 U.S.C. § 1988.

4. For such other relief as the Court deems just and proper.

DATED this 11th day of December, 2007.

Dale W. Storer,
Attorney for the Petitioner

CERTIFICATION

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, and that:

1. That service of this Petition has been made upon the Teton County Planning and Zoning Commission and the Teton County Board of Commissioners, and or their agents and attorneys, as follows:

a.	Barton J. Birch Teton County Prosecutor's Office 81 N. Main Street, #B Driggs, ID 83422	(✓) Mail ( ) Hand Delivery ( ) Facsimile ( ) Courthouse Box
b.	Kurt Hibbert Teton County Planning & Zoning Administrator Teton County Courthouse 89 N. Main Driggs, ID 83422	(✓) Mail ( ) Hand Delivery ( ) Facsimile ( ) Courthouse Box
c.	Douglas Self Driggs Planning & Zoning Administrator City Hall P.O. Box 48 Driggs, ID 83422	(✓) Mail ( ) Hand Delivery ( ) Facsimile ( ) Courthouse Box

2. That the clerk of Teton County has been paid the estimated fee for preparation of the transcripts requested above.

3. That the clerk of the agency has been paid the estimated fee for the preparation of the agency record.

Dale W. Storer
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

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DeAnne Casperson, Esq. (ISB No. 6698)
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Attorneys for Petitioner, Burns Holdings, LLC

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TETON

IN RE: Application for a CUP Permit to Exceed 45' Height Limit for M-1 Zone	Case No. CV-07-376 **STATEMENT OF ISSUES ON JUDICIAL REVIEW**
BURNS HOLDINGS, LLC, Petitioner and Applicant, v. TETON COUNTY BOARD OF COMMISSIONERS, Respondent.	

COMES NOW, the Petitioner, Burns Holding, LLC, and submits the following Statement of Issues for Judicial Review, pursuant to the provisions of Rule 84(d) of the Idaho Rules of Civil Procedure.

The issues for which Petitioner will seek Judicial Review include, without limitation, the following:

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a. Did the Findings of Fact and Conclusions adopted by the Board comply with the provisions of Idaho Code § 67-6535?

b. Did the Board apply proper legal standards in considering Petitioner's application for a Conditional Use Permit allowing the construction of a structure exceeding the forty-five foot (45') height limit set forth within the Driggs Zoning Ordinance?

c. Did the Board err in considering esthetic values when it denied the Conditional Use Permit, given that the subject property was located outside the scenic corridor adopted by Teton County and the City of Driggs?

d. Did the Board violate Petitioner's due process rights in considering evidence outside the CUP hearing and in failing to make all *ex parte* contact with members of the Board a matter of public record?

e. Did the Board err in ordering a *de novo* hearing to consider the CUP application, rather than considering the matter as an appeal of a final decision by the Driggs Planning and Zoning Commission?

f. Did the Board have jurisdiction to set aside a final decision by the Driggs Planning and Zoning Commission to issue the CUP permit, in the absence of a timely filed appeal by the opponents of the CUP?

g. Did the Board err in using the Teton County Comprehensive Plan, and the broad goals articulated therein, as a standard for determining whether or not to issue the subject CUP?

h. Does the use by the Driggs Zoning Ordinance of the Comprehensive Plan and the broad, general goals stated therein, as a criteria for evaluating and considering the issuance of conditional use permits, violate Petitioner's due process rights under the Idaho and United States Constitution?

i. Did the Board use the appropriate Comprehensive Plan, in evaluating and considering Petitioner's application for a Conditional Use Permit?

j. Did the Board act arbitrarily and capriciously in denying the CUP permit?

DATED this 11th day of January, 2008.

Dale Storer

Dale W. Storer
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, that I served a true and correct copy of the following described pleading or document on the attorney listed below by hand delivering, mailing or by facsimile, as indicated below, with the correct postage thereon, on this 11th day of January, 2008.

DOCUMENT SERVED: STATEMENT OF ISSUES ON JUDICIAL REVIEW

ATTORNEY SERVED:

Barton J. Birch
Teton County Prosecutor's Office
81 N. Main Street, #B
Driggs, ID 83422

(✓) Mail
( ) Hand Delivery
( ) Facsimile
( ) Courthouse Box

Dale W. Storer
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

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Attorneys for Petitioner, Burns Holdings, LLC

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TETON

IN RE: Application for a CUP Permit to Exceed 45' Height Limit for M-1 Zone BURNS HOLDINGS, LLC, Petitioner and Applicant, v. TETON COUNTY BOARD OF COMMISSIONERS, Respondent.	Case No. CV-07-376 **MOTION TO AUGMENT AGENCY RECORD/TRANSCRIPT AND FOR STAY OF BRIEFING SCHEDULE**

COMES NOW, the Petitioner, Burns Holdings, LLC, and moves the Court for an order granting leave to augment the agency record and transcript in the above-entitled action. In particular, Petitioner seeks to augment the agency record and transcript with the agency record and transcript of the proceedings before the Driggs Planning and Zoning Commission, Driggs City Council and Teton County Board of Commissioners, with

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respect to the Petitioner's application for a rezoning of the subject property from C-3 to M-1.

This Motion is made for the reason that the rezone proceedings were referred to numerous times during the course of the proceedings before the Board of County Commissioners regarding to the conditional use permit application and were expressly relied upon in their decision to deny the conditional use permit. This Motion is further based upon the Stipulation of the parties filed concurrently herewith.

DATED this 28th day of February, 2008.

Dale W. Storer
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, that I served a true and correct copy of the following described pleading or document on the attorney listed below by hand delivering, mailing or by facsimile, as indicated below, with the correct postage thereon, on this 28th day of February, 2008.

DOCUMENT SERVED: MOTION TO AUGMENT AGENCY RECORD/TRANSCRIPT AND FOR STAY OF BRIEFING SCHEDULE

ATTORNEY SERVED:

Barton J. Birch
Teton County Prosecutor's Office
81 N. Main Street, #B
Driggs, ID 83422

(✓) Mail
( ) Hand Delivery
( ) Facsimile
( ) Courthouse Box

Dale W. Storer
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

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Dale W. Storer, Esq. (ISB No. 2166)
DeAnne Casperson, Esq. (ISB No. 6698)
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Attorneys for Petitioner, Burns Holdings, LLC

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TETON

IN RE: Application for a CUP Permit to Exceed 45' Height Limit for M-1 Zone BURNS HOLDINGS, LLC, Petitioner and Applicant, v. TETON COUNTY BOARD OF COMMISSIONERS, Respondent.	Case No. CV-07-376 **ORDER GRANTING LEAVE TO AUGMENT AGENCY RECORD/TRANSCRIPT AND STAYING OF BRIEFING SCHEDULE; VACATING DATE OF HEARING FOR ORAL ARGUMENT**

The Petitioner has filed a Motion seeking to augment the agency record and transcript in the above-entitled action with the record and transcript of the proceedings before the Board of County Commissioners for a related application for a rezone of the subject property. The parties have stipulated to the augmentation of such record, which Stipulation has been filed herein, and good cause appearing;

NOW THEREFORE, it is hereby ordered that the Petitioner be and hereby is given leave to augment the agency record and transcript as requested. Petitioner shall pay the initial costs of preparing the augmented agency record and transcript.

Petitioners have further moved the Court for an order vacating the briefing schedule and the oral argument, pending the settlement of the augmented agency record. Good cause appearing therefore,

NOW THEREFORE, it is further ordered that the briefing schedule and oral argument set for June 10, 2008, at 3:00 p.m., be and hereby is vacated, pending settlement of the augmented record and transcript.

DATED this 4 day of March, 2008.

Jon J. Shindurling

CLERK'S CERTIFICATE OF MAILING

I hereby certify that I served a true copy of the foregoing document upon the following this 5 day of March, 2008, by mailing, with the necessary postage affixed thereto.

ATTORNEY SERVED:

Dale W. Storer Holden, Kidwell, Hahn & Crapo, P.L.L.C. P.O. Box 50130 Idaho Falls, ID 83405	(✓) Mail ( ) Hand Delivery ( ) Facsimile ( ) Courthouse Box
Barton J. Birch Teton County Prosecutor's Office 81 N. Main Street, #B Driggs, ID 83422	( ) Mail ( ) Hand Delivery ( ) Facsimile (✓) Courthouse Box

CLERK OF THE DISTRICT COURT

By: Shyllis A Hansen
Deputy Clerk

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DeAnne Casperson, Esq. (ISB No. 6698)
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Telephone: (208) 523-0620
Facsimile: (208) 523-9518

Attorneys for Petitioner, Burns Holdings, LLC

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TETON

IN RE: Application for a CUP Permit to Exceed 45' Height Limit for M-1 Zone BURNS HOLDINGS, LLC, Petitioner and Applicant, v. TETON COUNTY BOARD OF COMMISSIONERS, Respondent.	Case No. CV-07-376 **PETITIONER'S BRIEF**

COMES NOW, the Petitioner, Burns Holdings, LLC, and submits the following memorandum brief in support of its Petition for Judicial Review, pursuant to Rule 84 of the Idaho Rules of Civil Procedure.

STATEMENT OF CASE

Petitioner seeks judicial review of the verbal decision of the Teton County Board of Commissioners (the "Board") issued on November 15, 2007, denying Petitioner's application

for a conditional use permit to construct and operate a concrete batch processing plant located within the area of impact immediately adjacent to the City of Driggs, Idaho. Specifically, Petitioner sought a conditional use permit to construct a facility with a height in excess of forty five-feet, as allowed under the Driggs M-1 zone. The Board's verbal decision reversed an earlier determination by the Driggs Planning and Zoning Commission, granting the CUP application.[1] The decision was also contrary to the recommendation of the Teton County Planning and Zoning Administrator who made extensive findings that the CUP application complied with the Comprehensive Plan and was compatible with other uses in the neighborhood. R. p. 92.[2]

Earlier that year the Board had granted Burns' request to rezone the property from C-3, commercial, to M-1, industrial. In that proceeding, the Board approved the rezone upon the condition that the rezone would automatically revert to the original C-3 zone, if Burns did not construct the concrete batch plant within a time certain. The same condition was carried into a Development Agreement between the parties executed later that summer. R. p. 76. The Development Agreement included numerous provisions regulating the manner in which the property was to be developed and the timing therefor. R. pp. 75 through 78. There were no provisions in the Agreement restricting the height of the proposed building. *Ibid.*

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[1]Because the subject property was located within the Driggs area of impact, the application was initially submitted to the Driggs Planning and Zoning Commission. Under the Driggs zoning ordinance, CUP applications are approved or denied at the Commission level only, without further review or approval by the Driggs City Council.

[2]Because the official agency record filed with the Court was not paginated, Petitioner has attached a CD-ROM containing a "Bates-stamped" duplicate copy of the Agency Record as Appendix "A" to this Brief. The page references in this Brief correspond to the Bates numbering in such duplicate agency record.

Concurrently with the negotiations regarding the Development Agreement, the Driggs Planning and Zoning Commission processed and heard Burns' CUP application. Following a public hearing on July 11, 2007, the Driggs Planning and Zoning Commission unanimously approved Burns' application, including an express finding that the request met the CUP provisions of the Driggs Zoning Ordinance, as well as the Driggs Comprehensive Plan. CUP Tr., Vol IV, pp. 27 through 28.[3]

The first CUP hearing before the County Commissioners was scheduled on September 13, 2007. That hearing was tabled in order to allow the County Prosecuting Attorney to research the question of whether the case should be heard as an "appeal" by one of the project's protagonists, a Mr. Grabow, or whether it should be heard as an original proceeding under the Driggs Zoning and Area of Impact ordinances. The County Prosecuting Attorney ultimately determined the appeal was premature and that the CUP should be heard as an original proceeding pursuant to the Driggs/Teton County Area of Impact Ordinance and the Driggs Zoning Ordinance. A second evidentiary hearing before the Board was then held on November 15, 2007, under the Board's original jurisdiction. That hearing resulted in the denial of the CUP application.

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[3]Petitioner will hereafter use the nomenclature of "CUP Tr." with reference to the CUP proceedings, and "Rezone Tr." with respect to the earlier rezone proceedings in February, 2007. As the Court's file will reflect, the Agency transcript was supplemented with the transcript of the earlier rezone proceedings, following the lodging of the CUP proceedings transcript in this action. The references "Vol I", "Vol II" and "Vol III" will refer respectively to the similarly numbered transcripts of the two CUP hearings which were recorded on three separate CD's. Vol. IV refers to the transcript of the July 11, 2007 CUP hearing before the Driggs Planning and Zoning Commission.

STATEMENT OF ISSUES FOR REVIEW

1. Did the Board err in failing to adopt a written statement setting forth the factual basis for its decision and a reasoned statement explaining the Board's denial of Petitioner's CUP application, in violation of I.C. § 67-6535?

2. Did the Board err by failing to specify the reasoning, standards and criteria used to deny the CUP, in violation of I.C. § 67-6519(4)?

3. Did the Board err in using the Driggs CUP Application Form as the basis for its denial of the CUP, rather than the Driggs Zoning Ordinance?

4. Did the Board err in using the Driggs Comprehensive Plan, as a regulatory measure for determining whether or not to issue the subject CUP?

5. Did the Board incorrectly deny Petitioner's application for a Conditional Use Permit on the mistaken assumption that the February, 2007, rezone did not allow construction of a structure exceeding forty-five feet (45') in height?

6. Did the Board's use of the Driggs Comprehensive Plan and the broad, visionary goals stated therein, as criteria for evaluating and considering the issuance of conditional use permits, violate Petitioner's due process rights under the Idaho and United States Constitution? Did the Board's failure to specify the standards and criteria it used in denying the permit also violate Petitioner's due process rights?

7. Did the Board fail to comply with the Driggs Zoning Ordinance by failing to set appropriate conditions governing the proposed conditional use and by failing to make a finding that Petitioner was unable to meet those conditions.

8. Was the Board's decision in the rezone proceeding *res judicata* as to its subsequent effort to reconsider the compatibility of the conditional uses permitted in the M-1 zone, with the Comprehensive Plan?

STATEMENT OF FACTS

Proceedings Regarding the Conditional Use Permit.

In the proceedings before the Teton County Board of Commissioners (the "Board"), Burns sought a conditional use permit to operate a concrete batch plant having a height in excess of forty-five (45) feet. The subject property is located in Teton County, but within the area of impact designated pursuant to the Teton County/Driggs Area of Impact Agreement. See Appendix A. Pursuant to the Area of Impact Agreement between the City of Driggs and Teton County, a hearing on the CUP Application was conducted before the Driggs Planning and Zoning Commission on July 11, 2007, at the conclusion of which the Commission unanimously recommended approval of the permit. CUP Tr. Vol., IV, pp 27-28. On November 15, 2007, the CUP Application was heard by the Board, at the conclusion of which the Board issued a verbal denial of the CUP. No written findings or reasoned statement of the reasons or basis for denial was ever issued by the Board.

Location of Property and Surrounding Land Uses.

The property is located at 175 N. and 185 N., on State Highway 33, north of the City of Driggs, Idaho. R. p. 125. The parcel in question consists of approximately 6.5 acres and was zoned M-1, (Light Industrial) at the time of the CUP hearing. R. p. 125. The property is located immediately north of the airport, on the east side of State Highway 33; north of

Rite-Way Road and south of and adjacent to Casper Drive. R. p. 46. The subject property is located adjacent to M-1, ("Light Industrial") property across State Highway 33 on the west; C-3 ("Service and Highway Commercial") on the south; M-1 on the east; and C-3 on the north. R. p. 13. The property sits approximately 320 feet east of State Highway 33. R. p. 91; CUP Tr., Vol III, p. 3, L 14.

Zoning and Comprehensive Plan Designation.

The Driggs Comprehensive Plan states that manufacturing and industrial uses should be confined to an area north of the airport.[4] See Appendix "C", p. 87. Petitioner proposed to construct and operate a ready-mix concrete batch facility, which use is a permitted use under the Driggs Zoning Ordinance No. 267-06, section 13 - M-1 (Light Industrial), paragraph A (Uses Allowed), subparagraph 1- "Manufacturing." See Appendix "B", p. 25. Consistent with the Driggs Comprehensive Plan, the Board of County Commissioners had previously rezoned the subject property from C-3, (Service and Highway Commercial) to M-1 (Light Industrial) on February 26, 2007. See Rezone Tr., p. 36, LL. 20 through 22.

Description of Proposed Buildings.

A site plan reflecting the locations of the main plant, truck wash, water processing facility and storm water retention pond was attached as Exhibit "B" to Petitioner's CUP application. R. p. 7. Renderings of the proposed main building were also attached as Exhibit "C". R. p. 8. An illustrative photograph of a similar temporary batch plant facility was also

[4]The Driggs/Teton County area of impact ordinance (Ord. No. 242) specifies that the Driggs Comprehensive Plan is to be applied within the area of impact. See Appendix "D", at Section 1-3.

attached as Exhibit "D" to the application. R. p. 9. Elevation views of the facility as enclosed by a proposed wall and landscaping were also attached as Exhibit "E". R. p. 10.

Description of Plant Structure.

The proposed concrete plant contemplated an enclosed building in order to facilitate production of concrete on a year-round basis. R. p. 126. The concrete plant was also designed to operate in an energy efficient manner using state-of-the-art dust control systems. *Ibid.* The enclosed building was intended to mitigate sound, dust and vibration, as well as provide a pleasant, harmonious and attractive exterior. *Ibid.*

The portion of the proposed building that exceeded forty-five (45) feet would have comprised only eighteen (18) percent of the floor space of the entire building. R. p. 127. This taller section of the building was necessary in order to enclose the cement storage area and dust collection systems. *Ibid.* Equipment necessary for the storage area and dust collection systems required construction of the exterior enclosure at a of height slightly less than seventy-five (75) feet. *Ibid.* If the building height was limited to forty-five (45) feet, the plant would not be able to operate on an energy efficient basis and would require extended operating hours in order to meet the local demands for concrete. *Ibid.* In the absence of such equipment, the plant would be able to operate only as a transport plant which would have increased noise and dust emanating from the site. CUP Tr. Vol II, p. 10, LL. 18 through 25. Such height limitation would also have reduced the production capabilities of the plant, thereby creating the likelihood that concrete would need to be brought in from elsewhere within the Valley. Such scenario would have increased truck noise, vibration and

congestion on an already crowded State Highway 33 corridor. *Ibid.* Construction of the plant as proposed would have reduced truck exhaust emissions since concrete would be mixed in the plant, not by individual trucks. CUP Tr. Vol III, p. 14 LL. 14 through 24.

ARGUMENT

I.

Teton County Failed to Issue Written Findings of Fact or a Written Statement Explaining the Criteria and Standards Used to Evaluate the Application, as Required by Idaho Code § 67-6535.

Idaho Code § 67-6535 provides in pertinent part as follows:

> **67-6535. Approval or Denial of An Application to Be Based upon Standards and to Be in Writing.**
>
> * * * *
>
> (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.

See Idaho Code § 67-6535. See also *Cooper v. Ada County Board of County Commissioners,* 101 Idaho 407, 614 P.2d 947 (S. Ct. 1980). Idaho Code § 67-6519(4) also requires the governing board to specify the ordinance and standards used in evaluating an application for a permit and the reasons for approval or denial thereof.

As agency record reflects, the Board of Commissioners failed to issue written findings of fact or to set forth a reasoned statement of its reasons and criteria used to deny the CUP.

Instead the Board merely ruled verbally that the application did not comply with the Comprehensive Plan, notwithstanding the Driggs Planning and Zoning Commission's finding to the contrary. CUP Tr., Vol III, pp. 27 through 33. The Board also ruled that the application did not comply with the conditions imposed upon the earlier rezoning from C-3 to M-1. CUP Tr., Vol III, p. 32, LL. 1 through 7. Interestingly, the County Planning and Zoning Administrator found that the application *did* comply with the goals, policies and objectives of the Comprehensive Plan and was compatible with other uses in the neighborhood. R. p. 92. Notwithstanding the Administrator's findings, the Board verbally found that the application did *not* satisfy two criteria allegedly contained in the Comprehensive Plan, without explaining its reasoning or the facts upon which it relied in reaching that conclusion. *Ibid.*

Based upon the County's failure to adopt written findings and failure to issue a reasoned statement explaining the basis for its denial, the Board's decision should be reversed and the matter should be remanded to the County Commissioners with an order directing them to make such findings and reasoned statement.

II.

The Board of Commissioners Erred in Using the Driggs CUP Application Form as the Basis for Denying Petitioner's Application for a Conditional Use Permit.

Section 67-6512(a) of the Idaho Local Land Use Planning Act provides as follows:

> (a) As part of a zoning ordinance each governing board may provide *by ordinance* adopted, amended, or repealed in accordance with the notice and hearing procedures provided under section 67-6509, Idaho Code, for the processing of

> applications for special or conditional use permits. A special use permit may be granted to an applicant if the proposed use is conditionally permitted by the terms *of the ordinance*, subject to conditions pursuant to specific provisions *of the ordinance*, . . .

See Idaho Code § 67-6512 (italics added).

Contrary to the Local Planning Act, the Board based its decision upon two numbered criteria set forth in the Driggs CUP Application Form, rather than the criteria set forth in the Driggs Zoning Ordinance. At the conclusion of the CUP hearing, the County Commissioners engaged in a colloquy regarding the appropriate criteria to be used in evaluating the CUP application. After some discussion, Commissioner Stevenson asked the county attorney, Bart Birch, to clarify the appropriate criteria to be used:

> Commissioner Stevenson: I want to make sure we get a motion that works.
>
> Mr. Birch: Yeah. Like I say, I know the criteria for a county granting a conditional use permit as far as the county code criteria. As far as the City criteria, I think you're basing it based upon what you understand the comprehensive plan and the goals of the City to be.
>
> Commissioner Stevenson: Well, I read some of it. The criteria are here. It's just a matter of being able to match it up to everything in your comp plan. I'm not familiar enough with it to do that. Here are the . . .
>
> Mr. Birch: Well, I wouldn't worry about that so much. I . . . you have the criteria, look at those criteria, and say, in looking at the criteria provided by the City of Driggs *ordinance*.

CUP Tr., Vol. III, p. 25, LL. 1 through 17. (Italics added). Contrary to Mr. Birch's advice, Commissioner Stevenson then referenced criteria numbers 2 and 3 of the Driggs CUP Application Form which she had identified earlier during the proceeding:

Commissioner Stevenson: I read two of about five of them, but I don't know if you are happy with your motion or not.

Mr. Chairman: Were those in your packet?

Commissioner Stevenson: Yeah. I'm just trying to find which sticky note it is. They were labeled. I have to get through them all. Okay. Here it is. This is *on the form* that says, "Application for Conditional Use Permit and the Commission Evaluation." The planning and zoning commission shall review the particular facts and circumstances of each proposed conditional use in terms of the following standards and shall find adequate evidence showing that such use at the proposed location -- and then it has six things of which I only read from two of them earlier.

Mr. Chairman: Well, number one is: Will in fact constitute conditional use as established in the district regulations for the zoning district involved, will be harmonious with and in accordance with the general objective or with any specific objective of the comprehensive plan or the zoning ordinance. So the motion could include the Driggs Ordinances Criteria No. 2 and Criteria No. 3, which will be designed, constructed, operated . . .

CUP Tr., Vol. III, p. 25, L. 18 through p. 26, L. 18. (Italics added). A copy of the CUP Application Form quoted by Commissioner Stevenson is contained in the Agency Record. R. p. 5.

At that point, Commissioner Trupp questioned why Commissioner Stevenson was referring to the Driggs CUP Application Form, rather than the Driggs Zoning Ordinance:

"Commissioner Trupp: This is [an] application, not [an] ordinance. These are applications.

Mr. Chairman: I think these are the criteria.

Commissioner Stevenson: It's from the ordinance. It's their criteria just like we have to do that.

Mr. Chairman: These are from the ordinances the criteria for granting of a conditional use permit. No. 3, will be designed, constructed, operated, and maintained to be harmonious and appropriate in appearance with the existing

or intended character of the general vicinity and that such use will not change the essential character of the same area. So that –

Commissioner Stevenson: Those are the ones I read before.

Mr. Chairman: The motion can say, in accordance with Driggs ordinances for the evaluation of the conditional use permit Nos. 2 and 3.

Commissioner Stevenson: I would just like to, again, ask Bart, make sure we're getting this motion okay, because I know this is controversial. Maybe if we could read it back once more, and if you have any final comments for us.

* * * *

The Clerk: The motion will be: "Deny the CUP due to lack of conformance to Driggs' ordinances for evaluation of a CUP, particularly Criteria No. 2 and No. 3."

CUP Tr., Vol. III, p. 26 , L. 19 , through p. 28, L. 2.

As Mr. Trupp correctly pointed out, Commissioner Stevenson's and Young's motion was based, not upon the Driggs Zoning Ordinance, rather it was based upon "Criteria Nos. 2 and 3" of the CUP Application Form. As can be seen from the application in the agency record, the criteria quoted by Commissioners Young and Stevenson are identical to the numbered items 2 and 3 of the CUP Application Form. R. p. 5. More importantly, Criteria No. 3, in the CUP Application Form is nowhere to be found in the Driggs Zoning Ordinance. See Appendix "B", p. 47.

As noted above, § 67-6512 of the Idaho Local Land Use Planning Act specifically requires that the grant or denial of a conditional use permit be based on "terms of the *ordinance*. . ." Clearly then, basing denial upon criterion in the CUP Application Form that was not included in the Zoning Ordinance is wholly inappropriate and inconsistent with § 67-6512 of the Idaho Local Land Use Planning Act. ("LLUPA") The Board's denial of

Petitioner's CUP application was erroneous as a matter of law and its decision should therefore be reversed.

III.

The Board's Use of the Driggs Comprehensive Plan to Deny the CUP Application Unlawfully Elevated the Comprehensive Plan to the Level of Legally Controlling Zoning Law.

As noted above, the County Commissioners relied upon two criteria for that portion of its denial alleging a lack of compliance with the Driggs Zoning Ordinance. One of those criteria was nowhere to be found within the Driggs Zoning Ordinance. The remaining criteria used to deny the CUP permit was "Criteria No. 2" in the CUP application form, which stated that the conditional use must "be harmonious with and in accordance with the general objective (sic) or with any specific objective of the Comprehensive Plan and/or the Zoning Ordinance." See CUP Tr., Vol. III, p. 26, LL. 9 through 15 and p. 27, LL. 24 through p. 28, L. 2. Criteria No. 3, being nowhere found within the Driggs Zoning Ordinance, is certainly not an appropriate criteria upon which to premise denial and the net result is that the Board's denial was based solely upon an alleged failure to be "harmonious . . . with the general objective (sic) or with any specific objective of the Comprehensive Plan."

In *Urrutia v. Blaine County*, 134 Idaho 353, 2 P.3d 738 (S. Ct. 2000), the Idaho Supreme Court considered whether it was appropriate to deny a subdivision application based on non-compliance with the comprehensive plan. In that case, the Supreme Court held that use of the Comprehensive Plan as the sole basis for denying an application, was improper:

> The Act indicates that a comprehensive plan and a zoning ordinance are distinct concepts serving different purposes. A

> comprehensive plan reflects the "desirable goals and objectives, or desirable future situations" for the land within a jurisdiction. I.C. § 67-6508. This Court has held that a comprehensive plan does not operate as a legally controlling zoning law, but rather serves to guide and advise governmental agencies responsible for making decisions.
>
> * * * *
>
> It is to be expected that the land to be subdivided may not agree with all provisions in the comprehensive plan, but a more specific analysis, resulting in denial of a subdivision application based solely on non-compliance with the comprehensive plan elevates the plan to the level of legally controlling zoning law. *Such a result affords the board unbounded discretion in examining a subdivision application and allows the board to effectively rezone land based on the general language in the comprehensive plan.*

Urrutia v. Blaine County, 134 Idaho at 358, 2 P.2d at 743. (Italics added)

The Supreme Court considered the same issue in the case of *Sanders Orchard v. Gem County*, 137 Idaho 695, 52 P.3d 840 (S. Ct. 2000). The Court there held that a comprehensive plan is not an appropriate instrument to be used in approving or denying a specific development application:

> The governing board cannot, however, deny a use that is specifically permitted by the zoning ordinance on the ground that such use would conflict with the comprehensive plan. [Citing case]. "A comprehensive plan reflects the desirable goals and objectives, or desirable future situations for the land within a jurisdiction . . . but it does not operate as a legally controlling zoning law."

Orchard v. Gem County, supra, 52 P.3d at 699, at 844, 137 Idaho at 699. See also *Bone v. City of Lewiston*, 107 Idaho 844, 693 P.2d 1046 (S. Ct. 1984); *Giltner Dairy, LLC v. Jerome County*, 145 Idaho 630, 181 P.3d 1238 (S. Ct. 2008).

The use of a comprehensive plan to approve or disapprove a specific application or development permit under the LLUPA was also addressed in *Evans v. Teton County*, 139 Idaho 71, 73 P.3d 84 (S. Ct. 2003). In that case, the appellants asserted that approval of the Teton Springs PUD violated various provisions of the Teton County Comprehensive Plan. In response, the respondent, Teton Springs, countered that the comprehensive plan was not to be used as a zoning ordinance or regulatory measure and was singularly inappropriate for use as a basis to deny a PUD application. The Idaho Supreme Court agreed:

> The appellants assert that the Teton Springs PUD violates several important policies of the comprehensive plan. The respondent counters that the Comprehensive Plan is not a zoning ordinance that regulates project compliance.
>
> The discussion in part III.B above applies to this claim. While the Board of Commissioners may not disregard the Comprehensive Plan, *it is not a zoning ordinance by which a development project's compliance is measured.* Rather, the Comprehensive Plan provides guidance to the local agency charged with making *zoning* decisions. The appellants may or may not be correct in their concern that the Teton Springs PUD will adversely effect the present life style and alter the character of the area in violation of the policies of the Comprehensive Plan. That point was heavily debated during the approval process. Similarly, the fear of the "Jacksonization" of the Teton Valley, as the billionaires force the millionaires over Teton Pass into Driggs and Victor, may be well founded. However, regardless of the wisdom, or lack thereof, in approving Teton Spring's PUD application, *the Comprehensive Plan does not provide a legal basis for this court to reverse the Board of Commissioner's decision to approve the application.*

Evans v. Teton Springs, supra, 139 Idaho at 79, 73 P.3d at 92. (Italics added).

The Board's denial of Petitioner's CUP application in this case resulted in the exact evil foreseen in *Urrutia, supra*. Specifically, the Board's resort to the Comprehensive Plan, and all of its broad, visionary goals and objectives, afforded the Board "unbounded discretion," thereby allowing it to effectively rezone Petitioner's land and deny a use that was expressly permitted under the M-1 zone in question. The Driggs M-1 light industrial zone specifically allowed "manufacturing, assembling, fabricating, processing, packing, repairing or other uses . . ." See Driggs Zoning Ordinance, Chapter 2, Section 13. See Appendix "B", p. 26. The Driggs Zoning Ordinance also expressly allowed buildings with heights in excess of forty five-feet, provided a conditional use permit was first secured.[5] See Driggs Zoning Ordinance, Chapter 2, Section 13. Appendix "B", p. 27. By resorting to the Comprehensive Plan as its basis for the denial, the Board denied Burns the right to make use of its property in a manner that was expressly permitted in the M-1 zone. Effectively, by this artifice the Board acted directly contrary to its earlier decision in which it granted Petitioner's application to rezone the property from C-3 to M-1. See Rezone Tr., p. 37, L. 5 though 6, Necessarily, in making that finding, the Commissioners were required to "rezone in accordance with the comprehensive plan." See Idaho Code § 67-6511. By resorting to the broad, visionary goals and objectives in the Comprehensive Plan, without specifying which specific provision was inconsistent with the CUP permit, the Board in effect reversed its own earlier finding that the M-1 zone, which permitted the use of buildings in excess of forty-five

[5]A conditional use, like its cousin, an unconditional use, is considered as a permitted use under a zoning ordinance, the only difference being that under the latter, the Board has no authority to condition the use, whereas under the former, the use may be conditioned in order to assure compatibility and harmony with the surrounding uses. In either event, both are considered as permitted uses.

feet, was consistent with the Comprehensive Plan. By using the Comprehensive Plan and its broad, visionary goals and general policy objectives as a basis for denying a specific project, without making factual findings or citing to specific provisions in the Plan, the Board exercised "unbounded discretion," because it disapproved of a use that was expressly permitted by the Driggs Zoning Ordinance. Effectively, by the "mumbo jumbo" of resorting to the Comprehensive Plan and then failing to make specific factual findings setting forth the manner in which Petitioner's application was inconsistent with the Comprehensive Plan, the Commissioners denied a manufacturing use that it had expressly approved only three months earlier. The exact evils of such unbounded discretion, as foreseen in *Urrutia* and the *Teton Springs* cases noted above, have now materialized in the form of the decision issued by the County Commissioners here. That unbounded discretion also allowed the County Commissioners here to ignore a favorable recommendation by the Driggs Planning and Zoning Commission, a body which was, unlike the Board here, acutely familiar with the Driggs zoning ordinance and who had in fact found the CUP permit was in conformity with its own ordinance. See e.g. CUP Tr., Vol III, p. 29, L. 16 through p. 30, L. 10.

In sum, the Board's resort to the Comprehensive Plan as controlling regulatory law, violated the holdings of *Urrutia* and the other cases cited above and as such should be reversed.

IV.

The Board Violated Idaho Code § 67-6519 by Failing to Specify the Standards Used to Evaluate the CUP Permit, its Reasons for the Denial and the Actions Burns Could Take to Obtain a Permit.

Idaho Code § 67-6519 provides in pertinent part as follows:

> **67-6519. Permit Granting Process.**
>
> * * * *
>
> (4) Whenever a governing board or planning and zoning commission grants or denies a permit, it shall specify:
>
> (a) the ordinance and standards used in evaluating the application;
>
> (b) the reasons for approval or denial; and
>
> (c) the actions, if any, that the applicant could take to obtain a permit.

In this case, the Board's motion to deny the CUP was as follows:

"Mr. Chairman: All in favor?

The Clerk: Can I read it back to you again?

Mr. Chairman: Please.

Commissioner Stevenson: Yeah. Sure. One more time.

The Clerk: Chairman Young motioned to deny the CUP due to a lack of conformance to Driggs' standards for condition evaluation of a CUP criteria No. 2 and No. 3, and the fact that the M-1 zone change was granted based on a specific proposal that had no mention of a 75-foot high building, and, in fact, clearly indicated a 45-foot maximum height.

* * * *

Mr. Birch: Is that your motion, Larry?

Mr. Chairman: Yes. That motion has been seconded. And I called for those in favor.

Commissioner Stevenson: Aye.

Mr. Chairman: Aye. Opposed?

Commissioner Trupp: Aye.

Mr. Chairman: Motion carries. The conditional use permit is denied . . . "

CUP Tr., Vol III, p. 31, L. 21 through p. 33, L. 4.

As is evident from the discussion quoted above, the Board of Commissioners did not give any reason for its denial other than pointing to two criteria having broad reference to the Comprehensive Plan. More importantly, the Board failed to state i) the facts upon which it based its conclusion that Petitioner's application was inconsistent with Comprehensive Plan, ii) the specific provisions in the Comprehensive Plan deemed inconsistent with Burns' CUP application, iii) its reasoning for the denial, and iv) what actions Burns could take in order to obtain a permit. Consequently, Burns was deprived of any means to resolve the Board's concerns with the CUP permit. Effectively, by referring to the Comprehensive Plan in only a very general fashion, the Commissioners exercised "unbridled discretion," without providing Petitioner any inkling whatsoever of why its application was denied and what would be required to obtain the permit.

The Driggs Comprehensive Plan is a ninety-seven (97) page document, comprised of fifteen (15) chapters addressing numerous topics, including among other things, protection of private property rights, population, economic development, transportation, recreation and land use policies and goals. See Appendix "C" attached hereto. One is only left to guess which, among the numerous goals and objectives stated in the Driggs Comprehensive Plan,

were not satisfied by Petitioner's application. Simply stated, the Board's general reference to a ninety-seven (97) page document (i.e. the Comprehensive Plan) provides no basis whatsoever for this Court to review the Board's actions. Effectively, the Board's failure to comply with Idaho Code § 67-6519 allowed the Board to act arbitrarily and capriciously.

The Board's decision should be reversed and the Board should be compelled to use appropriate ordinance-based standards and to state reasons for its denial of the permit. Further, it should be ordered to advise Burns of any actions it could take to obtain the permit, if it again denies the permit .

V.

The Board Incorrectly Premised its Denial of the CUP Permit upon the Basis That the Previous Zone Change Limited the Height of Petitioner's Building to Forty Five Feet.

Commissioner Young's motion denying Petitioner's CUP application was as follows:

> The Clerk: Chairman Young motioned to deny the CUP due to a lack of conformance to Driggs' standards for condition evaluation of a CUP criteria No. 2 and No. 3, *and the fact that the M-1 zone change was granted based on a specific proposal that had no mention of a 75-foot high building, and, in fact, clearly indicated a 45-foot maximum height.*
>
> Commissioner Stevenson: I wouldn't put the maximum in there. The 45-foot height is what was discussed.
>
> The Clerk: Just take maximum out?
>
> Commissioner Stevenson: Because if you're trying to say it clearly said that – the 45 feet height is what was discussed. That was the major thing we heard, but its not – it wasn't listed as being necessarily maximum.
>
> The Clerk: Based on a specific proposal that had no mention of a 75-foot high building and, in fact, clearly indicated a 45-foot height.

Commissioner Stevenson: Okay.

Mr. Birch: Is that your motion, Larry?

Mr. Chairman: Yes. That motion has been seconded. And I called for those in favor.

Commissioner Stevenson: Aye.

Mr. Chairman: Aye. Opposed?

Commissioner Trupp: Aye.

CUP Tr., Vol III, p. 32, L. 1, through p. 33, L. 4. (Italics added).

However, contrary to Chairman Young's motion, the Board's decision motion granting the rezoning in February, 2007, did *not* include such limitation. In fact, the motion granting such rezoning was as follows:

> Commissioner Stevenson: I wasn't sure if you already had. Okay.
>
> I'd like to make a motion that we approve this zone change from C-3 to M-1 as requested – do we need to go through all – okay – with the condition that – conditions that the development agreement to be worked out with City and County Planning and Zoning Administrators address issues, such as noise, dust, truck traffic, landscaping, downlighting, hours of operation, building design, access improvements to perhaps include the road on the east side, and, also, that this zone change is specifically for the proposed Concrete Batch Plant. And, so, that if this project does not come to fruition, it would revert to C-3.

Rezone Tr., p. 36, L. 18 through p. 37, L. 7.[6] Commissioner Stevenson's motion was in apparent reference to a like condition imposed by the Driggs City Council, to the effect that the zone change would revert back to C-3 if the concrete batch plant was not constructed

[6]Although Burns did not appeal such "conditional" zoning, It should be briefly noted that such condition was *ultra vires* for several reasons. First, such reversionary "conditional" zoning would violate the notice and hearing requirements of I.C. § 67-6511. Secondly, by limiting the rezoning to concrete batch plants only, the Board violated the Driggs Zoning Ordinance which allowed other manufacturing and industrial uses in the zone. Effectively the Board unlawfully amended its zoning ordinance by creating a new "sub-zone" comprised of concrete batch plants only – an action that was clearly not allowed without compliance with the LLUPA notice and hearing provisions for zoning ordinance amendments.

within a time certain. Rezone Tr., p. 4, L. 3 through L. 9. Further this condition was carried forward into the Development Agreement signed by the County. R. p. 78. Interestingly, no mention of a 45 foot height restriction was made in that Agreement as well.

Clearly then, the earlier rezoning was *not* made conditional upon a height limitation of forty-five (45) feet. Rather, the only "condition" imposed upon the rezoning was that it would revert to C-3 if the batch plant was not constructed within a certain amount of time. Nowhere was a forty-five (45) foot height limitation imposed.

Furthermore, had such height limit been imposed in that proceeding, it would also have been *ultra vires* and in violation of the Driggs Zoning ordinance which expressly allows building heights in excess of forty-five (45) feet, as a conditional use. See Appendix B, Driggs Zoning Ordinance, Chapter 2, Section 13(C). Burn's CUP Application was not before the Board during the February, 2007, hearing and the Board could not impose such condition without conducting a separate CUP hearing, as required under the Driggs Zoning Ordinance and as required by I. C. § 67-6512. As noted above, a rezone that limits use of property to only one of many permitted uses in the zone, is a violation of the use provisions of that zone. When a government agency rezones property, it should examine the Comprehensive Plan in light of *all* uses allowed under the zone in question, rather than merely looking at an applicant's contemplated use – a use that could well change the next day. Although the Teton County Commissioners may have erroneously thought they were approving a concrete batch plant only, such is clearly not the product of a proper rezone under the Idaho Local Land Use Planning Act.

In sum, Commissioner Young's motion to deny the CUP permit on the basis that the earlier rezoning had imposed a forty-five (45) foot height limitation, was premised upon an incorrect recollection of the Board's earlier motion. The earlier rezoning was not made conditional upon a forty-five (45) foot height limitation, rather the only condition was that the rezoning would revert to the original C-3 zone, if Burns' concrete batch plant was not constructed within a time certain. Commissioner Young's use of that premise to deny Burn's application is simply not supported by the record in the earlier rezone proceedings.

VI.

The Board Failed to Follow the Driggs Zoning Ordinance in Denying Petitioner's CUP Application and it Violated the Appeal Period Set Forth in I. C. § 67-6521(d).

The portion of the Driggs Zoning Ordinance dealing with conditional uses provides as follows:

ZONING ORDINANCE 281.07

Chapter Four, Administrative Procedures

* * * *

Section 2. Conditional Use Permit Procedures.

A. The Following Provisions Shall Apply to Conditional Use Permits:

1. The Planning Commission may, . . . permit conditional uses where the uses are not in conflict with the comprehensive plan nor the zoning ordinance. *If the proposed conditional use cannot adequately meet the conditions necessary to assure protection and compatibility with the surrounding properties, uses and neighborhood,*

the Planning Commission will not approve the proposed use.

2. Upon the granting of a conditional use permit, conditions may be attached including, but not limited to, those:

   a. Minimizing adverse impact on other development;
   b. Controlling the sequence and timing of development;
   c. Controlling the duration of development;
   d. Assuring the development is maintained properly;
   e. Designating the exact location and nature of development;
   f. Requiring the provision for on-site facilities or services; and
   g. Requiring mor restrictive standards than those generally required in this ordinance.

See Appendix "B", Driggs Zoning Ordinance, Ch. 4, § 2, at p. 47. (Italics added). In this case, the Board did not impose *any* of the conditions listed in subsection (2), much less make a finding that Burns was unable to "meet the conditions necessary to assure protection and compatibility with the surrounding properties, uses and neighborhood . . ."[7] There was no discussion or findings whatsoever of an inability on Burns' part to meet such conditions. Rather the Board premised its denial upon a mistaken recollection of the earlier rezone hearing and an unsupported conclusion that the application did not meet "Criteria 2 and 3" in the CUP Application Form.

[7]Presumably those "conditions" referred to the conditions set forth in subsection 2(A)(2) of Chapter 4.

The question of whether or not buildings having a height in excess of forty-five (45) feet are compatible with the Comprehensive Plan map for the area, was a question that was resolved when Burns' property was rezoned to M-1, since such use was expressly permitted in that zone.[8] Thus, instead of granting the permitted use, subject to appropriate conditions necessary to assure compatibility with neighboring uses, the Board summarily denied the application without even bothering to explore in what manner conditions could be fashioned to assure compatibility of the proposed taller building with adjoining uses (e.g. enhanced set backs, landscaping or structural buffers, facade design or color coordination schemes, or operational limitations, etc.). They made no finding, as required by the Driggs Zoning Ordinance, that Burns was unable to meet any of those conditions. They simply ignored the Driggs Zoning Ordinance and conjured up several transparent and incorrect conclusions about their previous action and about Petitioner's compliance with the Comprehensive Plan, wholly independent of the criteria and conditions listed in the Driggs CUP ordinance.

VII.

The Driggs CUP Ordinance and the Board's Failure to Employ Specific Standards in Considering the CUP Permit Violated Petitioner's Due Process Rights.

Due process requirements under the Idaho and federal constitutions are applicable to land use and zoning actions. *Gay v. County Comm'rs of Bonneville County*, 103 Idaho 626, 628, 651, P.2d 560, 562 (Ct. App. 1982); *Chambers v. Kootenai County Board of Comm'rs*, 125 Idaho 115, 118, 868 P.2d 989, 992 (1994).

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[8]The Comprehensive Plan compatibility issue should have been *res judicata* since the appeal period on that issue had expired at the time the CUP hearing was held. The Board's decision to re-open the issue was in effect a violation of the 28 day appeal period in I. C. § 67-6521(d).

The Fourteenth Amendment of the United States Constitution provides as follows:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law . . .

U.S. Constitution, 14th Amendment, Section 1. Similarly, the Idaho Constitution states:

> No person shall be . . . deprived life, liberty or property without due process of law.

Idaho Constitution, Article 1, § 13. Laws are unconstitutional where men of common intelligence must necessarily guess at their meaning:

> It is a general principle of statutory law that a statute must be definite to be valid. It has been recognized that a statute is so vague as to violate the due process clause of the United States Constitution where its language does not convey sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practices or stated otherwise, where its language is such that men of common intelligence must necessarily guess at its meaning.

16A Am. Jur. 2d, *Constitutional Law* § 818, p. 988. The "void for vagueness" doctrine incorporates the due process notions of fair notice or warning and mandates that lawmakers set reasonably fair guidelines for triers of fact in order to prevent arbitrary and discriminatory enforcement." *Smith v. Goguen*, 415 U.S. 566, 94 S. Ct. 1242, 39 L. Ed. 2nd 605 (1974). The "void for vagueness" doctrine applies equally to civil statutes. *Jones v. City of Lubbock*, 727 F. 2d 364 (5th Cir. 1984). A civil or non-criminal statute is not unconstitutionally vague if persons of reasonable intelligence can derive core meaning from it. *Cotton States Mut. Ins. Co. v. Anderson*, 749 F.2d 663 (11th Cir. 1984). When evaluating a constitutional challenge to a statute on the basis of void-for-vagueness, the court must consider both the essential

fairness of the law and the impracticability of drafting legislation with greater specificity. *DuPont v. Idaho State Land Board of Commissioners,* 134 Idaho 618, 7 P.3d 1095 (S. Ct. 2000). An ordinance that provides for exceptions to the general rule, but provides no standards for granting of those exceptions, thus leaving them to the "unbridled discretion" of the city council, is void. *Messerli v. Monarch Memory Gardens, Inc.*, 88 Idaho 88, 397 P.2d 34 (1964).

Facial challenges to the constitutionality of a statute must establish that the enactment is impermissibly vague in all of its applications. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 102 S. Ct. 1186 (1982). Conversely, when the challenge to a statute is on an "as applied" basis, the challenger's burden is less daunting. Specifically, the court is only required to consider the facts of the specific case giving rise to the action and determine if the governmental agency failed to accord due process in the processing of the permit or application. Under that analysis, only the process is examined, and the statute or ordinance is not stricken down. There is no need under an "as-applied" analysis to show the ordinance is invalid in all of its applications. See e.g. *United States v. National Dairy Products Corporation*, 372 U.S. 29, 83 S. Ct. 594, 9 L. Ed. 2nd 561 (1963); *Smith v. Goguen*, 415 U.S. 566, 94 S. Ct. 1242 (1974).

As was noted in *Urrutia, supra*, use of the Comprehensive Plan as a regulatory measure to approve or disapprove of a development application "affords the Board unbounded discretion in examining a subdivision application and allows the Board to effectively rezone land based on the general language in the Comprehensive Plan." *Urrutia*

v. Blaine County, 134 Idaho at 358, 2 P.3d at 743. Although the *Urrutia* court did not premise its reversal on constitutional grounds, the same "unbounded discretion" gives rise to a parallel argument under the void-for-vagueness doctrine. In this case, the Board premised its denial upon the assertion that the application did not meet "Criteria 2 or 3" as set forth in the Application Form. As noted above, Criteria 3 was nowhere referenced in the Driggs Zoning Ordinance, and Criteria 2 referred apparently to section 2(A)(1) of the CUP ordinance which references a requirement that "the uses are not in conflict with the comprehensive plan nor the zoning ordinance." Importantly, the Board failed to state any factual basis for its conclusion that the proposed conditional use was inconsistent with the goals or objectives contained within the Comprehensive Plan nor did it identify components in the Plan that were not satisfied by Burn's application.

The Driggs Comprehensive Plan, like most comprehensive plans, is a planning document, which states numerous goals, objectives and community values. The following illustrate some of those goals and objectives:

- A city made up of a collection of connected neighborhoods that are stable, safe, attractive and reflective of the diverse character of its residents.
- An attractive revitalized downtown, diversified in its character to meet and merge opportunities and a business and industry leadership that supports the very needs of the city.
- Leadership committed to city improvement and progress to the incorporation of smart growth principles.

See Appendix "C", at p. 3. Following the statement of the Driggs "Community Vision", the Comprehensive Plan then sets forth an extensive recitation of various community values, policies, restrictions, conditions and goals is necessary to implement that "vision." See Appendix "C", pp. 7 though 97 inclusive. Although these broad, visionary goals and objectives might well serve as a "guide" for community leaders in establishing appropriate zones within their jurisdiction, such broad, visionary goals and objectives have no place as a regulatory standard for granting or denying CUP permits. They are simply too broad, vague and general to meet the "void-for-vagueness" doctrine. Specifically, these broad visionary goals simply do not afford enough guidance or information, sufficient to enable an applicant to structure his or her application in a fashion that meets the terms and conditions of the ordinance. Such is the function of a more specific zoning ordinance or subdivision ordinance.

More importantly, the visionary nature of these goals and objectives allowed the Board in this case to be arbitrary and capricious in its decision-making process, because there were no definable, objective standards by which to gauge regulatory compliance. By resorting to the Comprehensive Plan in this case, the County Commissioners were effectively able to reverse their rezoning decision of February of 2007, without reference to any particular component of the Comprehensive Plan and without stating its reasoning or the factual basis therefore. Such cavalier failure to specify specific standards or reasoning and the Board's use of a vague, visionary planning document, effectively denied Petitioner due process of law, on a facial basis, and on an "as applied" basis.

For the reasons set forth above, the Court should find the Driggs CUP Ordinance unconstitutional, both on its face, and as applied in this particular case.

VIII.

Petitioner Should Be Awarded its Reasonable Attorneys Fees Pursuant to I.C. § 12-117.

Idaho Code § 12-117 provides in pertinent part as follows:

> **12-117. Attorneys fees, witness fees and expenses awarded in certain instances.** – (1) Unless otherwise provided by statute, in any administrative or civil judicial proceedings involving as adverse parties a state agency, a city . . . , the court *shall* award the prevailing party reasonable attorneys fees, witness fees and reasonable expenses, *if the court finds that the party against whom the judgment is rendered acted without a reasonable basis in fact or law.*

See Idaho Code § 12-117. (Italics added). Idaho Code § 12-117 is not discretionary, rather the court must award attorneys fees if the court finds in favor of the person and that the state agency did not act with a reasonable basis in fact or law. *Ralph Naylor Farms, LLC v. Latah County*, 144 Idaho 806, 809, 172 P.3d 1081, 1084 (S. Ct. 2007); *Reardon v. Magic Valley Sand and Gravel,* 140 Idaho 115, 120, 190 P.3d 340, 345 (2004). Idaho Code § 12-117 serves dual purposes: (1) to serve as a deterrent to groundless or arbitrary agency actions; and (2) to provide a remedy for persons who have borne an unfair and unjustified financial burden attempting to correct mistakes that should never have been made. *Ralph Naylor Farms, LLC v. Latah County*, 144 Idaho at 809, 172 P.3d at 1084. See also *Fischer v. City of Ketchum*, 141 Idaho 349, 356, 109 P.3d 1091, 1098 (S. Ct. 2004). Where an agency acts

without authority, it is acting without a reasonable basis in fact or law. *Fischer v. City of Ketchum, supra; Magic Valley Sand and Gravel,* 140 Idaho at 120, 90 P.3d at 345.

In *University of Utah Hosp. v. Ada County Board of Com'rs.*, 143 Idaho 808, 153 P.3d 1154 (2007), the Supreme Court awarded attorney fees against the County when there were clear statutory procedures which the County had failed to follow in denying an application for medical indigency. Specifically, there were no facts indicating a good faith attempt to interpret the applicable statutes nor was there any reasonable confusion about the County's duties. In the case of *Fischer v. City of Ketchum*, 141 Idaho 349, 109 P.3d 191 (2005), the court awarded attorneys fees under section 12-117 because the City had "ignored the plain language of the ordinance that a certification . . . [was] required before granting a CUP." *Id.*, 141 Idaho at 356, 109 P.3d at 198. In *Naylor Farms, supra,* the Court articulated the test as follows:

> In considering whether Naylor Farms is entitled to an award of attorney fees, we must determine whether the County was faced with an ambiguous or unclear statute that would excuse a reasonable but erroneous interpretation, in the absence of applicable case.

Naylor Farms, LLC v. Latah County, 144 Idaho 806, 810, 172 P.3d 1081, 1085 (S Ct 2007) The Court further noted that, "Where an agency has no authority to take a particular action, it acts without a reasonable basis in fact or law." *Naylor Farms, LLC v. Latah County,* 144 Idaho at 356, 172 P.3d at 1098, citing *Moosman v. Idaho Horse Racing Commission*, 117 Idaho 949, 954, 793 P.2d 181, 186 (1990).

The actions of the Board in this case contravene well-established case law and a clear and ambiguous statute. The requirement of written findings of fact and a reasoned statement explaining the basis for an agency decision has been in place since the *Cooper v. Ada County Commissioners* case was issued in 1980. The requirement to adopt a written decision is also clearly set forth in Idaho Code § 67-6535 and 6519(4). Similarly, Idaho Code § 67-6512(a) clearly requires conditional use permits be evaluated and based upon standards set forth *by ordinance*, and reliance upon an administrative application form clearly contravenes that statute. Likewise, use of the Comprehensive Plan as a regulatory measure has been disavowed and deemed inappropriate since the Supreme Court's *Urrutia* decision in 2000. The Board's failure to specify the standards it used in evaluating the permit and the reasons for this denial and the actions Burns could take to obtain a permit also clearly violates Idaho Code § 67-6519. The Board's repeated failures to follow the plain language of the Driggs Zoning Ordinance and the Idaho Local Land Use Planning Act, as well as its failure to follow well-established case precedent, are clearly actions that "never should have been taken."

CONCLUSION

The Board failed miserably in performing its duty to comply with the Idaho Local Land Use Planning Act in this case. Its failure to adopt written findings, failure to state the standards upon which it relied, failure to set forth a reasoned statement supporting its decision, and failure to provide Burns with guidance on how it might comply with the CUP Ordinance, reflects a most cavalier process and attitude towards the Idaho Local Land Use Planning Act – one that deprived Petitioner of any fundamental fairness or due process. For

the reasons set forth above, the Board's decision should be reversed and remanded for a new hearing.

DATED this 10th day of July, 2008.

Dale W. Storer
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, that I served a true and correct copy of the following described pleading or document on the attorney listed below by hand delivering, mailing or by facsimile, as indicated below, with the correct postage thereon, on this 10th day of July, 2008.

DOCUMENT SERVED: PETITIONER'S BRIEF

ATTORNEY SERVED:

Barton J. Birch
Teton County Prosecutor's Office
81 N. Main Street, #B
Driggs, ID 83422

(X) Mail
( ) Hand Delivery
( ) Facsimile
( ) Courthouse Box

Dale Storer

Dale W. Storer
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

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Barton J. Birch (ISB No. 6426)
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Attorney for Respondent, Teton County Board of Commissioners

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TETON

IN RE: Application for a CUP Permit to Exceed 45' Height Limit for M-1 Zone BURNS HOLDINGS, LLC, Petitioner and Applicant, v. TETON COUNTY BOARD OF COMMISSIONERS, Respondent.	Case No. CV-07-376 **RESPONDENT'S BRIEF**

COMES NOW, the Respondent, Teton County Board of Commissioners, and submits the following memorandum brief in response to Petitioner's Brief in support of its Petition for Judicial Review, pursuant to Idaho Rule of Civil Procedure 84.

STATEMENT OF CASE

This brief is in response to Petitioner's brief in Support of Judicial Review of the decision of the Teton County Board of Commissioners ("the Board"). Petitioner applied for and was granted a rezoning that would allow it to build a concrete batch plant. On August 31, 2007, Teton County and Petitioner entered into a Developer's Agreement that outlined the provisions for building the concrete batch plant according to the application presented to the Board. R. p. 75.[1] Specifically, that Petitioner would comply with all building provisions set forth for an M-1 Light Industrial zone. In this document, Petitioner agreed to "comply with all federal, state, county and local laws, rules and regulations, which appertain to the subject property." R. p. 79. One of those local regulations required that "any building or structure or portion thereof hereafter erected shall not exceed forty-five (45) feet in height unless *approved by conditional use permit.*" (Emphasis added) Driggs City Ordinance 281-07, § 13(C). This provision does not guarantee the approval of a Conditional Use Permit ("CUP"), but rather the consideration of granting the CUP by the authoritative body. Petitioner then applied for a CUP and claimed that the tower on the batch plant needed an additional 30', placing the height of the batch plant at 75'. This application would have enabled Petitioner to circumvent the 45' height restriction outlined in Driggs City Ordinance 281-07. This was the proper course of action for Petitioner to have taken, but application for a CUP neither guarantees nor necessitates the approval of the CUP. On November 15, 2007, the Board denied Petitioner's application for a conditional use permit for the 75' height allowance. The Board denied the granting of the additional 30' of height, not the right for Petitioner to build a concrete batch plant on the rezoned land. Petitioner claims that this

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[1] Respondent is referencing the same pagination sequence as set forth by Petitioner is in its attached agency record.

decision by the Board was a reversal of the Driggs Planning and Zoning Commission ("Driggs P & Z"). However, according to the City of Driggs Area of Impact Ordinance, the boundary definitions require the applications to first go through Driggs P & Z. If Driggs P & Z recommends the application be approved, it will then be sent to the Board for a final decision. The Board retains the right to approve, deny or remand any application. Driggs City Ordinance, "Comprehensive Plans and Ordinances", 7-1-3(C). This authority to approve, disapprove or remand CUP applications is also granted in Teton County Ordinance 8-6-1-B. The Board is not obligated to approve any and every application that the city recommends for approval.

Petitioner also contends in its Statement of the Case that the Board's decision was in violation of the staff report prepared by Teton County. The purpose of the Staff Report is to recommend certain actions to the Board, but it is not the definitive authority on the acceptance or denial of the application. The findings in the staff report were provided to the Board for their consideration of the application. R. p. 98. Thus, when the Board made its decision on the CUP application, it took the recommendations of the City and the Staff report, as well as the impact zone agreement, county ordinances, and the county Comprehensive Plan into consideration. The staff report, like the county comprehensive plan, does not bind the Board into a specific course of action.

Ultimately, the Board acted within its jurisdiction as the final issuing authority when it denied Petitioner's CUP application. By taking other legislative provisions into account in the decision-making process, the Board acted responsibly and in accordance with both Driggs and Teton County ordinances. Considering the facts of this case and the issues under review, the Board's decision to deny the CUP application should be upheld.

STATEMENT OF ISSUES FOR REVIEW

1. Were the Board's verbal and recorded statements setting forth in the meeting minutes as the basis for its denial of the conditional use permit an acceptable factual basis and reasoned statement under I.C. § 67-6535?

2. Was the Board's reference and use of Criteria #2 and #3 as the reasoning and basis for denying the CUP acceptable under I.C. § 67-6514?

3. Did the Board correctly take the Driggs Comprehensive Plan under advisement when making its decision about whether or not to issue the CUP to Petitioner?

4. Was the Board correct in using the CUP Application in its decision to deny the CUP, where the application form has been based upon Driggs' zoning ordinance?

5. Was the Board correct when it upheld ordinances with a 45' height restriction? Was the Board within its jurisdiction to allow, deny, remand, or allow with conditions when it denied Petitioner's CUP application for an additional 30' height allowance?

6. Was the Board within its authority to approve, deny, remand, or approve with conditions when it denied Petitioner's CUP application?

7. Was the consideration of the Driggs Comprehensive Plan and other criteria as set forth in the CUP application and Driggs City Ordinances by the Board in its decision appropriate under due process regulations guaranteed by the Idaho and United States Constitution?

8. Did the Board take impacting factors, such as compatibility with the comprehensive plan, into consideration in determining whether to approve or deny Petitioner's CUP application?

9. Is Petitioner eligible to receive attorney's fees?

STATEMENT OF FACTS

Petitioner first applied for a zone change to build a concrete batch plant at 185 N. Highway 33 in the Driggs impact zone. When this zone change was authorized in February 2007, Petitioner was granted a special rezoning of a C-3 Commercial zone to an M-1 Light Industrial zone, on the condition that the zoning would revert to C-3 commercial if Petitioner did not build the proposed concrete batch plant granted in the application. Thus it was approved by the Board according to the application and the provisions outlined in the Driggs city ordinances for M-1 Light Industrial zones. One of the restrictions on buildings within an M-1 Light Industrial is that buildings are not to exceed 45' in height.

On August 31, 2007, Teton County and Petitioner entered into a Developer's Agreement that outlined the provisions for building the concrete batch plant according to the application presented to the Board. R. p. 75. Specifically, that Petitioner would comply with all building provisions set forth for an M-1 Light Industrial zone. In this document, Petitioner agreed to "comply with all federal, state, county and local laws, rules and regulations, which appertain to the subject property." R. p. 79. One local regulation required is that "any building or structure or portion thereof hereafter erected shall not exceed forty-five (45) feet in height unless approved by conditional use permit." Driggs City Ordinance 281-07, § 13 (C).

After the rezoning, Petitioner applied for a Conditional Use Permit. This CUP would have allowed Petitioner to build its concrete batch plant up to a height of 75'. As per the Area of Impact agreement, the application was presented first to the Driggs P & Z on July 11, 2007. Driggs P & Z found the additional 30' to be acceptable, and thus recommended the application to the Teton County Board of Commissioners for final approval. R. p. 4. Petitioner's application, dated October 4, 2007 did not express a hardship on Petitioner if the CUP was denied, but only

that the height allowance would allow Petitioner to store more equipment and use different methods to mix the concrete. R. p. 47-49. In the October 11, 2007 hearing before the Board, Mr. Burns stated that the "plant will have a 7,000 sq.ft. footprint with a 45' tower." R.p.71. There was no mention of the 30' height allowance during the rezone portion of the hearing. On November 15, 2007, the Board held a public hearing for Petitioner's CUP application. R.p. 116. At this time, the Board decided to deny the CUP application for a failure to conform under Criteria #2 and #3 of the Commission Evaluation standards. R.p. 119. The reason for the denial were discussed by the Board and transcribed into the official minutes, which were then made available. After the denial of the CUP, Petitioner filed for Judicial Review.

ARGUMENT

I.

Teton County Board of Commissioners met the requirement for written findings of fact or a written statement explaining the criteria and standards used to evaluate the application, as required by Idaho Code § 67-6535, by the use of recorded and published meeting and hearing minutes.

The findings of fact and conclusions adopted by the Board complied with the county ordinance and provisions of I.C. § 67-6535 because all relevant material provided by the board was included and referenced during the decision-making process. By the recording and publishing of the minutes from the hearing, Petitioner was provided with a written, reasoned statement for the denial of its CUP application. Approval or denial of a land use application must explain the relevant criteria and standards, relevant contested facts, and the rationale behind the decision. *Evans v. Teton County*, 139 Idaho 71, 80, 73 P.3d 84, 93 (2003). These conclusions must also be based upon applicable provisions of the comprehensive plan and relevant ordinances. *Id.* Standards and criteria used in the evaluation of the application must be set forth in the comprehensive plan, zoning ordinances, or other appropriate ordinance or

regulation of the city or county. I.C. § 67-6535(a). One decision provided that due process requirements need written record and conclusions to be viable. *Gay v. County Comm'rs of Bonneville County*, 103 Idaho 626, 628, 651 P.2d 560, 562 (Ct. App. 1982). Recently, the court has held that the informal, quasi-judicial nature of these hearings make verbatim reporting difficult, and where there has been notice for the hearings, the hearings are tape recorded and the exhibits preserved, there has been no violation of due process. *Rural Kootenai Organization Inc. v. Board of Comm'rs*, 133 Idaho 833, 844, 993 P.2d 596, 607 (1999). *Rural Kootenai* distinguished the burden of a county board from providing a formal written statement to providing records of the proceedings. *Id.*

In this case, the 45' height restriction is explicitly included in Driggs' City Ordinance 281-07. Under the Idaho Code, city ordinances are to be followed by the Board in planning and zoning questions. After considering relevant standards and criteria, the Board is required by I.C. § 67-6535 to provide a reasoned statement that explains what was used in reaching its conclusion. Additionally, Teton County Ordinance 8-6-1-B-11, in decisions on conditional use permits, provides that "a record of hearings, findings made and actions taken shall be made." Furthermore, Teton County Ordinance 9-3-4-D, which deals with land use applications, provides that "[w]ritten findings are not necessary where the public documents or records of the public meeting already provide a written record." In the case at hand, there were public hearings and meetings whereby the verbatim record could be listened to on tape, and where the written minutes accurately reflect the rationale used in denying the application. This requirement was met by the Board in the following recorded and transcribed statement:

> Motion to deny the CUP based on a lack of conformance to Driggs' standards for condition evaluation of CUP criteria 2 and 3, and that M-1 zone change was granted based on a specific proposal that had no mention of a 75' high building and, in fact, clearly indicated a 45' height. ---November 15, Page 32, Lines 1-19---

This statement meets the requirement of County Ordinance 9-3-4-D as a clear, valid reason as to why it was denying Petitioner's CUP application. While Title 9 is in reference to subdivision regulations, Petitioner fails to state a compelling reason as to why the official record should be good enough for hopeful subdivision developers but not for Conditional Use Permit applicants. Furthermore, there is no explicit language in the Teton County Code requiring written findings. The only requirement placed on the Board is that a record of hearings, findings made and actions taken shall be made. 8-6-1-B-11. Under I.C. §67-6535(c), the intent of the legislature that decisions made should be founded upon sound reason and practical application of recognized principles of law. In reviewing such decisions, the courts are directed to consider the proceedings as a whole and evaluate the adequacy of procedures and resultant decisions in light of practical considerations with an emphasis on fundamental fairness and the essentials of reasoned decision-making. Only those whose challenge to a decision demonstrates *actual harm* or *violation of fundamental rights* shall be entitled to a reversal of a decision. I.C. § 67-6535. (Emphasis added). Petitioner has failed to prove that the denial of the CUP has caused actual harm or caused a violation of its fundamental rights.

Because the Board applied proper City ordinances in reviewing and denying the Petitioner's application, provided a written reasoning that explained what criteria was applied and was considered relevant, and Petitioner has failed to show any actual harm or fundamental right violation stemming directly from the denial of its application, the Board has fully complied with the requirements set forth in I.C. § 67-6535. Thus the decision of the Board should be upheld.

II.

The Board's reference and use of Criteria #2 and #3 as the reasoning and basis for denying the CUP was proper under Idaho Code § 67-6519.

Driggs' Standards for Commission Evaluation of a CUP criteria #2 states that a building "will be harmonious with and in accordance with the general objective or with any specific objective of the Comprehensive Plan and/or the Zoning Ordinance. Criteria #3 states that a building "will be designed, constructed, operated and maintained to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity and that such use will not change the essential character of the same area". These two criteria have their foundations in the Driggs' city ordinances. By utilizing the evaluation criteria, the Board was within acceptable authority when it made its decision to deny Petitioner's CUP application.

By applying Driggs' city ordinance 281-07 and the goals enumerated in the Teton County comprehensive plan, the Board used proper legal standards when it considered Petitioner's application for a CUP. The allowance of a conditional use permit is discretionary with the Commission and may be granted only in the best interest of the general public. The Commission may approve, conditionally approve, or deny a special use permit. *Davisco Foods Intern, Inc. v. Gooding County*, 141 Idaho 784, 788 118 P.3d 116, 120 (2005).

What is significant about Petitioner's CUP application is that it was not looking to modify the zoning of the site, but rather to modify the allowable height of the building on the site. Under Teton County Zoning Regulations, a modification of the requirements of this title as to height of buildings is defined as a variance. Teton County Ordinance 8-6-3-A. A variance shall not be considered a right of special privilege, but may only be granted to an application only upon showing of undue hardship because of characteristics of the site and that the variance is not in conflict with the public interest. Teton County Ordinance 8-6-3-B. Without a

demonstration of hardship and physical constraint by the applying party, a variance may not be granted. By contrast, a CUP requires only that Petitioner show conformance with existing comprehensive plans, city ordinances, and other relevant authority. Teton County Ordinance 8-6-1-B-7. The granting of a conditional use permit or exception permits a use contemplated by the zoning ordinance; a variance permits a use not contemplated by the ordinance except where necessary to avoid hardship. *Archdiocese of Portland v. Washington County*, 254 Or. 77, 83-84, 458 P.2d 682, 685 (Or. 1969), citing Gaylord, Zoning: Variances, Exceptions, and Conditional Use Permits in California, 5 UCLA L.Review 179 at 194 (1958). Petitioner failed to demonstrate how the 30 additional feet conforms to existing regulations and ordinances. Petitioner also failed to establish that the 45' height restriction is an imposition of undue hardship. They are still allowed to build the concrete batch plant according to their site's M-1 zoning guidelines. Petitioner contended in the hearings that without the 75' height grant, the batch plant would be required to run longer hours of operation. The Board's decision should be upheld because Petitioner failed to demonstrate conformance to existing legal precedent, and the Board considered proper legal precedent in considering Petitioner's application for a Conditional Use Permit.

III.

The Board was correct in taking the Comprehensive Plan under advisement in its decision, and did not utilize it as the sole basis for denying the CUP application.

The Board is required to base application decisions on all applicable provision in the comprehensive plan, as well as city and county regulations and ordinances. Standards and criteria used in the evaluation of the application must be set forth in the comprehensive plan, zoning ordinances, or other appropriate ordinance or regulation of the city or county. I.C. § 67-6535(a). Under this section of the Idaho Code, city ordinances are to be followed by the Board in

planning and zoning questions. Driggs zoning ordinances are statutorily required to comply with the Comprehensive plan under LLUPA. This statute does not require that zoning decisions to strictly conform to land use designations, however, the comprehensive plan may not be ignored by either the Planning and Zoning Commission or the Board of Commissioners. It must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. *Cusack Co. v. City of Chicago*, 242 U.S. 526, 528, 37 S. Ct. 190, 191 (1917), *Jacobson v. Massachusetts*, 197 U.S. 11, 30-31, 25 S. Ct. 358, 363, (1905). These provisions are applicable to land use and zoning actions. *Gay v. County Comm'rs of Bonneville County*, 103 Idaho 626, 628, 651 P.2d 560, 562 (1982). In this case, the 45' height restriction is explicitly included in Driggs' City Ordinance 281-07.

The Board of County Commissioners was not the first body to consider the 75' height difference as a threat to scenic aesthetic views as a weighing mechanism. Driggs' Planning and Zoning took scenic views of the Teton Range into account when making their determination on the CUP as well, and asked whether or not the proposed 75' tall building compatible with surrounding properties and uses, including scenic views from Highway 33. The Driggs P & Z Commission concluded that an allowance of 75' would not cause a significant impact over a 45' building. This conclusion, however, was not the final decision, but rather a recommendation to the County of what P & Z concluded would be a *statutorily compliant* final decision. Considering the deference given to the City ordinances as required by State Law, as well as the recognition of the importance of the Scenic overlay, the Board did not err by taking the aesthetic values present in the Comprehensive Plan into account in its denial of the Conditional Use Permit requested by Petitioner.

Petitioner relies heavily on *Urrutia v. Blaine County*, 134 Idaho 353, 2 P.3d 738 (S. Ct. 2000) for its contention that the Board elevated the Comprehensive Plan to legally controlling law. However, *Urrutia* is distinguishable from the instant case because it involved the approval of a subdivision plat, not a re-zoning use. The land to be developed in *Urrutia* was zoned agricultural, and the main contention in the comprehensive plan was that the PUD was not similar to the 20-acre lots with single-family homes provided for in the zoning ordinances. In the instant case, the land had been rezoned specifically for the concrete batch plant. The rezoned plat was deemed compatible with the construction of the batch plant requested by Petitioner. The "exception" desired by Petitioner was not part of the zone change conditions, were not presented during the rezoning hearing, and were not given to the Board for consideration. The language in *Urrutia* cited by Petitioner is not applicable in this case, wherein a rezone was granted for the batch plant. Granting the rezone is not an invitation to petitioner to build whatever he wants, but rather to build what was requested in the application. Further, the holding in *Urrutia* was that the *Board could not use a comprehensive plan as the sole basis for denying an application*. (Emphasis added). The function of the comprehensive plan is to serve as a guide and advise the government agencies in charge of zoning decisions. *Urrutia v. Blaine County*, 134 Idaho 353, 357-358, 2 P.3d 738, 742-743 (S. Ct. 2000). In Petitioner's case, the comprehensive plan was merely considered as a factor in the denial of the application. The reasons cited in the denial by the Board were CUP Criteria #2 and 3, not failure to comply with the county comprehensive plan. The Board gave consideration, not deference, to the Comprehensive Plan.

In matters outside of city limits but within the impact zone, Driggs P & Z has recommending power with their decisions. The County Board is the entity that has the final say

on what does and does not fulfill the area of impact agreement. This role as final decision-maker is indicative of the dynamic between the city and county zoning decisions. When the permit in question is within the area of impact, the county will have the final say on the conditional use permit, and are not obligated to follow the decision by the city commission in their official decision. The city's power is restricted to a recommending body, and not as a final authority. The Board's role is to ensure that the application is in conformity with the goals as outlined in the comprehensive plan. It did not err by using the Teton County Comprehensive Plan and its goals as criteria to evaluate whether or not a CUP should be issued. They are required to take it into account as a matter of statutory regulation. For an ordinance to be declared unconstitutional, the provision must be clearly arbitrary and unreasonable, have no substantial relation to the public health, safety, morals, or general welfare. *Cusack Co. v. City of Chicago*, 242 U.S. 526, 528, 37 S. Ct. 190, 191 (1917). *Village of Euclid, Ohio, et al. v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). Both the city ordinance and the comprehensive plan are in accordance with general laws, and thus are above the standard for arbitrary and capricious. By adhering to these plans, the Board properly used ordinances and is in compliance with the Idaho Code and other statutory provisions.

IV.

The Board specified the criteria used to evaluate the CUP application, and provided the reasons for the denial, all of which were based upon existing Driggs' zoning ordinances.

As previously set forth, the Board relied on the criteria used in the City of Driggs Ordinance in denying the CUP application. Specifically, Criteria #2 and #3 as referenced in the CUP application merely restate Driggs City Ordinance 281-07 criteria that the use must not be in "conflict with the comprehensive plan" and that "if the proposed conditional use cannot adequately meet the conditions necessary to ensure protection and compatibility with the

surrounding properties, uses and neighborhood, the planning commission will not approve the proposed use." The record clearly reflects that the Board concluded that the proposed use would not be harmonious with the surrounding uses, and aesthetics. It should be noted that petitioner conceded in its opening statement at the November 15 hearing that the purpose for the CUP was for permission to exceed the 45' height restriction and to ensure that the proposed facility would be harmonious with the surrounding uses. Nov. 15 Transcript pp. 5-8. The Board ruled on precisely that issue, and based it upon criteria contained within the ordinance, as further articulated in the CUP application form. The request for the zone change was based on the premise that the building would be in the 45 foot range, and approval was granted based upon findings that such a use would be compatible with neighboring uses. To switch the concept, especially in the context of a zone change request, only necessitates that the Board closely observe the effect such would have on other uses within the zone. The Board decision is clearly ordinance-based, and it does specify the standards used in the evaluation process.

V.

The Board was within its jurisdiction to approve, deny, remand, or approve with conditions when it correctly upheld the 45' height restriction present in the city ordinances and denied Petitioner's CUP application.

The Board has jurisdiction to approve, approve with conditions, deny, or remand decisions by the Driggs Planning and Zoning Commission. There is a presumption that a local zoning board's action is valid when interpreting and applying it's own zoning ordinances. *Evans v. Teton County*, 139 Idaho 71, 74, 73 P.3d 84, 87 (2003). Regardless of this presumption in favor of the P & Z, the Board has the authority to be the final issuer of the permit. *Davisco Foods Intern, Inc v. Gooding County*, 141 Idaho 784, 788; 118 P.3d 116, 120 (2005).

In *Archdiocese of Portland v. Washington County*, 254 Or. 77, 82, 458 P.2d 682, 684-685 (Or. 1969), the court held that a council, upon an application for a special use permit, acts as an administrative agency and that it's action is presumed to be regular. More specifically, its action will be presumed valid, reasonable, correct, taken in knowledge of material facts justified by the facts, made upon full hearing or after giving all interested parties a reasonable opportunity to be heard and upon appropriate evidence duly considered and properly applied. *Milwaukie Co of Jehovah's Witnesses v. Mullen*, 214 Or. 281, 292, 330 P.2d 5, 11 (Or. 1958). By reason of the presumption of validity that attends legislative and official action, one who alleges unreasonable discrimination must carry the burden of showing it. *Milwaukie Co of Jehovah's Witnesses v. Mullen*, 214 Or. 281, 292, 330 P.2d 5, 11 (Or. 1958), citing *Concordia Fire Ins. Co v. People of State of Illinois*, 292 US 535, 547, 54 S. Ct. 830, 835 (1934).

Zone changes are commonly made simply because the change is requested and no one in the neighborhood has an objection to it. *Archdiocese of Portland v. Washington County*, 254 Or. 77, 83-84, 458 P.2d 682, 685 (Or. 1969). The same considerations do not obtain, however when the governing board passes upon an application for a conditional use. *Id.* The original ordinance itself expressly provides for the specified conditional uses that might be made in the zone. *Id.* In this sense, the granting of an application for a conditional use does not constitute a deviation from the ordinance but is in compliance with it. *Id.* Further, it may be observed that generally the conditional uses specified as permissible in a specific zone are uses that are compatible with the purposes of the zone. Exceptions fulfill the practical recognition that certain uses of property are compatible with the essential design of a particular zone although the use is contrary to the restrictions imposed on them. *Id.*

VI.

Was the Board within its authority to allow, deny, remand, or allow with conditions when it denied Petitioner's CUP application?

The Board followed Driggs ordinance by denying the CUP application. Conditional Use Permits are addressed in City of Driggs Zoning Ordinance 281-07, Chapter 4, Section 2 (A)(1): "The Planning Commission may, following the notice and hearing procedures provided under Section 67-6509, Idaho Code, permit conditional uses where the uses are not in conflict with the comprehensive plan nor the zoning ordinance. If the proposed conditional use cannot adequately meet the conditions necessary to ensure protection and compatibility with the surrounding properties, uses and neighborhood, the planning commission will not approve the proposed use." 281-07, Chapter 4, §2 (A)(2) lists the types of conditions that may be attached to a conditional CUP approval. Petitioner contends that the Board was required by law to impose a condition on the approved CUP in lieu of its denial. Petitioner also claims that the Board acted without authority and thus without reasonable basis in fact or law, and cites *Naylor Farms, LLC v. Latah County*, 172 P.3d 1081, 1084 (2007) for authority. What Petitioner neglects to recognize is that the Board's authority allows it to approve, deny, remand, or allow with conditions under the authority of Teton County Code 8-6-1-B. It is not required to approve all applications and then limit that approval with conditions; that is merely one of the options available to the Board in rendering a decision about a conditional use permit. Teton County Ordinance 8-6-1-B-9. Furthermore, under the rules of statutory construction, the presence of the word "May", as opposed to "Must", in the ordinance, means that the Board is not required by law to approve conditional use permits. Had the ordinance read "The Planning Commission "must", ... permit conditional uses where the uses are not in conflict with the comprehensive plan", then

Petitioner's contention that the Board was required to facilitate the approval of the CUP would have merit. Under the current ordinance, however, it does not.

Just as the Board's denial of the CUP did not violate Driggs' Ordinance 281-07, the Board's denial of Petitioner's CUP application did not violate I.C. §67-6521(d).

The power to approve an application within an impact zone resides exclusively with the county. *Blaha v. Board of Ada County Commissioners*, 134 Idaho 770, 778; 9 P.3d 1236, 1244 (Idaho 2000). In *Blaha*, the district court held that the sole purpose of the city regarding subdivisions located outside the city limits is to make a recommendation to the county with respect to whether the application is in conformance with relevant city codes. *Id.* Finding the City's role to be merely advisory and not governed by the Local Land Use Planning Act (LLUPA), the district court concluded that the City acted within its discretion in recommending approval of the final subdivided plat to the County. *Blaha v. Board of Ada County Commissioners*, 134 Idaho 770, 776; 9 p.3d 1236, 1241 (Idaho 2000). Even though *Blaha* can be distinguished from the instant case because it regards subdivision approval, the court's holding is analogous to establish authority in an impact zone. The language establishes a hierarchy between the city to recommend and the county authority to approve building projects that lie within impact zones.

In *Davisco Foods v. Gooding County*, the Court held that in the absence of an explicit statement outlining the standard of review to be used by the Board in reviewing P & Z decisions, the Board could interpret the ordinance in a reasonable manner considering the review process. The Gooding County Board interpreted its ordinance as allowing it to engage in a de novo review of an appeal from the P & Z decision. The court decided that this interpretation was reasonable, as the ordinance permitted the Board to "uphold, uphold with conditions, or overrule

the Commission." The court went on to state that if a Board upholds a P & z decision with additional conditions imposed on the permit, the Board is in fact granting a different special use permit than was approved by P & Z. The board's decision is not remanded to the P & Z for approval on the conditions. The Board is the final issuer of the permit. The Board's de novo review of the appeal from the P & Z's decision was proper. *Davisco Foods Intern, Inc v. Gooding County*, 141 Idaho 784, 788, 118 P.3d 116, 120 (2005). The Gooding County case is analogous to this issue because Teton County also lacks specific language establishing a standard of review for the Board of County Commissioners. For the Teton County Board to interpret it's own ordinances, the interpretation is required to be reasonable. Similarly, decisions made under a reasonable interpretation of a standard of review should be upheld.

VII.

The Board's consideration of the Driggs Comprehensive Plan and other criteria set forth in the CUP application, as well as the Driggs City Ordinances and Regulations, was appropriate under due process regulations guaranteed by the Idaho and United States Constitution.

The Board did not err by taking the Teton County Comprehensive Plan into account when determining whether or not to issue the subject Conditional Use Permit. A Comprehensive Plan is not a legally controlling zoning law, but serves as a guide to local government agencies charged with making zoning decisions. *Evans v. Teton County*, 139 Idaho 71, 76; 73 P.3d 84, 89 (Idaho 2003). Under Driggs City Ordinance 8-3-6(c)(1)-(2), the approval or denial of the application shall be based upon standards and criteria set forth in the comprehensive plan. The comprehensive plan is considered for compliance and conformance with the goals, policies, and objectives of the county. The final decisions should be based on these goals, as well as evidence gathered through the public hearing process. Any application provided for in LLUPA 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. I.C. § 67-6535. Furthermore, Teton County ordinance 8-3-3 requires that the comprehensive plan should be treated as a guide and adhered to, except when deviation can be justified for reasons of public safety, health, and welfare reasons. After considering the Comprehensive Plan, the planning and zoning commission may recommend, and the Board of County Commissioners may accept or deny, an amendment to the zoning ordinance. I.C. § 67-6511(b), *Bone v. City of Lewiston*, 107 Idaho 844, 849, 693 P.2d 1046, 1052 (1984), *Evans v. Teton County*, 139 Idaho 71, 76, 73 P.3d 84, 89 (Idaho 2003).

The Teton County Board of Commissioners followed established guidelines by taking the Comprehensive Plan into account in making their decision. Since Planning and Zoning is responsible for implementing and reviewing the Comprehensive Plan (I.C. § 67-6508), and the county is also held to the same standard when dealing with similar decisions, the Board was justified in taking the Teton County Comprehensive Plan into account when it chose to reject the 75' Conditional Use Permit.

VIII.

Did the Board take impacting factors, such as compatibility with the comprehensive plan, into consideration in determining whether to approve or deny Petitioner's CUP application?

The Board used the appropriate Comprehensive Plan while reviewing Petitioner's application for a CUP by referencing the Teton County Comprehensive Plan. Under Driggs' Ordinance 8-2-1, the Board of County Commissioners, in total or in part, adopts a Comprehensive Plan that includes all the land within the Board's jurisdiction. The plan itself is to be based on the components outlined in LLUPA. If a particular ordinance is not used, its omission must be justified by use of the Comprehensive Plan. Driggs Ordinance 8-2-1.

IX.

Petitioner is not eligible to receive attorneys fees under I.C. § 12-117 because the Board was acting within the scope of its authority when it denied Petitioner's CUP application.

Idaho Code § 12-117 states that a court shall award the prevailing party reasonable attorney's fees, witness fees and reasonable expenses, if the court finds that the party against whom the judgment is rendered acted without a reasonable basis in fact or law. I.C. §12-117(1). Petitioner requests attorneys fees under the argument that the Board was acting outside of the scope of its authority when it denied Petitioner's CUP application, and thus had no reasonable basis in fact or law. The two requirements that must be met to qualify for attorneys fees are: first, that the court found in favor of the party requesting attorneys fees, and second that the state agency acted without a reasonable basis in fact or law. *Mooseman v. Idaho Horse Racing Commission*, 117 Idaho 949, 954, 793 P.2d 181, 186 (1990). Petitioner's argument is based on *Naylor Farms, LLC v. Latah County*, a case that lacks a comparative factual basis with which to compare to the instant case. The facts in *Naylor* are defined by an ambiguous ordinance and a county Board of Commissioners who knew that they were testing a legal area with little controlling law. *Naylor Farms, LLC v. Latah County*, 172 P.3d 1081, 1086 (2007). All CUP applications that are recommended by the Driggs P & Z are not required to be approved by the Board, and can be legally denied. If all CUP applications were guaranteed, then the only authority that would have been granted to the Board in statutory language would be the ability to impose conditions at the hearings. Petitioner's CUP was denied under the authority of the Teton County Board of Commissioners through the use of a plain ordinance. Petitioner's argument that the Board had no authority to deny the CUP application, and thus denied it without reasonable basis in fact or law, is not accurate, and its request for attorneys fees should be denied.

CONCLUSION

Petitioner claims that the Board failed to adopt written findings, failed to state the standards upon which the denial was based, failed to provide a reasoned statement in support of its decision, and failed to tell Petitioner how it could acquire the CUP after the denial. All four of these contentions are a misrepresentation of the facts and events surrounding the Conditional Use Permit application process. The written findings were provided to Petitioner in the meeting minutes. The standards that Petitioner was required to meet in order to obtain a CUP were present on the application, and specifically referenced in the Board's decision to deny the application. These Criteria #2 and #3 were based upon local ordinances with which Petitioner needed to meet in order to gain approval from the Board. The reasoned statement was carefully worded by the Board in the motion to deny the application, as transcribed in the hearing minutes and made available to the public to read. Finally, the Board is not required by law to help Petitioner get approval, because conditional use permits are not guaranteed just because a CUP application is submitted to the Board. The ordinance clearly states, and Petitioner's introductory remarks on record affirm, that the CUP application was to "exceed the 45' height limit". The additional 30' requested by Petitioner are not guaranteed, and the Board was acting within its authority when it decided to deny the application. For the reasons established above, the Board's decision to deny Petitioner's Application for a Conditional Use Permit should be upheld.

Dated this 5th day of August, 2008.

Barton J. Birch
Teton County Prosecuting Attorney

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 5 day of August, 2008, I served a true and correct copy of the foregoing Respondent's Brief, by causing a copy thereof to be hand-delivered or by causing to be placed a copy thereof in the United States mail, postage prepaid, addressed to:

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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TETON

IN RE: Application for a CUP Permit to Exceed 45' Height Limit for M-1 Zone	
BURNS HOLDINGS, LLC, Petitioner and Applicant, v. TETON COUNTY BOARD OF COMMISSIONERS, Respondent.	Case No. CV-07-376 **PETITIONER'S REPLY BRIEF**

COMES NOW, the Petitioner, Burns Holdings, LLC, and submits the following Memorandum Brief in response to Respondent's Reply Brief.

ARGUMENT

I.

Merely Keeping a Transcribeable Record and Minutes of the Proceedings Before the Board Does Not Satisfy Idaho Code § 67-6535.

Respondent asserts that by keeping a transcribeable record and "recording and publishing the minutes from the meeting," it satisfied the requirements of I.C. § 67-6535. Respondent's Brief, p. 6. In making that assertion, Respondents fails to understand the difference between the mere ministerial act of keeping a record of the proceedings, either through a tape recording or keeping minutes of the proceedings, and the deliberative process associated with identifying and weighing relevant factual considerations and articulating a rationale for the agency's ultimate decision. More importantly, in the absence of findings of fact and conclusions of law, meaningful judicial review is impossible. In *Workman Family Partnership v. City of Twin Falls*, 104 Idaho 32, 655 P.2d 926 (S. Ct. 1982), the Idaho Supreme Court explained the function and need for adequate findings of fact and conclusions of law:

> If there is to be any meaningful judicial scrutiny of the activities of an administrative agency – not for the purpose of substituting judicial judgment for administrative judgment but for the purpose of requiring the administrative agency to demonstrate that it has applied the criteria prescribed by the statute and by its own regulations and has not acted arbitrarily on an *ad hoc* basis – we must require that its order clearly and precisely state what it found to be the facts and fully explain why those facts lead it to the conclusion it makes. Brevity is not always a virtue.
>
> We wish to make clear that by insisting on adequate findings of fact we are not simply imposing legalistic notations of proper form, or setting an empty exercise for local

> governments to follow. No particular form is required and no magic words need be employed. *What is needed for adequate judicial review is a clear statement of what, specifically, the decision making body believes, after hearing and considering all the evidence, to be the relevant and important facts upon which its decision is based. Conclusions are not sufficient.*

Workman Family Partnership v. City of Twin Falls, 104 Idaho at 37, 655 P.2d at 931. (Italics in original). See also *Evans v. Teton County*, 139 Idaho 71, 80, 73 P.3d 84, 93 (2003). Idaho Code § 67-6535 requires that approvals or denials "*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." (Emphasis added).

Starkly missing from the agency record and the clerk's minutes here is any clear explanation of what facts the Board considered to be significant, any form of reasoned analysis explaining its decision and citation to the particular section or sections of the ordinance, comprehensive plan or statutory provisions deemed applicable. The agency record contains only the bald, unsupported assertion that Burns' CUP application "did not comport with the Comprehensive Plan," without any explanation whatsoever of the factual basis upon which that conclusion was reached and without any citation to which section in the ninety-eight (98) page Comprehensive Plan was not satisfied by Burns' CUP application. The Court and the Petitioner herein, are left completely in the dark as to the County Commissioners' reasoning and the standards used to evaluate the CUP application.

Meaningful judicial review in this case is entirely impossible because the Board did not provide any clue as to what it deemed to be the relevant facts and what particular facet of Burns' CUP application was deemed inconsistent with the Comprehensive Plan. Merely turning on the tape recorder does not satisfy the clear mandate of these two statutes.

Respondent further attempts justify its failure to issue written findings of fact by citing to *Rural Kootenai Organization, Inc. v. Board of Comm'rs*, 133 Idaho 833, 993 P.2d 596 (1999). However, *Rural Kootenai* actually supports Petitioner's contention that the Board here failed to fulfil its statutory duties. In *Rural Kootenai*, the board of county commissioners held a public hearing and then afterward issued a written "Order of Decision" which included specific findings and conclusions. *Id.* at 835, 993 P.2d at 598. More importantly, in *Rural Kootenai*, the Supreme Court found only that the transcript of the hearing was adequate, despite the existence of numerous inaudible omissions. 133 Idaho at 844, 993 P.2d at 607. The Court *did not* hold that the transcript alone was sufficient to comply with I.C. § 67-6535. In this case, unlike the *Rural Kootenai* case, the Board issued no "reasoned" statement or findings of fact at all. In fact, the Supreme Court in *Rural Kootenai* actually rejected as non-compliant with I.C. § 67-6535 certain of the county board's enumerated findings. *Id.* The Court only upheld those findings where "the Board clearly set forth the ultimate facts relevant to its decision, and the facts are supported by the record." *Id.* Thus, like the factually deficient findings in *Rural Kootenai*, the Board's brief, conclusionary discussion on the record here does not comply with the requirements of I.C. § 67-6535.

Incredibly, Respondent asserts that despite the Board's failure to comply with the provisions of I.C. § 67-6535(a) and (b), Petitioner cannot claim relief under this section for failure to state "actual harm" as required by I.C. § 67-6535(c). Respondent's Brief, p. 8. If being deprived of its right to meaningful judicial review and of its statutory right to an explanation of the basis of the Board's decision, thereby being subjected to arbitrary, *ad hoc* decision-making, do not constitute "actual harm", then it would be impossible to think of anything that would. Being deprived of the right to use its property as expressly allowed by the Driggs CUP ordinance, is most certainly no trivial matter.

In sum, the Teton County Board of Commissioners did not provide a reasoned statement explaining the specific legal standards it was applying, the facts it considered relevant to its determination and the rationale it used to reach its decision. Like the City of Twin Falls in the *Workman* case, the Board acted "arbitrarily and on an *ad hoc* basis." Because the Board did not comply with the statutory requirements of § 67-6535, the Board's decision should be reversed and the matter should be remanded with an order directing the Board to make a reasoned statement of facts and to set forth a reasoned analysis supporting its conclusions.

II.

A Broad, Conclusory Reference to the Comprehensive Plan Does Not Satisfy the Mandate of Idaho Code § 67-6519.

Idaho Code § 67-6519 requires that whenever a governing board grants or denies a permit it must specify the ordinance and standards it used in evaluating the application, the reasons for approval or denial and the actions which the applicant could take to obtain a

permit. Respondent apparently contends that by merely referring to the Comprehensive Plan as a whole, without citing to any particular provision thereof, it satisfied its burden. Respondent's Brief, p. 9. Respondents further asserts that its citation to the application form, rather than the ordinance, also satisfied that duty. *Id.* Finally, Respondent fails to explain in any respect its failure to set forth the actions that Burns could take to obtain a permit.

> The motion adopted by the Board was as follows:
>
> Commissioner Stevenson: Yeah. Sure. One more time.
>
> The Clerk: Chairman Young motioned to deny the CUP due to a lack of conformance to Driggs' standards for condition evaluation of a CUP criteria No. 2 and No. 3, and the fact that the M-1 zone change was granted based on a specific proposal that had no mention of a 75-foot high building, and, in fact, clearly indicated a 45-foot maximum height.
>
> * * * *
>
> Mr. Birch: Is that your motion, Larry?
>
> Mr. Chairman: Yes. That motion has been seconded. And I called for those in favor.
>
> Commissioner Stevenson: Aye.
>
> Mr. Chairman: Aye. Opposed?
>
> Commissioner Trupp: Aye.
>
> Mr. Chairman: Motion carries. The conditional use permit is denied . . . "

CUP Tr., Vol III, p. 31, L. 21 through p. 33, L. 4. Aside from the Board's failure to adopt written findings of fact as required by § 67-6519, the Board's motion is devoid of any guidance as to what provision in the Comprehensive Plan was deemed inconsistent with Burns' application, what facts upon which the Board based its conclusion and what reasoning

the Board applied in reaching its conclusion. In effect, Respondent is telling the Court and Petitioner to "Go read the Comprehensive Plan and try to figure out what we did." Clearly such cavalier attitude does not satisfy in any meaningful way the Board's duty under Idaho Code §§ 67-6519 and 67-6535.

Finally, Respondent completely fails to answer or otherwise address Petitioner's contention that the Board misconstrued its earlier decision in the M-1 zone change. As noted in Petitioner's earlier brief, the Board's denial of the CUP was in error because it was premised upon Commissioner Young's erroneous recollection that the M-1 zone change was specifically limited to a forty-five (45) foot maximum height requirement. Petitioner's Brief, pp. 20 through 23. Contrary to Commissioner Young's recollection, the Board's motion in the earlier rezone proceeding was made conditional only upon the adoption of a mutually agreeable Development Agreement and upon the further condition that if the project did not come to fruition, the M-1 zoning would automatically revert to the C-3 zone. *Ibid,* p. 21.[1]

By failing to address Petitioner's contention, Respondent effectively admits the Board's error in this regard. Contrary to Commissioner Young's recollection, the earlier M-1 zone change did not "clearly indicate[d] a forty-five (45) foot maximum height." The Board's decision in that regard is clearly erroneous and should be reversed.

III.

The Board's Use of the Driggs Comprehensive Plan to Deny Burns' CUP Application Unlawfully Elevated the Comprehensive Plan to the Level of Legally Controlling Zoning Law.

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[1] As noted earlier, this condition was also violative of I.C. § 67-6519 which requires notice and hearing before property can be rezoned. Automatic rezoning without such notice and hearing clearly do not comply with this statute.

A. Use of a Comprehensive Plan as Legally Controlling Regulatory Law Is Improper.

Respondent accurately points out that the Board in part premised its denial of the Burns' CUP permit upon the alleged premise that the application did not comport with the Driggs Comprehensive Plan. CUP Tr. Vol. III, p. 31, L. 21 through p. 33, L. 4. Respondent goes on to argue that "the Comprehensive Plan may not be ignored by either the Planning and Zoning Commission or the Board of Commissioners." Respondent's Brief, p. 11. Petitioner does not take issue with this general proposition—provided the matter under consideration is a rezoning or other legislative matter such as an amendment to the zoning ordinance itself. However Respondent fails to justify its use of the Comprehensive Plan as a regulatory ordinance to determine project compliance with the zoning ordinance, in direct contradiction of the holdings in *Urrutia v. Blaine County,* 134 Idaho 353, 2P.3d 738 (2000); *Sanders Orchard v. Gem County*, 137 Idaho 695, 52 P.3d 840 (2000) and *Evans v. Teton County*, 139 Idaho 731 , 73 P.3d 84 (2003). In all of these cases, the Supreme Court uniformly held that the Comprehensive Plan is not appropriately used to determine project compliance nor does it operate as legally controlling zoning law. See Petitioner's Brief, pp. 13 through 17. Specifically, as noted in *Urrutia*, the use of a comprehensive plan as regulatory law "affords the Board unbounded discretion" in examining an application and would in effect allow a board to effectively rezone land based on the general language in the Comprehensive Plan. *Urrutia v. Blaine County*, 134 Idaho at 358, 2 P.2d at 743. Such is exactly the result here.

In the earlier M-1 rezoning proceeding, the Board effectively made a finding, as required by Idaho Code § 67-6511, that Burns' rezone was "in accordance with the

Comprehensive Plan." Necessarily included within such finding was a recognition that all of the uses, absolute or conditional, allowed in the M-1 zone, were consistent with the Comprehensive Plan. As Petitioner noted earlier, building heights in excess of 45 feet, were specifically allowed as a permitted use in that zone, provided appropriate conditions were met. Yet, a mere four (4) months later, the Board effectively reversed itself and held that the possibility of a building with a height in excess of forty-five (45) feet was *not* in accordance with the Comprehensive Plan. The latter decision was made without any factual findings, without any specific reference to any particular provision of the Comprehensive Plan and flew in the face of the earlier recommendation by the Driggs Planning and Zoning Commission and Teton County's own Planning and Zoning Administrator. Nowhere does Respondent justify its use of the Comprehensive Plan as a regulatory ordinance.[2] Interestingly the Driggs Planning and Zoning Commission found that the Petitioner's project was "appropriate at the requested location for the intended use and would not cause significant impact over that which would be caused by a building with the allowable height." R. p. 3-4. Despite the Planning and Zoning Commission's specific finding, the Board did not identify *any* surrounding properties with which it was comparing Petitioner's project. Nor did the Board identify the essential character of the area or indicate how Petitioner's project would be incompatible therewith. In the absence of findings of fact relevant to

[2]Respondent somewhat disingenuously argues that "The reason cited in the denial by the Board were CUP criteria # 2 and 3, not failure to comply with the County Comprehensive Plan." Respondent's Brief,. p. 12. Contrary to this assertion, criteria #2 in fact required a finding that the application was "in accordance with the general objective[s] or any specific objective[s] of the Comprehensive Plan." See R. p. 5.

Criteria No. #3, the Board cannot rely upon the mere conclusory statement that the CUP application did not conform to Criteria No. #3.

B. The Board's Reliance upon Criteria Other Than the Comprehensive Plan Was Equally Inappropriate.

Respondent argues that it only used the Comprehensive Plan "as a factor" in its decision and did not utilize it as the sole basis for denying Burns' CUP application. Respondent's Brief, pp. 10, 12. Respondent is technically correct that the Board did not premise its denial solely upon non-compliance with Comprehensive Plan. It also premised its decision upon Mr. Young's erroneous recollection that the earlier rezone was made conditional upon a maximum forty-five (45) foot height restriction. As noted above, that recollection was totally in error.

The Board also relied upon the so-called "Criteria #3", as articulated in the Driggs application form which required that the CUP "be designed, constructed, operated and maintained in the harmony with an appropriate in appearance with the existing or intended character in the general vicinity . . ." However as noted above, the Board failed to adopt written findings of fact setting forth the basis for its conclusion that the CUP application was not harmonious with other uses in the general vicinity. Specifically it made no findings with respect to the characteristics of the general area surrounding Burns' property and made no findings as to the specific reason why the concrete plant as designed was inconsistent with the surrounding industrial, manufacturing and commercial uses.[3]

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[3]Respondent states a number of times in its Brief that the Board took "aesthetic values" into account in its denial of the CUP permit. That statement is nowhere supported by the record, nor are there any written findings adopted by the Board to support that assertion. Further, the record also clearly reflects that Burns' property was located outside the scenic corridor adopted by the County along and parallel with State Highway 33. CUP Tr. Vol. III, p. 3, L. 19 through p. 22; p. 16, pp 3 through 10.

In summary, the Board's use of the Comprehensive Plan as controlling regulatory law was clearly inconsistent with well established Idaho case law and its reliance upon other erroneous and faulty conclusions, does not mitigate the Board's use of the Comprehensive Plan as regulatory law.

IV.

Petitioner's Application Was Properly Considered as a CUP Application Rather Than as a Variance and the Board Abused its Discretion by Denying the Permit Without Evaluating Possible Conditions under Which the Plant Could Be Allowed to Operate.

A. A Conditional Use Permit, Not a Variance, Was the Proper Vehicle for Considering Petitioner's Application.

Petitioner filed a CUP application because that is exactly what the Driggs ordinance required. Specifically, the Driggs CUP ordinance required all buildings with a height in excess of forty-five feet be approved as a conditional use. Burns' use of a building with a height greater than forty-five (45) feet was necessary to realize its goal of "provid[ing] a pleasant, harmonious and attractive exterior; facilitat[ing] [efficient] production of concrete and mitigat[ing] sound, dust and vibration." R. p.126-27. Initially in its Reply Brief, Respondent conceded that filing a CUP application "was the proper course of action for Petitioner to have taken . . . ." Respondent's Brief, p .2. However, Respondent later suggests that Petitioner should have applied for a variance, rather than a CUP, with the additional burden of showing "undue hardship." Respondent's Brief, p. 9. Respondent relies on several Teton County ordinances for this contention. However, Teton County ordinances are *not* the controlling law in this case. It is undisputed that the property in question is located within the

Driggs City Area of Impact and that "[p]ursuant to the agreement between the City of Driggs and the County, the Driggs City Ordinances are in effect in the Impact Area." Rezone Tr. p.16, L.18-24. Because, as the Board noted, "the Driggs ordinances apply," CUP Tr., Vol. II, p.37, L.11-14, the Teton County ordinances that Respondent cites in its Reply Brief do not govern this case.

According to the Driggs City Zoning Ordinance, buildings higher than forty-five (45) feet are a permitted use in a M-1 Zone, provided they are approved by a conditional use permit. Driggs City Ordinance 247-07, Ch. 2, § 13(C). Thus, the Driggs Ordinance specifically requires applicants who wish to construct a building higher than forty-five (45) feet in the M-1 Zone to obtain a conditional use permit, not a variance. Respondent obviously does not understand the difference between a variance and a conditional use permit. A variance is a means by which an applicant is granted an *exception* or "modification" to the requirements of an ordinance, based upon some unusual site condition or exceptional circumstance. See I. C. § 67-6516. Conversely, a conditional use is a specifically permitted use that is allowed with appropriate conditions. See I. C. § 67-6512. Unlike a variance, a conditional use does not involve an exception to the ordinance requirements, rather it is merely another form of a permitted use. Because it is an expressly permitted use under the ordinance, no showing of exceptional circumstances or undue hardship is necessary.

Because Petitioner was not required to obtain a variance, Petitioner likewise was not required to make a showing of "undue hardship." Rather, Petitioner merely had to meet the requirements for a conditional use permit, as set forth in the ordinance.

B. The Board Abused its Discretion Because it Failed to Consider Conditions or Actions Which Petitioner Could Take to Obtain a Permit.

Respondent asserts that the Board has authority to "approve, deny, remand, or allow with conditions" a CUP application. Respondent's Brief, p. 16. Petitioner takes no issue with that broad, general statement. In fact , Petitioners never argued, and do not here argue, that the Board was without authority to approve, deny or formulate conditions appropriate to ensure Burns' CUP application was harmonious with the surrounding industrial and manufacturing uses. What the Petitioner does argue is that Board failed to follow its own ordinance. As was noted in Petitioner's earlier Brief, the Driggs CUP ordinance contains a listing of potential conditions that might be attached to the CUP as necessary to minimize adverse impact on surrounding uses, control the sequence, timing and duration of development and ensure proper maintenance. See Appendix B, Driggs Zoning Ordinance, Ch. 4, § 2, at p. 47. See also Petitioner's Brief, pp. 23 through 25. The Driggs Zoning Ordinance further provides guidance to the Board as to the very limited circumstance where it is appropriate to deny a CUP application: "If the proposed conditional use *cannot adequately meet the conditions* necessary to assure protection and compatibility with the surrounding properties, uses and neighborhood, the Planning and Zoning Commission will not approve the proposed use." *Ibid.*[4]

Here, the Board simply ignored the applicable CUP Ordinance. Specifically, it made no effort whatsoever to consider appropriate conditions to ensure harmony and compatibility

[4]Because Burns property was located in the Area of Impact, the agency in charge of applying the CUP ordinance was the Board of County Commissioners, rather than the Driggs Planning and Zoning Commission.

with surrounding uses. Further, it failed to gauge or assess Burns' capability of complying with such conditions and then totally ignored the requirement in the Ordinance that the use could be denied only upon a finding that the applicant could not meet those conditions. In effect, the Board completely missed the purpose of the hearing. In its haste to deny the application, the Board relapsed into what was effectively a reconsideration of its earlier zoning hearing and a reversal of its decision therein, notwithstanding the passage of the applicable appeal period.

The case should be remanded to the Board, with an order to assess appropriate conditions to ensure harmony with the surrounding industrial and manufacturing uses and to assess Burns' ability to comply with those conditions. The Board should further be instructed that it may deny the permit only upon an express finding that Burns is without the ability to meet such appropriate conditions. The Board should further be instructed that aesthetic considerations are appropriate only to the extent necessary to harmonize with the surrounding industrial and manufacturing uses and that consideration of subjective "scenic" values is not appropriate since the property is located outside the scenic corridor.

V.

The Board Abused its Discretion by Re-visiting the Issue of Consistency with the Comprehensive Plan, Notwithstanding the Passage of the Applicable Appeal Period.

Some nine months prior to the CUP hearing in November, 2007, the Board changed the zoning designation of Petitioner's land from C-3 to M-1. The M-1 zone allowed any "[m]anufacturing, assembling, fabricating, processing, packing, repairing, or storage uses which have not been declared a nuisance by statute." Driggs City Ordinance 274-07, Chapter

2, Section 13(A)(1). The Board specifically found that a concrete batch plant was an appropriate use under an M-1 zone. Rezone Tr. p.36, L.24 through p.37, L.7. And, as noted above, buildings higher than forty-five (45) feet are expressly permitted as conditional uses in the M-1 zone. Driggs City Ordinance, Chapter 2, Section 13(C). By the time of the November 15, 2007, CUP hearing, the appeal period for the M-1 rezoning (i.e. twenty-eight (28) days) had long since passed. See Idaho Code § 67-6519(4).

Whenever a board of county commissioners approves a zoning change it must find that the change is in accordance with the comprehensive plan. I.C. § 67-6511; *Evans v. Teton County, 139 Idaho 71, 76, 73 P.3d 84, 89 (2003).* If a county board approves a zoning change that is inconsistent with the comprehensive plan, such action constitutes invalid spot zoning. *Id.* Therefore, by approving the change from C-3 to M-1 in this case, the Board necessarily found that all permitted uses, including the conditionally permitted uses in the M-1 zone, were in accordance with the Comprehensive Plan. More specifically, the Board's approval of the zoning change necessarily established that all permitted uses in the M-1 zone, including buildings over forty-five (45) feet in height, were compatible with the Comprehensive Plan, provided the applicant complies with appropriate conditions to assure harmony with the surrounding industrial and commercial uses.

Whenever a board is confronted with a land use decision which has previously been before it, "[T]he board's liberal discretion . . . is limited" in situations where the governing board has previously made a determination related to the same parcel now under consideration. *Haines v. Zoning Bd. Of Appeals of Town of Oxford*, 26 Conn.App. 187, 191-

92, 599 A.2d 399, 402 (Ct.App. 1991). Specifically, the governing board "is prohibited from reversing a previous decision unless the facts and circumstances have materially changed so as to affect the reason for the original decision." *Id. See also Schlehuser v. City of Seymour*, 674 N.E.2d 1009, 1014 (Ind.App. 1996) (noting that because the function of a governing board is "quasi judicial, it generally has no inherent power to review and vacate, rescind or alter its decision after it has been made"). Further, Idaho Code § 67-6519 establishes an appeal period of twenty-eight (28) days and any effort to rescind or alter a decision after the appeal has run, would be a clear violation of this statute. Here, the Board made no finding that there had been a change of facts and circumstances such as would have justified reconsideration of its earlier rezoning decision. Further, even assuming there had been a material change in the circumstances such as might have justified a reversion to the C-3 zone, the proper procedure would have been to conduct a new hearing, with notice to the applicant of the Board's intent to reconsider the zoning of the parcel. See Idaho Code §§ 67-6511 and 67-6509. Had such been the Board's intent, Burns would have therefore been afforded advance notice of the Board's intent to reconsider the earlier rezoning, consistent with the principles outlined in the Comprehensive Plan.[5] No such notice was given to Burns. Instead, the Commissioners effectively "back-doored" Burns by refusing consideration of a conditional use that was expressly permitted under the M-1 zone and by refusing to consider *any* conditions that might have been appropriate to assure compatibility with the adjoining industrial and manufacturing uses.

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[5]It should be noted however that such intended rezoning would have been in violation of the four (4) year provision of Idaho Code § 67-6511(d).

In sum, the Board improperly revisited the issue of general compatibility with the comprehensive plan, all in violation of I. C. § 67-6519. Instead of making a good faith effort to consider appropriate conditions to assure compatibility of Burns' concrete plant with the surrounding industrial uses, the Board embarked upon an *ad hoc* quest to find some visionary goal or value buried somewhere in the Comprehensive Plan upon which they could predicate a justification for their arbitrary denial. By so doing, the Board abused its discretion, much in the same fashion as predicted in *Workman, supra.* The Board's decision should be reversed and the matter remanded with appropriate instructions to the Board to confine its consideration to the specific requirements of the Driggs CUP ordinance..

VI.

The Board's Decision to Deny the Application Based on Non-conformance with the Comprehensive Plan Violated Petitioner's Due Process Rights.

As Respondent concedes, "comprehensive plans do not themselves operate as legally controlling zoning law." *Bone v. City of Lewiston*, 107 Idaho 844, 850, 693 P.2d 1046, 1052 (1984); Respondent's Brief, p.18. This case illustrates precisely the problem with making land use decisions based on comprehensive plans rather than relying upon objective standards set forth in zoning or subdivision ordinances. "A comprehensive plan reflects the 'desirable goals and objectives, or desirable future situations' for the land within a jurisdiction." *Urrutia v. Blaine County*, 134 Idaho 353, 357, 2 P.3d 738, 742 (2000) (quoting I.C. § 67-6508). A comprehensive plan does not function as and should not be used as a regulatory ordinance. *Bone, supra.* The Driggs Comprehensive Plan[6] sets forth ninety-eight (98) pages

[6]Appendix C to Petitioner's Brief

of various community values, policies, restrictions, conditions, and goals necessary to implement Driggs' "Community Vision." To deny a land use permit based on general non-compliance with the comprehensive plan violates due process because such policies, values, or goals are simply too broad and visionary to be used to determine project compliance. Such determinations should more appropriately be made under the zoning ordinance or subdivision which contain more objective, definable standards.

Because it lacks specific, objective standards, using the comprehensive plan as a basis for denying a permit gives the board unbridled discretion, thereby allowing the board to act arbitrarily. *See Drake v. Craven*, 105 Idaho 734, 738-39, 672 P.2d 1064, 1068-69 (Ct.App. 1983) (noting the importance of "sufficiently clear standards to guide the governing board in zoning requests, and sufficient procedures to guard against the exercise of uncontrolled discretion by the board"). Because the ninety-eight (98) page comprehensive plan at issue here is such a wide-ranging, visionary document, it establishes no specific standards by which the Board could measure the Burns' application. Without objective criteria, use of the comprehensive plan as a regulatory measure results in a process "so vague that men and women of common intelligence must necessarily guess at its meaning and differ as to its application, [which] violates the first essential of due process of law." *Anderson v. City of Issaquah*, 70 Wash.App. 64, 75, 851 P.2d 744, 751 (1993); *See also Drake*, 105 Idaho at 738, 672 P.2d at 1068. In such a state of affairs, the applicant is left to the complete mercy and unbridled whims of the Board.

In this case, the Board also based its denial on "CUP criteria No.2." CUP Tr., Vol. III, p.32, L.1-7. Criterion No. 2 requires the proposed project to be "*harmonious* with and in accordance with the *general objective* or any specific objective of the Comprehensive Plan and / or the Zoning Ordinance." R.p.5 (emphasis added). As noted in Section II, *supra*, although the Board also pointed to CUP Criterion No. 3 as a reason for the denial, the Board made no finding of fact regarding the "appearance" or "character of the general vicinity," or any specific aspect of Petitioner's proposed project it deemed inconsistent with the surrounding uses. Instead it relied upon its mistaken recollection regarding the existing Development Agreement which purportedly limited Petitioner's construction of a building higher than a forty-five (45) feet. Further, the Board did not identify any specific objective of the Comprehensive Plan or the Driggs CUP ordinance with which Petitioner's proposed project was inconsistent. Thus, even though the Board articulated other reasons for its denial, those reasons were clearly erroneous, with the result that the Board effectively based its denial solely on the fact that Petitioner's project was not "harmonious" with a "general objective" of the Comprehensive Plan.

In *Anderson, supra,* the court found that using terms such as "harmonious," "appropriate," and "compatible" violated due process because those terms were "unconstitutionally vague." 70 Wash.App. at 75-77, 851 P.2d 751-52. The court found that such terms "do not give effective or meaningful guidance to applicants, to design professionals, or to the public officials . . . who are responsible for enforcing the code." *Id.* at 76, 851 P.2d at 751. Although the vague language in that case was found in the code itself

and not a comprehensive plan, *Anderson* clearly illustrates why the use of broad and visionary standards of a comprehensive plan deprives an applicant of a fair hearing and due process. Such broad language provides no standards, affords the b oard unbridled discretion, and gives the applicant no indication what he should do to conform his conduct to the requirements of the law. In short, basing a denial on the comprehensive plan violates fundamental due process.

Respondent also asserts that it was proper for the Board to consider aesthetic considerations when evaluating Petitioner's permit. Respondent's Brief, p.11. However, Petitioner's Brief however points to no findings of fact by the Board where aesthetic considerations were discussed or articulated as a basis for denial. Even assuming *arguendo* that such were used as a basis for denial, the use of aesthetic considerations ostensibly found in the comprehensive plan, would similarly be devoid of an objectively definable standard and violative of due process. This underscores why the Idaho Local Land Use Planning Act requires that all denials be based on specific, objective provisions of an ordinance. *See* I.C. § 67-6519.

In this case, the Board denied the Petitioner's application because, they *felt* the building was too high. However, the Board could not articulate any valid, objective legal standard upon which they based that decision—that is they did not state how high was too high nor did it define the baseline upon which it based that determination. The Board did not identify any objective standard from the Driggs comprehensive plan stating that seventy-five (75) feet high buildings are entirely impermissible—in fact the Driggs CUP ordinance clearly

suggests otherwise.[7] The Board noted that the Driggs Comprehensive Plan expresses a "*desire* for an *attractive* north entry into Driggs and that *larger* metal buildings reduce that attractiveness." CUP Tr., Vol. III, p.17, L.13-15 (emphasis added). Like the language at issue in *Anderson*, these visionary terms, although perhaps appropriate for use in a legislative context where no specific parcel of property is under consideration, provide the Board with no identifiable objective standards to use when evaluating an application and are thus an "unconstitutionally vague" basis upon which to make a land use decision. 70 Wash.App. at 77, 851 P.2d at 752. In this case, the Board did not identify what constitutes "attractiveness," how such "desire" could be fulfilled, or what the dimensions of a "larger" building are. In *Anderson*, the court stated "[b]ecause the commissioners themselves had no objective guidelines to follow, they necessarily had to resort to their own subjective 'feelings.'" *Id.* In this case too, Board members had no objective criteria upon which to base the denial and so had to resort to their own subjective feelings. Commissioner Stevenson expressly stated, "I don't *feel* that [Petitioner's project] meets the criteria established by the City of Driggs for the approval. I know that the planning & zoning commission said it did, but I disagree." CUP Tr., Vol. III, p.21, L.24 through p.22, L.2 (emphasis added). Just as in *Anderson*, for the Board in this case to resort to subjective feelings "is the very epitome of discretionary, arbitrary enforcement of the law." 70 Wash.App. at 78, 851 P.2d at 752.

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[7] In searching for some objective basis for its denial, the Board also mentioned the Scenic Corridor Overlay, but then acknowledged that the property is "not . . . technically within the scenic corridor." CUP Tr., Vol. III, p.16, L.7. Moreover, the Board does not state what additional restrictive standards would apply even if the building were within the corridor. The Board does not refer to any objective provisions for the Scenic Corridor Overlay Provisions that bar a seventy-five (75) feet high building located outside the corridor.

Because the Board did not use any identifiable objective standards when denying Petitioner's application, the Board violated the Petitioner's Constitutional due process rights. The Board's decision should be reversed and the matter remanded for reconsideration consistent with the objective standards contained with the Driggs CUP ordinance.

CONCLUSION

The Board here failed to afford Burns a fundamentally fair hearing, devoid of arbitrary, *ad hoc* decision making. It provided Burns and the Court here with no written explanation of the basis for its decision and failed to follow the mandate of *Cooper v. Board of Ada County Commissioners*, a decision that has been in place since the early 1980's. They ignored their own ordinance and substituted their own "feelings" without even making a token effort to consider appropriate conditions for the proposed conditional use, as required by the applicable ordinance.

The matter should be remanded with instructions to consider appropriate conditions to assure compatibility with the surrounding industrial and commercial uses. The Board should be ordered to cease using the visionary goals in the Comprehensive Plan as regulatory criteria and to cease using subjective "aesthetic" standards. Petitioner should be awarded its reasonable attorneys fees, given the Board's failure to follow well-established case precedent and clear statutory mandates.

DATED this 25th day of August, 2008.

Dale W. Storer
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, that I served a true and correct copy of the following described pleading or document on the attorney listed below by hand delivering, mailing or by facsimile, as indicated below, with the correct postage thereon, on this 25th day of August, 2008.

DOCUMENT SERVED: PETITIONER'S REPLY BRIEF

ATTORNEY SERVED:

Barton J. Birch	( ) Mail
Teton County Prosecutor's Office	( ) Hand Delivery
81 N. Main Street, #B	( ) Facsimile
Driggs, ID 83422	( ) Courthouse Box
Chambers Copy	
Honorable Jon J. Shindurling	( ) Mail
Bonneville County Courthouse	( ) Hand Delivery
605 N. Capital Ave.	( ) Facsimile
Idaho Falls, ID 83402	( ) Facsimile

Dale W. Storer
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

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Burns Holdings, LLC vs. Board of County Commissioners of Teton County

All Items

Hearing type:	Hearing	Minutes date:	10/21/2008
Assigned judge:	Jon J Shindurling	Start time:	02:43 PM
Court reporter:	Nancy Marlow	End time:	02:43 PM
Minutes clerk:	PHYLLIS HANSEN	Audio tape number:	
Prosecutor:	[none]		

Tape Counter: 238	J calls case; ids those present oral argument regarding appeal PA - Dale Storer, Dan Dansie appeal of denial of CUP by county commissioners
Tape Counter: 240	J - major assertions is Board failed tomake appropriate written findings remedy would be to remand for rehearing or remediation from the Board J bifurcate the argument and will hear the remaining issues at later date PA - plain and simple, the County did not do it says took tape recordings and have minutes that will not do devoid of any indication of how they got there
Tape Counter: 242	DA - asseert there is a written record not asserting the tape recording satisfies reequirement argue - no prescribed form or format so long as there is a basis that shows the factual reasons for denial evry single deliberation has to be done in public format written minutes satisfy that requirement
Tape Counter: 246	PA - our argument is not that there was no record made; simply not having written findings simply did not satisfy the statute
Tape Counter: 247	J - 75-6535(b) no question been raised that not proceeding under that chapter inn order to make adequate effort on review - provide parties due process but adequate basis to determine fctors on which decision was based at public hearing a lot of things happen that are irrelevant difficult to figure out what commission may have been seeing as appropriate or not apporpriate distill legal basis for decision third benefit - parties ability to see how decision arrived; ability to inderstand the decision and rationale for the decision forced the body to discipline themselves so they arenot arbitray and capricious order formal written findings of fact and conclusions of law will remand to the commission for the preparation of F of F, Con of Law Storer to prepare Order
Tape Counter: 255	PA - want to raise issue of attorneys fees urge court consider that since requirement for written findings have been around since the 1980's to file with the court a fee request and cost bill

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TETON

IN RE:

Application for a CUP Permit to Exceed 45' Height Limit for M-1 Zone

BURNS HOLDINGS, LLC,

Petitioner and Applicant,

v.

TETON COUNTY BOARD OF COMMISSIONERS,

Respondent.

Case No. CV-07-376

ORDER

FILED IN CHAMBERS
AT IDAHO FALLS
BONNEVILLE COUNTY
HONORABLE JON J. SHINDURLING
DATE 10/30/08
TIME 3:50PM
DEPUTY CLERK Janice Watters

This matter came before the Court for hearing on October 21, 2008, pursuant to the Court's prior Scheduling Order. The Court has considered the briefs submitted by both parties and the oral arguments submitted by counsel at the hearing. Based thereupon, the Court makes the following order:

1. The Court finds that Respondent, Teton County failed to prepare written findings and a reasoned statement as required by Idaho Code § 67-6535, thereby frustrating the ability of the Court to perform an appropriate judicial review of the proceedings below. Accordingly, the matter is hereby remanded to the Teton County Board of County Commissioners and the Court further directs said Board to forthwith prepare and issue written findings and conclusions consistent with such code section.

2. The Court is advised by counsel for the parties that a new hearing is not desired and accordingly the Court hereby directs that the Board of County Commissioners

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issue written findings and conclusions, based upon the testimony and evidence presented at the hearing before the Board on November 17, 2007.

3. In the event Petitioner desires further judicial review of such written findings and conclusions, Petitioner shall file an amended petition for judicial review within the time frames set forth in Idaho Code § 67-6521(d), failing which the Findings and Conclusions of the Board shall be deemed final.

DATED this 30 day of October, 2008.

Jon J. Shindurling
District Judge

CLERK'S CERTIFICATE OF MAILING

I hereby certify that I served a true copy of the foregoing document upon the following this 31 day of October, 2008, by mailing, with the necessary postage affixed thereto.

ATTORNEY SERVED:

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CLERK OF THE DISTRICT COURT

By: Grace Wootan
Deputy Clerk

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Attorneys for Petitioner, Burns Holdings, LLC

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TETON

IN RE: Application for a CUP Permit to Exceed 45' Height Limit for M-1 Zone BURNS HOLDINGS, LLC, Petitioner and Applicant, v. TETON COUNTY BOARD OF COMMISSIONERS, Respondent.	Case No. CV-07-376 **AMENDED PETITION FOR JUDICIAL REVIEW**

Petitioner, Burns Holdings, LLC, respectfully submits this Petition for Judicial Review pursuant to the provisions of Idaho Code §§ 67-5270 and 67-6521 and Rule 84 of the Idaho Rules of Civil Procedure. In support of such Petition, Petitioner alleges as follows:

1. Petitioner is an Idaho limited liability company with its principal place of business located in Idaho Falls, Idaho.

2. Respondent, the Teton County Board of County Commissioners (the "Board"), is a political subdivision of the state of Idaho.

3. Venue of this Petition is proper under the provisions of Idaho Code § 67-5272.

4. On or about June 14, 2007, Petitioner filed an Application for a Conditional Use Permit ("CUP") with the City of Driggs Planning and Zoning Commission, seeking to obtain a conditional use permit allowing the Applicant to exceed the forty-five (45) foot height limit applicable with respect to the M-1 Zone, as established by the Zoning Ordinance of the City of Driggs, Idaho. The subject property was described as Lot 1b, Block II, and the eastern 110' of Lot 1a, Teton Peaks View Subdivision and is located within the Area of Impact identified by the Teton County and City of Driggs Area of Impact Ordinances, Agreements and Map. Because the subject property was located within the Area of Impact, the application was brought pursuant to § 2, Chapter 4, of the Zoning Ordinance of the City of Driggs, which zoning ordinance was, by virtue of the Area of Impact ordinances and agreement, made applicable to all properties located within the Area of Impact.

5. The application was heard by the Driggs Planning and Zoning Commission on July 11, 2007, at the conclusion of which the Driggs Planning and Zoning Commission granted the application. On or about July 23, 2007, Mr. John N. Bach, filed a " Notice of Appeal" of the decision of the Commission with the Teton County Board of County Commissioners. On or about September 13, 2007, the County Commissioners conducted a hearing, at the conclusion of which it determined to hear the matter *de novo*, rather than as an appeal.

6. On November 15, 2007, the Teton County Board of Commissioners conducted a hearing for the purpose of considering the CUP application, at the conclusion of which the Board denied the CUP application.

7. On or about December 11, 2007, Petitioner filed a Petition for Judicial Review in this case. At the conclusion of the hearing on such Petition, the Court vacated the November 15, 2007, Decision of the Board and remanded the matter to the Board for the purpose of preparing and issuing written findings and conclusions, setting forth the basis for the November 15, 2007, Decision. On or about December 22, 2008, the Board adopted written Findings and Conclusions, pursuant to the Court's Order. In such Findings and Conclusion, the Board again denied the CUP Application.

8. The earlier proceedings before the Commission and the Board were recorded magnetically and a copy of the tape recording is in the possession of the Clerk of the Teton County Board of County Commissioners and the Clerk of the Driggs Planning and Zoning Commission. The Agency Record and Agency Transcript were duly filed with this Court in conjunction with the original Petition for Judicial Review filed by the Petitioner in this action. The proceedings before the Board on December 22, 2009, were recorded magnetically and a copy of the tape recording is also in the possession of the County Clerk.

9. Petitioner will file a Statement of the Issues for Judicial Review within fourteen (14) days from the date of the filing of this Amended Petition.

10. Petitioner further requests that the Clerks of the Driggs Planning and Zoning Commission and the Board prepare and file a complete record of all pleadings, exhibits and

other documents filed or considered in conjunction with the December 22, 2008, proceedings, together with a transcript of the proceedings before the Board on such date.

11. Petitioner further requests that it be awarded its reasonable attorneys fees and costs pursuant to Idaho Code §§ 12-117, 12-121 and 42 U.S.C. § 1988.

WHEREFORE, Petitioner prays for relief as follows:

1. For judicial review of the Board's decisions in this matter, pursuant to Idaho Code § 67-6521.

2. For an order reversing the decision of the Board issued on December 22, 2008, and ordering and directing that the CUP Application be granted as a matter of law, or alternatively for an order remanding the matter to the Board for reconsideration consistent with the Court's direction.

3. For an order awarding Petitioner its reasonable attorneys fees and costs pursuant to Idaho Code §§ 12-117, 12-121 and 42 U.S.C. § 1988.

4. For such other relief as the Court deems just and proper.

DATED this 14th day of January, 2009.

Dale W. Storer,
Attorney for the Petitioner

CERTIFICATION

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, and that:

1. That service of this Amended Petition has been made upon the Teton County Planning and Zoning Commission and the Teton County Board of Commissioners, and or their agents and attorneys, as follows:

a.	Kathy Spitzer Teton County Prosecutor's Office 81 N. Main Street, #B Driggs, ID 83422	(X) Mail ( ) Hand Delivery ( ) Facsimile ( ) Courthouse Box
b.	Teton County Planning & Zoning Administrator Teton County Courthouse 89 N. Main Driggs, ID 83422	(X) Mail ( ) Hand Delivery ( ) Facsimile ( ) Courthouse Box
c.	Douglas Self Driggs Planning & Zoning Administrator City Hall P.O. Box 48 Driggs, ID 83422	(X) Mail ( ) Hand Delivery ( ) Facsimile ( ) Courthouse Box

2. That the clerk of Teton County has been paid the estimated fee for preparation of the transcripts requested above.

3. That the clerk of the agency has been paid the estimated fee for the preparation of the agency record.

Dale W. Storer
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

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Holden Kidwell
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LAW OFFICES

1000 Riverwalk Drive, Suite 200
PO Box 50130
Idaho Falls, Idaho 83405

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Fax: (208) 523-9518
www.holdenlegal.com

FACSIMILE TRANSMITTAL SHEET

DATE: January 20, 2009

TO: Clerk of the Court **FAX #:** (208) 354-8496

FROM: Dale W. Storer **FAX #:** (208) 523-9518

RE: *Burns Holdings, LLC, v. Teton County Board of Commissioners*
Teton County Case No. CV-07-376

ITEMS SENT:

(1) Amended Petition for Judicial Review.

NO. OF PAGES INCLUDING TRANSMITTAL SHEET: 6

MESSAGE: Will you kindly file the attached Amended Petition for Judicial Review with respect to the above-entitled matter. Thank you.

ORIGINALS: Sent by Mail ( ) Kept on File (X)

If you do not receive all of the pages, please call back as soon as possible (208) 523-0620.

Telecopier Operator
Sandi Mueller

Dale W. Storer, Esq. (ISB No. 2166)
DeAnne Casperson, Esq. (ISB No. 6698)
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Attorneys for Petitioner, Burns Holdings, LLC

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TETON

IN RE: Application for a CUP Permit to Exceed 45' Height Limit for M-1 Zone	Case No. CV-07-376 **AMENDED PETITION FOR JUDICIAL REVIEW**
BURNS HOLDINGS, LLC, Petitioner and Applicant, v. TETON COUNTY BOARD OF COMMISSIONERS, Respondent.	

Petitioner, Burns Holdings, LLC, respectfully submits this Petition for Judicial Review pursuant to the provisions of Idaho Code §§ 67-5270 and 67-6521 and Rule 84 of the Idaho Rules of Civil Procedure. In support of such Petition, Petitioner alleges as follows:

1. Petitioner is an Idaho limited liability company with its principal place of business located in Idaho Falls, Idaho.

2. Respondent, the Teton County Board of County Commissioners (the "Board"), is a political subdivision of the state of Idaho.

3. Venue of this Petition is proper under the provisions of Idaho Code § 67-5272.

4. On or about June 14, 2007, Petitioner filed an Application for a Conditional Use Permit ("CUP") with the City of Driggs Planning and Zoning Commission, seeking to obtain a conditional use permit allowing the Applicant to exceed the forty-five (45) foot height limit applicable with respect to the M-1 Zone, as established by the Zoning Ordinance of the City of Driggs, Idaho. The subject property was described as Lot 1b, Block II, and the eastern 110' of Lot 1a, Teton Peaks View Subdivision and is located within the Area of Impact identified by the Teton County and City of Driggs Area of Impact Ordinances, Agreements and Map. Because the subject property was located within the Area of Impact, the application was brought pursuant to § 2, Chapter 4, of the Zoning Ordinance of the City of Driggs, which zoning ordinance was, by virtue of the Area of Impact ordinances and agreement, made applicable to all properties located within the Area of Impact.

5. The application was heard by the Driggs Planning and Zoning Commission on July 11, 2007, at the conclusion of which the Driggs Planning and Zoning Commission granted the application. On or about July 23, 2007, Mr. John N. Bach, filed a " Notice of Appeal" of the decision of the Commission with the Teton County Board of County Commissioners. On or about September 13, 2007, the County Commissioners conducted a hearing, at the conclusion of which it determined to hear the matter *de novo*, rather than as an appeal.

6. On November 15, 2007, the Teton County Board of Commissioners conducted a hearing for the purpose of considering the CUP application, at the conclusion of which the Board denied the CUP application.

7. On or about December 11, 2007, Petitioner filed a Petition for Judicial Review in this case. At the conclusion of the hearing on such Petition, the Court vacated the November 15, 2007, Decision of the Board and remanded the matter to the Board for the purpose of preparing and issuing written findings and conclusions, setting forth the basis for the November 15, 2007, Decision. On or about December 22, 2008, the Board adopted written Findings and Conclusions, pursuant to the Court's Order. In such Findings and Conclusion, the Board again denied the CUP Application.

8. The earlier proceedings before the Commission and the Board were recorded magnetically and a copy of the tape recording is in the possession of the Clerk of the Teton County Board of County Commissioners and the Clerk of the Driggs Planning and Zoning Commission. The Agency Record and Agency Transcript were duly filed with this Court in conjunction with the original Petition for Judicial Review filed by the Petitioner in this action. The proceedings before the Board on December 22, 2009, were recorded magnetically and a copy of the tape recording is also in the possession of the County Clerk.

9. Petitioner will file a Statement of the Issues for Judicial Review within fourteen (14) days from the date of the filing of this Amended Petition.

10. Petitioner further requests that the Clerks of the Driggs Planning and Zoning Commission and the Board prepare and file a complete record of all pleadings, exhibits and

other documents filed or considered in conjunction with the December 22, 2008, proceedings, together with a transcript of the proceedings before the Board on such date.

11. Petitioner further requests that it be awarded its reasonable attorneys fees and costs pursuant to Idaho Code §§ 12-117, 12-121 and 42 U.S.C. § 1988.

WHEREFORE, Petitioner prays for relief as follows:

1. For judicial review of the Board's decisions in this matter, pursuant to Idaho Code § 67-6521.

2. For an order reversing the decision of the Board issued on December 22, 2008, and ordering and directing that the CUP Application be granted as a matter of law, or alternatively for an order remanding the matter to the Board for reconsideration consistent with the Court's direction.

3. For an order awarding Petitioner its reasonable attorneys fees and costs pursuant to Idaho Code §§ 12-117, 12-121 and 42 U.S.C. § 1988.

4. For such other relief as the Court deems just and proper.

DATED this 14th day of January, 2009.

Dale W. Storer,
Attorney for the Petitioner

CERTIFICATION

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, and that:

1. That service of this Amended Petition has been made upon the Teton County Planning and Zoning Commission and the Teton County Board of Commissioners, and or their agents and attorneys, as follows:

a.	Kathy Spitzer Teton County Prosecutor's Office 81 N. Main Street, #B Driggs, ID 83422	(✓) Mail ( ) Hand Delivery ( ) Facsimile ( ) Courthouse Box
b.	Teton County Planning & Zoning Administrator Teton County Courthouse 89 N. Main Driggs, ID 83422	(✓) Mail ( ) Hand Delivery ( ) Facsimile ( ) Courthouse Box
c.	Douglas Self Driggs Planning & Zoning Administrator City Hall P.O. Box 48 Driggs, ID 83422	(✓) Mail ( ) Hand Delivery ( ) Facsimile ( ) Courthouse Box

2. That the clerk of Teton County has been paid the estimated fee for preparation of the transcripts requested above.

3. That the clerk of the agency has been paid the estimated fee for the preparation of the agency record.

Dale W. Storer
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

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Attorneys for Petitioner, Burns Holdings, LLC

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TETON

IN RE: Application for a CUP Permit to Exceed 45' Height Limit for M-1 Zone BURNS HOLDINGS, LLC, Petitioner and Applicant, v. TETON COUNTY BOARD OF COMMISSIONERS, Respondent.	Case No. CV-07-376 **AMENDED STATEMENT OF ISSUES ON JUDICIAL REVIEW**

COMES NOW, the Petitioner, Burns Holding, LLC, and submits the following Statement of Issues for Judicial Review, pursuant to the provisions of Rule 84(d) of the Idaho Rules of Civil Procedure.

The issues for which Petitioner will seek Judicial Review include, without limitation, the following:

a. Did the Findings of Fact and Conclusions adopted by the Board on December 22, 2008 comply with the provisions of Idaho Code § 67-6535?

b. Did the Board err in concluding that its earlier rezone of Petitioner's property did not allow construction of a structure exceeding forty-five foot (45') in height?

c. Did the Board err in considering esthetic values when it denied the Conditional Use Permit, given that the subject property was located outside the scenic corridor adopted by Teton County and the City of Driggs?

d. Did the Board err in considering the February 2007 rezone of the property as a basis for denying the Conditional Use Permit?

e. Did the Board violate Petitioner's due process rights in considering evidence outside the CUP hearing and in failing to make all *ex parte* contact with members of the Board a matter of public record?

f. Did the Board err in using the Teton County Comprehensive Plan, and the broad goals articulated therein, as a regulatory standard for determining whether or not to issue the subject CUP?

g. Does the use of the Teton County Comprehensive Plan and the broad, general goals stated therein, as regulatory criteria for evaluating and considering the issuance of conditional use permits, violate

Petitioner's due process rights under the Idaho and United States Constitution?

h. Did the Board erroneously use the Teton County Comprehensive Plan rather than the Driggs Comprehensive Plan, in evaluating and considering Petitioner's application for a Conditional Use Permit?

i. Do principles of res judicata bar the Board from finding the CUP application does not comport with the County Zoning Ordinance?

j. Did the Board act arbitrarily and capriciously in denying the Conditional Use Permit?

DATED this 5th day of February, 2009.

Dale W. Storer
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, that I served a true and correct copy of the following described pleading or document on the attorney listed below by hand delivering, mailing or by facsimile, as indicated below, with the correct postage thereon, on this 5th day of February, 2009.

DOCUMENT SERVED: AMENDED STATEMENT OF ISSUES ON JUDICIAL REVIEW

ATTORNEY SERVED:

Kathy Spitzer
Teton County Prosecutor's Office
89 N. Main Street, #5
Driggs, ID 83422

(✓) Mail
( ) Hand Delivery
( ) Facsimile
( ) Courthouse Box

Dale W. Storer
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

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BURNS HOLDING, LLC CONDITIONAL USE PERMIT
FINDINGS OF FACT AND CONCLUSIONS OF LAW

County of Teton)
)
State of Idaho)

IN RE: Burns Concrete CUP
175-185 North State Highway 33
Driggs, Idaho 83422

FINDINGS OF FACT

1. Burns Holding, LLC desires to operate a concrete batch plant within the City of Driggs Area of Impact in Teton County, Idaho.

2. The City of Driggs approved M-1 Light Industrial zoning for the subject parcels, Lot 1B and the eastern 110 feet of Lot 1A, Block 2, Teton Peaks View Subdivision, a County subdivision.

3. The proposed concrete batch plant is in excess of forty-five (45) feet, the maximum height limit allowed in the M-1 zoning district.

4. Burns Holdings, LLC submitted an application with the City of Driggs for a conditional use permit (CUP) for a height of seventy-five (75) feet, a conditional use permit being the method for a height variance in the M-1 zoning district in the City of Driggs.

5. The City of Driggs Planning & Zoning Commission recommended to Teton County approval of the CUP with a maximum of seventy-five (75) feet height.

6. Burns Holdings, LLC submitted a CUP application with Teton County to operate a temporary concrete batch plant with a height of seventy-five (75) feet on the subject parcels.

7. After proper notifications, the Teton Board of County Commissioners (Board), held public hearings on September 13, 2007, October 11, 2007, and November 15, 2008 for the Burns Concrete CUP application.

8. On November 15, 2007, after hearing and testimony, the Board denied the CUP request due to lack of conformance to CUP conditions number 2 and 3 and due to the fact that the M-1 zone change was granted based on a specific proposal that had no mention of a 75' high building and in fact clearly indicated a 45' height.

9. CUP Condition number 2 states tha the proposed use "will be harmonious with and in accordance with the general objective or with any specific objective of the Comprehensive Plan and/or Zoning Ordinance".

10. CUP Condition number 3 states "will be designed, constructed, operated and maintained to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity and that such use will not change the essential character of the same area".

11. The written minutes of the November 15, 2007 Board meeting at which the Burns Holdings, LLC CUP request was denied were memorialized by the Board on December 13, 2007.

CONCLUSIONS OF LAW

This matter was remanded from the District Court with instructions to issue written findings of fact and conclusions of law, which articulate in writing the board's basis for denial. In examining the transcript of the November hearing, the Board of County Commissioners for the County of Teton hereby finds as follows:

1) That City of Driggs Ordinance 281-07, § 13(c) states that "any building or structure of portion thereof hereafter erected shall not exceed forty-five feet in height unless approved by conditional use permit" for any structure to be located in an M-1 light industrial zone.

2) That the proposed concrete batch plant, as set forth by Burns Concrete requests permission for a 75' height allowance. The applicant has acknowledged that they need special permission to build to a height of 75 feet.

3) Teton County has the final authority to approve such permits since the proposed location falls within the Driggs City area of Impact, and the County BOCC has the authority to approve, disapprove, or remand CUP applications according to Teton County Ordinance 8-6-1-B.

4) That Applicant previously requested a zone change for the subject property, and that zone change was based upon the Board of County Commissioners' understanding that a concrete batch plant would be located on the property, but that the height of any structures would be in conformance with the 45' height restriction. That this Board would likely not have granted the zone change if the representations were for a 75' height structure for the concrete batch plant.

5) That Criteria for the allowance of any Conditional Use Permit is set forth in the application for a conditional use permit, and that those criteria do reflect the criteria set forth in Driggs City ordinance.

6) That Criteria No. 2 of the application states that the conditional use "will be harmonious with and in accordance with the general objective or with any specific objective of the comprehensive Plan and/or the zoning Ordinance."

7) That Criteria No. 3 of the application provides that the Conditional Use "will be designed, constructed, operated, and maintained to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity and that such use will not change the essential character of the same area."

8) That we conclude that Criteria #2 and #3 reflect Driggs' City Ordinance 281-07, which provides that the use must not be in "conflict with the comprehensive plan" and that "if the proposed conditional use cannot adequately meet the conditions necessary to ensure protection and compatibility with the surrounding properties, uses and neighborhood, the planning commission will not approve the proposed use."

9) That based upon evidence received at the hearing, we conclude that a 75 height could not be allowed with or without conditions to ensure protection and compatibility with the surrounding properties, uses, and neighborhood." Specifically, the proposed use is located just off of a scenic corridor, and views of the Teton Mountain Range would be obstructed by such a building, and evidence, including public comment, was presented that surrounding neighbors would have their views of the mountains obstructed. We conclude further, that the 75' height allowance would not be in conformance with the comprehensive plan for this portion of scenic corridor.

10) That additional evidence was introduced concerning operating hours, dust, and traffic safety, but that the primary purpose of the conditional use permit application was for special permission regarding height.

11) That there was public comment that the zone change to M-1 may have been met with more resistance had the concept for the proposed use included a 75' high structure, but the community's understanding was that the zone change would allow for a 45' high dry plant, and not a 75' high wet plant.

12) That we as a board of County Commissioners conclude that the zone change application would have resulted differently if the applicant had represented a 75' batch plant as the proposed use in the new zone.

CONCLUSION

That based upon the staff report, planning and zoning recommendations, and public comment received, we deny the request for the Conditional Use Permit, which would allow Burns Concrete to exceed the 45' height restriction placed upon them in the M-1 light manufacturing zone. We conclude further that the original zone change was premised upon a 45' height restriction, and that was our understanding during the course of the zone change process. We conclude further that the excessive height would be in conflict with the Comprehensive Plan, specifically an exceedingly high structure would be located along the scenic corridor.

We also conclude that the height allowance could not be conditioned to ensure the protection and compatibility with the surrounding properties, uses, and neighborhood. Property owners have relied upon zoning that would protect their views, and such a height allowance would change the essential character of the neighborhood.

premised upon a 45' height restriction, and that was our understanding during the course of the zone change process. We conclude further that the excessive height would be in conflict with the Comprehensive Plan, specifically an exceedingly high structure would be located along the scenic corridor.

We also conclude that the height allowance could not be conditioned to ensure the protection and compatibility with the surrounding properties, uses, and neighborhood. Property owners have relied upon zoning that would protect their views, and such a height allowance would change the essential character of the neighborhood.

Teton County Board of County Commissioners

Larry Young, Chairman — Date 12-22-08

Mark Trupp, Commissioner

Alice Stevenson, Commissioner

ATTEST: Mary Lou Hansen

Mary Lou Hansen, Clerk

FILED
May 26, 2009

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IN RE: Application for a CUP Permit to Exceed 45' Height Limit for M-1 Zone BURNS HOLDINGS, LLC, Petitioner and Applicant, v. TETON COUNTY BOARD OF COMMISSIONERS, Respondent.	Case No. CV-07-376 **PETITIONER'S SUPPLEMENTAL BRIEF**

COMES NOW Petitioner, Burns Holding, LLC ("Burns"), and submits this Supplemental Brief in support of Petitioner's Amended Petition for Judicial Review.

INTRODUCTION

This is a petition for judicial review of the November 15, 2007 decision of the Teton County Board of Commissioners (the "County" or the "Board") denying Burns' request for

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a conditional use permit ("CUP") to construct a concrete batch plant. The same matter was previously before the Court at the conclusion of which the Court remanded it to the Board with the directive to prepare appropriate written findings and conclusions. The Board subsequently issued such required findings and conclusions, without conducting any further evidentiary hearings. Such findings have now been filed with the Court and the matter is now before the Court for consideration of Burns' original Petition for Judicial Review. The factual record and transcripts already lodged with the Court in this case, together with parties' briefs, appendices, and the Court's orders, establish the following facts and course of proceedings.[1]

Factual Background

The property on which Burns' planned to construct the batch plant is located in Teton County within the Driggs City Area of Impact. The property on which the batch plant will be constructed is outside of Teton County's Scenic Corridor Overlay. The property was initially zoned C-3, a commercial zone. However, in February 2007, the Board approved Burns' request to rezone the property to M-1, an industrial zone. While the Board did attach certain conditions to its approval, none of those conditions related to the height of buildings which would be constructed on the property. No one, including Burns, appealed the Board's decision granting the rezone.

[1] Petitioner submitted a CD-ROM with its opening brief filed in conjunction with the first hearing in this matter. The CD contains PDF versions of the relevant ordinances and documents in effect at the time Petitioner filed its CUP application, including: the City of Driggs Zoning Ordinance; the City of Driggs Comprehensive Plan; the Teton County / Driggs Area of Impact Ordinances; and the Teton County Zoning Ordinance. The CD also contains a Bates-stamped copy of the agency record.

During the summer of 2007, Burns submitted a CUP application to the City of Driggs, as is required under the County's Area of Impact Agreement with Driggs. The conditional use permit was necessary because the design for Burns' batch plant exceeded the height limit for buildings in the M-1 zone – forty-five feet (45'). The design of Burns' batch plant incorporated many features which would result in a quieter, cleaner, and more energy efficient structure. However, in order to incorporate these environmental advantages, the lowest possible design was seventy-five feet (75'). The Driggs planning and zoning staff recommended approval of the CUP. On July 11, 2007, the Driggs Planning and Zoning Commission held a hearing on Burns' CUP application. At the conclusion of the hearing they voted to approve the application. CUP Tr. Vol. IV, p.27 L.18 through p.28, L.9.[2]

The Driggs Area of Impact Agreement states that the Board of County Commissioners must approve or deny any land use application approved by the Driggs Planning and Zoning Commission. Thus, on November 15, 5007, the Board held a hearing on Burns' CUP application. At the hearing the Board received testimony in favor of, and opposed to, the plant. Although the batch plant was not located within the Scenic Corridor Overlay, the Board heard testimony regarding the plant's impact on the view of the Teton Peaks mountain range. Burns submitted engineering drawings showing that the batch plant would have much less of a visual impact than would a forty-five foot (45') building located within the Scenic

[2] When citing to transcripts, this Supplemental Brief uses the same nomenclature adopted by Petitioner's opening brief: "CUP Tr." with reference to the CUP proceedings; and "Rezone Tr." with respect to the earlier rezone proceedings in February, 2007. As the Court's file will reflect, the Agency transcript for the CUP application was supplemented with the transcript of the earlier rezone proceedings, following the lodging of the CUP proceedings transcript in this action. The references "Vol I", "Vol II" and "Vol III" will refer respectively to the transcripts of the two CUP hearings denominated CD 1, CD 2, and CD 3. Vol. IV refers to the transcript of the July 11, 2007 CUP hearing before the Driggs Planning and Zoning Commission.

Corridor Overlay. Nevertheless, the Board expressed concern that the batch plant would "impair the views" of the community. Ultimately the Board voted to deny Burns' CUP application. The Board based its decision on nonconformance with a purported "specific proposal" presented at the February 2007 rezone which "clearly indicated a 45-foot height." CUP Tr. Vol. III, p. 32, LL 1-19. The Board also alleged "lack of conformance to Driggs standards for condition evaluation of a CUP criteria No. 2 and No. 3." *Id.* The Board did not indicate what those criteria were, or how Burns' proposed facility failed to comply with those criteria. The Board did not produce written findings of fact and conclusions of law.

Procedural History of the Petition for Judicial Review

Burns filed the instant Petition for Judicial Review on December 11, 2007. Among other things, Burns' argued that the Board violated provisions of the Idaho Code by failing to make a written statement of the factual basis and reasons for denying the CUP application; that the board erred in failing to specify proper legal standards upon which it based its denial of the permit; that the board erred by improperly relying on the February 2007 rezone as a basis for denying the CUP application; that the Board failed to comply the procedures of the governing local ordinance when denying the CUP application; and that the Board's failure to employ specific standards when denying the CUP application violated Burns' due process rights. All of these arguments were detailed extensively in the Burns' original briefs filed prior to the first hearing on the matter.

On October 21, 2008, the Court heard oral argument on the matter. At the Court's request, oral argument focused exclusively on the issue of the adequacy, *vel non*, of the

Board's "findings." The County argued that the transcribed record of the November 15, 2007, hearing satisfied the Idaho Code's requirement for a written decision. Burns disagreed and argued that the Board failed to comply with statute because they failed to set forth, in writing, the specific legal standards used to evaluate the CUP application, the facts they found to be significant, and the reasoning which led to their conclusion. The Court agreed with Burns and, in an Order dated October 30, 2008, required the Board "to forthwith prepare and issue written findings and conclusions" consistent with I.C. § 67-6535. The Court's Order also indicated that Burns could file "an amended petition for judicial review" in the event that "Petitioner desires further judicial review of such written findings and conclusions."

After the Court's October 30, 2008, Order, discussed below, the Board submitted written Findings of Fact and Conclusions of Law (the "Findings") dated December 22, 2008. The Findings focus on the batch plant's height. The Board acknowledged that the plant will not be constructed within the Scenic Corridor Overlay, but nevertheless asserted that "the 75' height allowance will not be in conformance with the comprehensive plan for this portion of the scenic corridor." However, the Board again did not explain why such a height does not conform to the comprehensive plan's goals for an industrial zone located outside the Scenic Overlay Corridor.[3] In the Findings, the Board also based its denial of the CUP application on what it believes was "the community's understanding . . . that the [February 2007] zone change would allow for a 45' high dry plant, and not a 75' high wet plant." The Board again

[3]As argued below, Petitioner asserts that conformance to the Comprehensive Plan is not relevant at this stage of the proceedings; that issue was already decided at the time of the original rezone.

failed to articulate specific facts upon which it based its conclusion that the CUP application did not conform to the Comprehensive Plan and that it was not compatible with the surrounding industrial uses. The Board also did not cite to specific provisions in the Comprehensive Plan which were allegedly not met by the CUP application.

The County lodged the December 22, 2008, findings with the Court on February 10, 2009. In response to the written Findings, Burns filed an Amended Statement of Issues on Judicial Review and now files this Supplemental Brief in support of its Amended Petition for Judicial Review.

SUMMARY OF ARGUMENT

Except as supplemented below, Burns asserts that the arguments raised in its opening brief and reply brief retain vitality and apply with equal force to the new Findings now before the Court. Burns hereby incorporates the arguments made in those briefs by reference and respectfully urges this Court to give those arguments due consideration. Burns also asserts that the County's new Findings are inadequate under the Idaho Local Land Use Planning Act because Board has not specifically identified any provisions of the County's zoning laws used to evaluate the CUP application nor explained how a seventy-five foot (75') building would be inconsistent with adjoining industrial uses. Finally, Burns asserts that the written Findings' reliance on an alleged "understanding" or agreement that Burns' plant would be limited to forty-five feet (45'), purportedly made at the time of the earlier rezone, is erroneous as a matter of law. Simply stated, the record clearly shows there was no such "understanding."

ARGUMENT

I.
The County Has Still Not Complied with the Provisions of Idaho Code § 67-6535.

At the October 21, 2008, hearing on this matter, Burns asserted that the County had not complied with the requirements of the Local Land Use Planning Act because it had not prepared written findings of fact and conclusions of law. *See* Idaho Code § 67-6535. In the case of *Workman Family Partnership v. City of Twin Falls*, the Idaho Supreme Court held: "'We must require that [a local government body's] order clearly and precisely state what it found to be the facts and *fully explain* why those facts lead it to the decision it makes.'" 104 Idaho 32, 37, 655 P.2d 926, 931 (1982) (quoting *South of Sunnyside Neighborhood League v. Bd. of Comm'rs*, 280 Or. 3, 569 P.2d 1063 (1977)). The court continued:

> What is needed for adequate judicial review is a clear statement of what, specifically, the decisionmaking body believes, after hearing and considering all the evidence, to be the relevant and important facts upon which its decision is based. Conclusions are not sufficient.

Id. At the earlier hearing in this case, the Court rejected the County's argument that the transcript of the November 15, 2007, hearing before the Board, complied with the Idaho Code § 67-6535, as interpreted by *Workman Family Partnership*. The Court disagreed and instructed the Board to "forthwith prepare and issue written findings and conclusions consistent with such code section."

Although the County has now prepared written Findings, those Findings still do not meet the requirements of Idaho Code § 67-6535 and *Workman Family Partnership* any better than the hearing transcript. Specifically, the Findings commit the very sin which *Workman*

Family Partnership warned against: they do not explain what the County found to be the facts and why those facts lead to a certain conclusion. Despite the Supreme Court's explicit instructions, the Findings amount to little more than broad, unsupported legal conclusions without any specific reference to the particular legal standard of issue and without any specific reference to the facts relied upon in reaching such conclusion of law.

The Findings state that one criterion which the Board used to evaluate the CUP application was whether the conditional use "will be harmonious with the general objective or with any specific objective of the Comprehensive Plan and/or the zoning Ordinance."[4] Findings at p. 3. First, it should be noted that the County continues to use the Comprehensive Plan as a regulatory measure in violation of the holding in *Urrutia v. Blaine County*, 134 Idaho 353, 2 P.3d 738 (S. Ct. 2000). See Petitioner's Reply Brief at p. 13. Similarly, the County's use of broadly stated goals, objectives and community values in the Comprehensive Plan as regulatory provisions also violates Petitioner's due process rights. See Petitioner's Brief at p. 25. Aside from those fundamental short comings, the Findings do not identify which general or specific objectives of the Comprehensive Plan or Zoning Ordinance the Board used to evaluate the CUP application. Nor do the findings state which facts the County relied upon in reaching the conclusion that the CUP application does not comport with the Comprehensive Plan. Specifically, with one limited exception noted below, the Findings fail to identify which provision in the ninety-eight (98) page Comprehensive Plan was not met by Petitioner's CUP Application.

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[4] *See* Petitioner's Br. at 9-12 for Burns' argument that the County applied the wrong legal standard when evaluating the CUP application.

Nor do the Findings identify any specific fact or facts supporting their conclusion that "a seventy-five foot (75') height could not be allowed with or without conditions to ensure protection and capability with the surrounding uses and neighborhood." See Findings No. 9, p. 4. Specifically, the Findings fail to describe the adjoining industrial uses, and fail to state specific facts supporting their conclusion that the view of the Teton Mountain Range would be obscured. In fact, the line of sight diagrams Burns introduced into evidence at the hearing show that due to the location of the batch plant outside the scenic corridor and the lengthy distance between Highway 33 and the location of the batch plant, the view of the Tetons would *not* be obscured. Further, the Findings fail to address why a "view of the Tetons" would be important with respect to property located within an industrial zone outside the scenic corridor. Nor did the Findings set forth a factual finding explaining why the proposed CUP would not be in harmony with adjacent industrial uses. The Findings do assert that height of seventy-five feet (75') would be inconsistent with Comprehensive Plan's scenic corridor provision. Findings No. 9, p. 4. However, as the Findings acknowledge, the proposed conditional use is "off of a [sic] scenic corridor." *Id.* Clearly, the County appears to be engaging in an *ad hoc* modification of the comprehensive plan to extend the boundaries of the scenic corridor beyond areas currently designated as scenic corridor. In any event, the County merely offers the conclusory statement that a seventy-five foot (75') building would be inconsistent with the scenic corridor provisions of the Comprehensive Plan. However, the County does not specifically identify any of those provisions nor does the county explain

why a seventy-five foot (75') building would be inconsistent with them.[5]

As noted in Petitioner's initial brief, when the County rezoned the property to M-1 (Light Industrial), they implicitly and necessarily made a finding that all permitted uses in the M-1 zone were consistent with the Comprehensive Plan.[6] See Petitioner's Reply Brief, p. 14-17. Uses having a height in excess of forty-five feet (45') are specifically permitted conditional uses in the M-1 zone and the County's finding in this case that such uses are inconsistent with the Comprehensive Plan now flies squarely in the face of their earlier conclusions at the time the property was rezoned to M-1. See Petitioner's Brief p. 22-23. In effect, the County is now attempting to down zone Petitioner's property, without conducting the required notice and hearing process under the Local Planning Act.

As was also noted in Petitioner's earlier briefs, the County simply ignored the Driggs Zoning Ordinance and instead used the convenient fall-back of concluding that the CUP Permit was not in accordance with the Comprehensive Plan, without any supporting facts or without reference to any specific legal criteria. Petitioner's Brief at 13-18. Instead of considering or imposing operational conditions or developmental conditions necessary to mitigate impact upon adjoining industrial uses, the County simply makes an unsupported conclusion that a "view of the Teton Mountain Range" is somehow important or necessary for the adjoining industrial uses, even though Petitioner's property is located outside the

---

[5] The Findings make the conclusory statement that "views of the Teton Mountain Range would be obstructed by such a building, and evidence, including public comment, was presented that surrounding neighbors would have their views of the mountains obstructed." Findings at p. 4. Assuming, *arguendo*, that the building would impact some of the neighbors' view, the County does not explain how a building outside the scenic corridor would violate any provision of the zoning ordinance or comprehensive plan.

[6] All rezonings must be in accordance with the Comprehensive Plan. I.C. § 67-6511.

scenic corridor. Clearly, the County failed to follow the Driggs Zoning Ordinance when it failed to consider appropriate operational conditions designed to minimize adverse effect on adjoining industrial properties. Instead the Board simply reverted to the subterfuge of using a "view of the Tetons" as the criteria for concluding that it was impossible to impose operational or development "condition necessary to ensure protection and compatibility with surrounding *properties* . . ." See Driggs Zoning Ordinance Section 281.07, Section 2. See also Petitioner's Brief, p. 23.

In short, though the County has now prepared written Findings, the County has not complied with this Court's Order that it submit findings consistent with Idaho Code § 67-6535. The County has not "clearly and precisely stated what found to be the facts," the County has not specifically identified the relevant legal standards, nor has the County explained how it applied the facts to those legal standards to reach a conclusion. Because the County has not complied with Idaho Code § 67-6535, the Court should again remand the matter to the County with explicit and direct instructions to focus strictly upon operational or development conditions "necessary to ensure protection and compatibility *of surrounding properties*, as required by the Driggs Zoning Ordinance." (Italics added). The Court should further specifically instruct the County to fairly and fully consider the possibility of such conditions and to explicitly document why it is impossible to impose conditions such as will assure compatibility with surrounding properties, if that is the conclusion they ultimately reach. The Court should expressly instruct the County that legal conclusions without such factual support and findings do not meet the *Workman Family Partnership* Standard and that

their failure to comport with that standard may result in an imposition of attorneys fees or other sanctions of the Court.

II.

The County Erred in Basing its Denial of the Cup Application on the February 2007 Rezone.

Although Burns contends that the Findings are statutorily deficient, the Findings do show that the County denied Burns' Conditional Use Permit based on the erroneous conclusion that the February 2007 rezone was conditioned on a forty-five foot (45') high concrete batch plant. Contrary to the Board's written Findings, the motion granting the earlier rezone was as follows:

> Commissioner Stevenson: I wasn't sure if you already had. Okay.
>
> I'd like to make a motion that we approve this zone change from C-3 to M-1 as requested – do we need to go through all – okay – with the condition that – conditions that the development agreement to be worked out with City and County Planning and Zoning Administrators address issues, such as noise, dust, truck traffic, landscaping, downlighting, hours of operation, building design, access improvements to perhaps include the road on the east side, and, also, that this zone change is specifically for the proposed Concrete Batch Plant. And, so, that if this project does not come to fruition, it would revert to C-3.

Rezone Tr., p. 36, L. 18 through p. 37, L. 7. As can be seen from this motion, the conditions to be imposed were to be included within a development agreement addressing things such as "noise, dust, truck traffic, landscaping, downlighting, hours of operation, building design, access and roads." No height limitation was imposed in the development agreement subsequently approved by the County. R. pp.75-82. The Board's decision is erroneous for two reasons: first, the record does not support the conclusion that the rezone was conditioned on any height limitations, and second, the County lacks power to enforce conditions which

are not clearly expressed in the record or allowed under the zoning ordinance.

A. The County's Finding That February 2007 Rezone Was Contingent on a Forty-five Foot (45') Concrete Plant Is Clearly Erroneous.

The Findings specifically indicate that the Board believed it's decision to grant the February 2007 rezone "was based upon the Board's understanding that a concrete batch plant would be in conformance with the 45' height limitation." Findings at 3. Elsewhere the Board affirms its belief that the rezone was conditioned on "a 45' high dry plant, and not a 75' high wet plant." *Id.* at 4. As noted in Petitioner's opening brief, a careful review of the record in the earlier rezone proceedings indicates that this finding has no support whatsoever in the Board's earlier decision. *See* Petitioner's Br. at 20-22.

At the earlier rezone hearing in February, the parties discussed the height of the proposed concrete plant. While at that time Burns hoped to be able to engineer the plant to fit within that forty-five foot (45') limitation, Kirk Burns clearly indicated that it likely would not meet the height limitation:

> CHAIRMAN YOUNG: So, you're talking about a rectangular building of what square footage and what height?
>
> MR. KIRK BURNS: *We don't have that completely worked out.* We're shooting to get the 45 foot limit. Concrete plants are difficult on that. *We discussed a five and ten foot possible variance.*

Rezone Tr. p. 52, L. 7-13 (emphasis added).

Even though as it turned out the plant required more than a ten foot (10') variance, the likelihood of that the building would be at least fifty-five feet (55') high was clearly discussed at the hearing. There is nothing in the record indicating that the Board granted the

rezone with the understanding that the concrete plant would not exceed forty-five feet (45'). The Board's finding that the previous rezone limited the building height to forty-five feet (45') or less is patently incorrect and clearly erroneous. This Court should give that finding no deference. *Spencer v. Kootenai County*, 145 Idaho 448, 180 P.3d 487 (2008) (holding that the court is not bound by the agency's findings of fact where they are clearly erroneous).

B. Conditions Which Are Not Clearly Stated in the Record Are Not Enforceable.

Assuming *arguendo*, that the County had the power to impose conditions as part of the rezone process,[7] those conditions should have been clearly stated in the record in order for them to be binding on Burns. Zoning conditions are only effective when they are expressed with sufficient clarity to inform the applicant and nearby land owners of the limitations on the use of the land. 83 Am. Jur. 2d *Zoning* § 883. Conditions must be clearly and specifically stated in the record; they "cannot incorporate by reference statements made by an applicant at the hearing." *Id.* "Conditions that are not stated on the permit may not be imposed on the permittee." *In re Alfred Kostenblatt*, 161 Vt. 292, 640 A.2d 39 (1994).

The Board did not issue written findings or a written decision in connection with the February 2007 rezone. As noted above, there were no express height conditions specifically expressed by the Board at the rezone hearing. While it is true that Kirk Burns expressed his hope that the plant could be engineered to meet the height restriction, his comments cannot form the basis of enforceable conditions on the use of the property. There is quite simply

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[7] Burns alleges that any height limitation would have been in any event an *ultra vires* action on the part of the Board because the zoning ordinance specifically allows buildings higher that forty-five feet (45') as conditional uses. *See* Petitioner's Br. at 22-23.

nothing in the record which indicates that the February 2007 rezone was made contingent upon a forty-five foot (45') height limitation. Because there was no express height limitation in the record for the earlier rezone, such a limitation is not enforceable against Burns. It was improper for the Board to premise its denial of the CUP application on its purported "understanding" that the concrete plant would be limited to forty-five feet (45').

Burns' original briefs detail many other shortcomings and errors committed by the County during the course of the November 15, 2007, hearing. Those arguments will not here be repeated and the Court is referred to those briefs which apply with equal vitality to the County's new Findings.

CONCLUSION

In sum, the arguments set forth in Petitioner's original brief are equally applicable to the Board's newly adopted written Findings and the County's latest decision should be set aside for the reasons stated therein. The Board made no attempt to impose operational or development conditions designed to ensure compatibility with adjoining industrial uses, as was required by the Driggs Zoning Ordinance. Further, the Board made no finding, as required by the Zoning Ordinance, that it was impossible to adopt any set of operational or developmental conditions that would assure neighborhood compatibility. Instead, the Board relied upon a very vague "view of the Teton Mountain Range" as its sole criteria, despite the fact that the plant is located outside the scenic corridor. It failed to recite any facts explaining why "view of the Teton Mountain Range" was necessary to assure compatibility with the adjoining industrial and commercial uses. The Board cited no ordinance provision

supporting their "view of the mountains" provision nor did they point to any provision in the Comprehensive Plan requiring such view for properties outside the scenic corridor.

Petitioner's fundamental due process rights have been violated, rather blatantly, in this case, and the Board's decision should be again reversed with specific and express directions to follow the Driggs Zoning Ordinance as written, and to cease using the Comprehensive Plan as a regulatory measure, in violation of the *Urrutia* case noted above. The Court should award attorneys fees in this case and further admonish the County that their failure to follow the Court's direction may warrant the imposition of attorneys fees and other sanctions.

DATED this 21st day of May, 2009.

Dale Storer

Dale W. Storer
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, that I served a true and correct copy of the following described pleading or document on the attorney listed below by hand delivering, mailing or by facsimile, as indicated below, with the correct postage thereon, on this 21st day of May, 2009.

DOCUMENT SERVED: PETITIONER'S SUPPLEMENTAL BRIEF

ATTORNEY SERVED:

Kathy Spitzer
Teton County Prosecutor's Office
81 N. Main Street, #B
Driggs, ID 83422

(✓) Mail
( ) Hand Delivery
( ) Facsimile
( ) Courthouse Box

Dale W. Storer
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO

JUN 16 2009
5:00 AM

****

RE:

- ASSIGNMENT AND TRANSFER OF CASES FROM JUDGE BRENT J. MOSS TO JUDGE GREGORY W. MOELLER;
- ASSIGNMENT AND TRANSFER OF TETON COUNTY CASES FROM JUDGE JON J. SHINDURLING TO JUDGE GREGORY W. MOELLER
- ASSIGNMENT AND TRANSFER OF JEFFERSON COUNTY CIVIL CASES FROM JUDGE GREGORY ANDERSON TO JUDGE GREGORY W. MOELLER

ADMINISTRATIVE ORDER

CV 07-376

2009-5-20

IT IS HEREBY ORDERED that all cases previously assigned to Brent J. Moss in the Seventh Judicial District are transferred to Judge Gregory W. Moeller, **EXCEPT** for cases in Lemhi, Custer and Butte counties that were assigned to Judge Joel E. Tingey pursuant to Administrative Order 2009-03-30; all closed or inactive cases previously assigned to Judge Brent J. Moss in the remaining counties will now be assigned to Judge Gregory W. Moeller. This order is effective April 24, 2009.

IT IS FURTHER ORDERED that all Teton County cases assigned to Judge Jon J. Shindurling are transferred to Judge Gregory W. Moeller; all closed or inactive Teton cases previously assigned to Judge Jon J. Shindurling or Judge Brent J. Moss shall be assigned to Judge Gregory W. Moeller; effective May 20, 2009

IT IS FURTHER ORDERED that all Jefferson County cases assigned to Judge Brent J. Moss and all civil cases assigned to Judge Gregory S. Anderson are transferred to Judge Gregory W. Moeller; all closed or inactive civil Jefferson County cases previously assigned to Judge Brent J. Moss or Gregory S. Anderson shall be assigned to Judge Gregory W. Moeller; **unless specifically retained by the presiding judges**; effective May 20, 2009.

IT IS FURTHER ORDERED that a copy of this Order shall be filed by the Clerk of the Court in each pending case and a copy sent to each attorney/party of record; effective May 20, 2009.

IT IS FURTHER ORDERED that the Administrative District Judge may determine on a case by case basis that a matter be retained by the previously assigned Judge for purposes of judicial efficiency; effective May 20, 2009.

IT IS FURTHER ORDERED that parties in these actions shall file all original pleadings, briefs, affidavits, or other documents with the District Court Clerk in the County of original jurisdiction, and **FURTHERMORE,** counsel and parties are to comply with I.R.C.P. 7(b)(3)(F) and Idaho Criminal Rule 3.2 by lodging copies of filed documents with the Judge at resident chambers.

IT IS SO ORDERED.

DATED THIS 27 DAY OF May, 2009.

Honorable Jon J. Shindurling
Administrative District Judge

Distribution:

Seventh Judicial District Bar
Seventh Judicial District Elected Clerks
Seventh Judicial District Prosecutor's Office
Seventh Judicial District Public Defender's Office
Honorable Gregory W. Moeller
Honorable Gregory S. Anderson
Honorable Jon J. Shindurling
Honorable Joel E. Tingey
Honorable Darren B. Simpson

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Attorney for Respondent Teton County

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TETON

BURNS HOLDINGS, LLC, AN IDAHO LIMITED LIMITED LIABILITY COMPANY,
Petitioner,

v.

BOARD OF COMMISSIONERS OF TETON COUNTY, STATE OF IDAHO,
Respondent.

Case Nos.: CV-07-376

RESPONDENT'S SUPPLEMENTAL BRIEF

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This *Supplemental Brief* is submitted by Respondents Board of Commissioners of Teton County, Idaho ("County"). This brief responds to the *Petitioner's Supplemental Brief* dated May 21, 2009.

I. SUMMARY OF ARGUMENT

This is a strange case. I call it strange because many people seem to be arguing over a pig when in fact there is a cow before us. The pig is the conditional use permit ("CUP") applied for by Burns Holdings, LLC to exceed the 45' height limit for the Drigg's area of impact M-1 zone. The cow is the variance procedure that should have been followed in order to modify the ordinance's height requirement. According to § 67-6516 of the Local Land Use Planning Act ("LLUPA") a variance must be obtained before one can modify the height of a building. Contrary to LLUPA, Section 13 C of the City of Driggs' Ordinance 281-07 (attached as Exhibit "A") states that "[a]ny building or structure or portion thereof hereafter erected shall not exceed forty-five (45) feet in height unless approved by conditional use permit." This sentence conflicts not only with LLUPA but with the Driggs' Ordinances themselves. Section 3 of the City of Driggs Ordinance 274-07 (attached as Exhibit "B") parrots LLUPA stating that "[a] variance is a modification of the requirements of this ordinance as to ... height of buildings ... " The ordinance goes on to distinguish a variance from a CUP by stating "[a] variance does not include a change of authorized land use." If you cannot obtain a variance for what is a change of use then the converse is true and you cannot obtain a change of use for what is a variance. Even if the Driggs' ordinances did not agree with LLUPA, LLUPA controls. "A local ordinance that conflicts with a state law or is preempted by state regulation of the subject matter, is void." *Arthur v. Shoshone County*, 133 Idaho 854, 862, 993 P.2d

617, 625 (Idaho App.2000); citing *Envirosafe Serv. of Idaho v. County of Owyhee, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987)*; see also *Gumprecht v. City of Coeur d'Alene*, 104 Idaho 615, 617, 661 P.2d 1214, 1216 (1983) (holding that proposed initiative to adopt zoning ordinance conflicted with procedures under LLUPA for adoption of planning and zoning ordinances and, therefore, the district court properly enjoined the initiative election).

Because it is clear, both in Idaho's Local Land Use Planning Act and in the Driggs' City Ordinances that a variance must be obtained in order to modify the height restrictions of a particular zone Petitioner should have applied for a variance and not a CUP. Because all the guidance and law surrounding how a CUP is approved or denied are inapplicable to what is in reality a variance request, the County was unable to grant the CUP.

II. ARGUMENT

A. YOU CAN CALL A COW A PIG BUT IT IS STILL A COW.

The manner in which a zoning decision may be made is the exclusive function of the legislative branch of government. The procedural steps which the legislature puts in place for processing particular land-use restrictions are mandatory, regardless of the characterization of the proceedings. *Gay v. County Commissioners of Bonneville County*, 103 Idaho 626, 628, 651 P.2d 560, 562 (Idaho App.1982). In *Gay*, Simplot applied for and obtained a variance to construct a fertilizer storage and blending facility that was not a permitted use in their A-1 zone. In determining the standard of review to apply to the action the Court stated:

> Although the county's action here has been characterized as the granting of a "variance," it was in reality a change of authorized land use for a particular parcel of property..... The statute defines a variance as follows:

> a modification of the requirements of the [zoning] ordinance
> as to lot size, lot coverage, width, depth, front yard, side yard,
> rear yard, setbacks, parking space, height of buildings, or other ordinance
> provision affecting the size or shape of a structure
> or the placement of the structure upon lots, or the size of lots.
> A variance, as so defined, does not include a change of authorized land use. Rather, it is limited to adjustment of certain regulations concerning the physical characteristics of the subject property.

Id.

Driggs, in one phrase of its ordinances, characterizes as a CUP what is in reality a variance. Just as a variance does not include a change of authorized land use, a conditional use permit does not include the adjustment of regulations concerning the physical characteristics of a property, this is clearly defined as a variance under LLUPA. It is apparent from the Idaho Code and the Drigg's Ordinances that a CUP and a variance are "dissimilar, are not one and the same and that the provisions for each are not to be construed together as reciprocal parts of an integrated ordinance.". *One Hundred Two Glenstone, Inc. v. Board of Adjustment of City of Springfield*, 572 S.W. 2d 891, 893 (Mo. App. 1978).

In *One Hundred Two Glenstone* the Plaintiff was erroneously issued a building permit for a loading dock that was in violation of the City's setback ordinance. When the zoning violation was discovered a stop work order was issued by the City and Plaintiff applied for a "special exception" which is synonymous with a conditional use permit or special use permit. *Id.* The Springfield Board denied the request for a special exception. The Court in its review of the matter stated:

> In short, what plaintiff actually needed was a variance. However, it erroneously and repeatedly assured the board that it sought only a special exception to which, in our opinion, it was not entitled. Therefore, as there was no application before the board for or a hearing held on a variance, we cannot say that the board or the circuit court

erred in not granting, sua sponte, a variance or in denying the specific and limited request for a special exception.

Id. at 894; citing *Waeckerle v. Board of Zoning Adjustment*, 525 S.W.2d 351, 358 (Mo.App.1975). As in the present case, the plaintiff needed a variance and not a special use permit and thus the Board was justified in denying the application.

Petitioner raises several arguments in its briefs, all of which center around the County's improper evaluation of the CUP application. The briefs are somewhat difficult to interpret because of the pig/cow problem. All of Petitioner's arguments and supporting authority talk about conditional uses and are thus inapplicable to the height modification requested. LLUPA and the Driggs ordinances clearly require that an applicant obtain a variance for a height modification. Idaho Code § 67-6516. So the pig, the CUP, needs to be recognized as a cow, a variance, and the correct application and procedure followed.

B. THE COUNTY WAS UNABLE TO GRANT THE PETITIONER THE CUP BECAUSE PETITIONER NEEDS A VARIANCE

Petitioner argues that the County failed to provide specific criteria as to why the County denied their application for a CUP. A CUP application is not analogous to a variance and therefore the application could not be granted. *One Hundred Two Glenstones, Inc.*, 572 S.W. 2d at 894. LLUPA provides the standards for determining the validity of a conditional use permit:

> A special use permit may be granted to an applicant if the proposed use is conditionally permitted by the terms of the ordinance, subject to conditions pursuant to specific provisions of the ordinance, subject to the ability of political subdivisions, including school districts, to provide services for the proposed use, and when it is not in conflict with the plan.

Idaho Code § 67-6512(a).

Section 2 of the City of Driggs' Ordinance 274-07 (attached as Exhibit C) also addresses conditional use permit procedures, offering criteria similar to the above and adding that there must be conditions imposed upon the use that assure protection and compatibility with the surrounding properties, uses and neighborhood. Thus an applicant may obtain a CUP in the Driggs impact area if: 1) the use is listed as conditionally allowed; 2) conditions are imposed pursuant to the specific provisions of the ordinance; 3) the approval is subject to the ability of political subdivisions, including school districts, to provide services for the use; 4) there is a finding that the use does not conflict with the comprehensive plan; and 5) conditions are imposed upon the use that assure protection and compatibility with the surrounding properties, uses and neighborhood. Following is a detailed discussion of these requirements in relation to this application.

1. The CUP could not be granted because the proposed use is not listed as conditionally allowed.

Subsection B of Section 13 (see Exhibit "A") lists the ten (10) "Conditional Uses Permitted" in the M-1 zone (kennel, sawmill, etc.). All ten of these conditional uses are in fact *uses* and a height of 75 feet is not among them. It is possible that one of the listed uses could have a 75 foot high structure, but only if they obtained a variance. If a use is not listed in the zoning ordinance then the listed uses are reviewed to determine whether the proposed use is similar to any of those listed. A modification of the height of a building is not only absent from the list of permitted conditional uses, it is not similar to any of the 10 permitted uses. Respondent understands that the ordinance is confusing since Subsection C does state that any building or structure "*shall not* exceed forty-five (45) feet in height *unless* approved by a conditional use permit." (Emphasis added.) The wording of the ordinance is unfortunate but it should have been recognized that what was

being suggested is that an applicant who wishes to exceed maximum height limit may apply to do so and that Idaho law requires that a variance be obtained for a height modification.

2. The CUP could not be granted pursuant to specific conditions listed in the ordinance because they are applicable only to changes in *use*.

The Driggs' ordinance that addresses conditional use permit procedures also lists conditions that could be attached to the granting of a permit:

a. Minimizing adverse impact on other development;
b. Controlling the sequence and timing of development;
c. Controlling the duration of development;
d. Assuring the development is maintained properly;
e. Designating the exact location and nature of development;
f. Requiring the provision for on-site facilities or services; and
g. Requiring more restrictive standards than those generally required in this ordinance.

Section 2 (A) (2) of the City of Driggs' Ordinance 274-07 (attached as Exhibit C). Petitioner complains that the County failed to impose any of the conditions listed in the ordinance (Petitioner's Brief p.24). But, none of these conditions are applicable to a request to build a structure 35 feet higher than a 45 foot maximum.

3. Criteria #3 is applicable only to changes in use.

The ability of political subdivisions to provide services is immaterial to a height variance.

4. The CUP could not be granted because the County found that the "use" was in conflict with the comprehensive plan.

Section III of Respondent's initial brief complains that the County relied upon the comprehensive plan in its denial of the application, yet LLUPA and the Driggs ordinance both require a finding that the proposed use is not in conflict with the comprehensive

plan. Throughout the Driggs' Comprehensive Plan the area North of Driggs is referred to as a "gateway". Section 9.3 of the Plan lists gateways at the North and South entrance to Driggs as a "need". The Plan's 'Vision' for Community Design states:

> The Vision for Hwy 33 outside of downtown is as an **attractive, functional, and memorable gateway** into the community. The sense of arrival at each end of the community should be dramatic, but in keeping with the **beauty** of Teton Valley and the surrounding mountains. New buildings should be setback from the highway, with ample landscaping, concealed parking and **architecture that draws on the western and agricultural vernaculars** ...

Driggs' Comprehensive Plan, Section 9.4, Page 61 (emphasis added). One of the stated actions under Section 9.4 is to "[c]reate and maintain attractive gateways to Driggs on Highway 33 (South and North) and on Ski Hill Road." The County found that the application conflicted with the Driggs' Comprehensive Plan because it almost doubled the allowable height of the zone.

5. **The County could not grant the CUP because it was unable to impose conditions upon the use that assured protection and compatibility with the surrounding properties, uses and neighborhood.**

Because the use of the property was not at issue (just the height of a structure on the property) it was not possible for the County to impose conditions on the use at the CUP hearing. The Driggs' Ordinance notably states that the Planning Commission **"will not approve"** the proposed use if such conditions cannot be met. Section 2 (A) (1) of the City of Driggs' Ordinance 274-07 (attached as Exhibit C). The Driggs Planning Commission thus should have denied the conditional use permit, never sending it to the County.

C. PETITIONER MOST LIKELY COULD NOT MEET THE REQUIREMENTS FOR A VARIANCE AND CANNOT OBTAIN ONE BY GOING THROUGH AN EASIER PROCESS.

It is doubtful that Petitioner could obtain approval for a height variance because their need for a height modification has nothing to do with the characteristics of the site. The Idaho Code and the Driggs' Ordinance both state (inside the parenthetical is the Driggs' Ordinance's only addition to Idaho Code § 67-6516):

> A variance shall not be considered a right or special privilege, but may be granted to an applicant only upon a showing of undue hardship because of characteristics of the site and that the variance is not in conflict with the public interest [nor the general land or conditions of the neighborhood].

Idaho Code § 67-6516 and Section 3(A)(2) of the City of Driggs Ordinance 274-07 (attached as Exhibit "B")

The criteria for a variance are not only completely different than those for a CUP, they are also much tougher to meet. For example, undue hardship is not a prerequisite to the granting of a conditional use permit, whereas a showing of undue hardship is a prerequisite to obtaining a variance, and the undue hardship has to be caused by the peculiarities of the site. Because the criteria for a variance are different and stricter than that for a CUP, Petitioner cannot effectively obtain a height variance by going through the easier, less restrictive, CUP process.

III. CONCLUSION

You can call a cow a pig, but it is still a cow. Rather than changing the nature of the height restriction, the Driggs' Ordinance merely states the obvious – that in order to exceed the maximum height limit you have to get permission. It does not matter that Driggs mistakenly says you need a conditional use permit; LLUPA is clear, the modification of the height of building requires a variance.

If it walks like a cow and talks like a cow it is a cow.

Moooo.

DATED this 16th day of July, 2009

Respectfully submitted,

Kathy Spitzer
Teton County Prosecuting Attorney

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 16th day of July, 2009, I served a true and correct copy of the foregoing Respondent's Brief, by causing a copy thereof to be hand-delivered or by causing to be placed a copy thereof in the United States mail, postage prepaid, addressed to:

Dale Storer
Holden, Kidwell, Hahn & Crapo
P.O. Box 50130
Idaho Falls, ID 83405

[X] Mail [ ] Hand [ ] Fax

Kathy Spitzer, Attorney at Law

EXHIBIT A

Section 13. M-1 (Light Industrial)

The purpose of the M-1 Light Industrial Zone is to provide for and encourage the grouping of light industrial uses. Uses must be capable of operating in a location where appearance of buildings and the treatment of the land about them will be unobtrusive and not detrimental to surrounding commercial or residential uses.

A. Uses Allowed:

1. Manufacturing, assembling, fabricating, processing, packing, repairing, or storage uses which have not been declared a nuisance by statute, resolution or any court of competent jurisdiction and provided these uses shall not cause:
   a. Unreasonable dust, smoke, gas, fumes, noise, vibration, or odor beyond the boundaries of the site on which such use is conducted; nor
   b. Hazard of fire, explosion, or other physical damage to any adjacent building or vegetation;
2. Wholesaling, warehousing, storage, and distribution;
3. Storage of contracting equipment, maintenance or operating equipment of public agencies or public utilities or materials and equipment of a similar nature;
4. Food processing; and
5. Industrial laundry and dry cleaning.
6. Grain elevator and bulk storage such as for potatoes, hay, and other similar uses;
7. Radio or television studio;
8. Auction establishment;
9. Auto gas/service station;
10. Auto sales and service;
11. Trailer sales and rentals;
12. Commercial or private off-street parking lot;
13. Auto body and paint shop;
14. Truck repair/service station;
15. Business services, as defined in Chapter 4, Section 5;
16. Crafts shop;
17. Cottage industry
18. Bottling and distribution plant;
19. Contractor's shop;
20. Sale of hay, grain, seed and related supplies;
21. Sale of heavy building material and machinery;
22. Sale of salvaged goods within an enclosed building;
23. Sheet metal, roofing or sign painting shop;
24. Storage warehouse;
25. Trade or industrial school; and
26. Temporary building as necessary for construction purposes, and for a period not to exceed one year.

B. Conditional Uses Permitted:

1. Kennel;
2. Broadcasting tower for radio or television;
3. Storage for wholesale or for distribution in bulk of any flammable liquid above or below ground;
4. Sawmill or log production facility;
5. Impound yard or any similar safe storage facility;
6. Micro-brewery;
7. Animal hospital / vet clinic;
8. Private amusement park, ball park, race track or similar uses;
9. Transit or trucking terminal; and
10. Public utility installation.

C. Height Regulations:

Any building or structure or portion thereof hereafter erected shall not exceed forty-five (45) feet in height unless approved by conditional use permit.

D. Setback Requirements:

1. Front yard:

The front yard setback shall be a minimum of twenty (20) feet when a lot abuts, touches, adjoins, or is across the street from a residential zone; otherwise, no front yard setback is required.

2. Side yard:

The side yard shall be a minimum of twenty (20) feet when a lot abuts, touches, or adjoins a residential zone; otherwise, no side yard setback is required.

3. Rear yard:

The rear yard shall be a minimum of twenty (20) feet when a lot abuts, touches, or adjoins a residential zone; otherwise, no rear yard setback is required.

E. Area Requirements:

There shall be no minimum lot size.

F. Accessory Buildings:

Accessory buildings shall not be placed in front yard and shall meet the same setback requirements as principal buildings. An accessory building or group of accessory buildings with a residential use shall not cover more than thirty (30) percent of the rear yard. Accessory buildings under 120 square feet in size shall not be required to meet rear and side yard setback requirements.

G. Off-Street Parking Requirements:

All off-street parking shall be governed by Chapter 2, Section 2.

H. Signs:

The erection of signs is regulated by the current Sign Ordinance adopted by the City of Driggs.

EXHIBIT B

Section 3. Variance Procedures

A. The Following Section Shall Apply to Variances:

1. A variance is a modification of the requirements of this ordinance as to lot size, lot coverage, width, depth, front yard, rear yard, setbacks, parking space, height of buildings, size of lots, or other ordinance provisions affecting the size or shape of a structure or the placement of the structure upon the lot. A variance does not include a change of authorized land use.

2. A variance shall not be considered a right or special privilege, but may be granted to an applicant only upon showing of undue hardship because of characteristics of the site and that variance is not in conflict with the public interest nor the general land or conditions in the neighborhood.

3. Applications for a variance shall be filed with the City on forms prescribed by the City accompanied by such data and information necessary to assure the fullest presentation of facts and evaluation by the Planning and Zoning Commission.

4. A filing fee set by resolution shall be submitted by the property owner or owner's representative at the time of filing an application for a variance.

5. A record of hearings, findings made and actions taken shall be maintained.

6. Prior to granting or denying a variance, at least one (1) public hearing in which interested persons shall have an opportunity to be heard shall be held. At least fifteen (15) days prior to the hearing, notice of the time and place, and a summary of the proposed variance shall be published in the official newspaper or paper of general circulation within the jurisdiction.

7. Notice of the hearing shall be provided to property owners and purchasers of record adjoining the parcel under consideration. Notice shall also be posted on the premises or property not less than one (1) week prior to the hearing.

8. Upon granting or denying a variance, the Planning Commission shall specify:
   a. The ordinance and standards used in evaluating the application;
   b. The reasons for approval or denial; and
   c. The procedural actions, if any, that the applicant could take to obtain a permit for a variance.

9. Any owner or purchaser of record within a two hundred (200) foot radius of the exterior boundaries of the subject property may appeal the decision of the Planning Commission, provided written notice of the appeal is filed with the City Clerk within five (5) working days after the decision of the Planning Commission.

10. In reviewing an appeal, the City Council shall hold a public hearing following the same procedures as the Planning Commission and may approve, disapprove, or modify the action of the Planning Commission.

EXHIBIT C

Section 2. Conditional Use Permit Procedures

A. The Following Provisions Shall Apply to conditional use permits:

1. The Planning Commission may, following the notice and hearing procedures provided under Section 67-6509, Idaho Code, permit conditional uses where the uses are not in conflict with the Comprehensive Plan nor the zoning ordinance. If the proposed conditional use cannot adequately meet the conditions necessary to assure protection and compatibility with the surrounding properties, uses and neighborhood, the Planning Commission will not approve the proposed use.

2. Upon the granting of a conditional use permit, conditions may be attached including, but not limited to, those:
   a. Minimizing adverse impact on other development;
   b. Controlling the sequence and timing of development;
   c. Controlling the duration of development;
   d. Assuring the development is maintained properly;
   e. Designating the exact location and nature of development;
   f. Requiring the provision for on-site facilities or services; and
   g. Requiring more restrictive standards than those generally required in this ordinance.

3. Prior to granting or denying a conditional use, studies may be required of the social, economic, fiscal and environmental effect of the proposed conditional use. A conditional use is not transferable from one parcel of land to another.

4. Upon granting or denying a conditional use permit, the Planning Commission shall specify:
   a. The ordinance and standards used in evaluating the application;
   b. The reason for approval or denial; and
   c. The actions, if any, that the applicant could take to obtain a permit.

5. An applicant denied a permit or aggrieved by a decision may within sixty (60) days after all remedies have been exhausted under this ordinance, seek judicial review under the procedures provided by Sections 67-5215 (b) through 67-5216, Idaho Code.

6. Application for conditional use permit shall be filed with the City on forms prescribed by the city accompanied by such data and information necessary to assure the fullest presentation of facts and evaluation by the Planning and Zoning Commission.

7. A filing fee set by resolution shall be submitted by the property owner or owner's representative at the time of filing an application for a conditional use permit.

8. A record of hearings, findings made and actions taken shall be maintained.

9. Any owner or purchaser of record within a three hundred (300) foot radius of the exterior boundaries of the subject conditional use property may appeal the decision of the Planning Commission, provided written notice of the appeal is filed with the City Clerk within five (5) working days after the decision of the Planning Commission.

10. In reviewing an appeal, the City Council shall hold a public hearing following the same procedures as the Planning Commission and may approve, disapprove, or modify the action of the Planning Commission.

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Attorneys for Petitioner, Burns Holdings, LLC

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TETON

IN RE: Application for a CUP Permit to Exceed 45' Height Limit for M-1 Zone	Case No. CV-07-376 **PETITIONER'S SECOND REPLY BRIEF**
BURNS HOLDINGS, LLC, Petitioner and Applicant, v. TETON COUNTY BOARD OF COMMISSIONERS, Respondent.	

COMES NOW Petitioner, Burns Holding, LLC ("Burns"), and submits the following Second Reply Brief in response to the Respondent's Supplemental Brief dated July 16, 2009.

PROCEDURAL HISTORY

Petitioner has filed three briefs in this action prior to the instant brief, to wit: Petitioner's initial Brief dated July 11, 2008, a Reply Brief dated August 26, 2008, and a Supplemental Brief dated May 26, 2009. Following the initial argument of this case before

Judge Shindurling, the Court ordered Teton County to prepare written findings of fact and conclusions as required by Idaho Code § 67-6535. See Order dated October 30, 2008. Following such remand, the County then adopted new Findings of Fact and a written decision and Petitioner thereafter filed an Amended Petition for Judicial Review, once again challenging the County's written Findings for precisely the same reasons that it had earlier challenged the County's verbal decision. Concurrently with the filing of its Amended Petition for Judicial Review, Burns also filed a Supplemental Brief dated May 26, 2009. In that Brief, Burns noted once again that the County's written decision suffered from the same shortcomings, deficiencies and problems exhibited in its earlier verbal decision. On July 16, 2009, Teton County filed its Supplemental Brief in response to Petitioner's Supplemental Brief. This Brief now responds to Teton County's Supplemental Brief dated July 16, 2009.

I.

Teton County's Supplemental Brief Fails to Address the Issues Raised in this Petition for Judicial Review and Raises New Issues on Appeal for the First Time.

A. Failure to Address Issues Raised on Appeal.

In its initial Brief dated July 11, 2008, Burns raised the following issues in its Statement of Issues for Review:

1. Did the Board err in failing to adopt a written statement setting forth the factual basis for its decision and a reasoned statement explaining the Board's denial of Petitioner's CUP application, in violation of I.C. § 67-6535?

2. Did the Board err by failing to specify the reasoning, standards and criteria used to deny the CUP, in violation of I.C. § 67-6519(4)?

3. Did the Board err in using the Driggs CUP Application Form as the basis for its denial of the CUP, rather than the Driggs Zoning Ordinance?

4. Did the Board err in using the Driggs Comprehensive Plan, as a regulatory measure for determining whether or not to issue the subject CUP?

5. Did the Board incorrectly deny Petitioner's application for a Conditional Use Permit on the mistaken assumption that the February, 2007, rezone did not allow construction of a structure exceeding forty-five feet (45') in height?

6. Did the Board's use of the Driggs Comprehensive Plan and the broad, visionary goals stated therein, as criteria for evaluating and considering the issuance of conditional use permits, violate Petitioner's due process rights under the Idaho and United States Constitution? Did the Board's failure to specify the standards and criteria it used in denying the permit also violate Petitioner's due process rights?

7. Did the Board fail to comply with the Driggs Zoning Ordinance by failing to set appropriate conditions governing the proposed conditional use and by failing to make a finding that Petitioner was unable to meet those conditions.

8. Was the Board's decision in the rezone proceeding *res judicata* as to the Board's subsequent effort to reconsider the compatibility of the conditional uses permitted in the M-1 zone, with the Comprehensive Plan?

In its Supplemental Brief dated July 16, 2009, Teton County failed to address *any* of these issues. Petitioner will not here, re-argue those issues and the Court is simply referred to the Petitioner's three previous Briefs, for a discussion of those issues. Suffice it to say that all of those arguments remain unrefuted, and the County's last written decision should be set aside for all of the reasons set forth in those Briefs.

B. Raising Issues for the First Time on Appeal.

Teton County has asserted for the first time on appeal that Burns' Application should not have been processed as a Conditional Use Permit, rather it should have been processed as a variance. See pp. 4-10, Respondent's Supplemental Brief. This argument merits little response.

Teton County's argument was never raised in the proceedings below nor was it a basis for the County's denial of the CUP. It is well established that review on appeal is limited to those issues raised before the administrative tribunal. *Balser v. Kootenai County Board of Commissioners*, 110 Idaho 37, 40, 714 P.2d 6, 9. "An appellant court will not decide issues presented for the first time on appeal." *Johnson v. Blaine County*, 146 Idaho 916, 204 P.2d 1127, 1131 (2009). Here, the County attempts to shift the target by putting forth, for the first time, a new ground for denying the CUP — a ground that was not raised in either the County's verbal decision or its subsequent written decision. Raising an issue for the first time on appeal is not permissible under the case authorities cited above and Teton County's arguments should not therefore be considered.

II.

The Driggs Zoning Ordinance Expressly Allows the Issuance of Conditional Use Permits for Structures Exceeding Forty-five Feet (45') in Height.

Teton County argues that Burns should have applied for a variance, rather than a CUP. See Respondent's Supplemental Brief, p. 6. In doing so, the County ignores the express terms of the applicable ordinance. Section 13 of City of Driggs Ordinance No. 274-07, subsection C, expressly allows buildings exceeding forty-five feet (45') in height in the M-1 Zone:[1]

> C. Height Regulations:
>
> Any building or structure or portion thereof hereafter erected shall not exceed forty-five (45) feet in height *unless approved by a Conditional Use Permit.*

[1]The Driggs Zoning Ordinance is applicable because the property is located within the Driggs area of impact.

Chapter 2, Section 13C, Ordinance No. 274-07, Driggs Zoning Ordinance at p. 26 (emphasis added). Chapter 4, Section 2 of the Driggs Zoning Ordinance sets forth the procedure for granting those conditional use permits. Specifically, section 2A of Chapter 4 allows denial of the CUP only if it is impossible to set adequate conditions to assure protection and compatibility with surrounding properties:

> **Section 2. Condition Use Permit Procedures.**
>
> A. The Following Provisions Shall Apply to Conditional Use Permits:
>
> 1. The Planning Commission may, following the notice of hearing procedures provided under section 67-6509, Idaho Code, permit conditional uses were the uses are not in conflict with the Comprehensive Plan nor the Zoning Ordinance. *If the proposed conditional use cannot adequately meet the conditions necessary to assure protection and compatibility with the surrounding properties, uses and neighborhood, the Planning Commission will not approve the proposed use.*

Teton County made no finding of an inability to establish conditions that would assure compatibility of Burns' proposed use with the surrounding industrial uses. Rather the ruling was premised solely upon a vague, reference to the Comprehensive Plan without any findings whatsoever indicating which of the numerous provisions in the Comprehensive Plan upon which the County premised its determination. (See Issue No. 2 of Burns' Statement of Issues on appeal regarding the inadequacy of the County's findings in that regard).

Petitioner's argument that the County could not grant the CUP because of an inability to impose appropriate conditions (See p. 9, Respondent's Supplemental Brief) has no basis

whatsoever in the County's written decision. The County has set forth no facts or reasoning supporting that premise and such conclusionary finding does not comply with the requirements of I.C. §§ 67-6535 and 67-6519(4) nor the applicable standards set forth in *Workman Family Partnership v. City of Twin Falls*, 104 Idaho 32, 37, 655 P.2d 926, 931 (1982).

CONCLUSION

Teton County, when faced with the compelling arguments set forth in Petitioner's earlier Briefs, shifts the target by now arguing for the first time on appeal that a CUP application was not the appropriate vehicle for Burns to follow. Teton County's Supplemental Brief fails to address any of Burns' arguments and instead puts forth an argument that ignores the express terms of the applicable ordinance.

For all the reasons set forth in Petitioner's earlier Briefs, the Petition for Judicial Review should be granted and the matter remanded to the Teton County Commissioners for reconsideration. Specifically, the matter should be remanded to the Teton County Board of Commissioners with express instructions to reconsider the matter on the basis of the record presented at the initial hearing. In particular, the Board should be ordered to specify the reasoning, standards and criteria used to consider the CUP Application, as required by Idaho Code § 67-6519(4) and should refrain from using the Comprehensive Plan as a regulatory measure for determining whether or not to issue the CUP. Further, the Board should be expressly instructed that, contrary to its findings and conclusions, the previous February 26, 2007, rezone did not forbid the construction of a structure in excess of forty-five feet (45')

in height and that such was not and should not be a proper basis for denial of the CUP. Further, the Board should be instructed that use of the Comprehensive Plan as a regulatory measure violates Petitioner's due process rights and that the Board should confine its deliberations to the record and to the standards and criteria set forth in the Driggs Zoning Ordinance.

Petitioner should also be awarded its reasonable attorneys fees under Idaho Code § 12-117, since the County failed to respond to any of the issues raised by Petitioner in its Petition for Judicial Review. The County's argument is clearly an effort to raise new issues on appeal in violation of the *Balser* and *Johnson* cases cited above. The County's arguments are clearly without any basis in law or fact.

DATED this 30th day of July, 2009.

Dale W. Storer
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, that I served a true and correct copy of the following described pleading or document on the attorney listed below by hand delivering, mailing or by facsimile, as indicated below, with the correct postage thereon, on this 30th day of July, 2009.

DOCUMENT SERVED: PETITIONER'S SECOND REPLY BRIEF

ATTORNEY SERVED:

Kathy Spitzer
Teton County Prosecutor's Office
81 N. Main Street, #B
Driggs, ID 83422

(✓) Mail
( ) Hand Delivery
( ) Facsimile
( ) Courthouse Box

Honorable Gregory Moeller
Madison County Courthouse
P.O. Box 389
Rexburg, ID 83440-0389

Chambers Copy
(✓) Mail
( ) Hand Delivery
( ) Facsimile

Dale W. Storer
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

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COURT MINUTES

CV-2007-0000376

Burns Holdings, LLC vs. Board of County Commissioners of Teton County

Hearing type: Motions

Hearing date: 8/18/2009

Time: 11:21 am

Judge: Gregory W Moeller

Courtroom:

Court reporter: David Marlow

Minutes Clerk: PHYLLIS HANSEN

Tape Number:

Dale Storer Atty for Applicant

Dan Dansie - Atty for APplicant

Kathy SPItzer - Attorney for County

Dale – explains procedures have gone through

Two segments contain same problem – adequacy or inadequacy of the findings

Supplemental Brief

Do not believe County ever responded adequately

Argued variance - don't think is proper

1125

J assuming both sides are right – ord required cond use permit but should have been variance , what appropriate remedy

Storer – don't think that is the case

CUP is expressly permitted by the ordinance

Variance – exceptional reason

CUP is appropriate is ordinance allows specific use

Remedy would be to remand back to let us do

PA - Still have problem with not raising on appeal

Failure of county to adopt appropriate findings

Was never done

Cites Twin Falls case

"Conclusions are not sufficient"

We don't have a clue what they are premising that on

They do not purport to facts

J – can some of those be inferred

1 – this development is not within the scenic corridor

They don't point to any provision in the CUP that says 75' contravenes the Plan

They don't indicate why is inconsistent with the plan

Ordinance requires finding it is impossible to draft or create conditions that make proposed use compatible with adjoining properties

1133

J – how far outside scenic corridor - right on the border

Use standards to measure if complying

Applicant needs to know what they need to do

Ad hoc decision making

1135

Glaring problem –

County's use of comprehensive plan as regulatory measure

Purpose of comprehensive plan articulates goals

County is trying to use Comp plan as one size fits all

Can't tell where do or don't comply

1138

Another problem – look at rezoning process –

Look at all of the issues that might be permitted under the zoning ordinance

Zoning ordinance is appropriate standards

County's effort to undo the prior rezone

Feb 2007 county rezoned the property

Must make finding is in accordance with comp plan

Now in Nov is flip flop

1141

J – if says 45 but can apply for CUP to make it higher, means any height - same analysis

PA – yes

1144

PA another point - look at ordinance denied only on findings would find int incompatible

They don't support that with facts

Can't tell what they used; you can't tell where they got there

J – conclusions without foundations?

PA – finds at conclusions of court trial

Have to be able to understand their reasoning

1147

Summary – due process problem; have briefed that

CUP – broad vague

Applicant does not have idea what they need to do to apply

Have specificity

Becomes pure guessing game

1149

Specific guidelines – already been back once

What we're asking for is not new hearing

Already submitted evidence

Request it be remanded

And order include very specific instructions about compliance with local planning act

Be factual findings finding that based on the record

1151

J – looking at conclusions - if they were to rewrite that, how should it read

Nee d to say what out of compliance with

Find nonconformity

Articulate your standard so we know

Specify things that could be done

Confine deliberations to the record

Virtually impossible for the scenic view of the Tetons to be obstructed

Should cease using comp plan as regulatory

J – does court have authority to issue order that extends beyond this case – not asking for that

Mere legal conclusions are not sufficient

1157

We want to comply

What we don't want is ad hoc decision making

J – one ?

1159

DA – petitioner didn't show 67-5279 – some substantial right was prejudiced

Finding that is not in conflict with the plan

Find many facts in Fof and C ofL

If not in compliance with the compl plan would never have gotten a rezone

1206

J – does the County feel it was misled - yes

I offered settlement of 65 feet and they said no

1212

J concern is to say is not really CUP but variance, changing rules of the game at the finish line

DA – very apparent not a CUP

J – isn't the County bound by the language of their ordinance

J – are we supposed to analyze the language and guess what they men or are we to take it literally

1216

J – sounds like you need to fix the ordinance

1220

PA – rebuttal

County be instructed to confine it's deliberations to the record

Every 5 years review CUP – no way developers can proceed; meant ordinance

Question of duplicity in two step approach - look at their own ordinance – that is what their own ordinance required

Engaging in spot zoning

Suggest remand with no new hearing

1227

J – additional things to submit

Matter is submitted

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR TETON COUNTY

IN RE: Application for a CUP Permit to exceed 45' Height Limit for M-1 Zone	
BURNS HOLDINGS, LLC, Petitioner, v. TETON COUNTY BOARD OF COUNTY COMMISSIONERS, a political subdivision of the State of Idaho, Respondent.	Case No. CV-07-376 DECISION ON REVIEW

I. BACKGROUND

This is a petition for judicial review of the December 22, 2008 decision of the Teton County Board of Commissioners ("County"). The County's Findings of Fact and Conclusions of Law denied Burns Holdings, LLC's ("Burns") application for a conditional use permit to construct a 75-foot concrete batch plant.

Burns owns 6.5 acres north of the City of Driggs, immediately north of the airport. The property is located within the Driggs City Area of Impact. In February 2007, the County changed the zoning on Burns' property from C-3 (commercial) to M-1 (light industrial). Driggs' City Ordinance governs the uses allowed in an M-1 zone, which include the following: "[m]anufacturing, assembling, fabricating, processing,

packing, repairing, or storage uses which have not been declared a nuisance by statute."[1] Burns is seeking permission to construct a 75-foot high concrete batch plant.

Because the City Ordinance required a conditional use permit for buildings exceeding 45 feet in height,[2] Burns submitted its application for a conditional use permit. In July 2007 the Driggs Planning and Zoning Commission unanimously approved Burns' application. The County then held an evidentiary hearing before the Board of Commissioners on November 15, 2007 and issued a verbal denial of the application.

Burns filed a petition for judicial review of the County's decision in December 2007, based in part on the lack of written findings of fact and conclusions of law. This Court found in Burns' favor and remanded the case back to the County to provide written findings of fact and conclusions of law. The Court stated:

> [The County] failed to prepare written findings and a reasoned statement as required by Idaho Code § 67-6535, thereby frustrating the ability of the Court to perform an appropriate judicial review of the proceedings below.[3]

On remand, the County produced written Findings of Fact and Conclusions of Law, again denying Burns' application. Burns once again seeks judicial review of the County's written decision and filed its Amended Statement of Issues on Judicial Review. This Court heard oral argument on August 18, 2009.

II. ISSUES PRESENTED ON REVIEW

Petitioner's Amended Statement of Issues on Judicial Review presents the Court with the following issues on review:

a. Did the Findings of Fact and Conclusions adopted by the Board on December 22, 2008 comply with the provisions of Idaho Code § 67-6535?

b. Did the Board err in concluding that its earlier rezone of Petitioner's property did not allow construction of a structure exceeding forty-five foot (45') in heights?

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[1] City Ordinance 274-07, Chapter 2, Section 13(A)(1).
[2] City Ordinance 281-07, § 13(c) (stating "any building or structure or portion thereof hereafter erected shall not exceed forty-five feet in height unless approved by conditional use permit").
[3] Order, ¶ 1 (Oct. 30, 2008).

c. Did the Board err in considering esthetic values when it denied the Conditional Use Permit, given that the subject property was located outside the scenic corridor adopted by Teton County and the City of Driggs?

d. Did the Board err in considering the February 2007 rezone of the property as a basis for denying the Conditional Use Permit?

e. Did the Board violate Petitioner's due process rights in considering evidence outside the CUP hearing and in failing to make all *ex parte* contact with members of the Board a matter of public record?

f. Did the Board err in using the Teton County Comprehensive Plan, and the broad goals articulated therein, as a regulatory standard for determining whether or not to issue the subject CUP?

g. Does the use of the Teton County Comprehensive Plan and the broad, general goals stated therein, as regulatory criteria for evaluating and considering the issuance of conditional use permits, violate Petitioner's due process rights under the Idaho and United States Constitution?

h. Did the Board erroneously use the Teton County Comprehensive Plan rather than the Driggs Comprehensive Plan, in evaluating and considering Petitioner's application for a Conditional Use Permit?

i. Do principles of *res judicata* bar the Board from finding the CUP application does not comport with the County Zoning Ordinance?

j. Did the Board act arbitrarily and capriciously in denying the Conditional Use Permit?

III. STANDARD OF REVIEW

Idaho's Local Land Use Planning Act (LLUPA) allows an affected person aggrieved by a local governing body's decision on a conditional use permit to seek judicial review of that decision.[4] A court reviewing a local governing body's decision bases its review on the record created before the governing body.[5]

Upon review, a court must affirm a local governing body's action unless it determines such body's findings, inferences, conclusions, or decisions: (1) violate

[4] I.C. § 67-6519(4); I.C. § 6521(d).
[5] I.R.C.P. 84(e)(1).

constitutional or statutory provisions; (2) exceed the body's statutory authority; (3) were made upon unlawful procedure; (4) were not supported by substantial evidence in the record; or (5) were arbitrary, capricious, or an abuse of discretion.[6] Local governing bodies enjoy a strong presumption that their actions, where they have interpreted and applied their own zoning and planning ordinances, are valid.[7]

Additionally, a reviewing court will defer to a governing body's factual findings unless they are clearly erroneous. A governing body's factual findings are not clearly erroneous "so long as they are supported by substantial, competent, although conflicting, evidence."[8] "Substantial evidence is such relevant evidence as a reasonable mind might accept to support a conclusion; it is more than a scintilla, but less than preponderance."[9] Indeed, a court will not substitute its judgment for that of the governing body as to the weight of the evidence on questions of fact.[10] However, a reviewing court exercises free review over questions of law, including whether a governing body violated statutory or constitutional provisions.[11]

To prevail, a challenger must show not only that the governing body has erred in a manner specified in I.C. § 67-5279(3), but also that the challenger's substantial rights have been thereby prejudiced.[12] If the court does not affirm the governing body's decision, it shall set the decision aside, in whole or in part, and remand the matter to the governing body for proceedings as necessary.[13]

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[6] I.C. § 67-5279(3).
[7] *Evans v. Teton County*, 139 Idaho 71, 74, 73 P.3d 84, 87 (2003); *Whitted v. Canyon County Board of Com'rs*, 137 Idaho 118, 121, 44 P.3d 1173, 1176 (2002).
[8] *Evans*, 139 Idaho at 74, 73 P.3d at 88; *Friends of Farm to Market v. Valley County*, 137 Idaho 192, 196, 46 P.3d 9, 13 (2002).
[9] *Marchbanks v. Roll*, 142 Idaho 117, 124 P.3d 993, 995 (2005) (internal quotations and citations omitted).
[10] *Whitted*, 137 Idaho at 121, 44 P.3d at 1176; I.C. § 67-5279(1).
[11] *Friends of Farm to Market*, 137 Idaho at 196, 46 P.3d at 13.
[12] I.C. § 67-5279(4).
[13] I.C. § 67-5279(3).

IV. DISCUSSION

1. The County's written Findings of Fact and Conclusions of Law do not comply with Idaho law.

In order for the Court to conduct a meaningful review of the County's decision, the Court needs a written decision that (1) adequately states the facts the County relied upon and (2) clearly explains how the County applied the law to those facts. For example, one basis for reviewing the County's decision set forth in Idaho Code § 67-5279(3) is whether the County's decision is supported by substantial evidence in the record.[14] Absent an explanation of the contested facts, the facts relied upon, and the applicable law, it is impossible for this Court to determine whether substantial evidence supports the County's decision.

In order to assure that a reviewing court can do its job (and in order to protect the due process rights of a party aggrieved by a local government decision), Idaho statutes and case law place certain legal requirements on a governing body's written decisions.

a. Idaho law requires that written findings of fact and conclusions of law state the relevant law, the relevant contested facts, and the rationale supporting the decision.

Idaho law first requires that the grant or denial of a conditional use permit application be in writing.[15] This writing should consist of a concise statement of the governing body's decision making process. It should also include the relevant legal standard, the relevant contested facts, and the rationale for reaching its decision (the application of the law to the facts). Idaho Code § 67-6535(b) states,

> 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

[14] I.C. § 67-5279(3)(d).
[15] I.C. § 6535(b); I.C. § 67-6519(4).

statutory provisions, pertinent constitutional principles and factual information contained in the record.[16]

Idaho Code § 67-6519(4) states a similar standard and includes the requirement that the governing board guide the applicant in obtaining approval, if approval is possible:

> Whenever a governing board or zoning or planning and zoning commission grants or denies a permit, it shall specify:
> a. The ordinance and standards used in evaluating the application;
> b. The reasons for approval or denial; and
> c. The actions, if any, that the applicant could take to obtain a permit.

The legislature has clearly stated the intent for these requirements: "It is the intent of the legislature that decisions made pursuant to this chapter should be founded upon sound reason and practical application of recognized principles of law."[17]

Idaho case law has further defined the requirements of an adequate written decision. In the 1982 Idaho Supreme Court case *Workman Family Partnership v. City of Twin Falls*, the Supreme Court found that a governing body must produce a written decision that gives a district court enough information to conduct judicial review. "[I]n order for there to be effective judicial review of the quasi-judicial actions of zoning boards, there must be a record of the proceedings and adequate findings of fact and conclusions of law."[18] The Court clarified what constitutes "*adequate* findings of fact and conclusions of law" by citing and adopting a decision by the Oregon Supreme Court.

The Oregon Supreme Court concluded that to prevent ad-hoc or arbitrary decisions, the governing body issuing the decision must "clearly and precisely state what it found to be the facts and fully explain why those facts lead it to the decision it makes. Brevity is not always a virtue."[19] The Oregon Court continued:

> *What is needed for adequate judicial review is a clear statement of what, specifically, the decision-making body believes, after hearing and*

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[16] I.C. § 6535(b).
[17] I.C. § 6535(c).
[18] *Workman Family Partnership v. City of Twin Falls*, 104 Idaho 32, 36, 655 P.2d 926, 930 (1982).
[19] Id., 104 Idaho at 37, 655 P.2d at 931 (citing *South of Sunnyside Neighborhood League v. Board of Commissioners*, 280 Or. 3, 569 P.2d 1063, 1076-77 (1977)).

considering all the evidence, to be the relevant and important facts upon which its decision is based. Conclusions are not sufficient.[20]

In *Workman* the Supreme Court ruled that the district court should remand the case in order for the board of commissioners to produce findings of fact and conclusions of law sufficient for the district court to perform judicial review.

In this case, the County initially failed to produce a written decision. This Court remanded the case and ordered the County to write its decision. In its October 2008 order, the Court found that the County "failed to prepare written findings and a reasoned statement as required by Idaho Code § 67-6535." The County's failure to issue a reasoned statement frustrated "the ability of the Court to perform an appropriate judicial review."[21] The Court then directed the County to "issue written findings and conclusions, based upon the testimony and evidence presented at the hearing before the Board on November 17, 2007."[22] The County issued its written Findings of Fact and Conclusions of Law in December 2008. The remainder of this decision reviews whether the County's written decision comports with Idaho law as stated above.

b. The County's written decision fails to meet the requirements set by Idaho law and is insufficient to allow this Court to perform appropriate judicial review.

Although the County issued written Findings of Fact and Conclusions of Law, Burns contends that the County's written decision still fails to meet the standard outlined by Idaho law. The Court agrees.

The County's Findings of Fact and Conclusions of Law fail to state the relevant contested facts and fail to explain the County's rationale for denying Burns' application. Because the County failed to explain upon what facts it relied and why those facts led it to the decision it made, the Court is unable to conduct the appropriate analysis required under law.

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[20] *Workman*, 104 Idaho at 37, 655 P.2d at 931 (emphasis in the original).
[21] Order, ¶ 1 (Oct. 30, 2008).
[22] Id. at ¶ 2.

For example, the County's written decision states that Burns' application was denied because it failed to meet two criteria from the application for a conditional use permit:

> (1) "That Criteria No. 2 of the application states that the conditional use 'will be harmonious with and in accordance with the general objective or with any specific objective of the comprehensive plan and/or the zoning ordinance."[23]
>
> (2) "That Criteria No.3 of the application provides that the conditional use 'will be designed, constructed, operated, and maintained to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity and that such use will not change the essential character of the same area."[24]

According to these two criteria, Burns' 75-foot concrete batch plant must be in harmony with the comprehensive plan and zoning ordinance, and the plant must be in harmony with general vicinity and character of the same area.

The County cited from Driggs' City Ordinance 281-07 that says that the proposed conditional use must not be in "conflict with the comprehensive plan" and that "if the proposed conditional use cannot adequately meet the conditions necessary to ensure protection and compatibility with the surrounding properties, uses and neighborhood, the planning commission will not approve the proposed use."[25] The County's legal basis was harmony and compatibility with the surrounding vicinity, as well as harmony and compatibility with the zoning ordinance and comprehensive plan.

The County applied the law in the ninth paragraph of its Conclusions of Law. Essentially, the County concluded that Burns' proposed conditional use (the 75-foot concrete batch plant) would not be in harmony with the surrounding vicinity because it would obstruct views of the Teton Mountain Range. The paragraph states,

> That based upon evidence received at the hearing, we conclude that a 75' height could not be allowed with or without conditions 'to ensure protection and compatibility with the surrounding properties, uses, and neighborhood.' Specifically, the proposed use is located just off of a

[23] Findings of Fact and Conclusions of Law, ¶ 6 (Feb. 10, 2009).
[24] Id. at ¶ 7.
[25] Id. at ¶ 8.

> scenic corridor, and views of the Teton Mountain Range would be obstructed by such a building, and evidence, including public comment, was presented that surrounding neighbors would have their views of the mountains obstructed. We conclude further, that the 75' height allowance would not be in conformance with the comprehensive plan for this portion of scenic corridor.[26]

The County's rationale in reaching its decision, the application of law to the facts in this case, can be summarized thus: Burns' permit was denied because members of the public testified that their views of the Teton Mountain Range would be obstructed. However, the substance of the testimony and evidence was never set forth. While this could possibly justify denial of a permit, the Court finds that this minimal citation to evidence fails to satisfy the standard set by Section 67-6535, 67-6519(4), and the Supreme Court's standard from *Workman*.

The County's decision lacks any citation to the relevant contested facts. According to the decision, the County held three separate public hearings (September 13, 2007, October 11, 2007, and November 15, 2007). From these three public hearings, the only evidence that found its way into the County's written decision is anonymous public comment. Anonymous public comment is insufficient. What is needed are clear, precise statements of the facts and a full explanation of why those facts lead to the decision.[27] What is needed are citations to the relevant conflicting facts relied upon.[28] The decision lacks any information that would lay a foundation for the credibility of the testimony relied upon—who made the public comment and whether they live in the "general vicinity" of the proposed plant. The decision lacks any reference to conflicting evidence, though it is clear that conflicting evidence was presented.

The record indicates that Burns presented testimony and line of sight diagrams indicating that a 75-foot plant would not obstruct views of the mountains. The County's decision fails to cite or weigh this evidence. There was also evidence that the general vicinity of the plant is zoned M-1 (light industrial), outside the scenic corridor. The

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[26] Findings of Fact and Conclusions of Law, ¶ 9.
[27] *Workman*, 104 Idaho at 37, 655 P.2d at 931 (citing *South of Sunnyside Neighborhood League v. Board of Commissioners*, 280 Or. 3, 569 P.2d 1063, 1076-77 (1977)).
[28] I.C. § 67-6535(b).

County's decision fails to weigh this evidence. Both the Planning and Zoning Commission and the Zoning Administrator recommended that Burns' application be approved, yet the County denied it. While the County is free to reach its own decision, its decision must be based on reasoned decision making, not anonymous public comment.

In October this Court remanded this case with the specific direction that the County elicit testimony and evidence in its written decision: "[T]he Court hereby directs that the Board of County Commissioners issue written findings and conclusions, *based upon the testimony and evidence presented at the hearing before the Board on November 17, 2007.*"[29] The County failed to do this.

In *Workman*, the Idaho Supreme Court found that a letter to a zoning applicant containing a few conclusory statements was insufficient for a district court to conduct judicial review. It is this Court's opinion that the County's "Findings of Fact and Conclusions of Law" is no better than the conclusory letter in *Workman*.

While this Court will not reweigh the evidence, upon review this Court must decide whether the Board's conclusions were "supported by substantial evidence in the record" or whether the Board's decision was "arbitrary, capricious, or an abuse of discretion." The County's written decision must state the facts relied upon, as well as the weight given to that evidence, if the Court is to decide whether the County's decision is based on "sound reason and practical application of recognized principles of law,"[30] or whether the decision is ad-hoc or arbitrary. By failing to cite the evidence it relied upon, failing to cite relevant conflicting evidence, and failing to weigh of the evidence, the County has failed to produce a decision upon which this Court can adequately conduct judicial review.

The County suggested at oral argument that the Court should lower the bar for Teton County. They argued that a county attorney or county commission from a small, rural county should not be held to as high a standard as elsewhere in Idaho. The Court rejects the notion that there is a variable standard in Idaho for the competency and professionalism of county attorneys, or the county commissions they represent. The

[29] Order, ¶ 2 (emphasis added).
[30] I.C. § 6535(c).

Court has great confidence that Teton County and its legal representatives are fully capable of meeting the same high standard of professionalism reasonably expected for any other county in the state.

c. Additional concerns

The Court has two other concerns in addition to those cited above. First, on remand the County will need to address several legal arguments raised by Burns, which it has not yet considered. Burns argues that the County mistakenly used the Teton County Comprehensive Plan rather than the Driggs Comprehensive Plan. Burns also argues that regardless of which comprehensive plan the County uses, the comprehensive plan cannot serve as a regulatory standard for determining whether or not to issue the conditional use permit. Additionally, there is a legal issue about whether the proposed concrete plant's proximity to the scenic corridor is a relevant consideration given that the plant is located outside the corridor's defined boundary. The County's decision needs to address these legal concerns.

The Court's second concern is that the County's decision treated Burns' permit hearing as an opportunity to rehear its February 2007 zoning decision. The County's Conclusions of Law eleven and twelve state:

> That there was public comment that the zone change to M-1 may have been met with more resistance had the concept for the proposed use included a 75' high structure, but the community's understanding was that the zone change would allow for a 45' high dry plant, and not a 75' high wet plant.[31]

And:

> That we as a board of county commissioners conclude that the zone change application would have resulted differently if the applicant had represented a 75' batch plant as the proposed use in the new zone.[32]

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[31] Findings of Fact and Conclusions of Law, ¶ 11.
[32] Id. at ¶ 12.

While these conclusions may be true, they cannot serve as a basis for granting or denying a conditional use permit. The County is bound to grant or deny the permit according to the criteria in the application.

2. Burns has established that it had a substantial right prejudiced.

According to Idaho Code § 67-5279(4), a petitioner must establish that his substantial right was prejudiced to warrant judicial review. Here, Burns has established that he has had a substantial right prejudiced.

Burns has a substantial right to have its conditional use permit application reviewed according to Idaho law. Burns has a right to receive a decision that reflects a thoughtful analysis of the law and facts. Burns has a right to use its property in a lawful manner. These rights have been prejudiced by the County's failure to produce a written decision that complies with Idaho law.

3. The County's new argument that Burns should have applied for a variance, rather than a conditional use permit, is untimely and disingenuous.

Much of the County's reply brief on this petition for review argued that Burns should have pursued its application as a variance, rather than as a conditional use permit. It is unreasonable to make this argument at this point in the case.

First, Burns was directed by the City Ordinance to pursue a conditional use permit and the County's decision confirmed that method as the appropriate course. City Ordinance 281-07, § 13(c) specifically directs applicants to apply via a conditional use permit: "any building or structure or portion thereof hereafter erected shall not exceed forty-five feet in height *unless approved by conditional use permit*."[33] The County confirmed that Burns needed a conditional use permit in its written Findings of Fact and Conclusions of Law—the County stated this decision in the first paragraph of its Conclusions of Law. Although the County attorney now concedes this language in the

[33] City Ordinance 281-07, § 13(c) (emphasis added); Findings of Fact and Conclusions of Law, ¶ 1.

City Ordinance was a "poor word choice," that is no reasons to relieve the County from the plain language of the ordinance.

Second, Burns has been pursuing its conditional use permit for nearly two years. During that time, Burns has petitioned for review and had the petition remanded once for the County's failure to produce written findings of fact and conclusions of law. The County produced written findings of fact and conclusions of law again confirming the conditional-use-permit method. To argue at this point—after two years of time, expense, and effort—that Burns really needed to seek a variance strikes the Court as fundamentally unfair and a blatant disregard for the Applicant's right to have his permit reviewed according to "sound reason and practical application of recognized principles of law."[34]

4. The Court grants attorney's fees and costs for Burns for all proceedings before this Court on judicial review.

Idaho Code § 12-117(1) allows for attorney's fees and costs for a prevailing party "if the court finds that the party against whom the judgment is rendered acted without a reasonable basis in fact or law." In this case, Burns is the prevailing party and the County has acted without a reasonable basis in fact or law.

This decision addresses the County's second attempt to produce findings of fact and conclusions of law that comport with Idaho law. The Court remanded this case back in October 2008 because the County denied Burns' permit without producing written findings of fact and conclusions of law. In the words of the Court,

> The Court finds that Respondent, Teton County, failed to prepare written findings and a reasoned statement as required by Idaho Code § 67-6535, thereby frustrating the ability of the Court to perform an appropriate judicial review of the proceedings below.[35]

The County then produced written findings of fact and conclusions of law. As discussed above, the County's Findings of Fact and Conclusions of Law are insufficient

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[34] I.C. § 6535(c).
[35] Order, ¶ 1.

because they failed to comply with the standard outlined by Section 67-6535 and *Workman*. As a result, Burns has expended time and money to pursue two consecutive petitions for review without reaching the merits of the case. That is an unreasonable and inappropriate burden to place upon a party.

After the first remand, the County had an opportunity to produce a written decision that reflected reasoned decision making based on principles of law. It was reasonable for the County to have an opportunity to fix its mistake. Had the County produced a written decision that comported with Idaho law, Burns would have only had to pursue one petition for judicial review. As Burns now stands, it has pursued two petitions and both have been remanded. It is unreasonable that Burns has spent time and effort for over two years and is right where it originally started. The County has yet to produce a written decision that is adequate for an Idaho court to review.

The County has further acted unreasonably with its legal argument on review. The County's argument on review—that Burns has mistakenly pursued a conditional use permit when he needed a variance—is two years too late. Burns pursued a conditional use permit because the City Ordinance specifically required him to do so.[36] The County's Findings of Fact and Conclusions of Law cite the ordinance as its first conclusion of law.[37] To present such an argument now is unreasonable and capricious.

For these reasons, the Court awards Burns' reasonable attorney fees and costs on the amended petition for judicial review.

V. CONCLUSION

The Court finds that the County's Findings of Fact and Conclusions of Law fail to satisfy the standard as set forth in Idaho Code §§ 67-6535, 67-6519(4), and *Workman*. The inadequacies failed to give this Court sufficient information to conduct judicial review. The case is REMANDED and the County is ordered to follow the provisions of Idaho Code §§ 67-6535, 67-6519(4), and *Workman* and submit written findings of fact and conclusions of law that comply. Additionally, the Court awards reasonable attorney

[36] City Ordinance 281-07, § 13(c).
[37] Findings of Fact and Conclusions of Law, ¶ 1.

fees and costs for the Amended Petition for Judicial Review pursuant to Idaho Code § 12-117.

So Ordered.

Dated this 29th day of September, 2009.

Gregory W. Moeller, District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Decision on Review was this 29 day of September, 2009, served upon the following individuals via U.S. Mail, postage prepaid, unless otherwise indicated:

Dale W. Storer
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Clerk of the Court

By: _____
Law Clerk

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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TETON

BURNS HOLDINGS, LLC, an Idaho Limited Liability Company Petitioner, v. TETON COUNTY BOARD OF COMMISSIONERS, a political subdivision of the State of Idaho, Respondent.	BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION **Case No. CV-07-376**

Idaho Code §12-117(1) authorizes the award of attorney fees against a county, but only if two conditions are met: (1) there must be a prevailing party; and (2) the Court must find that the non-prevailing party acted without a reasonable basis in fact or law. *Burns Holdings, LLC v. Madison County Bd. of County Com'rs,* 147 Idaho 660, 214 P.3d 646, 650 (2009); citing *Ada County Highway Dist. V. Total Success Investments, LLC*, 145 Idaho 360, 372, 179 P.3d 323, 335 (2008). If both conditions cannot be met, the Court is prohibited from awarding attorney fees. In the present case, neither condition is met so the Court could not award attorney fees.

The facts of *Crown Point Development, Inc. v. City of Sun Valley* are very similar to the present case. The district court awarded attorney fees against the City of Sun Valley because of a perceived injustice and the Supreme Court reversed. In *Crown Point*, the Court determined that Sun Valley's findings of fact did not comply with Idaho law. *Crown Point Development, Inc. v. City of Sun Valley*, 144 Idaho 72, 77 156 P.3d 573, 578 (Idaho 2007). The district court

had ruled that Crown Point was entitled to attorney fees because Sun Valley "acted without reasonable basis in fact or law as demonstrated by the numerous errors in the City's revised Findings." *Id.* at 78. The Supreme Court vacated the district court's award of attorney fees, stating: "**Since the case is being remanded to the City in order for it to make reviewable findings of fact, it can no longer be said that Crown Point is the prevailing party.** Thus, we vacate the district court's award of attorney's fees to Crown Point." *Id.* (Emphasis added.) The facts of the present case are synonymous. The Court remanded to the County to make reviewable findings of fact and conclusions of law. Accordingly, the Court did not find in favor of a party. The first part of the two part test is not met, thus no attorney fees can be awarded.

The second part of the test also fails as the Court could not have found that the County acted without a reasonable basis in fact or law. The petition for judicial review was filed by Burns Holdings, LLC challenging Teton County's denial of a conditional use permit (CUP). Judicial review of county actions is limited: "... the Board's actions are not subject to judicial review under the IAPA unless there is a statute invoking the judicial review provisions of the IAPA." *Burns Holdings, LLC v. Madison County Bd. of County Com'rs,* 147 Idaho 660, 214 P.3d 646, 649 (2009). Judicial review of a CUP denial is authorized, but the Court did not make a finding that the County acted without reasonable basis in fact or law in the denial of the conditional use permit. In the Court's own words, it was unable to make this finding: "[b]ecause the County failed to explain upon what facts it relied and why those facts led it to the decision it made, the Court is unable to conduct the appropriate analysis required under law." Decision on Review, September 29, 2009, page 7. Because the Court could not find that the County acted without a reasonable basis in fact or law in denying the CUP application the second condition of an award of attorney fees under Idaho Code §12-117(1) cannot be met and attorney fees are unavailable.

Dated this 13th Day of October, 2009.

Kathy Spitzer

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of October, 2009, a true and correct copy of the foregoing was forwarded to the following:

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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TETON

IN REGARDING: Application for a CUP Permit to Exceed 45' Height Limit for M-1 Zone BURNS HOLDINGS, LLC, Petitioner and Applicant, v. TETON COUNTY BOARD OF COMMISSIONERS, Respondent.	Case No. CV-07-376 **ORDER RE: MOTION FOR RECONSIDERATION**

Based upon the Stipulation of the parties filed herein, it is hereby ordered that the portion of the Court's Memorandum Decision dated September 29, 2009, awarding attorneys fees to Petitioner, be and hereby is set aside, without prejudice as to Petitioner's right, if any, to assert a claim for attorneys fees and costs, at such time as the matter is completely and finally resolved.

DATED this 17th day of November, 2009.

Gregory Moeller
District Judge

CLERK'S CERTIFICATE OF MAILING

I hereby certify that I served a true copy of the foregoing document upon the following this 18 day of November, 2009, by mailing, with the necessary postage affixed thereto.

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CLERK OF THE DISTRICT COURT

By: Phyllis A Hansen
Deputy Clerk

G:\WPDATA\DWS\14688 - Burns Brothers\14688.000 Burns v. Teton County\Petition for Judical Review\Pleadings\Reconsideration.ORD.wpd:sm

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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TETON

IN RE: Application for a CUP Permit to Exceed 45' Height Limit for M-1 Zone BURNS HOLDINGS, LLC, Petitioner and Applicant, v. TETON COUNTY BOARD OF COMMISSIONERS, Respondent.	Case No. CV-07-376 **SECOND AMENDED PETITION FOR JUDICIAL REVIEW**

Petitioner, Burns Holdings, LLC ("Burns"), respectfully submits this Second Amended Petition for Judicial Review pursuant to the provisions of Idaho Code §§ 67-5270 and 67-6521 and Rule 84 of the Idaho Rules of Civil Procedure. In support of this Petition, Petitioner alleges as follows:

1. Petitioner is an Idaho limited liability company with its principal place of business located in Idaho Falls, Idaho.

2. Respondent, the Teton County Board of County Commissioners (the "Board"), is a political subdivision of the state of Idaho.

3. Venue of this Petition is proper under the provisions of Idaho Code § 67-5272.

4. On or about June 14, 2007, Petitioner filed an Application for a Conditional Use Permit ("CUP") with the City of Driggs Planning and Zoning Commission (the "Commission"), seeking to obtain a CUP allowing the Applicant to exceed the forty-five (45) foot height limit applicable with respect to the M-1 Zone, as established by the Driggs City Zoning Ordinance. The subject property was described as Lot 1b, Block II, and the eastern 110' of Lot 1a, Teton Peaks View Subdivision and is located within the Area of Impact identified by the Teton County and City of Driggs Area of Impact Ordinances, Agreements and Map. Because the subject property was located within the Area of Impact, the application was brought pursuant to § 2, Chapter 4, of the Driggs City Zoning Ordinance, which zoning ordinance was, by virtue of the Area of Impact ordinances and agreement, made applicable to all properties located within the Area of Impact.

5. In late spring or early summer, 2007, Kurt Hibbert, the former Teton County Planning and Zoning Administrator, specifically advised Burns that a CUP application – rather than a variance – was the appropriate vehicle for Burns to proceed with its efforts to construct a building higher than forty-five (45) feet.

6. Burns' CUP application was heard by the Commission on July 11, 2007. At the conclusion of the hearing, the Commission unanimously found that Burns' CUP

application met all of the criteria in the Driggs City Zoning Ordinance and therefore recommended Burns' CUP application be approved.

7. On November 15, 2007, the Board conducted a hearing for the purpose of considering the CUP application, at the conclusion of which the Board denied the CUP application.

8. On or about December 11, 2007, Petitioner filed a Petition for Judicial Review in this case. On October 21, 2008, the Court heard oral argument on the Petition. The Court found that the Board had not complied with Idaho Code § 67-6535 and the Idaho Supreme Court's decision in *Workman Family Partnership v. City of Twin Falls*, 104 Idaho 32, 655 P.2d 926 (1982). At the conclusion of the hearing on that Petition, the Court vacated the November 15, 2007, Decision of the Board and remanded the matter to the Board for the purpose of preparing and issuing written findings and conclusions, setting forth the basis for its decision as required by such statute and case.

9. On or about December 22, 2008, the Board adopted written Findings of Fact and Conclusions of Law (the "First Findings and Conclusions"). In the First Findings and Conclusion, the Board again denied the CUP application.

10. In response to the First Findings and Conclusion, Burns filed an Amended Petition for Judicial Review on or about January 20, 2009.

11. On August 18, 2009, the Court heard oral argument on the Amended Petition for Judicial Review. On September 29, 2009, the Court issued a decision on the Amended Petition for Judicial Review. Specifically, the Court again found that the First Findings and

Conclusions failed to satisfy Idaho Code § 67-6535 and *Workman Family Partnership*. The Court also found that the Board had again failed to evaluate the contested facts or apply the relevant law to those facts. The Court admonished the County for arguing that Burns should have pursued a variance rather than a CUP, noting that the Driggs City Zoning Ordinance specifically directs applicants wishing to construct a building higher than forty-five (45) feet to pursue a CUP application.

12. Once again, the Court remanded the matter back to the Board for the purpose of preparing and issuing written findings and conclusions, consistent with Idaho Code §§ 67-6535, 67-6519(4) and *Workman Family Patnership*.

13. On or about November 9, 2009, the Board issued Amended Findings of Fact and Conclusions of Law (the "Second Findings and Conclusions"). For the third time the Board denied the CUP application.

14. The Second Findings and Conclusions do not comply with the Court's two previous orders: they are inconsistent with both Idaho Code § 67-6535 and *Workman Family Partnership*; they violate Burns' constitutional rights; and they are arbitrary, capricious, and/or an abuse of discretion. Specifically, the Second Findings and Conclusions, *inter alia*:

a. deny Burns' CUP application on the grounds that Burns should have sought a variance rather than a CUP – a position specifically rejected by the Court in its September 29, 2009 decision;

b. fail to set forth the specific contested facts relevant to its decision and apply the appropriate law to those facts – as required by Idaho Code § 67-6535 and by the Court's previous two orders;

c. deny Burns' CUP based on vaguely articulated policy concerns, rather than legal standards set forth in a duly adopted ordinance, as required by Idaho Code § 67-6535(a);

d. misconstrue the proceedings before the Commission in the Board in a manner that is completely contrary to the weight of the evidence in the record;

e. rely on "testimony" of incompatibility presented by members of the Board, which "testimony" lacks evidentiary support in the record;

f. deny the CUP based on grounds that were never discussed by the Board during the November 15, 2007, hearing and were not mentioned in First Findings and Conclusions;

g. use the Driggs Comprehensive Plan as a regulatory ordinance; and

h. violate Burns' due process rights under the Idaho Constitution and the United States Constitution.

15. Petitioner will file a Statement of the Issues for Judicial Review within fourteen (14) days from the date of the filing of this Second Amended Petition.

16. The earlier proceedings before the Commission and the Board were recorded magnetically and a copy of the tape recording is in the possession of the Clerk of the Board

and the Clerk of the Commission. The Agency Record and Agency Transcript were duly filed with this Court in conjunction with the original Petition for Judicial Review filed by the Petitioner in this action.

17. Based on information and belief, the proceedings before the Board that resulted in the December 22, 2008, and November 9, 2009, decisions were recorded magnetically and a copy of the tape recording is also in the possession of the Clerk of the Court.

18. Petitioner requests that the Clerks of the Driggs Planning and Zoning Commission and the Board prepare and file a complete record of all pleadings, exhibits and other documents filed or considered in conjunction with the December 22, 2008, decision (if such are not already part of the record), and all pleadings, exhibits, Board minutes, tape recordings and other documents filed or considered in conjunction with November 9, 2009, decision, together with a transcript of the proceedings before the Board that resulted in said decisions.

19. This Petition for Judicial Review has been pending since December 11, 2007. This Court has twice remanded the matter to the County with specific instructions to comply with Idaho law. Following each remand, the County has ignored the Court's order and responded with findings and conclusions which do not comport with Idaho law and which contain no valid, legal basis for denying Burns' CUP application. In each decision, the Board has articulated a different basis for denying Burns' CUP, none of which complies with the Idaho Local Land Use and Planning Act. Burns has a right to right to speedy resolution of this matter under Idaho Cons. Art. I, § 18. The County's repeated failure to comply with this

Court's order has frustrated Burns' constitutional rights and denied him the right to use its property.

20. Petitioner is entitled to an award of reasonable attorneys fees and costs pursuant to Idaho Code §§ 12-117, 12-121 and 42 U.S.C. § 1988.

WHEREFORE, Petitioner prays for relief as follows:

1. For judicial review of the Board's decisions in this matter, pursuant to Idaho Code § 67-6521.

2. For an Order reversing the decision of the Board issued on November 9, 2009, and finding that the Board's third denial of the CUP application was arbitrary, capricious and/or an abuse of discretion, and directing the Board to approve Petitioner's CUP application and to grant such approval forthwith.

3. For an order awarding Petitioner its reasonable attorneys fees and costs pursuant to Idaho Code §§ 12-117, 12-121 and 42 U.S.C. § 1988.

4. For such other relief as the Court deems just and proper.

DATED this 30th day of November, 2009.

Dale W. Storer,
Attorney for the Petitioner

CERTIFICATION

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, and that:

1. That service of this Second Amended Petition has been made upon the Court and Teton County Planning and Zoning Commission and the Teton County Board of Commissioners, and or their agents and attorneys, as follows:

a.	Kathy Spitzer Teton County Prosecutor's Office 81 N. Main Street, #B Driggs, ID 83422	(✓) Mail ( ) Hand Delivery ( ) Facsimile ( ) Courthouse Box
b.	Teton County Planning & Zoning Administrator Teton County Courthouse 89 N. Main Driggs, ID 83422	(✓) Mail ( ) Hand Delivery ( ) Facsimile ( ) Courthouse Box
c.	Douglas Self Driggs Planning & Zoning Administrator City Hall P.O. Box 48 Driggs, ID 83422	(✓) Mail ( ) Hand Delivery ( ) Facsimile ( ) Courthouse Box

2. That the clerk of Teton County has been paid the estimated fee for preparation of the transcripts requested above.

3. That the clerk of the agency has been paid the estimated fee for the preparation of the agency record.

DATED this 30th day of November, 2009.

Dale W. Storer
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

Dale W. Storer (ISB No. 2166)
Daniel C. Dansie (ISB No. 7985)
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
1000 Riverwalk Drive, Suite 200
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Facsimile: (208) 523-9518

Attorneys for Petitioner, Burns Holdings, LLC

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TETON

IN REGARDING: Application for a CUP Permit to Exceed 45' Height Limit for M-1 Zone	Case No. CV-07-376 **SECOND AMENDED STATEMENT OF ISSUES ON JUDICIAL REVIEW**
BURNS HOLDINGS, LLC, Petitioner and Applicant, v. TETON COUNTY BOARD OF COMMISSIONERS, Respondent.	

COMES NOW Petitioner, Burns Holdings, LLC (Burns), through counsel of record, and submits this Second Amended Statement of Issues on Judicial Review pursuant to Rule 84(d)(5), I.R.C.P.

Petitioner intends to assert the following issues on judicial review:

a. Do the Amended Findings of Fact and Conclusions of Law, filed by the Teton County Board of Commissioners (Board) on November 9, 2009, violate the provisions of Idaho Code §§ 67-6519 and 67-6535?

b. Was the Board's action denying Burns' Conditional Use Permit (CUP) application – for the reason that Burns did not request a variance – arbitrary, capricious, and/or an abuse of discretion?

c. Was the Board's decision that a conflict existed between the provision in the Driggs City Ordinance allowing buildings over forty-five (45) feet when approved by a CUP and the Idaho Code arbitrary, capricious, and/or an abuse of discretion?

d. Was it arbitrary, capricious, and/or an abuse of discretion for the Board to interpret "as if it never existed" the provision of the Driggs City Ordinance allowing buildings over forty-five (45) feet when approved by a CUP?

e. Did the Board's decision to interpret "as if it never existed" that provision of the Driggs City Ordinance allowing buildings over forty-five (45) feet when approved by a CUP violate Burns' due process rights under the Constitutions of the United States and the State of Idaho?

f. Is the Board's interpretation of the Driggs City Ordinance entitled to any deference from this Court on judicial review?

g. Was it arbitrary, capricious, and/or an abuse of discretion for the Board to find that a building with a height of more than forty-five (45) feet is not conditionally permitted by the Driggs City Ordinance?

h. Was it arbitrary, capricious, and/or an abuse of discretion for the Board to find that there are no conditions which could mitigate the impact of the building for which Burns sought the CUP and ensure its compatibility with the surrounding properties, uses and neighborhood?

i. Did the use of the Comprehensive Plan, and the general goals stated therein, as a regulatory ordinance for evaluating and considering Burns' CUP application violate Burns' due process rights under the Constitutions of the United States and the State of Idaho?

j. Assuming, without admitting, that use of the Driggs Comprehensive Plan was proper, is there substantial competent evidence in the record to support the Board's finding that the building proposed in Burns' CUP application was in conflict with the Driggs Comprehensive Plan?

k. Is there substantial competent evidence in the record to support the Board's Findings of Fact and Conclusions of Law?

l. Was it arbitrary, capricious, and/or an abuse of discretion for the Board to base its decision in part on "testimony" submitted by Board members, which testimony lacked evidentiary support in the record?

m. Was it arbitrary, capricious, and/or and abuse of discretion for the Board to deny the CUP based on grounds that were never discussed by the Board during the November 15, 2007, hearing and were not mentioned in the initial Findings of Fact and Conclusions of Law prepared by the Board?

n. Did Kathy Rinaldi's participation in the Board's November 9, 2009, decision violate Burns' Constitutional right to an impartial tribunal, where, prior to her election to the Board, Ms. Rinaldi appeared in the matter in opposition to Burns' CUP application?

DATED this 30th day of November, 2009.

Dale W. Storer
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, that I served a true and correct copy of the following described pleading or document on the attorney listed below by hand delivering, mailing or by facsimile, as indicated below, with the correct postage thereon, on this 30 day of November, 2009.

DOCUMENT SERVED: SECOND AMENDED STATEMENT OF ISSUES ON JUDICIAL REVIEW

PERSON SERVED:

Kathy Sptizer
Teton County Prosecutor's Office
81 N. Main Street, #B
Driggs, ID 83422

(X) Mail
( ) Hand Delivery
( ) Facsimile
( ) Courthouse Box

Dale W. Storer
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

G:\WPDATA\DWS\14688 - Burns Brothers\14688.000 Burns v. Teton County\Petition for Judical Review\Pleadings\Second Amended Statement of Issues.wpd:sm

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Daniel C. Dansie (ISB No. 7985)
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Telephone: (208) 523-0620
Facsimile: (208) 523-9518

Attorneys for Petitioner, Burns Holdings, LLC

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TETON

IN RE: Application for a CUP Permit to Exceed 45' Height Limit for M-1 Zone BURNS HOLDINGS, LLC, Petitioner and Applicant, v. TETON COUNTY BOARD OF COMMISSIONERS, Respondent.	Case No. CV-07-376 **MOTION TO AUGMENT AGENCY RECORD**

COMES NOW, the Petitioner, Burns Holdings, LLC, and moves the Court for an order granting leave to augment the agency record and transcript in the above-entitled action. This matter is made pursuant to Idaho Code § 67-5276(1)(b).

Petitioner makes this request because of a procedural irregularity associated with the decision of the Respondent Teton County Board of Commissioners ("County" or "Board")

denying Petitioner's CUP application. Specifically, the Board's Amended Findings of Fact and Conclusions of Law deny the CUP for the reason that Petitioner filed an application for a CUP rather than a variance. This is an issue which was never raised or discussed at the CUP hearing before the Board or at any time during the application process. Had the Board raised the issue during the CUP hearing, Petitioner would have been able to adduce the evidence it now seeks to introduce: that the Board of County Commissioners specifically instructed the Petitioner to proceed by filing a CUP.

If the Court grants the instant motion, Petitioner will introduce an affidavit from the former Teton County Planning and Zoning Director, Kurt Hibbert, averring that he was expressly instructed by the Board of County Commissioners to instruct Petitioner that a CUP, and not a variance, was the appropriate vehicle for Petitioner to pursue in order to gain approval for a seventy-five (75) foot building. A copy of the proposed affidavit is attached hereto as Exhibit "A."

DATED this 15th day of December, 2009.

Dale W. Storer
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, that I served a true and correct copy of the following described pleading or document on the attorney listed below by hand delivering, mailing or by facsimile, as indicated below, with the correct postage thereon, on this 15 day of December, 2009.

DOCUMENT SERVED: MOTION TO AUGMENT AGENCY RECORD

ATTORNEY SERVED:

Kathy Spitzer
Teton County Prosecutor
89 N. Main Street, #5
Driggs, ID 83422

(~~X~~) Mail
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( ) Courthouse Box

Dale W. Storer
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

G:\WPDATA\DWS\14688 - Burns Brothers\14688.000 Burns v. Teton County\Petition for Judical Review\Pleadings\Augment Record (Second).Motion.wpd:

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Facsimile: (208) 523-9518

Attorneys for Petitioner, Burns Holdings, LLC

Stip to Strike everything after 1st Sent of ¶ 8

IN THE DISTRICT COURT OF THE SEVENTH JU
STATE OF IDAHO, IN AND FOR THE C

IN REGARDING:

Application for a CUP Permit to Exceed 45' Height Limit for M-1 Zone

BURNS HOLDINGS, LLC,

Petitioner and Applicant,

v.

TETON COUNTY BOARD OF COMMISSIONERS,

Respondent.

Case No. CV-07-376

AFFIDAVIT OF KURT HIBBERT

STATE OF IDAHO)
)ss.
County of Fremont)

I, KURT HIBBERT, hereby depose and say as follows

1. During the summer to 2007 I was employed as the Planning and Zoning

Director of Teton County, Idaho.

2. My position as Planning and Zoning Director required me to be familiar with both the Teton County Zoning Ordinance and the Driggs City Zoning Ordinance. I was also familiar with the Driggs City Area of Impact and Associated Impact Area Agreement located within Teton County.

3. Pursuant to an Impact Area Agreement with the City of Driggs, Teton County applies the Driggs City Zoning Ordinance to properties located within the Driggs City Area of Impact.

4. In the late spring or early summer of 2007, I had a series of discussions with Kirk Burns and other representatives of Burns Concrete regarding a proposal for a concrete batch plant which Burns Concrete intended to construct in Teton County. The property on which Burns planned to build the facility is located within the Driggs City Area of Impact.

5. Burns Concrete's proposal called for a concrete batch plant with a height of between sixty (60) and seventy-five (75) feet. Generally, the Driggs City Ordinance requires that buildings be forty-five (45) feet high or less. However, the ordinance allows for buildings higher than forty-five (45) feet when approved pursuant to a conditional use permit (CUP).

6. Based on the provisions of the Driggs City Ordinance, and Teton County's Impact Area Agreement with the City of Driggs, I discussed with the Teton

County Board of Commissioners the Burns Concrete proposal and the question of whether Burns' application should be processed as a variance or a CUP application. I was instructed by the Board that they desired to process the application as a CUP application as they wanted to "protect the county" by imposing specific conditions of approval.

7. Based on my discussions with the Commissioners and in the presence of said Commissioners, I advised Kirk Burns, a representative of Burns Concrete, that the Commissioners' desired him to submit an application for a CUP rather than a variance.

8. Following my recommendation and the direction given by the Commissioners, Burns Concrete did in fact file a request for a CUP to construct a batch plant in the summer of 2007. Kirk Burns emphasized several times during the course of his several presentations to the Teton County Commissioners that the structures in his project would be in a certain range of height, the highest point of which could be in the 60 to 75 foot range. This discussion preceded the motion for approval of the project via a conditional use permit and was part of the deliberations.

9. After the public hearing and deliberations on the proposal, the commissioners formally decided that they would grant the CUP upon the agreement by both parties to a series of conditions which were to be outlined in a development agreement which would be made part of the (CUP). The proposal was therefore conditionally approved pending the execution of the CUP with the associated

conditions. A motion was made and passed to approve the CUP with the delineated set of conditions.

10. At this point I was specifically instructed and assigned by the Teton County Commissioners to work with the City of Driggs to develop the Conditional Use Permit and associated development agreement in conformance to the specific conditions outlined by the Commissioners in their meeting.

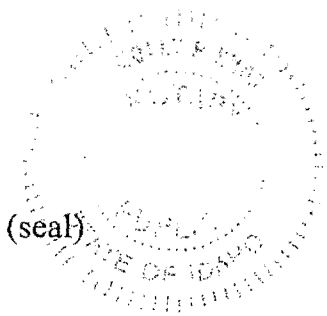
11. I subsequently worked with Doug Self, the Planning Administrator at the City of Driggs, to specifically address every aspect of the conditions imposed by the County Commissioners on the development during their motion of approval. I referred to the audio recording of the hearing during this process to assure every required component was addressed. There were absolutely no restrictions placed by the commissioners on the height of the project structures as part of these conditions.

12. The City of Driggs approved this development agreement and after their formal approval, I delivered the city executed document to County Commission Chairman Larry Young. Mr. Young reviewed the document with me at his desk in the north-east, corner-room, on the second floor of the courthouse. He carefully reviewed with me each component of the agreement. He signed it upon being satisfied to completeness and conformance with the specified conditions of approval in my presence.

DATED this 4th day of December, 2009 .

Kurt L. Hibbert

SUBSCRIBED AND SWORN TO before me this 4th day of December 2009



(seal)

Notary Public for Idaho Molly D. Knop
Residing at: Fremont County
My Commission Expires: 2012

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, that I served a true and correct copy of the following described pleading or document on the attorney listed below by hand delivering, mailing or by facsimile, as indicated below, with the correct postage thereon, on this 15th day of December.

DOCUMENT SERVED: AFFIDAVIT OF KURT HIBBERT

ATTORNEY SERVED:

Kathy Spitzer
Teton County Prosecutor's Office
81 N. Main Street, #B
Driggs, ID 83422

(X) Mail
(X) Hand Delivery
( ) Facsimile

Dale W. Storer
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

G:\WPDATA\DWS\14688 - Burns Brothers\14688.000 Burns v. Teton County\Petition for Judical Review\Pleadings\Affidavit of Kurt Hibbert.wpd

COURT MINUTES

CV-2008-0000246 7 376

Burns Holdings vs Teton County BOC

~~City Of Victor vs. Teton Springs Golf And Casting Club, LLC, etal~~

Hearing type: Motion to Augment Record

Hearing date: 1/5/2010

Time: 2:19 pm

Judge: Gregory W Moeller

Courtroom:

Court reporter: David Marlow

Minutes Clerk: PHYLLIS HANSEN

Tape Number:

Dale Storer Petitioner/ Appellant

Kathy Spitzer Respondent

J calls case; ids those present

PA – third time before the court

Brought under statute that allows augmentation of the record

Because of issue belatedly raised by the county – whether or not Burns should have filled application for Variance

Issuance not raised in the issuance of the ruling

County again takes that very same position

Burns was directed and advised by commissioners that it should be filed as a CUP rather than as a variance

Affidavit of Hibbert confirms

Question of judicial estoppel they who instructed Burns to file as CUP

J – is Hibberts Affidavit necessary

PA – in absence couldn't make judicial estoppel argument

224

Difference between a CUP and a Variance

Basis for deviating from the ordinance

Zero evidence in the ordinance that would support the County decision

That decision was capricious and arbitrary

Very reason why excess height was required was to make it compatible

227

Everything after paragraph 8 does not go to question of judicial estoppel (Affidavit of Kirk Hibbert)

Should be stricken

Hibbert added to Affidavit unbeknownst to us and urge it be stricken

J – everything after first sentence of paragraph 8

J – submit corrected affidavit

229

RA responds

J – wouldn't square one have required additional fact finding

Conditional use permit is not a guarantee

J – has been any action taken by the county to correct the ordinance

RA – ask City to change City of Driggs Code to change ; is in the process

232

J – concern – reads from decision

Think gave pretty clear signal there that that dog was going to hunt

RA – first hearing was a confusing hearing

Considerable confusion as to why CUP hearing instead of variance

J – if government entity has confusion, who should I hold to a higher standard

For two years Burns pursued this as a CUP; only after appeal before me, was first time variance was mentioned

Commissioners relied upon Hibbert

Rest of affidavit was very misleading

237

J – tell me why you think we shouldn't have the affidavit

RA – A two reasons for denial

Findings of fact had 8 pages

2- very much was raised

J – does that argument go against credibility or admissibility

RA – both

If out parts that are misleading, who's to say the rest of it is not misleading

If going to be allowed, would like to produce my own affidavits from the commissioners stating what they think happened

J – worried that returning from judicial review to summary judgment motion

Were no findings or conclusions first time we came in

Previous prosecutor tried to say written record was enough

Need to start from the basis that this is the first time we have had something adequate to review

RA – record shows they were confused as to what was a CUP or a variance

244

PA – whole issue arises because of the belated manner in which it came up

If the court were to find it is "too late" then the whole issue goes away

246

J – not being asked to decide appeal today, just what the record should show

Reluctant to enter things in to the record took place after the record was establish

Have great concerns about whole variance vs CUP issue

Don't think Affidavit of Kirk Hibbert would have much bearing

Going to deny the motion

Serious due process concerns about changing the rules during the course of the game

More is expected of a government entity

Other issue are the battleground for this case

KATHY SPITZER, ISB #6053
TETON COUNTY PROSECUTOR
89 North Main Street, Suite 5
Driggs, ID 83422
(208) 354-2990
kspitzer@co.teton.id.us

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TETON

BURNS HOLDINGS, LLC, an Idaho Limited Liability Company Petitioner, v. TETON COUNTY BOARD OF COMMISSIONERS, a political subdivision of the State of Idaho, Respondent.	Amended Findings of Fact and Conclusions of Law **Case No. CV-07-376**

BURNS HOLDING, LLC CUP DENIAL
AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following are amended findings of fact and conclusions of law for the denial of the Burns Holdings, LLC's Conditional Use Permit application by the Board of County Commissioners of Teton County on November 15, 2007. All references to the Driggs City Ordinances refer to the January 16, 2007 version.

1. Conclusion of Law

Burns Holding, LLC must apply for a variance to exceed the 45 foot height limitation in the M-1 zone. Idaho Code § 67-6516 clearly states that: "[a] variance is a modification of the bulk and placement requirements of the ordinance as to ... height of buildings, or other ordinance provision affecting the size or shape of a structure." The applicant requests a modification of the height of a building and therefore must apply for a variance and not a conditional use permit. The Idaho Constitution, Article XII, § 2, 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." "A local ordinance that conflicts with a state law or is preempted by state regulation of the subject matter, is void." *Arthur v. Shoshone County*, 133 Idaho 854, 862, 993 P.2d 617, 625 (Idaho App.2000); citing *Envirosafe Serv. of Idaho v. County of Owyhee, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987)*. Because the County cannot act in conflict with State law it reads any ambiguity in the Driggs Ordinance in harmony with the Local Land Use Planning Act.

Finding of Fact

Chapter 2, Section 13 C of the City of Driggs' Ordinance 281-07 states that "[a]ny building or structure or portion thereof hereafter erected shall not exceed forty-five (45) feet in height *unless approved by conditional use permit.*" (Emphasis added.) The County interprets this section of the ordinance as follows: "[a]ny building or structure or portion thereof hereafter erected shall not exceed forty-five (45) feet in height." Any other reading of this section of the Driggs City Ordinance would directly conflict with § 67-6516 of the Local Land Use Planning Act ("LLUPA") which clearly states that a variance and not a conditional use permit must be obtained before one can modify the height of a building. That portion of the Driggs ordinance that could be interpreted so as to conflict with State law is void, of no effect, as if it had never existed. The County finds that the applicant did not make the correct application for a height variance and that it is not possible for the County to grant a CUP to Burns Holding, LLC in order to allow them to build a structure which is 30 feet higher than the maximum height allowed in the M-1 zone. A conditional use permit is much easier to obtain than a variance. The applicant cannot get around a very clear area of State law by applying for a CUP, even when the Driggs code uses the term "conditional use permit", when State law is clear that a variance is required.

References to the need for a "variance" occurred at least twenty times during the November 15, 2007 hearing. Some of Chairman Young's first words were: "This is a conditional use permit hearing for a height variance." 4:17-18. The first time the

applicant himself speaks he states that he is requesting a height variance. 9:15-16. Sandy Mason, representing Valley Advocates for Responsible Development stated: "VARD does not recommend granting a CUP for this height variance for several reasons." The applicant's attorney, Dale Storer, a renowned local government, planning and zoning attorney,[1] was present during the hearing and has represented the applicant during the entire process. Mr. Storer failed to clarify the situation or give reasons in the applicant's response why a CUP was the correct method for a height variance when the Idaho Code is clear that a variance is required for an increased height. Regardless, the County does not feel that the applicant was unaware or uninformed of the law. [2]

2. Conclusion of Law
Idaho Code § 67-6512(a) states

> A special use permit may be granted to an applicant if the proposed use is conditionally permitted by the terms of the ordinance, subject to conditions pursuant to specific provisions of the ordinance, subject to the ability of political subdivisions, including school districts, to provide services for the proposed use, and when it is not in conflict with the plan.

Section 2 of the City of Driggs' Ordinance 274-07 also addresses conditional use permit procedures, offering criteria similar to the above and adding that there must be conditions imposed upon the use that assure protection and compatibility with the surrounding properties, uses and neighborhood. An applicant must meet all five of these tests in order to be granted a CUP. A finding that an applicant does not meet one of the five criteria is sufficient to deny an application. Even if the County were to analyze the application according to the rules governing a conditional use permit, Burns Holding failed to meet four of the five of the necessary criteria for approval.

Finding of Fact.

A. <u>The CUP could not be granted because a height of 75 feet is not conditionally permitted by the specific terms of the ordinance.</u>

The Driggs M-1 zoning ordinance lists two categories of uses for the M-1 zone, allowed and conditional. Allowed uses are listed under Chapter 2, Section 13(A) and Section 13(B) lists the ten (10) "Conditional Uses Permitted". A height of 75 feet is not

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[1] Excerpt from firm bio: Mr. Storer has served as the City Attorney for the City of Idaho Falls since 1982 and he also represents a number of other smaller cities, school districts, counties, electrical utilities and private developers. He has served three terms as president of the Idaho Municipal Attorneys Association and he currently serves on the board of directors for the Idaho Municipal Attorneys Association and as the Idaho state chairman of the International Municipal Lawyers Association. He has frequently testified before the Idaho State Legislature on a variety of issues affecting cities, counties and other public entities.

[2] In the County's initial brief on judicial review of the CUP denial it states: "What is significant about Petitioner's CUP application is that it was not looking to modify the zoning of the site, but rather to modify the allowable height of the building on the site." Respondents Brief, August 5, 2008, page 9.

listed under either of these two sections. Because a height of 75 feet is not mentioned in Section 13(B) the board finds that the use is not conditionally allowed.

Even though a height of 75 feet is not specifically listed as conditionally permitted anywhere in the ordinance, the County is cognizant of the fact that height regulations are mentioned in Section 13(C) of the ordinance which states: "[a]ny building or structure or portion thereof hereafter erected shall not exceed forty-five (45) feet in height unless approved by conditional use permit." The County does not believe that this section overrides the specific provisions of Section 13(B) of the ordinance. If Section 13(C) were interpreted as conditionally permitting a 75 foot high structure then the ordinance would have to be interpreted as conditionally permitting a building of any height and size, skyscrapers included. An ordinance provision cannot be read in isolation but must be interpreted in the context of the entire document. Chapter 1(D) of Drigg's City Ordinance 274-07 states as its intent "that this Ordinance be interpreted and construed to further the purposes of this Ordinance and the objectives and characteristics of the zoning districts." The stated purpose of the Ordinance is to:

> [P]romote pride of ownership, health, safety, comfort, convenience and general welfare of the residents of the City of Driggs and to achieve the following objectives:
>
> 1. To protect property rights and enhance property values.
> 2. To provide for the protection and enhancement of the local economy.
> 3. To ensure that important environmental features are protected and enhanced.
> 4. To encourage the protection of prime agricultural lands for the production of food.
> 5. To avoid undue concentration of population and overcrowding of land.
> 6. To ensure that the development of land is commensurate with the physical characteristics of the land.
> 7. To protect life and property in areas subject to natural hazards and disasters.
> 8. To protect recreation resources.
> 9. To avoid undue water and air pollution.
> 10. To secure safety from fire and provide adequate open spaces for light and air.
> 11. To implement the comprehensive plan.
> 12. To provide the manner and form of preparing and processing applications for modification of and variances from zoning regulations;
> 13. To encourage the proper distribution and compatible integration of commercial and industrial uses within designated areas; and
> 14. To insure that additions and alterations to, and/or remodeling of, existing buildings or structures are completed in compliance with the restrictions and limitations imposed thereunder.

Chapter 1(C) of Ordinance 274-07.

Allowing structures to far exceed allowable height limitations by obtaining a conditional use permit is not in keeping with the purpose and intent of the Ordinance and thus the height regulation paragraph cannot be read as adding such a "use" to those specifically listed in Chapter 2, Section 13(B) of the M-1 zoning ordinance. Allowing a structure to

so exceed allowable height limitations through a CUP would violate the objectives of the ordinance. Specifically, such an interpretation would: 1) fail to protect property rights and enhance property values because property owners would have no idea how tall a neighboring building could be; 2) fail to provide for the protection and enhancement of the local economy because economic values in the area are largely dependent upon our scenic offerings. Having a "sky's the limit" ordinance that could essentially block the scenery would not protect this economy; 3) fail to ensure that important environmental features are protected and enhanced because our scenic vistas are one of our area's important environmental assets; 4) fail to ensure that the development of land is commensurate with the physical characteristics of the land because such an interpretation does not take physical characteristics of the land into account; 5) fail to protect recreation resources and fail to provide adequate open spaces for light and air because these cannot be provided without a height limitation, views and a feeling of openness being an integral part of much of the Valley's recreation; 6) fail to implement the comprehensive plan as explained in paragraph D below; 7) fail to provide the manner and form of preparing and processing applications for modification of and variances from zoning regulations because it would provide confusion in their processing; and 8) fail to provide for the compatible integration of commercial and industrial uses within designated areas because it is impossible to assure compatibility without some form of height limitation.

Furthermore, the County cannot reconcile an application for a conditional use permit for 75 foot high structure with the clear meaning of Chapter 4, Section 3(A) of the Ordinance. Section 3(A) is very similar to Idaho Code § 67-6516, and states:

> A variance is a modification of the requirements of this ordinance as to ... height of buildings, size of lots, or other ordinance provisions affecting the size or shape of a structure or the placement of the structure upon the lot. A variance does not include a change of authorized land use.

When the County reads the City of Driggs Ordinance 274-07 as a whole it is clear that a CUP can only be obtained in an M-1 zone for the uses listed in Chapter 2, Section 13(B) and that a height of 75 feet is not amongst those uses. The statement in Chapter 2, Section 13(C) that a building or structure may be allowed to exceed forty-five (45) feet in height cannot be read in isolation. Additionally, because there are no parameters around this height allowance, the County cannot say that a seventy five foot high structure is specifically permitted by the terms of the ordinance. Furthermore, as is explained in the next section, a CUP can only be granted subject to conditions *pursuant to specific provisions of the ordinance.* There are no specific provisions listed in Chapter 2, Section 13(C) that suggest how a height modification can be conditioned.

B. <u>The CUP could not be granted pursuant to specific conditions listed in the ordinance.</u>

Idaho Code § 67-6512(a) also requires that a CUP not be granted unless it will be "subject to conditions pursuant to specific provisions of the ordinance." There are no specific provisions regarding the conditioning of a 30 foot height modification in the ordinance. The Driggs' ordinance that addresses conditional use permit procedures states: "If the proposed conditional use cannot adequately meet the conditions necessary to

assure protection and compatibility with the surrounding properties, uses and neighborhood, the Planning Commission will not approve the proposed use." The ordinance goes on to suggest the imposition of conditions:

a. Minimizing adverse impact on other development;
b. Controlling the sequence and timing of development;
c. Controlling the duration of development;
d. Assuring the development is maintained properly;
e. Designating the exact location and nature of development;
f. Requiring the provision for on-site facilities or services; and
g. Requiring more restrictive standards than those generally required in this ordinance.

Chapter 4, Section 2(A)of the City of Driggs' Ordinance 274-07.
While all of these would be applicable to the uses listed in Chapter2, Section 13(B), none appear applicable to the height regulation in Section 13(C). Idaho Code clearly states that a CUP can only be granted "subject to conditions pursuant to specific provisions of the ordinance." The County does not feel that there are any conditions that are specific to the height variation provision of Section 13(C).

When the County does consider conditions a-g listed above, it is clear that the applicant failed to show how they could be met. The applicant did not show the County how the adverse impact of this height increase could be minimized nor can the County determine a way to minimize the impacts of a building that is 30 feet higher than the 45 foot maximum. The applicant did introduce some "line of sight" evidence but the County had issues with this evidence. Chairman Young explained his skepticism regarding the line of sight evidence such as the site angle that was used on pages 40:12 – 41:11 of the November 15, 2007 transcript. The County also finds that it cannot control the sequence, timing or duration of the height, once it is allowed it would continue, sequence, timing and duration thus cannot be adequately controlled. The maintenance of the extra 30 feet of height is equally difficult to condition and the applicant provided no suggestions. Maintenance of a development usually refers to trash, weeds, etc., none of which are concerns 75 feet up in the air. The exact location and nature of the development could not minimize the impact of the additional 30 feet. Even though the applicant suggests that placing the structure several feet from the property line would minimize its impact, the Commissioners do not agree. Because the applicant needs the building to not only be 75 feet tall, but 60 feet wide these conditions are impossible to meet; applicant is not asking for a 75 foot cell tower – a pencil in the air – but a 60 x 75 foot building. Likewise, the County finds that no on-site facilities or services or more restrictive standards could minimize the impact of a building this size and the applicant again provided no suggestions as to how this condition could be met. The County thus is unable to grant the CUP subject to conditions pursuant to specific provisions of the ordinance.

C. <u>The CUP could not be granted subject to the ability of political subdivisions, including school districts to provide services for the proposed use.</u>

Political subdivisions, including schools, would not be affected by the height variation.

D. The CUP could not be granted because the County found that the "use" was in conflict with the comprehensive plan.

Throughout the Driggs' Comprehensive Plan the area North of Driggs is referred to as a "gateway". Section 9.3 of the Plan lists gateways at the North and South entrance to Driggs as a "need". The Plan's Vision for Community Design states:

> The Vision for Hwy 33 outside of downtown is as an attractive, functional, and memorable gateway into the community. The sense of arrival at each end of the community should be dramatic, but in keeping with the beauty of Teton Valley and the surrounding mountains. New buildings should be setback from the highway, with ample landscaping, concealed parking and architecture that draws on the western and agricultural vernaculars ...

Driggs' Comprehensive Plan, Section 9.4, Page 61. One of the stated actions under Section 9.4 is to "[c]reate and maintain attractive gateways to Driggs on Highway 33 (South and North) and on Ski Hill Road." The County finds that the application conflicts with the Driggs' Comprehensive Plan because it creates a large industrial structure that cannot be adequately shielded in the area that Driggs would like to see become a memorable gateway.

E. The County cannot grant the CUP because it is unable to impose conditions upon the use that assure protection and compatibility with the surrounding properties, uses and neighborhood.

Because a concrete batch plant is a permitted use in the M-1 zone it is not possible for the County to impose conditions on the use of the batch plant. This application is not about the uses that will be conducted on the property but about the height of the building in which the uses will be conducted. When the applicant was granted a conditional zone change there were moderating conditions such as landscaping imposed, but none of the conditions addressed a 75 foot height because it was a zone change process and the height of buildings was not at issue. Now the County is presented with this application for a conditional use permit to allow a building that is significantly higher than any other in the area. The County has not been presented with any plausible way to mitigate the extra 30 feet of height now being requested, nor is it able to craft any conditions that would assure surrounding properties, uses and neighborhoods protection and compatibility with the additional 30 feet of height.[3] The County therefore finds that a 75 foot height is not compatible with the surrounding properties, uses and neighborhood where a maximum of 45 feet for all structures is maintained and that the protection and compatibility of the surrounding properties, uses and neighborhood cannot be assured and

[3] No mitigation to surrounding neighbors was offered. As mentioned earlier, the applicant did present the idea that setting the 75 foot tall by 60 foot wide building back from the edge of the property line would mitigate the additional 30 feet of height [as viewed from the highway only], because the sight angle would be lower. Commissioner Young pointed out at the hearing that he was not persuaded by the applicant's line of sight argument because although the sight angle would be lower, the top of the building would still be so high that it would even project above the crest of the Tetons, unlike any existing building in the vicinity.

agrees with Sandy Mason's statement at the November 15, 2007 hearing: "you cannot mitigate that height."

Section 2 (A) (1) of the City of Driggs' Ordinance 274-07 notably states that the Planning Commission **"will not approve"** the proposed use if such conditions cannot be met. For all the reasons stated above, the County finds that the application failed to meet one or more of the criteria outlined in the Idaho Code and the Driggs Ordinance, all of such criteria being necessary before a County can grant a conditional use permit. For all the reasons stated, The County must deny the conditional use permit application.

TETON COUNTY:

Larry Young, Commissioner

Kathy Rinaldi, Commissioner

Robert Benedict, Commissioner

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FILED IN CHAMBERS AT REXBURG, MADISON COUNTY, IDAHO.
Date. 1-12-10
Time 11:15 a.m.
By Gregory W. Moeller
DISTRICT JUDGE

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TETON

IN RE: Application for a CUP Permit to Exceed 45' Height Limit for M-1 Zone BURNS HOLDINGS, LLC, Petitioner and Applicant, v. TETON COUNTY BOARD OF COMMISSIONERS, Respondent.	Case No. CV-07-376 **ORDER DENYING MOTION TO AUGMENT**

Petitioner's Motion to Augment the Record came before the Court for hearing on January 5, 2010. The Court has considered the Briefs filed by the parties and oral arguments submitted by the parties. Based thereupon, the Court makes the following order:

ORIGINAL

IT IS HEREBY ORDERED that Petitioner's Motion to Augment the Record with the Affidavit of Kurt Hibbert be and hereby is denied for the reasons stated by the Court at the conclusion of oral argument.

DATED this 12th day of January, 2010.

Gregory W. Moeller
District Judge

CLERK'S CERTIFICATE OF MAILING

I hereby certify that I served a true copy of the foregoing document upon the following this 12 day of January, 2010, by mailing, with the necessary postage affixed thereto.

ATTORNEY SERVED:

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CLERK OF THE DISTRICT COURT

By: Angie Wood
Deputy Clerk

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