UIdaho Law
Digital Commons @ UIdaho Law

Idaho Supreme Court Records & Briefs

1-24-2011

Burns Holdings, LLC v. Teton County Bd. of Com'rs Clerk's Record v. 2 Dckt. 38269

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs

Recommended Citation
"Burns Holdings, LLC v. Teton County Bd. of Com'rs Clerk's Record v. 2 Dckt. 38269" (2011). *Idaho Supreme Court Records & Briefs*. 2859.
https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/2859

This Court Document is brought to you for free and open access by Digital Commons @ UIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact annablaine@uidaho.edu.

Vol 2 of 2

COPY

IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

LAW CLERK

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

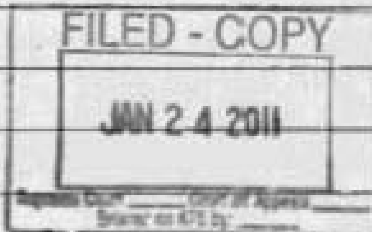
Dale W. Storer, P.O. Box 50130, Idaho Falls, Idaho 83405
Attorney-for-Petitioners/Appellants

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

Filed this ______ *day of* ______, *20* ___

______ *Clerk*

By ______ *Deputy*



38269

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

Table of Contents

Petition for Judicial Review, filed December 11, 2007 Page 0001

Statement of Issues on Judicial Review, filed January 15, 2008 Page 0006

Motion to Augment Agency Record/Transcript and for Stay of Briefing Schedule, filed March 3, 2008 Page 0011

Order Granting Leave to Augment Agency Record/Transcript And Staying of Briefing Schedule; Vacating Date of Hearing For Oral Argument Page 0014

Petitioner's Brief, filed July 11, 2008 Page 0017

Respondent's Brief, filed August 05, 2008 Page 0051

Petitioner's Reply Brief, filed August 25, 2008 Page 0073

Minute Entry, filed October 21, 2008 Page 0096

Order, filed October 30, 2008 Page 0097

Amended Petition for Judicial Review, filed January 28, 2008 Page 0100

Amended Statement of Issues on Judicial Review, filed February 06, 2009 Page 0111

Findings of Fact, filed February 10, 2009 Page 0115

Petitioner's Supplemental Brief, filed May 26, 2009 Page 0122

Administrative Order, filed June 11, 2009 Page 0139

Respondent's Supplemental Brief, filed July 16, 2009 Page 0141

Petitioner's Second Reply Brief, filed July 31, 2009 Page 0162

Minute Entry, filed August 8, 2009 Page 0170

Decision on Review, filed September 29, 2009 Page 0176

Brief in Support of Motion for Reconsideration,
filed October 13, 2009 Page 0192

Order RE: Motion for Reconsideration, filed November 17, 2009 Page 0195

Second Amended Petition for Judicial Review,
filed December 04, 2009 Page 0198

Second Amended Statement of Issues on Judicial Review,
filed December 04, 2009 Page 0206

Motion to Augment Agency Record, filed December 17, 2009 Page 0211

Minute Entry, filed January 05, 2010 Page 0220

Amended Findings of Fact and Conclusions of Law,
filed January 12, 2010 Page 0224

Order Denying Motion to Augment, filed January 12, 2010 Page 0232

Brief in Support of Second Amended Petition for Judicial Review,
filed February 10, 2010 Page 0235

Respondent's Reply Brief Second Amended Petition
for Judicial Review, filed March 10, 2010 Page 0268

Reply Brief in Support of Second Amended
Petition for Judicial Review, filed March 24, 2010 Page 0313

Minute Entry, filed April 20, 2010 Page 0327

Third Decision on Review, filed June 10, 2010 Page 0331

Petitioner's Motion for Reconsideration, filed June 24, 2010 Page 0350

Petitioner's Brief in Support of Motion for Reconsideration,
filed August 06, 2010 Page 0353

Respondent's Reply Brief in Opposition to Petitioner's Motion for Reconsideration, filed August 10, 2010 — Page 0372

Minute Entry, filed August 17, 2010 — Page 0382

Amended Third Decision on Review, filed October 1, 2010 — Page 0385
Notice of Appeal, filed November 10, 2010 — Page 0406

Final Judgment, filed November 30, 2010 — Page 0410

Certificate of Exhibits, dated December 30, 2010 — Page 0412

Clerks Certificate, dated December 30, 2010 — Page 414

Certificate of Service, dated December 30, 2010 — Page 415

Index

Administrative Order, filed June 11, 2009 0139

Amended Findings of Fact and Conclusions of Law,
filed January 12, 2010 0224

Amended Petition for Judicial Review, filed January 28, 2008 0100

Amended Statement of Issues on Judicial Review, filed
February 06, 2009 0111

Amended Third Decision on Review, filed October 1, 2010 0385

Brief in Support of Motion for Reconsideration,
filed October 13, 2009 0192

Brief in Support of second Amended Petition for Judicial Review,
filed February 10, 2010 0235

Certificate of Exhibits, dated December 30, 2010 0411

Certificate of Service, dated December 30, 2010 415

Clerk's Certificate, dated December 30, 2010 414

Decision on Review, filed September 29, 2009 0176

Final Judgment, filed November 30, 2010 0410

Findings of Fact, filed February 10, 2009 0115

Minute Entry, filed April 20, 2010 0327

Minute Entry, filed August 8, 2009 0170

Minute Entry, filed August 16, 2010 0382

Minute Entry, filed January 05, 2010 0220

Minute Entry, filed October 21, 2008 | 0073

Motion to Augment Agency Record, filed December 17, 2009 | 0211

Motion to Augment Agency Record/Transcript and for Stay of Briefing Schedule, filed March 3, 2008 | 0011

Notice of Appeal, filed November 10, 2010 | 0406

Order Denying Motion to Augment, filed January 12, 2010 | 0232

Order, filed October 30, 2008 | 0097

Order Granting Leave to Augment Agency Record/Transcript and Staying of Briefing Schedule; Vacating Date of Hearing for Oral Argument | 0014

Order RE: Motion for Reconsideration, filed November 17, 2009 | 0195

Petition for Judicial Review, filed December 11, 2007 | 0001

Petitioner's Brief, filed July 11, 2008 | 0017

Petitioner's Brief in Support of Motion for Reconsideration, filed August 06, 2010 | 0353

Petitioner's Motion of Reconsideration, filed June 24, 2010 | 0350

Petitioner's Reply Brief, filed August 25, 2008 | 0073

Petitioner's Second Reply Brief, filed July 31, 2009 | 0162

Petitioner's Supplemental Brief, filed May 26, 2009 | 0122

Reply Brief in Support of Second Amended Petition for Judicial Review, filed March 24, 2010 | 0313

Respondent's Brief, filed August 05, 2008 | 0051

Respondent's Reply Brief in Opposition to Petitioner's Motion for Reconsideration, filed August 10, 2010 | 0372

Respondent's Reply Brief Second Amended Petition for Judicial Review, filed March 10, 2010 | 0268

Respondent's Supplemental Brief, filed July 16, 2009 | 0141

Second Amended Petition for Judicial Review, filed December 04, 2009 | 0198

Second Amended Statement of Issues on Judicial Review, filed December 04, 2009 | 0206

Statement of Issues on Judicial Review, filed January 14, 2008 | 0006

Third Decision on Review, filed June 10, 2010 | 0331

Se[illegible]th Judicial District - Teton County

User: SHILL

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

Date	Code	User		Judge
2/11/2007	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

Sev th 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
1/17/2009	ORDR	PHYLLIS	Order Re Motion for Reconsideration	Gregory W Moeller
2/4/2009	PETN	PHYLLIS	Second Amended Petition for Judicial Review	Gregory W Moeller
	MISC	PHYLLIS	Second Amended Statement of Issues on Judicial Review	Gregory W Moeller
2/17/2009	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

Date	Code	User		Judge
/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

)ate	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

FILED
FEB 10 2010
TETON CO, ID
DISTRICT COURT

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
Idaho Falls, Idaho 83402
P.O. Box 50130
Idaho Falls, Idaho 83405-0130
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 **BRIEF IN SUPPORT OF SECOND AMENDED PETITION FOR JUDICIAL REVIEW**

COMES NOW Petitioner, Burns Holdings LLC, and submits this Brief in Support of Second Amended Petition for Judicial Review. The Second Amended Petition is brought for the reason that the Respondent has again disregarded the Court's previous decisions in this matter by (1) basing its decision on grounds foreclosed by this Court in its earlier Memorandum Decision, (2) failing to issue a decision that complies with I.C. §§ 65-6519 and

ORIGINAL

6535, and (3) issuing a decision that is arbitrary and capricious because there is no factual basis in the record for the Commissioners' findings that it is impossible to fashion conditions that would render Burn's batch plant compatible with the surrounding commercial and industrial uses. This Court has given the Board ample opportunity to issue a reasoned decision that fulfills the requirements of Idaho law and the Board has not done so. For the reasons set forth below, this Court should reverse the Board's decision and remand the matter with specific instructions to grant the Petitioner's application.

Introduction

More than two years ago the Respondent Teton County Board of Commissioners (the "Board" or "County") held a public hearing on a Conditional Use Permit ("CUP") application filed by Petitioner, Burns Holdings LLC ("Burns"). Burns sought the CUP in order to construct a seventy-five (75) feet high concrete batch plant within the M-1 zone and in a location surrounded by a variety of industrial and commercial uses. Because the proposed batch plant was located within the Driggs area of impact, the application was considered under the applicable provisions of the Driggs Zoning ordinance. The Driggs Zoning Ordinance specifically allows buildings over forty-five (45) feet when "approved by conditional use permit." DCZO[1] § 2(13)(C).

At that hearing, and for the two years leading up to this Second Amended Petition for Judicial Review, the Board has acted arbitrarily and capriciously with respect to Burns' CUP

[1] For convenience, the Zoning Ordinance of the City of Driggs, Idaho, 274-07 (January 16, 2007), which was in effect at the time Burns filed the CUP application, is herein referred to as "DCZO." A complete copy of the DCZO was included as an exhibit on the CD-ROM which Petitioner included with the Petitioner's Brief filed on July 10, 2008.

application. The Board has consistently disregarded the provisions of the Local Land Use Planning Act ("LLUPA" or "Act") requiring issuance of a reasoned decision setting forth the facts and legal basis for its decision, notwithstanding stern admonition by this Court, as well as Judge Shinderling. For more than two years, the Board has abdicated its duty and has used a "moving target" approach to deny Burns' CUP application. An examination of the record of the hearing reveals the reason for the evasive and ungrounded decisions issued by the Board: there are no facts in the record upon which a denial could be premised. Burn's application met the parameters of the CUP ordinance in every respect. These tactics have frustrated justice and made effective resolution of this matter impossible. Further, in Board's most recent action on this matter, one of the newly installed county commissioners, Kathy Rinaldi, participated in the deliberations antecedent to the adoption of the Amended Findings and Conclusions of Law and voted to deny Burns' CUP application — despite testifying against Burns' CUP application at the earlier hearing. R. At 99, 107.

The Board held its initial public hearing on this matter on November 15, 2007. When the Board initially denied Burns' CUP application, it found that the CUP application did not comply with the County Comprehensive Plan and that an earlier rezone was conditioned on a building with a height of less than forty-five (45) feet. CUP Tr. Vol. III, p.32, ll. 1-7.[2] As was noted in Burns' earlier Brief, such condition was nowhere found within the Board's earlier decision granting a rezone of the subject property to M-1.[3] Further, despite the clear

[2] The scheme for citing to transcripts of hearings associated with this case and the agency record is explained in footnotes 2 and 3 of the initial Petitioner's Brief filed on July 11, 2008.

[3] *See* Petitioner's Supplemental Brief, filed May 21, 2009, at 12-15.

requirement of I.C. §65-6519, the Board failed to make written findings of fact and conclusions of law. Burns filed this petition for Judicial review on December 11, 2007, citing the lack of written findings, attacking the merits of the Board's decision, and identifying several statutory and constitutional errors committed by the Board during the CUP process.

On October 21, 2008, Judge Shindurling heard oral argument on the matter. At that hearing, the County argued that verbal findings contained in the transcript and reflected in the minutes of the proceedings satisfied the requirements of the Act. The Court disagreed and held that the Board's failure to produce written findings was inconsistent with I.C. §§ 65-6519, 6535: "The Court finds that Respondent, Teton County failed to prepare written findings and a reasoned statement as required by Idaho Code § 67-6535." Order[4] at 1. Judge Shindurling remanded the matter to the County without addressing the merits of Burns' other arguments.

On remand, the Board issued written Findings of Fact and Conclusions of Law ("Second Findings"[5]), which again denied Burns' CUP application. The Second Findings were again based on the Board's belief that the earlier rezone was premised on a forty-five (45) foot tall building. Second Findings at 5. The Board also found that the proposed building would conflict with the Comprehensive Plan, "specifically an exceedingly high structure would be located along the scenic corridor." *Id.* However, it is undisputed that the

---

[4] Filed on October 30, 2008.

[5] Dated December 22, 2008. The Board's earlier "verbal" findings will be referred to somewhat loosely as the "First" Findings.

proposed use was outside the scenic corridor. CUP Tr. Vol. III, p. 3, ll. 20-22. Again, despite the Court's order that the Board comply with § 67-6535, the Second Findings failed to identify the relevant contested facts or the applicable law as required by the Act.

In response to the Second Findings, Burns filed an Amended Petition for Judicial Review on January 14, 2009. Once again Burns pointed out that the earlier rezone did not contain a limitation on building height, that the Board continued to unlawfully use the Comprehensive Plan as a regulatory ordinance[6], and that the Board's decision did not comply with I.C. § 67-6535. In its responsive brief, filed on July 16, 2009, the County argued — for the first time since the CUP application process began — that Burns should have requested a variance rather than a CUP. The Board made such conclusion, despite the clear language in the DCZO authorizing buildings over forty-five (45) feet when "approved by conditional use permit."

The Court heard argument on the Amended Petition for Judicial Review on August 18, 2009. In a written decision issued on September 29, 2009, the Court agreed with Burns that the Second Findings did not comply with Idaho Code § 67-6535, stating: "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." Decision on Review at 7. The Court specifically noted that the "County's decision lacks any citation to the relevant contested facts" and found that the Board's "minimal citation[s] to evidence fails to satisfy the standard" contained in § 67-6535 and *Workman Family Partnership v. City of Twin Falls*,

---

[6] *See Urrutia v. Blaine County*, 134 Idaho 353, 2 P.3d 738 (2000).

104 Idaho 32, 655 P.2d 926 (1982). *Id.* at 9. The Court further noted that the "County's decision must state the facts relied upon, as well as the weight given to that evidence." *Id.* at 10. The Court also held that the County's variance argument was "untimely and disingenuous." Decision on Review at 12. Specifically the Court found that it was "unreasonable to make this argument at this point in the case" because the DCZO specifically directs applicants for buildings over forty-five (45) feet to pursue a CUP and also because waiting for more than two years after Burns initially filed the CUP application to suggest that Burns should have pursued a variance is "fundamentally unfair and a blatant disregard" for Burns' rights. *Id.* at 12-13.

On November 9, 2009, the County filed Amended Findings of Fact and Conclusions of Law ("Third Findings"), which denied Burns CUP application for the third time. Like the first two denials, the Third Findings do not comply with Idaho Code § 67-6535 because they again do not identify the relevant facts upon which the Board based its decision. Moreover, in the Third Findings the Board blatantly disregarded this Court's Decision on Review in a number of important respects. First, the Board denied the CUP on the basis that Burns should have applied for a variance — a basis the Court rejected at the August 18, 2009, hearing and in the Decision on Review. Second, the Third Findings, contrary to the mandate of Idaho Code § 67-6535, failed to identify what the Board found to be the salient facts and dispositive law. Finally, as argued below the Third Findings are arbitrary and capricious because they are not supported by substantial and competent evidence.

More than two years have passed since the hearing on this matter and it is abundantly clear that the County continues to ignore well-established law and is not acting in good faith. All of the Board's decisions have violated § 67-6535. Twice the Court has heard argument on this issue and twice the Court has remanded the matter back to the Board with instructions that the County comply with the statute. Following both remands, the County has ignored the Court's directions. The Board's reasons for denying the CUP change and evolve with each new decision. This continued misconduct on the part of the County has prejudiced, and continues to prejudice, Burns' right to use his property. Additionally, the Board's conduct has cost Burns tens of thousands of dollars in costs and attorney's fees.

The time for a remand to the Board with instructions to prepare findings that comply with § 67-6535 has passed. The Board has demonstrated that it will not comply with the statute — indeed it cannot because there are no facts in the record that would support a denial. Remanding the matter back for additional findings would allow the Board to yet again produce findings that do not comply with the statute, would continue to deprive Burns of fundamental fairness and further delay resolution of this matter. There is no competent evidence in the record supporting the Board's decision to deny the CUP. Thus for the reasons set forth below, this Court should, pursuant to Idaho Code § 67-5279(3), reverse the Board's decision and remand the matter to the Board for "further proceedings" consistent with the Court's findings (i.e. with directions to approve the CUP application.)

ARGUMENT

1. The Board's Finding That Burns Should Have Pursued a Variance, Rather than a CUP, Was Foreclosed by the Court's Earlier Decision; to Rely on That Argument Again Is Arbitrary and Capricious.

a. The Board's Use of the Variance Argument as a Basis to Deny the Application Violates the Law of the Case Doctrine.

Instead of identifying facts and applying law, as required by LLUPA and the Court's previous decisions, the Third Findings again deny the CUP for the reason that Burns should have pursued a variance instead of a CUP. Third Findings at 1. Given the Court's earlier decision, that finding is arbitrary, capricious and borders on contempt of court.

"The doctrine of law of the case provides that where an appellate court states a principle of law in deciding a case, that rule becomes the law of the case and is controlling in the lower court and on subsequent appeals." *Urrutia v. Blaine County*, 134 Idaho 353, 360, 2 P.3d 738, 745 (2000). Where a case is remanded after an appeal, the decision on remand must be made "in light of and in consonance with the rules of law as announced by the appellate court in that particular case." *Union Pacific Corp. v. Idaho State Tax Comm'n*, 139 Idaho 572, 575, 83 P.3d 116, 116 (2004) (citation omitted). "When a district court entertains a petition for judicial review, it does so in an appellate capacity." *Burns Holdings, LLC v. Madison County Bd. of County Comm'rs*, 147 Idaho 660, 662, 214 P.3d 646, 648 (2009).

The Court's second decision remanding this matter to the County clearly held that it was "unreasonable" for the County to defend the denial of Burns' CUP application on the basis that Burns should have pursued a variance. Decision on Review at 12. The Court held

that DCZO § 2(13)(C) "specifically directs applicants to apply via a conditional use permit" when seeking to construct a building over forty-five (45) feet. *Id.* Thus, that decision became the "law of the case." On remand, the Board was obligated to make a decision "in light of and in consonance" with the Court's ruling on the variance argument. Instead, the Board disregarded the Court's decision and once again used the variance argument as a reason for denying Burns' CUP application: "Burns Holding, LLC must apply for a variance to exceed the 45 height limitation in the M-1 zone . . . The County finds that the applicant did not make the correct application for a height variance . . ." Third Findings at 1. In sum, the Board cavalierly ignored the Court's previous decision and, for that reason alone, the Board's decision should be reversed and remanded.

b. The Board's Decision to Ignore the Plain Language of Dczo § 2(13)(C) When Evaluating Burns' CUP Application Was Arbitrary and Capricious.

The law regarding statutory interpretation is clearly established in Idaho: meaning and effect must be given to "every word and clause of a statute." *State v. Mercer*, 143 Idaho 123, 126, 138 P.3d 323, 326 (Ct. App. 2005); *see also Farber v. Idaho State Ins. Fund*, 147 Idaho 307, ---, 208 P.3d 289, 292 (2009) (statutes must be interpreted in a manner that "give[s] effect to all the words of a statute so that *none will be void*, superfluous, or redundant") (emphasis added); *Obendorf v. Terra Hug Spray Co., Inc.*, 145 Idaho 862, 188 P.3d 834 (2008) (in matters of statutory construction courts "prefer[] an interpretation that gives meaning to every word, clause, and sentence"). Principles of statutory construction are applicable to local ordinances. *Evans v. Teton County*, 139 Idaho 71, 77, 73 P.3d 84, 90 (2003).

In the Third Findings, the Board interprets DCZO § 2(13)(C) — a provision which clearly permits buildings over forty-five (45) feet when approved by a conditional use permit — "as if it had never existed." Third Findings at 1. Having conveniently excised the provision of the ordinance that unambiguously authorizes the CUP application filed by Burns, the Board finds that Burns "must apply for a variance to exceed the 45 foot height limitation." Third Findings at 1. On its face, the Board's decision is disingenuous and is directly contrary to well-established principles of statutory interpretation cited above. As such, the Board's interpretation is arbitrary, capricious and an abuse of discretion.

2. The Board's Findings of Fact and Conclusions of Law Are, Again, Deficient under Idaho Code § 67-6535 Because They Do Not Adequately Explain the Factual and Legal Basis for the Board's Denial of the Permit.

a. Idaho Code § 37-6535 Requires a Reasoned Statement of the Facts and the Law Justifying the Board's Decision.

The LLUPA clearly outlines the standard which a local government body must meet when denying a land use application:

> 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.

Idaho Code § 67-6535(b). The Idaho Supreme Court has provided local governments with further guidance on preparing written findings of fact and conclusions of law. In *Workman Family Partnership*, the court held:

> 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.

104 Idaho at 37, 665 P.2d at 931 (quoting *South of Sunny side Neighborhood League v. Bd. of Commissioners*, 280 Or. 3, 569 P.2d 1063 (1977)). In a recent decision, the Idaho Supreme Court again emphasized that when issuing a local land use decision "[c]onclusory statements are not sufficient." *Cowan v. Bd. of Comm'rs of Fremont County*, 143 Idaho 501, 511, 148 P.3d 1247, 1257 (2006).

In addition to the text of § 67-6535 and the cases interpreting it, the Board has had the benefit of instruction from this Court explaining the proper way to prepare written findings of fact and conclusions of law. This Court instructed the Board to prepare a "written decision that (1) adequately states the facts the Board relied upon and (2) clearly explains how the Board applied the law to those facts." Decision on Review at 5. Order at 1. The Court also explained that "[t]he Board's written decision must state the facts relied upon, as well as the weight given to that evidence . . ." *Id.* at 10.

b. *The Third Findings Violate § 67-6535 Because They Do Not Adequately State the Facts the Board Relied upon and Clearly Explain How the Board Applied the Law.*

Despite this Court's specific instruction to the Board, the Third Findings do not clearly "explain[] the criteria and standards considered relevant," they do not "state[] the relevant contested facts relied upon," and they do not adequately "explain[] the rationale for the decision." Instead, the Third Findings are entirely conclusory. The fundamental problem

with the County's findings is that they fail to apply law to facts, as is required by Idaho Code § 67-6535. A brief discussion of each of the findings illustrates the Board's failure and demonstrates why the Board's decision should be reversed.

Finding 1.

The County's first "finding" is, as discussed above, the erroneous conclusion that Burns needed to apply for a variance rather than a CUP. The only fact to which to the County cites in support of this conclusion is the uncontested fact that the building is "30 feet higher" than the unconditionally permitted 45 foot height provision. Third Findings at 1. The building's height is, of course, the reason for seeking the CUP in the first place. There is no discussion of relevant facts, rather the finding is nothing more than the erroneous legal conclusion that Burns should have applied for a CUP.

Finding 2(A).

The County finds that a height of 75 feet is not permitted by the ordinance. Third Findings at 2-3. However, this too is an erroneous legal conclusion — not the application of facts to law. The Board contends that the CUP cannot be granted because a height of 75 feet is not expressly mentioned as a conditional use. Third Findings at 2-3. As noted above, buildings over 45 feet are specifically permitted conditional uses. Again, however, the County does not apply law to relevant facts; the building's height is the only fact mentioned. Denying the request for a CUP to build a seventy-five (75) foot building merely because the proposed building is seventy-five (75) feet high is a clear bootstrap, especially in the face of an ordinance which specifically allows buildings of such height when approved by a CUP.

Finding 2(A) is based on entirely on the County's irrational — and, for purposes of this litigation, irrelevant — fear that if Burns' CUP is granted the County would have to approve "a building of any height and size, skyscrapers included." Third Findings at 3. This is a policy discussion appropriate to a legislative forum; it is not the application of law to facts required by Idaho Code § 67-6535. If the County wished to enforce a *per se* maximum height restriction, it should have expressly included such limitation in the ordinance. The fact that the ordinance apparently would allow consideration of "skyscrapers" is of no relevance whatsoever to this proceeding.

Finding 2(B).

Next, the County contends that the CUP could not be granted pursuant to the specific conditions listed in the ordinance. Third Findings at 4. Far from applying facts to law in order to reach their conclusion, the Board made its decision based only on the commissioner's opinions and feelings. The Board declared that it "does not *feel* that there are any conditions that are specific to the height provision." Third Findings at 5. Beyond that "feeling", they provided no rationale or factual basis for their apparent conclusion that it was impossible to mitigate the visual impact of 30 additional feet of a multi-faceted, tan colored building upon adjoining industrial uses and set back 550 feet back from Highway 33 — well beyond the scenic corridor.

The County also reaches the conclusion that "no on-site facilities or services or more restrictive standards could minimize the impact of a building this size." Third Findings at 5. This conclusory statement indicates the County's view that in the universe of possible

conditions, none exist which could possibly mitigate the impact of the building's height. As illustrated in Section 4, below, this conclusion is unsupported by any explanation, rationale or evidence in the record. Under § 67-6535, the finding is deficient because the Board does not explain *why* Burns' mitigating conditions would not work, and *why* it felt it was impossible to craft conditions which could mitigate the building's impact. Rather, the Board merely states the bald conclusion that such *is* the case. Further, as noted below, the record clearly shows there were numerous means by which the visual aspect of the additional height could be mitigated.

Finding 2(C).

Even this finding, which actually favors Burns, is deficient under §67-6535. The County merely reaches the conclusion that political subdivisions, including schools, would not be affected by the proposed building, but the County does not explain the rationale which led to that conclusion. Third Findings at 5.

Finding 2(D).

The County focuses upon a single "gateway" provision in the 90-page plus Comprehensive Plan and finds that Burns' proposal is not compatible therewith. Third Findings at 6. Nowhere does the Board make any effort to define the meaning or intent with respect to the "gateway" reference in the Comprehensive Plan.[7] Nor does it explain *why* Burns' proposal is inconsistent with the gateway provisions or why the scenic corridor provisions should be extended beyond their defined bounds. Those failings aside, the

---

[7]The most likely meaning of the reference to the Driggs "gateway" is the 330 foot scenic corridor paralleling State Highway 33. Again, Burns' property is located outside such corridor.

Board's conclusion on this point is also suspect because it cherry-picks one rather oblique provision with which the Board, erroneously, believes Burns' building is inconsistent, while ignoring a host of other provisions in the Comprehensive Plan with which Burns' proposal is entirely consistent. For example, the County ignores a provision in the Comprehensive Plan stating "[T]he area around the airport has been consistently envisioned as an appropriate industrial area because of the noise impacts of the airport and fairgrounds, the existence of other light industrial and commercial uses." Comprehensive Plan at 82.

The Board's other findings with respect to the Comprehensive Plan also do not comport with § 67-6535 because they do not explain the Board's rationale for reaching the conclusion that Burns' plan is inconsistent with the Comprehensive Plan. The Board asserts that Burns' proposal is incompatible with the Comprehensive Plan "because it creates a large industrial structure which cannot be adequately shielded in the area that Driggs would like to see become a memorable gateway." As noted above, the Board makes no attempt to ascertain the meaning or identify the area referenced as a "gateway." Further, the Board does not explain *how* it reached its conclusion that the building cannot be adequately shielded, *what* would constitute adequate shielding, or even *why* such shielding is necessary on property which is, unquestionably, outside the scenic corridor and located within an area north of the airport that has been identified as particularly appropriate for heavy industrial use. The Board seems hung up on "shielding" and ignores the design elements of the building itself (i.e. color, texture, roof line and other design features breaking up the building profile and making the building attractive). Finally, the Board does not describe the nature

or proximity of the adjoining industrial uses and *why* Burns' additional building height might be objectionable to or otherwise interfere with their operation.

Third, the County's continued use of the comprehensive plan as a regulatory ordinance is a violation of the Idaho Supreme Court's holding in *Urrutia v. Blaine County*, 134 Idaho 353, 2 P.3d 738 (2000). Burns addressed this issue in Section III of Petitioner's initial brief filed July 11, 2008, and will not here repeat that argument.

Finding 2(E).

The County determines that it cannot impose any conditions on Burns' proposal which would make that proposal compatible with the surrounding uses because it calls for an "additional 30 feet of height." Again, the only fact the Board refers to is the undisputed fact that the plan calls for 75-foot building. The Board's decision implies a *per se* rule that a 75-foot building is under all circumstances absolutely incompatible with surrounding uses. This conclusion ignores the fact that buildings which exceed the general height allowance are expressly permitted under DCZO § 2(13)(C) — by finding the additional height cannot be mitigated, the Board effectively imposes a *de facto*, but unexpressed height limit. The conclusion is also directly contrary to § 67-6535 because it is not supported by an evaluation or explanation of any fact justifying a finding of incompatibility with adjoining uses, other than the building's height itself.

The Board acknowledged that the property in question is in an industrial zone, but failed to explain *what* the surrounding uses are and *why* a 75-foot building is incompatible with those industrial uses. Instead, the County based its decision on the wholly conclusory

statement of Sandy Mason, one of the witnesses who appeared at the hearing: "You cannot mitigate that height." Third Findings at 6-7. Neither Mr. Mason nor the Board offered any factual basis or rationale supporting that conclusion nor any explanation why the statement was relevant.[8] As the Idaho Supreme Court stated in *Workman*, "[c]onclusions are not sufficient." *Workman*, 104 Idaho at 37, 655 P.2d at 931. The Board's reliance upon such irrelevant opinion flies in the face of I. C. § 67-6535 and the Court's earlier instructions to the Board. The Court specifically instructed the County that "[w]hat is needed are clear, precise statements of the facts and a full explanation of why those facts lead to the decision. What is needed are citations to the *relevant* conflicting facts relied upon." Decision on Review at 9 (emphasis added, citations omitted).

The Board's conclusion ignores — and did not discuss — the substantial evidence in the record discussing the measures that Burns has taken to ensure that the building would be compatible with the surrounding uses. *See* R. at 31-33 (identifying design elements implemented to ensure compatibility with surrounding uses: a landscaped wall intended to mitigate both the view of the building and the noise produced by the facility; external landscaping intended to break up the external profile and roof line of the building; a design which mitigates noise, vibration, dust, and sound; and a building color similar to other structures in the area). *See also* R. at 75-78 (the "Developer's Agreement" between Burns and the County which identified several measures which the parties agreed would "assure compatibility with other surrounding uses"); CUP Tr. Vol. III, p 4, ll. 9-22 (noting that Burns

---

[8]As explained below Mason's statement was made with respect to his view that Burns' building obstructed the "view of the Tetons" and that such obstruction could not be mitigated. It had no reference to adjoining uses.

designed the building so that the highest part of the building would be roughly 550 feet off the highway). Specifically, the Board's decision fails to explain why these mitigating features will not work.

In short, there is nothing in the Third Findings which amounts to a "reasoned statement" that "explains the rationale for the decision." *See* Idaho Code § 67-6535. After three attempts, the Board has demonstrated that it simply will not, and as illustrated below can not, issue a decision in this matter which complies with § 67-6535. This Court should not give the Board the opportunity to yet again issue an arbitrary decision which does not comply with the statute – and, as a result, again burden Burns for a fourth time with the additional time, expense and delay in order to exercise his constitutional and statutory right to a decision "founded upon sound reason and practical application of recognized principles of law." I.C. § 67-6535(c).

3. No Facts Justifying Denial of the Permit Were Presented to The Board at The Hearing.

The Board's difficulty in applying the law to the relevant facts, as required by § 67-6535, stems from the fact that there are simply no facts in the record which justify a denial of Burns' CUP. The uncontroverted evidence in the record demonstrates that Burns project is compatible with the surrounding properties and uses. R. at 5-22, 31-33, 75-77, 124-35 (Burns' project will be located in an industrial zone; the design incorporates rural and agricultural themes; the building's colors will match surrounding buildings; the project will be built outside the scenic corridor; the property will be enclosed by a wall and landscaping; varied roof lines break up the building's profile and visual impact; the additional height itself

is necessary to conceal equipment which mitigates sound, dust, noise, and vibration). By contrast, none of the witnesses appearing in opposition to Burns' project presented any *facts* which controvert the evidence presented by Burns. None of the witnesses introduced evidence of incompatibility. Rather, as illustrated below, the witnesses appearing in opposition based their testimony solely on philosophical opinions, visionary ideals for the community and unsupported conclusions, none of which had any relevance to the compatibility of the Burns plant with surrounding industrial uses.

A. Testimony of John Bach.

Mr. Bach was the first witness to speak in opposition to Burns' proposal. CUP Tr. Vol. II, p. 19, ll. 13-15. Mr. Bach offered factual testimony about his own property, but offered no facts related to Burns' application. Instead he offered a rambling opinion about the adequacy of the notice process and a reminiscence about his appearance before the Board on an unrelated matter in 1993 and 1994. CUP. Tr. Vol. II, p. 19-24. At one point Chairman Young had to remind him that "I did ask that we confine our comments to the question on the table, which is the height variance at this particular hearing." CUP Tr. Vol. II, p. 22, ll. 12-15. The gravamen of Mr. Bach's testimony was his opinion that Burns' plant "is completely detrimental in all aspects of what your criterias [sic] *for this zone*." CUP Tr. Vol. II, p. 23, ll. 2-3 (emphasis added). While testimony regarding appropriate uses for the area might have had some relevance to the earlier rezone hearing, his philosophical meanderings never addressed the building height issue. Moreover, Mr. Bach did not support his opinion

with any factual basis demonstrating how the height of the building was detrimental or otherwise incompatible with surrounding properties and uses.

B. Testimony of Sandy Mason.

The only other witness appearing at the hearing in opposition to the proposal was Sandy Mason, the executive director of VARD, a local environmental advocacy group. CUP Tr. Vol. II, p. 25, l. 2. As noted above, Mr. Mason's testimony was founded on the conclusory assertion that "you cannot mitigate that height." CUP Tr. Vol. II, p.27, ll. 13-14. Taken in context, his mitigation statement appears to be made with respect to the "view of the Tetons" rather than with respect to adjoining industrial uses. Mason's testimony did not include any facts beyond the undisputed description of the height and width of Burns' proposal. He suggested that a height of 75 feet alone was, in itself, sufficient grounds to deny the CUP. Burns has previously pointed out the fallacy of using the height of the building, alone, as a basis for denying a CUP, when the DCZO specifically authorizes buildings over 45 feet if they are approved by a CUP.

Mr. Mason further stated that he disagreed with the line-of-sight drawings Burns presented — again an indication that his concerns focused upon the "view of the Tetons" and not upon concerns about adjoining industrial uses. CUP Tr. Vol II, p. 26, ll. 16-22. He offered an opinion that Burns' proposal "certainly blocks the view of the mountains, no question about it. When you put 64 feet wide [sic], it definitely is going to block that view." *Id.* However, other than this irrelevant allegation, he did not offer any additional factual evidence. Preserving a "view of the mountains" is nowhere listed as a criteria for

disapproval of CUPs. Rather, the sole criterion is compatibility with adjoining "*uses*." DCZO § 4(2)(A). Further, by limiting the scenic corridor — which does allow consideration of aesthetic values — to 330 feet from Highway 33, the Board appears to have implicitly ruled out the use of aesthetic considerations for properties situated outside that corridor.

Mr. Mason presented no facts showing that Burns' proposal is inconsistent with surrounding industrial properties or was inconsistent with the Comprehensive Plan. Indeed, his opposition to Burns' CUP application was not based on facts at all, but on his personal views of appropriate planning policy: "[T]his variance, if you will, granted in the CUP, sets a bad precedent." CUP Tr. Vol. II, p. 26, l. 24 through p. 27, l. 1. Suggesting that the CUP decision should be based on policy considerations and not the facts of Burns' application, Mr. Mason states "in the County in general, if you grant a variance for CUP [sic], now engineering-wise it might make sense, but I think you have to look at a bigger picture than that." CUP. Tr. Vol. III, p. 27, ll. 2-5. Apparently the Board heeded Mr. Mason's advice: it based its decision not on the facts related to Burns' application, but on personal opinions and visionary planning goals. While these considerations may have been arguably relevant at the rezone hearing — they have no relevance at a CUP hearing considering building height.

C. Written Comments.

In addition to the two witnesses who appeared in opposition at the hearing, the Commission received written comments from several other individuals and organizations. As noted above, Kathy Rinaldi, now a commissioner who participated in the deliberations

leading to the Third Findings, appeared on behalf of VARD in opposition to the Burns Proposal. R. at 99, 107. Like Mr. Mason, Ms. Rinaldi did not offer any factual evidence upon which the Board could rely when making its decision. She merely concluded that granting the CUP "will set a bad precedent for the vicinity of the Scenic Byway." R. at 99. While acknowledging that the building will be located outside the scenic corridor, she still suggested that Board should deny the CUP for the same aesthetic reasons the Board could rely if the building were located in the Scenic Corridor.[9] Again, while this testimony might have had some relevance at a rezone hearing where the Board considers appropriate uses for the area, it had no relevance to the issue at hand. None of the other witnesses who submitted written testimony offered any factual evidence that Burns' proposed building was incompatible with surrounding uses or in conflict with the comprehensive plan. R. at 100-02, 105-06, 108-11.

Simply stated, there is nothing in the record which shows that Burns' proposed 75' foot building is inconsistent with the Comprehensive Plan or could not be made compatible with surrounding properties and uses. To the contrary, the undisputed evidence demonstrates that there are many steps which Burns could and did take to ensure compatibility with the surrounding properties.

---

[9] Burns does not dispute that the proposed batch plant will have some impact on the view of the mountains if the vantage point is close to the plant. However, it is undisputed that the building will not be located close to Highway 33 or within the Scenic Corridor. Thus, it is unclear what basis the Board had for relying so heavily on aesthetic considerations. *See* Third Findings at 6-7. Moreover, as Burns' line-of-sight drawings reveal, Burns could — without the need to obtain a CUP — construct a 45 foot building closer to Highway 33 which would have a greater impact on the view of the Tetons than the 75 foot building in its current location.

4. The Board's Finding that Burns Failed to Demonstrate Conditions That Could Mitigate the Impact of the Proposed Building Was Arbitrary and Capricious.

a. The Court Is Not Obligated to Give Deference to Findings Not Supported by Substantial Evidence.

In addition to being legally deficient under Idaho Code § 67-6535, the Board's conclusion that there are *no* conditions which could mitigate the impact of the proposed building's height is arbitrary and capricious because that conclusion is directly contradicted by the undisputed evidence in the record. A reviewing court can reverse the decision of a county board which is not supported by substantial and competent evidence. *Galli v. Idaho County*, 146 Idaho 155, 158, 191 P.3d 233, 236 (2008); Idaho Code § 67-5279(3)(d).

To uphold the Board's decision, the Court must find that it is supported by substantial and competent evidence. "Substantial and competent evidence is 'relevant evidence which a reasonable mind might accept to support a conclusion.'" *Lane Ranch Partnership v. City of Sun Valley*, 144 Idaho 584, 590, 166 P.3d 374, 380 (2007) (citing *Lamar Corp. v. City of Twin Falls*, 133 Idaho 36, 43, 981 P.2d 1146, 1153 (1999)). In this case, the Board provides no rationale for its conclusion that there were no conditions which could make Burns' proposed building compatible with surrounding uses. Because the Board's finding is not supported by substantial competent evidence, it is entitled to no deference from this Court. *Lewis v. State, Dept. of Trans.*, 143 Idaho 418, 146 P.3d 684 (Ct. App. 2006) (citing *Urrutia v. Blaine County*, 134 Idaho 353, 357, 2 P.3d 734, 742 (2000)).

b. Burns Offered Ample Evidence of Mitigating Conditions Which Assured Compatibility with Adjoining Industrial Uses.

The Board found that "[t]he 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 seventy-five (75) foot building. Third Findings at 5. The Board further found that it "has not been presented with any plausible way to mitigate the extra 30 feet now being requested, nor is it able to craft conditions that would assure surrounding properties, uses and neighborhoods protection and compatibility." Third Findings at 6.

If this is truly the Board's position, then the Board is acting in bad faith. The record is replete with uncontradicted evidence of Burns' efforts to implement height-mitigating design elements in order to ensure the building blended in with surrounding uses and that operational elements would not infringe upon adjoining property owners.[10] *See* R.at 31-33, 75-77, 124-35. Indeed, it is curious that County identified and imposed conditions in the "Developer's Agreement" which would "assure compatibility with other surrounding uses" and yet now states that no such conditions could possibly exist. *See* R. at 77.

Burns submitted extensive written and verbal testimony to the Board at the time of the hearing. R. at 124-35; CUP Tr. Vol. II, p. 5-18. The record contains uncontradicted testimony that a height of seventy-five (75) feet was necessary to enclose the mechanical equipment designed to mitigate impacts of the plant operation upon adjoining uses and

---

[10] Indeed, dust, noise, vibration and truck traffic would have been a potential problem for adjoining landowners if Burns had chosen to build a batch plant within the forty five foot height initial limitation. R. at 126. Burns' efforts to build a plant that is quieter, cleaner, more efficient and more environmentally friendly have been wholly ignored by the Board, who appears to be fixated solely on aesthetic considerations. One wonders if the Board truly believes that, when weighed in the balance, the community would be better off having a noisier, dustier, dirtier, more wasteful plant enclosed within a building meeting the 45 foot limit, in comparison to an environmentally friendly, fully-enclosed structure 75 feet in height.

ensure responsible environmental compliance. CUP Tr. Vol. II, p.15, ll. 10-12. Those features include equipment necessary to facilitate energy efficiency, reduce dust emissions and minimize sound and vibration. R. at 13.[11] Ironically, the very feature the Board finds objectionable — that is, the height of the enclosure — is necessitated by environmental and compatibility considerations. In addition to describing why the additional height is necessary to accommodate a sound, dust and vibration reduction system, the written testimony demonstrates that the building was specifically designed to "break up the visual appearance of the taller building" by employing "differing heights of . . . adjoining plant buildings . . . varying color schemes, and roof lines and facade textures between the panels." R. at 127. The record also contains evidence Burns presented to the Driggs Planning and Zoning Commission demonstrating how the use of a barrier wall and landscaping could mitigate the view of a taller building. R. at 31-33. The record is replete with evidence describing mitigating efforts undertaken by Burns, including conditions the Board, in the Development Agreement, has already agreed to and acknowledged will ensure compatibility with the other properties in this industrial area. R. at 31-33, 75-77, 124-35.

All of these are conditions — some self-imposed and some adopted pursuant to the Development Agreement — were designed to ensure the building harmonized with surrounding uses and the visual appearance of a taller building was diminished. R. at 31-33, 75-77, 124-35. The written testimony propounded by Burns clearly contradicts the Board's finding that the applicant presented *"no"* evidence of mitigating conditions. R. at 124-35.

---

[11] A Bates-Stamped version of the Agency Record is included as an exhibit on the CD-ROM Petitioner filed with the initial Petition for Judicial Review.

The Board's statement that Burns did not present *"any"* evidence of mitigating conditions is disingenuous, is not supported by "substantial competent evidence," and is not binding on the Court. *Lewis v. State Dept. of Trans.*, 143 Idaho 418, 421, 146 P.3d 684, 687 (Ct. App. 2006). To hold that it had not been presented with *any* evidence of mitigating conditions, demonstrates the Board's bad faith in this matter. The Board's decision to base the denial of the CUP on a purported inability to impose mitigating conditions is arbitrary and capricious, particularly in view of its failure to explain why Burns' proposed mitigating elements would not work.[12]

5. The Board's Conclusion That Burns' Proposed Use Was Not in Accordance with the Comprehensive Plan Was Arbitrary and Capricious.

The Board's conclusion that Burns' proposed use is conflict with the Comprehensive Plan because it could not be adequately "shielded" is also arbitrary and capricious because the Board provides no factual support for such conclusion and ignores other provisions in the Comprehensive Plan specifically designating the area north of the airport as being particularly well suited for industrial and manufacturing uses.

The Board cites to a provision of the Driggs Comprehensive Plan describing the Driggs "gateway." Third Findings at 6. The Board asserts that Burns proposed building "conflicts" with the Driggs Comprehensive Plan's gateway provision. *Id.* Again, the Board cites to no facts, other than the mere fact of the building height itself, demonstrating the manner in which the additional height is inconsistent with the "gateway" provisions. The

---

[12] The Board did not point to any evidence that the conditions identified by Burns would not have their intended effect. The Board merely cites to Commissioner Young's statements in the record that he was "skeptical" about the line-of-sight diagram. Third Findings at 5. However, his *opinion* about the diagram is not a *fact* which the Board could justify its denial. Further, the "view of the Tetons" was not a relevant consideration in any event.

Board does not define where the "gateway" is, how deep the gateway corridor is nor what feature or features of Burns' cream-colored building in fact conflict with this vague, undefined "gateway" concept. It simply refers to the nebulous "gateway" provision and then finds an inconsistency without any supporting rationale or facts. As noted above, "mere conclusions are not sufficient." *Cowan v. Bd. of Comm'rs of Fremont County, supra.*

Nor does the Board explain why it continues to use the Comprehensive Plan as a regulatory ordinance, contrary to the holding in *Urrutia v. Blaine County*, 134 Idaho 353, 2 P.3d 738 (S. Ct. 2000).[13] See also Petitioner's Reply Brief at p. 13.[14] Most egregiously, the Board ignores other provisions of the Drigg's Comprehensive Plan which state that "[t]he area immediately around the airport has been consistently envisioned as an appropriate industrial area because of the noise impacts of the airport and fairgrounds, the existence of other light industrial and service commercial uses."[15] Driggs Comprehensive Plan at 82. "Large or high impact (noise, odor, etc.) manufacturing and industrial uses should be confined to an area north of the airport." *Id.* at 88. It is undisputed that the industrial use proposed by Burns is located in the area immediately north of the Driggs airport. R. at 2.

---

[13] See Section III of the initial Petitioner's Brief for the argument that use of the Comprehensive Plan as a regulatory measure and as a basis for denying Burns' CUP application is improper under the Idaho Supreme Court's decision in *Urruita v. Blaine County*, 134 Idaho 353, 2 P.3d 734 (2000).

[14] Burns continues to urge that use of the broad, visionary criteria contained in a Comprehensive Plan also violates due process and vagueness principles under the Idaho and United States Constitutions. The argument will not here be repeated, but the Court is referred to Petitioner's Brief, dated July 11, 2008, pp 25-30; Petitioner's Reply Brief dated August 26, 2008, pp 17-22.

[15] The Driggs Comprehensive Plan in effect at the time Burns' CUP application was filed is included on the CD-ROM filed as an attachment to the initial Petitioner's Brief.

There is no evidence in the record supporting the Board's finding that Burns' proposed use is in conflict with the "gateway" provision of the Comprehensive Plan. To the contrary, the only substantial, competent evidence in the record indicates that the proposed use is completely consistent with the Driggs Comprehensive Plan. Indeed, by approving the February 2007 rezone, the Board implicitly found that an industrial use—such as Burns' batch plant—was consistent with the Comprehensive Plan and therefore harmonious with the surrounding properties and uses. *See Taylor v. Canyon County Bd. of Comm'rs*, 147 Idaho 424, ---, 210 P.3d 532, 546 (2009) (noting that when examining a request for a rezone a county board must make a factual inquiry into whether the request is consistent with the comprehensive plan); *see also* Idaho Code § 67-6511, *Love v. Board of County Comm'rs*, 105 Idaho 558, 671 P.2d 471 (1983).[16]

6. This Court Can and Should Remand this Matter to the Board with Instructions to Approve Burns' Cup Application.

The Idaho Administrative Procedures Act allows this Court to set aside the Board's decision and to remand the matter back to the Board for "further proceedings as necessary." Idaho Code § 67-5279(2). In *Workman* the court noted that "in circumstances such as these in which there are no findings or the findings are clearly inadequate, the district court should *at least initially* remand the case to the agency." 104 Idaho at 38, 655 P.2d 932 (emphasis added). The *Workman* court noted that "[w]e express no opinion on the issue of whether remand would be necessary in a case in which an agency refuses to comply with the orders

[16]See also Petitioner's Reply Brief dated August 26, 2008,pp. 14-17, wherein Burns argues that by revisiting the Comprehensive Plan consistency issue the County violated LLUPA's appeal period and principles of *res judicata*.

of a district court" — thus suggesting that where an agency consistently refuses to comply with a court order, a court could remand the matter to the board with specific instructions to grant the permit. *Id.* n.8. After *Workman,* the Supreme Court held, in a slightly different context that where a County has acted arbitrarily and where there is no indication in the record suggesting that further determinative findings can be made, a district court may properly refuse to remand the matter and order the County to grant the requested petition. In *Bonner General Hosp. v. Bonner County*, 133 Idaho 7, 981 P.2d 242 (1999), the County contended that the district court should have remanded an indigency determination back to the County for further proceedings, instead of ordering the County to grant the indigency petition without an opportunity for further factual findings. The Idaho Supreme Court affirmed the district court's decision that the findings of the county commissioners were "not supported by substantial and competent evidence" and that the County's denial of the petition was "arbitrary, capricious and an abuse of discretion." *Id.* at 11, 981 P.2d at 246. Importantly, the Supreme Court affirmed the district court's refusal to allow the County to make additional findings, holding that "[Where] there is no indication in the record that further findings could be made from the paucity of evidence that would affect the outcome of this case. . . we hold that no remand by the district court was necessary." *Id.*

In this case, the Court has twice found that the Board's decision on the CUP application fails to comply with § 67-6535. The Court has twice remanded the matter to the Board to prepare written findings justifying their decision and in each instance the Board has only recited broad, conclusory statements with no factual support in the record. It is quite

obvious why the Board continues to resort to broad, conclusory statements: there are no facts in the record which would support a denial. Like *Bonner General Hosp.*, remand in this case would serve no purpose. The salient facts regarding the nature of Burns proposal are uncontroverted; given the absence of evidence supporting a denial of the requested CUP, no findings of fact could be made that would affect the outcome of this case. Allowing the Board to once again produce unsupported and conclusory findings would only give the Board license to once again frustrate Burns' right to a reasoned decision and further delay resolution of this matter. This Court should declare the Board's decision to be arbitrary and capricious and order the Board to grant the permit without the need to make further findings.

7. Burns Is Entitled to Attorney Fees Because the Board Blatantly Disregarded the Court's Previous Decisions.

An award of attorney fees is appropriate in a proceeding against a county where, "The court finds that the party against whom the judgment is rendered acted without a reasonable basis in fact or law." Idaho Code § 12-117(1). Such an award is particularly appropriate where the non-prevailing party has received "the district court's repeated explanations of the lawsuit's failings." *Doe v. City of Elk River*, 144 Idaho 337, 339, 160 P.3d 1272, 1274 (2007). Here, the Board has twice ignored the Court's admonition to adopt specific factual findings and avoid unsupported legal conclusions. Instead, Burns has on each occasion been plagued with a target which seems to move with every decision issued by the Board.

Initially, the Board held that the earlier rezone expressly limited the building height to 45 feet. When confronted with the written transcript showing otherwise, the Board quietly dropped this conclusion in their next written findings. Later, the Board disingenuously raised

the argument the Burns should have pursued a variance rather than a CUP. At the August 18, 2009, hearing and in its Decision on Review, the Court reprimanded the Board for raising that issue for the first time at such a late stage in the proceeding. Nevertheless, in the Third Findings, the Board again denied the CUP application based on Burns' failure to request a variance. Clearly, the Board has received "repeated explanations" of the argument's failings and of the need to support its decision with reasoned conclusions supported by substantial competent evidence. Finally, the Board continues to ignore the clear mandate of *Urrutia* directing that a comprehensive plan cannot be used as a regulatory ordinance.

If this Court remands the matter to the Board with instructions to grant the permit, the situation becomes different from the facts of *Crown Point Development, Inc. v. City of Sun Valley*, which the County identified in its Brief in Support of Motion for Reconsideration of the Court's earlier decision awarding Burns attorney fees. In that case, the Supreme Court vacated the district court's award of attorney fees as being premature because the matter was "remanded to the City in order for it to make reviewable findings of fact." 144 Idaho 72, 78, 156 P.3d 573, 579 (2007). However, in this case there is simply nothing in the record from which the County could make findings that support a decision to deny the permit. Thus, there is no need for the Court to remand the matter back with instructions to make reviewable findings — the Board has tried three times and failed miserably on all occasions. Rather this Court should, consistent with *Workman* and *Bonner General Hospital*, remand the matter with instructions to grant the CUP, thus bringing this matter to a conclusion. In that

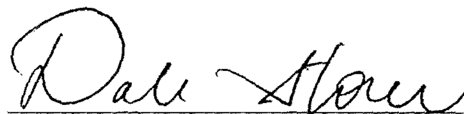
situation, *Crown Point Development* would no longer be applicable. Thus, Burns is entitled to attorney fees pursuant to § 12-117 and *Doe v. City of Elk River*.

CONCLUSION

The Third Findings do not comply with Idaho Code § 67-6535 because they do not clearly state the facts the Board relied upon nor explain how the Board applied the law to those facts. The Board's decision to deny the CUP application for Burns' failure to seek a variance is arbitrary and capricious. The Board's findings are arbitrary and capricious because they are not supported by substantial competent evidence in the record.

The Board has demonstrated that it is unwilling to comply with this Court's instructions to issue findings that comply with the Idaho Code. Given the absence of any evidence in the record supporting a denial of the CUP, this Court should find that the Board has acted arbitrarily and that there is no indication in the record that further factual findings will be of benefit. The Court should bring this long and troubled saga to a close by remanding the matter back to the Board with specific instructions to grant the CUP, without making further findings.

DATED this 9th day of February, 2010.



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

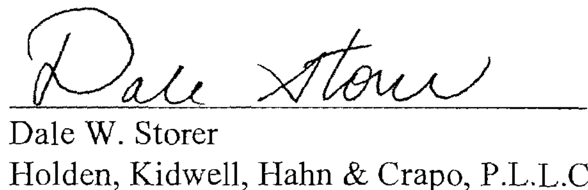
CERTIFICATE OF SERVICE

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 9th day of February, 2010.

DOCUMENT SERVED: BRIEF IN SUPPORT OF SECOND AMENDED PETITION FOR JUDICIAL REVIEW

ATTORNEY SERVED:

Kathy Spitzer Teton County Prosecutor 89 N. Main Street, #5 Driggs, ID 83422	(✓) Mail ( ) Hand Delivery ( ) Facsimile ( ) Courthouse Box
Honorable Gregory Moeller Madison County Courthouse P.O. Box 389 Rexburg, ID 83440-0389	(✓) Mail ( ) Hand Delivery ( ) Electronic mail ( ) Courthouse Box



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

G:\WPDATA\DWS\14688 - Burns Holdings\14688.000 Burns v. Teton County\Petition for Judical Review\Pleadings\Brief in Support of Second Amended Petition.v5.wpd.sm

Kathy Spitzer, Esq. [ISB No. 6053]
TETON COUNTY PROSECUTING ATTORNEY
89 N. Main Street
Driggs, Idaho 83455
208-354-2990
kspitzer@co.teton.id.us

Attorney for Respondent Teton County

FILED
MAR 10 2010
TIME: 2:13
TETON CO. ID DISTRICT COURT

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 REPLY BRIEF SECOND AMENDED PETITION FOR JUDICIAL REVIEW

COMES NOW Respondent, Teton County Board of Commissioners, and submits this Reply Brief in answer to Petitioner's Second Amended Petition for Judicial Review.

TABLE OF CONTENTS

I. Introduction 3

II. Argument 5

A. The Amended Findings of Fact and Conclusions of Law are adequate
i. The Amended Findings of Fact Comply with Idaho law 5
ii. The Board's Decision was based on Substantial and Competent Evidence 7

B. The Board's Decision Must be Affirmed Unless Applicant Demonstrates that Substantial Rights Have Been Prejudiced 11

C. The Board of County Commissioners had Discretion to Deny 14

D. Denial of a Conditional Use Permit Application Is Mandatory if Certain Conditions Cannot Be Met. 16

E. The Board of County Commissioners Properly Considered Aesthetics When Deciding Whether to Grant Burn's Application for a Conditional Use Permit. 17

F. Public Comment Should be Considered When it is Provided 19

G. The Comprehensive Plan Must Be Followed in Zoning Decisions
   i. Conditional use permits are zoning decisions...............................21
   ii. Compliance with the comprehensive plan is a question of fact for the governing body and their decision can only be overturned if it is proven to be clearly erroneous. 24

H. The Variance Issue is Properly Addressed
   i. The Board's Finding that Burns Should Have Pursued a Variance is not Foreclosed by the Court's Earlier Remand 26
   ii. The Variance Issue has been raised for Over Two Years and has been Continually Ignored by Petitioner. 27
   iii. The Plain Language of a Local Ordinance must be Ignored when it Conflicts with State Law 29

I. Commissioner Rinaldi's Signature on the Amended Findings did not Violate Petitioner's Constitutional Right to an Impartial Tribunal. 31

J. Teton County is Entitled to Attorney Fees on this Review Because the Petition for Review Lacks a Reasonable Basis in Fact or Law 33

III. Conclusion 37

I. INTRODUCTION

The Board of County Commissioner's (BOCC) issued Amended Findings of Fact and Conclusions of Law that adequately comply with the standards set forth by Idaho law. The Amended Findings give insight into the BOCC's reasons for denial of the permit and are based upon factual evidence applied to local and State law. Petitioner's request for well reasoned findings has been satisfied.

Petitioner's Second Amended Statement of Issues on Judicial Review is comprised mainly of concerns regarding the BOCC's alternative finding that a variance should have been applied for by the applicant. In their Amended Findings the BOCC sets forth several reasons for the denial, any one of which could serve on its own as a basis for denial. In their Amended Findings, the BOCC thoroughly analyzed the application according to the law surrounding conditional use permits (CUPs)[1] and reveal their thoughts as to why they denied the CUP based exclusively on the facts applied to CUP law. The Amended Findings also iterate the BOCC's concern that a variance may have been the proper application for a height modification based upon State law, but this concern is just one of several reasons for their denial.

Once this Court determines that the Amended Findings of Fact and Conclusions of Law are adequate, Petitioner must accept the denial of his permit application. Although the Board needed to issue a written decision that set forth their reasons for denial, the Board has discretion to deny conditional use permit applications so long as their reasoning is not completely erroneous. Absent such a finding, the Court cannot

---

[1] The terms "conditional use permit" and "special use permit" are synonymous. *Taylor v. Canyon County Bd. of Com'rs,* 147 Idaho 424, 435, 210 P.3d 532, 543 (2009). Because Teton County uses "conditional" rather than "special" I will refer to them as conditional use permits.

interfere with the Board's decision. Furthermore, even if the Court could say that the decision was erroneous, the Court still cannot interfere with the Board's decision unless Petitioner proves that a substantial right has been prejudiced, a right that is separate and apart from the Board's issuance of a written decision. The CUP denial only affects Petitioner's ability to construct a building that is 75 feet high. Petitioner is still free to operate a concrete batch plant, it just cannot be 75 feet tall. Therefore, Petitioner cannot say (and has not said) that a substantial right has been prejudiced.

Because conditional use permits are zoning decisions, the comprehensive plan must be followed. Analyzing the conditional use permit application for conformance with the comprehensive plan is not only reasonable, but necessary under the law. Caselaw is clear that before a CUP can be granted it must be found that it does not conflict with the comprehensive plan; visionary goals, aesthetics and symmetry are all proper considerations when deciding whether to grant a conditional use permit.

The BOCC properly analyzed the conditional use permit application at length, they had a long public hearing on the application and their Amended Findings list several valid reasons for their denial, any one of which could stand alone as a basis to deny and all of which are logical and supported by substantial evidence. Furthermore, their denial does not impair a substantial right of Petitioner. Obviously Petitioner wants a different answer then the County has been giving him for two years; but the County's answer remains the same and it is an appropriate answer.

II. ARGUMENT

A. THE AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE ADEQUATE

i. The Amended Findings of Fact Comply with Idaho Law

Teton County followed the standards dictated by statute and case law when it drafted its Amended Findings of Fact and Conclusions of Law. The section of the Local Land use Planning Act (LLUPA) which describes written Findings 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 statutory provisions, pertinent constitutional principles and factual information contained in the record.

Idaho Code § 67-6535(b). Court cases provide further insight into Findings of Fact and Conclusions of law, stating that they should reveal "the underlying facts or policies that were considered . . .." *Workman Family Partnership v. City of Twin Falls,* 104 Idaho 32, 38, 655 P.2d 926, 932 (1982). Written Findings are supposed to provide insight into the County's decision. *Id.* The County's written decision provides this insight. The Board of County Commissioners weighed the evidence before them in light of the relevant law and explained their belief as to why a height of 75 feet is not conditionally permitted, why a 75 foot height could not be granted pursuant to specific conditions listed in the ordinance, why a height of 75 feet in that area conflicted with the comprehensive plan, and why a height of 75 feet was not compatible with the surrounding properties, uses and neighborhood. The BOCC also explained that they were presented with no means nor could they craft any conditions that would adequately protect the area or insure that the 75 foot tall building was compatible with the neighborhood. They also explained their

belief that granting a CUP in this instance would violate State law, but they did not rely upon this as their reason for denial since the application already failed at least one State or local requirement for CUP granting.

In the *Workman Family Partnership* case the only "findings" were a letter of denial to the applicant signed by the Community Development Director which stated:

> Reasons for the refusal to rezone are as follows:
> 1. Too great of change from an R-2 Zoning District to a C-1 Zoning District.
> 2. Residential property to the south of the proposed mall would be adversely affected by devaluation of property values.
> 3. A rezone would violate the integrity of existing residential zoning districts."

Id. at 37. The Court determined that this letter did not constitute Findings and thus remanded down for adequate findings of fact and conclusions of law to be prepared. "Nothing in the letter reveals the *underlying* facts or policies that were considered by the Council. The reasons listed in the zoning action sheets are likewise conclusory, and they provide very little *insight* into the Council's decision." *Id.* at 38 (emphasis added). The Court in *Workman* clearly does not think that an unofficial letter could serve as a governing board's findings. But the Court made it clear that by asking for proper Findings it was not setting a legal standard that would be difficult for governing bodies 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 32, 37 655 P.2d 926, 931 (1982) (emphasis added); *quoting* South of Sunnyside Neighborhood League v. Board of

Commissioners, 280 Or. 3, 569 P.2d 1063, 1076-77 (1977). The Court is looking for the reasoning behind the decision, the information that is not apparent in the oral decision. In many other cases the Supreme Court has found adequate Findings that are much less detailed and insightful than the ones at issue. *See Cowan v. Board of Com'rs of Fremont County*, 148 P.3d 1247, 1257+, 143 Idaho 501, 512 (2006) ("... the Board's written findings and conclusions did not violate Cowan's due process rights.)

Teton County's Amended Findings thoroughly explain their reasons for denying the CUP application. They analyze and consider the stated purpose of the Driggs Ordinance, and explain the rationale for their decision based on Chapter 4, Section 2 of the Driggs Ordinance dealing with Conditional Use permits; Chapter 2, Section 13 of the Driggs Ordinance dealing with the M-1 zone; the Driggs Comprehensive Plan; as well as State law. The County's Amended Findings take the points of law provided by State Code and local ordinance and apply them to the facts in the application and the evidence provided at the public hearings. The County's Findings provide conclusions, but only after they consider, at length, the underlying facts and policies pertinent to the application. Petitioner's contention that the Findings are deficient is based solely upon their negative result (denial), not upon their application of fact to law.

ii. THE BOARD'S DECISION WAS BASED ON SUBSTANTIAL AND COMPETENT EVIDENCE

The County's decision was rational and justifiable. Petitioner contends that the County's interpretation of its own ordinances is flawed.[2] Petitioner obviously disagrees with the outcome of the County's analysis, but this does not mean that their analysis is

[2] Per Title 7 of the Teton County Code the City of Drigg's zoning ordinances and comprehensive plan were adopted by the County for the Drigg's area of impact.

wrong. There is a strong presumption of favoring the validity of the actions of zoning boards, which includes the application and interpretation of their own zoning ordinances. *Howard v. Canyon County Bd. of Comm'rs,* 128 Idaho 479, 480, 915 P.2d 709, 711 (1996). Review of the Board's action is subject to the requirements of I.C. § 67-5279. *Taylor v. Canyon County Bd. of Com'rs,* 147 Idaho 424, 431, 210 P.3d 532, 539 (2009)

> When the agency was required by the provisions of this chapter or by other provisions of law to issue an order, the court shall affirm the agency action unless the court finds that the agency's findings, inferences, conclusions, or decisions are:
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) not supported by substantial evidence on the record as a whole; or
> (e) arbitrary, capricious, or an abuse of discretion.

Idaho Code § 67-5279(3). In his brief, Petitioner appears to argue that the Amended Findings violate (d) and (e) above.

The Board's decision was supported by substantial evidence. Substantial and competent evidence is "relevant evidence which a reasonable mind might accept to support a conclusion." *Lane Ranch P'ship v. City of Sun Valley,* 144 Idaho 584, 590, 166 P.3d 374, 380 (2007) (citing *Lamar Corp. v. City of Twin Falls,* 133 Idaho 36, 43, 981 P.2d 1146, 1153 (1999)). The main fact before the BOCC was Petitioner's proposal to build a structure 30 feet higher than the any other building in the vicinity. The BOCC was not persuaded by the applicant's assertions that the height would not impact the community and that the building would essentially "blend in". In their Amended Findings the BOCC analyzed the application in light of all the relevant laws and all the evidence submitted by the applicant and others through written and oral comment and reached a decision based upon consideration of all the facts and law. A reasonable mind

would accept the Board's findings as adequate to support their conclusion that the CUP not be granted.

The Board's decision does not have to be the only possible conclusion that could be reached from the facts presented. Even if the matters presented to the Board could have been decided differently, the law is clear that the reviewing Court cannot substitute its own judgment for that of the Board. "Substantial and competent evidence sufficient to support factual determinations made by the Board of County Commissioners in zoning cases need not be uncontradicted, nor must it necessarily lead to a certain conclusion; it need only be of such sufficient quantity and probative value that reasonable minds could reach the same conclusion as the fact finder". *Spencer v. Kootenai County*, 145 Idaho 448, 456,180 P.3d 487, 495 (2008). Even where there is conflicting evidence the County's determinations are binding on the court. *Lane Ranch P'ship v. City of Sun Valley,* 144 Idaho 584, 590, 166 P.3d 374, 380 (2007).

> While there was disputed evidence on both sides of this issue, it is not this Court's duty, sitting in its appellate capacity, to weigh the evidence in this matter and re-determine the facts. Again, the standard governing judicial review in a case involving the LLUPA (local Land Use Planning Act) provides that this Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. Idaho Code § 67-5279(1). Rather, this court defers to the agency's findings of fact unless they are clearly erroneous.

Fischer v. City of Ketchum, 141 Idaho 349, 109 P.3d 1091 (2005)."When deciding whether a decision is supported by substantial evidence pursuant to I.C. § 67-5279(3)(d), a court cannot substitute its judgment for that of the board." *Wohrle v. Kootenai County,* 147 Idaho 267, 207 P.3d 998, 1005 (2009).[3] "In reviewing an agency's findings of fact,

[3] Kootenai County's findings were as follows:
5.01 The granting of the variance requested in this application would not be in conformance with Kootenai County Zoning Ordinance No. 348, Section 30.03, Section 30.02 and Idaho Code § 67-6516. The evidence presented

the court does not substitute its judgment for that of the agency as to the weight of the evidence presented." *Friends of Farm to Market,* 137 Idaho at 196, 46 P.3d at 13. The Court in *Angstman v. City of Boise* found that there was conflicting evidence before the City Council regarding the adequacy of a parcel that was the subject of a CUP application, but refused to reverse findings that were clear, dispositive and supported by the record. *Angstman v. City of Boise*, 917 P.2d 409, 128 Idaho 575, 579 (1996). The Court stated the standard of review of an agency's findings as follows:

> [A] court reviewing an administrative decision pursuant to the IAPA may reverse or remand for further proceedings only if substantial rights of the appellant have been prejudiced. I.C. § 67-5279(4); *Jefferson County v. Eastern Idaho Regional Medical Center,* 127 Idaho 495, 497, 903 P.2d 84, 86 (1995). There is a strong presumption favoring the validity of the action of a zoning board. *South Fork Coalition v. Board of Commissioners of Bonneville County,* 117 Idaho 857, 860, 792 P.2d 882, 885 (1990). The party attacking a zoning decision bears the burden of proving that the zoning ordinance was applied improperly. *Sprenger,* 127 Idaho at 586, 903 P.2d at 751. The reviewing court must apply a presumption of validity afforded to the zoning board when considering the adoption, interpretation and application of zoning ordinances by the board. *South Fork Coalition,* 117 Idaho at 860, 792 P.2d at 885.

Angstman v. City of Boise, 917 P.2d 409, 128 Idaho 575, 577-578 (1996). The County's denial of the CUP must be upheld according to Idaho law.

---

regarding the Applicants' inability to construct structures on the steep topography of the subject parcel does show that an undue hardship exists. However, this request fails to meet the requirement of public interest and the intent of the zoning ordinance, specifically Section 30.03(d). The issuance of variances that not only encroach into the required setback but also the lakebed is not in the public interest and would allow a benefit that is not afforded to other property owners fronting Coeur d'Alene Lake.

5.02 The granting of the variance requested in this application does not meet the requirements of Idaho Code § 67-6516 because it would serve to legitimize the Applicants' construction of decks without required building permits, which would be considered a special privilege.

5.03 The requested variance does not conform to Kootenai County Zoning Ordinance No. 348 and Idaho Code § 67-6516 because the requested variance is not necessary to accommodate the recreational use of the property and would be detrimental to surrounding properties and the public welfare if zero setbacks and lake encroachments were to be allowed, even by special permit.

The BOCC's written decision explains at length how it reached the conclusion that the CUP application must be denied. In their Amended Findings they considered every aspect of local and State law surrounding CUPs, they explained the law and the facts and gave a full explanation of why those facts led to their decision. A decision is not arbitrary and capricious if it is "sufficiently detailed to demonstrate that it considered applicable standards and reached a reasoned decision .." *Brett v. Eleventh Street Dock Owners,* 141 Idaho 517, 523 112 P.3d 805 (2005) They took the law and applied reason and came to a conclusion, thus it cannot be said that their decision was arbitrary or capricious.

> So long as the Board's "findings, conclusions and decision are sufficiently detailed to demonstrate that it considered applicable standards and reached a reasoned decision, we [will] find that the decision was not arbitrary and capricious and was based on substantial evidence in the record."

Terrazas v. Blaine County ex rel. Bd. of Com'rs, 147 Idaho 193, 204, 207 P.3d 169, 180 (2009); *citing* I.C. § 67-6535(a-b) and *Brett v. Eleventh St. Dockowner's Ass'n, Inc.,* 141 Idaho 517, 523, 112 P.3d 805, 811 (2005). The Board of County Commissioners had many concerns which were outlined in their Findings of Fact and Conclusions of law. The bottom line for this Court is that the Board's Findings are supported by substantial, competent evidence in the record and their decision must be upheld.

B. THE BOARD'S DECISION MUST BE AFFIRMED UNLESS APPLICANT DEMONSTRATES THAT SUBSTANTIAL RIGHTS HAVE BEEN PREJUDICED

Finally, even if the Board's decision had not been based on substantial evidence or was otherwise invalid under I.C. § 67-5279(3), I.C. § 67-5279(4) states: "Notwithstanding the provisions of subsections (2) and (3) of this section, agency action shall be affirmed unless substantial rights of the appellant have been prejudiced." This

section of the Code has often been quoted and used by the Supreme Court. *Wohrle v. Kootenai County*, 147 Idaho 267, 207 P.3d 998, 1006 (2009); *citing Lane Ranch P'ship v. City of Sun Valley,* 144 Idaho 584, 591, 166 P.3d 374, 381 (2007); *see also Dry Creek Partners, LLC, v. Ada County Com'rs, ex rel. State*, 148 Idaho 11, 217 P.3d 1282, 1287 (2009); *In re Idaho Dept. of Water Resources Amended Final Order Creating Water Dist. No. 170,* 148 Idaho 200, 220 P.3d 318, 323 (2009); *Sanders Orchard v. Gem County,* 137 Idaho 695, 52 P.3d 840 (2002). The legislature is very clear that they do not intend agency action to be overturned unless there has been actual harm to a fundamental right. The code section in LLUPA dealing with Findings of Fact and Conclusions of law parrots the language found in the Idaho Administrative Procedure Act:

> Only those whose challenge to a decision demonstrates actual harm or violation of fundamental rights, not the mere possibility thereof, shall be entitled to a remedy or reversal of a decision.

Idaho Code § 67-6535(c). In the *Wohrle* case the Court determined that the denial of a variance request did not deprive the applicant of any substantial rights because the applicant was "still able to use their property as permitted under state laws and regulations and county ordinances-all of which were in effect when Respondents purchased their properties." *Id.* Although the applicants could not build without a variance, the Court determined that they were "still able to put their property to reasonable use by using and enjoying a dock on Coeur d'Alene Lake, so no substantial rights have been prejudiced." *Id.* at 1007. In the present case, Petitioner purchased a property that was zoned C-3. He obtained a zone change to M-1 so that he could operate a cement batch plant. No substantial rights of Petitioner's have been prejudiced because Petitioner is able to conduct a myriad of activities on his property. Most significantly,

Petitioner has been able to operate a concrete batch plant whose height exceeds 45 feet for two and a half years. Petitioner was permitted to operate this tall but temporary facility for a period of 18 months beginning August 31, 2007 after which the County had the right to revoke the authority to operate the temporary facility. The County has allowed the facility to remain operational.

Thus, regardless of whether the Board of County Commissioner's actions meet the standard set forth in Idaho Code § 67-5279(3), the district court must affirm the board's action "unless substantial rights of the appellant have been prejudiced." I.C. § 67-5279(4); *Taylor v. Canyon County Bd. of Com'rs*, 147 Idaho 424, 431, 210 P.3d 532, 539 (2009) ("It is the burden of the party contesting the board's action ... to first illustrate how the board erred in a manner specified under I.C. § 67-5279, and then establish that a substantial right has been prejudiced." *Citing Druffel v. State, Dept. of Transp.,* 136 Idaho 853, 855, 41 P.3d 739, 741 (2002); Johnson v. Blaine County, 146 Idaho 916, 920 204 P.3d 1127, 1131 (2009); *Marcia T. Turner, LLC v. City of Twin Falls*, 144 Idaho 203, 208, 159 P.3d 840 (2007) ([L]and-use decision must be upheld if substantial rights of the appellant have not been prejudiced.); *Lane Ranch P'ship v. City of Sun Valley,* 144 Idaho 584, 590, 166 P.3d 374, 380 (2007)) (A party appealing a county board of commissioners' decision must first show that the board "erred in a manner specified in Idaho Code § 67-5279(3), and then it must show that a substantial right has been prejudiced.") Furthermore, it is the burden of the party contesting the board's action to prove that a substantial right has been prejudiced. Petitioner has not even raised the subject, much less proven that a substantial right has been prejudiced.

Although the Amended Findings are adequate, even if they were not this is not the "substantial right" that is envisioned by I.C. § 67-5279(4). As stated above, a Board's zoning decision can only be overturned where the petitioner first demonstrates that the Findings of Fact and Conclusions of Law violate I.C. § 67-5279(3) and then additionally proves that a substantial right has been prejudiced. Again, Idaho Code § 67-5279(4) states: "Notwithstanding the provisions of subsections (2) and (3) of this section, agency action shall be affirmed unless substantial rights of the appellant have been prejudiced." The "notwithstanding" language is there to show that *regardless* of the inadequate Findings described in subsection (3), the petitioner must prove that a substantial right has been prejudiced. The inadequate findings cannot be this substantial right, otherwise there would be no second step and no "notwithstanding" language. Thus, Petitioner must show that a substantial right was prejudiced in order for the court to take any action other than to affirm the Board's decision. Petitioner has made no such showing.

C. THE BOARD OF COUNTY COMMISSIONERS HAD DISCRETION TO DENY

Both the County Code for the Driggs Area of Impact[4] and the Idaho Code[5] provide that a conditional use permit (aka special use permit) "may" be authorized under certain circumstances. They do not state that a conditional use permit "shall" be granted

---

[4] 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. Driggs Ordinance 275-07, Chapter 4, Section 2(a)(1) (emphasis added).
* The County adopted the Drigg's Code for the area of impact.

[5] 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. I.C. § 67-6512(a) (emphasis added).

if those circumstances are proven at a public hearing. The use of the word "may" rather than the word "shall" clearly gives the governing board discretion in determining whether to grant an application. *Walborn v. Walborn*, 120 Idaho 494, 501, 817 P.2d 160, 167 (1991); *citing Saxton v. Gem County,* 113 Idaho 929, 750 P.2d 950 (1988); *Marks v. Vehlow,* 105 Idaho 560, 671 P.2d 473 (1983); *State v. Bunting Tractor,* 58 Idaho 617, 77 P.2d 464 (1938); *State v. Aubert,* 119 Idaho 868, 811 P.2d 44 (Ct.App.1991); *Frazier v. Neilsen & Co.,* 115 Idaho 739, 769 P.2d 1111 (1989) (Where a statute used the word "may" the court held that, "If the statute was intended to provide exclusive remedies, it would have used mandatory 'shall' language, rather than the permissive 'may.' "). "The use of the word "may" shows that the City Council had discretion regarding the decision to grant or deny the special use permit." *Marcia T. Turner, LLC v. City of Twin Falls,* 144 Idaho 203, 211-212, 159 P.3d 840, 848-849 (2007). According to the clear wording of the statute, the governing body may, in its discretion, choose to deny a conditional use. *Davisco Foods Intern, Inc. v. Gooding County*, 141 Idaho 784, 788, 118 P.3d 116, 120 (2005).

Even absent the clear language of the Idaho Code and the Driggs ordinance the general rule of thumb is that there is discretion in quasi-judicial acts. For the purpose of judicial review, the grant or denial of a conditional permit is a quasi-judicial act within the discretion of the governing body. 3 Rathkopf's The Law of Zoning and Planning § 61:47 (4th ed.). Although the Driggs ordinance does not establish definite standards for approval "conformity with the express standards does not mandate approval of the application." *Id.*

> The courts have the power and duty to ask the board for its reasons, so as to determine whether they were lawful ones or such as reasonable minds could

> act on. For a court to say that those reasons are not good enough would mean that the Judges have taken over the duties and powers of the board. 'Special exception' disputes are to be resolved by the common-sense judgments of representative citizens doing their best to make accommodations between conflicting community pressures, and for the courts to intervene, in the absence of clear illegality, would be contrary to settled and practical necessities of zoning procedure.

Id. The Commissioners job is not an easy one. Without any special training they must deal with a myriad of issues that are often replete with conflicting community pressures. In the present case they had neighbors, community members and advocacy groups voicing opposition to the CUP application. They also had the applicant, a sound businessman and his recognized land use attorney, pushing for its approval. The BOCC is elected by the citizens of the County to balance these pressures and reach a decision: that is their job. The 2008 elections prove that the community supports their decision making capability and absent clear illegality this Court must as well. The reasons stated in the Board's Amended Findings of Fact and Conclusions of Law are ones that reasonable minds could act upon. There are over 6 single spaced pages of reasons why the Board felt compelled to deny the application, including those outlined in Idaho Code § 67-6512(a) and the City of Driggs' Ordinance 274-07.

D. DENIAL OF A CONDITIONAL USE PERMIT APPLICATION IS MANDATORY IF CERTAIN CONDITIONS CANNOT BE MET.

Allowing a permit is discretionary, but denying it can be mandatory. "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." Driggs Ordinance 275-07, Chapter 4, Section 2(a)(1) (emphasis added). In its Findings of Fact and Conclusions of

Law the County found that it 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. The conditional use permit application requested a height of 75 feet in a neighborhood where the surrounding properties all maintain a maximum height of 45 feet. The Board found that it could not identify a way to mitigate the impact of a 62 foot wide, 75 foot tall building; a 75 foot tall building would stand out high above the existing skyline in an area where there are low level single story buildings and no projections above the building lines. The applicant did provide "line of sight" drawings which the Commissioners found unpersuasive. "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." *Burns Holding, LLC CUP Denial Amended Findings of Fact and Conclusions of Law,* Footnote 3. Although the Zone change application imposed some conditions regarding the change in zone to M-1, obviously none of these were crafted to address the CUP application for a 75 foot tall building that followed. Because they were not presented with any plausible method to protect neighboring properties or any way to make the height compatible with the surrounding properties, the Commissioners had no choice but to deny the application.

E. THE BOARD OF COUNTY COMMISSIONERS PROPERLY CONSIDERED AESTHETICS WHEN DECIDING WHETHER TO GRANT BURN'S APPLICATION FOR A CONDITIONAL USE PERMIT

In the 2007 Idaho Supreme Court case *Marcia T. Turner, LLC v. City of Twin Falls*, Marcia T. Turner, L.L.C. (Turner) applied for a special use permit to operate a

primary television station with wireless communication facilities. After a hearing and consideration of the matter, the City Council decided that the proposed use was not consistent with the provisions of the Comprehensive Plan, that it was not consistent with the zoning provisions of the City Code, and that it would be unsightly in the proposed location. One of the Petitioner's contentions on review was that these findings were not supported by substantial evidence because the Council based decision based upon aesthetics. Petitioner asserted: "[I]t appears the City Council was concerned strictly with aesthetics and nothing more, as evidenced by the Findings of Fact and Conclusions of Law." *Marcia T. Turner, LLC v. City of Twin Falls*, 144 Idaho 203, 211, 159 P.3d 840, (2007). The Court was clear in its answer that aesthetics most certainly can be a reason for the denial of a CUP:

> The City Council was also entitled to consider aesthetics when deciding whether to grant Turner's application for a special use permit. As this Court stated in *Lamar Corp. v. City of Twin Falls,* 133 Idaho 36, 41, 981 P.2d 1146, 1151 (1999) (citations omitted), with respect to billboards: "A city's appearance is a substantial government interest, and cities may enact zoning ordinances to preserve aesthetics. A city may regulate the construction and placement of billboards for the purpose of preserving aesthetics even though aesthetic judgments are 'necessarily subjective.' " Likewise, in *Williamson v. City of McCall,* 135 Idaho 452, 19 P.3d 766 (2001), we upheld a district court's determination that landowners had failed to prove that their request to separate their property from the city would not materially mar the symmetry of the city. ... The City Council did not abuse its discretion in denying the special use permit based upon its finding that "[a] 120' lattice transmission/receiving tower [at a gateway entrance to the city] would be unsightly and appear to be out of place in this area."

Id. at 212. The present case is very similar to *Turner*. Like the Twin Falls City Council the BOCC denied the CUP in part because it would be unsightly, blocking the view of the mountains and marring the North entrance to the City and it could not be integrated with the other buildings in the area. The City Council in Turner

relied exclusively on the fact that the tower would "be out of place", whereas the BOCC had five other self supporting reasons for denial. If the Supreme Court determined that the Twin Falls City Council could base its determination of denial on a finding that something would be unsightly, it cannot be said in the case at hand that the BOCC improperly used aesthetics as one of five reasons for denial.

F. PUBLIC COMMENT SHOULD BE CONSIDERED WHEN IT IS PROVIDED

In a quasi-judicial agency hearing the public is allowed to comment and the governing board should listen and consider any public comment that is given. Petitioner argues in his brief that the written comments and oral testimony at the hearing should have been disregarded because they lacked specific facts. The Supreme Court was very clear in the *Turner* case that a public hearing is "not a trial where the weight of the evidence presented determined the result." *Marcia T. Turner, LLC v. City of Twin Falls*, 144 Idaho 203, 211, 159 P.3d 840, 848 (2007). In support of its assertion that the City Council's decision was not supported by evidence in the record, Turner had argued, "What more compelling proof is there than not one citizen appeared and objected to the tower during the Planning and Zoning hearings and not one person appeared before the City Council, even after notice to the entire Magic Valley area, to voice any objection to the tower?" *Id.* In response to these arguments the Court stated: "Turner's argument misapprehends the nature of the public hearing.." *Id.* at 211. The Court went on to remind the Petitioner that the decision to deny a CUP is purely discretionary. In the present case, advocacy groups and individuals actually did comment in writing and orally at the hearing. If a City Council has the discretion to deny an application despite a lack

of community opposition, the Board of County Commissioners certainly had the right to exercise their discretion and deny an application when faced with community opposition.

District courts acting in their appellate capacity are not authorized to interfere with a governing body's decision making process and a part of that decision making process is listening to the thoughts and concerns of the public.

> To sanction such interference in the ordinary case would undermine the important role local agencies play in the land use planning process and possibly negate meaningful participation by the public in the decision making process.

Daley v. Blaine County, 108 Idaho 614, 618, 701 P.2d 234, 238 (1985) [6]; *quoting Workman Family Partnership v. City of Twin Falls,* 104 Idaho 32, 39, 655 P.2d 926, 933 (1982). In *Daley,* the petitioner sought a conditional use permit in order to move a pre-existing Victorian style two-story home onto a lot in a flood plain management district. The Court, noting that they were acting only in an appellate capacity, concluded that the Commissioner's decision was sustainable "at least on some of the grounds set out in the decision." *Id.* at 617-618. In the present case, the Commissioner's received numerous comments from the public stressing reasons that the CUP should be denied. Public

---

[6] Blaine County's Findings were as follows: 1. Approval of the reduced setbacks would affect the BLM's and public's use of the affected adjacent property. 2. There are serious questions which have been unanswered by the applicant and by the applicant's engineer concerning the location of the well and the required and actual distance between it, the property line, and the proposed septic system. 3. The reasons for adopting and maintaining the 100 foot setback from Highway 75 (allowing area for future highway expansion, separating adjacent lot activities and congestion from highway through-traffic activity, and maintaining the visual corridor of Highway 75) apply to this lot although the requirement came into effect after approval of Lake Creek Subdivision. 4. The location of a historic house in a precarious floodplain situation and on a lot which is below the elevation of the floodplain and which is protected from flooding only by the adjacent BLM parking lot is contrary to the county's established policies for the floodplain management district. 5. The lot (being .3 acre in area) is too small for the size house and garage being proposed to be placed on it, as evidenced by the minimal setbacks requested. 6. The location of the house and garage five feet from the property line with the BLM would cause the house to be adversely affected by the future development of the BLM property for public use.
7. From the site information presented by the applicant, the lot does not appear to be buildable and cannot be determined to be buildable without detailed engineering data. 8. The Board of County Commissioners of Blaine County does not wish to approve a building site that will need future protection from flooding.

comment is a necessary part of the hearing process, it is not just there for show, but is there to provide "a meaningful chance to comment on the CUP's impact on community or other facts affecting surrounding property." *Fischer v. City of Ketchum*, 141 Idaho 349, 355, 109 P.3d 1091, 1097 (2005). The Supreme Court has been very clear that public input heard and weighed by an elected board is valuable, yet Petitioner feels that unless the public can testify to a certain legal standard that their opinions should not be considered. Petitioner does state on page 21 of his brief that the public's concerns may be relevant at a rezone hearing. As discussed below, a CUP hearing is akin to a rezone and thus the comments of the public are even more relevant.

G. THE COMPREHENSIVE PLAN MUST BE FOLLOWED IN ZONING DECISIONS

i. Conditional use permits are zoning decisions.

The Local Land Use Planning Act's requirement of consistency with the comprehensive plan applies to zoning ordinances and conditional use permits (which are in essence "mini-zones") and not to other land use actions such as subdivisions. Idaho Code §§67-6511, 67-6512(a), 67-6513. Conditional use permits are zoning decisions, subdivisions are not. *Eacret v. Bonner County*, 139 Idaho 780, 786, 86 P.3d 494, 500 (2004). The Board of County Commissioners is specifically directed by Idaho Code § 67-6512(a) and by the Driggs Ordinance 274-07 Chapter 4, Section 2(A)(1) to find that the proposed conditional use is not in conflict with the comprehensive plan. Courts have consistently held that when evaluating a conditional use application conformance with the comprehensive plan must be determined. *Evans v. Board of Com'rs of Cassia County Idaho*, 137 Idaho 428, 434, 50 P.3d 443, 449, (2002).

Petitioner continues to misinterpret the *Urrutia v. Blaine County* case, believing it supports their proposition that the County erred by addressing compliance with the comprehensive plan in their Findings of Fact and Conclusions of Law. The *Urrutia* case is easily distinguished from the present case because it involved a subdivision application, not a conditional use permit. It is well established that a comprehensive plan is not a legally controlling law when governing bodies are analyzing subdivision applications. *Bone v. City of Lewiston,* 107 Idaho 844, 850, 693 P.2d 1046, 1052 (1984); *Urrutia v. Blaine County,* 134 Idaho 353, 357-358, 2 P.3d 738, 742-743 (2000). While it is true that the comprehensive plan plays a limited role in subdivision applications, its role in zoning issues is different - zoning decisions must be in accordance with the comprehensive plan. I.C. § 67-6511; *State v. City of Hailey,* 102 Idaho 511, 514, 633 P.2d 576, 580 (1981). "Planning is a determination of public policy, and zoning, to be a legitimate exercise of police power should be in furtherance of that policy." *Giltner Dairy, LLC v. Jerome County*, 145 Idaho 630, 633, 181 P.3d 1238, 1241 (2008). For subdivisions, the comprehensive plan guides the interpretation and exercise of a specific authority articulated in the ordinance but it cannot be used to create new requirements or obstacles at odds with land uses permitted under the ordinance. The applicant in *Urrutia* applied to subdivide property and his application complied with Blaine County's zoning and subdivision ordinances. *Id.* at 356. Because subdividing land into twenty-acre lots for single family residences was specifically permitted, the comprehensive plan could not alone be used to deny the applicant what they were otherwise by law permitted to do. But, conditional use permits are different. Their whole purpose is to allow something that is not otherwise permitted by law. Because there is no underlying zoning that

affects them they are discretionary zoning decisions. In *Howard v. Canyon County Bd. of Com'rs*, the applicant applied for a CUP and was denied. He argued that he satisfied all reasonable conditions of the Canyon County CUP ordinance and thus should get a CUP. The Court disagreed. *Howard v. Canyon County Bd. of Com'rs*, 128 Idaho 479, 481, 915 P.2d 709, 711 (1996). The Court concluded that the use was prohibited by the comprehensive plan and that this was a proper reason for denial.

> Moreover, we also affirm the decision that Howard's proposal is in conflict with the Comprehensive Plan. ... Substantial and competent evidence supports the Commissioners' conclusion that approval of Howard's subdivision in the middle of a large agricultural tract would be the "scattered nonfarm" use prohibited by the Comprehensive Plan and would cumulatively affect the area's character in conflict with the Comprehensive Plan.

Id. at 482.

For subdivision applications there is no need to address the comprehensive plan, because LLUPA mandates no "accordance" or "not in conflict" requirement for them. Section 67-6535 requires that the comprehensive plan be addressed where "appropriate" and "applicable," that is, in the case of a rezone or a conditional use permit. The reason for the special treatment of conditional use permits is that, by their nature, they allow uses not in accordance with the normal zoning for an area. Thus, conditional use permits are, in essence, mini-zones. Therefore, the consideration given to whether the zoning for a property is in accordance with the comprehensive plan must be re-visited when an applicant seeks a conditional use permit.

ii. Compliance with the comprehensive plan is a question of fact for the governing body and their decision can only be overturned if it is proven to be clearly erroneous.

When analyzing zoning requests a determination of compliance with the comprehensive plan must be made. *Sprenger, Grubb & Associates, Inc. v. City of Hailey,* 133 Idaho 320, 986 P.2d 343 (1999). Whether approval of a CUP would conflict with the comprehensive plan is a question of fact that must be addressed and answered in factual findings. *Evans v. Teton County,* 139 Idaho 71, 76 73 P.3d 84, 89 (2003). Because the issue of accordance with the comprehensive plan is one of fact, the city or county adopting the zoning ordinance has considerable leeway in determining whether the requirement is met. *Love v. Board of County Com'rs of Bingham County*, 108 Idaho 728, 730, 701 P.2d 1293 (1985)[7]. That determination can only be overturned by a

---

[7] The *Love* cases illustrate that the issue of accordance with the comprehensive plan is one of fact. At the first *Love* case (*Love* 1) it was determined that the initial findings were insufficient to support the commissioner's decision that a zone change was in accordance with the comprehensive plan. The issue was remanded and Bingham County Board of County Commissioners made and filed what the Court, in *Love 2,* called: "*extensive* additional findings."[7] *Id.* at 729 (emphasis added). The Court then determined that these "extensive" findings justified the Board's decision.

ADDITIONAL FINDINGS OF BOARD OF COMMISSIONERS OF BINGHAM COUNTY, IDAHO REGARDING THE PETITION FOR ZONE RECLASSIFICATION MADE BY W.W. HAVENS AND NORANDA MINING, INC. THE BOARD OF COUNTY COMMISSIONERS, OF BINGHAM COUNTY, STATE OF IDAHO, AFTER DUE DELIBERATION AND CONSIDERATION, HEREBY FINDS AS FOLLOWS:

1. The provisions of Chapter 3, Section I of the Bingham County Ordinance 80-1 (the Bingham County Zoning Ordinance) and Title 67, Chapter 65, of the Idaho Code have been complied with, to-wit:

(a) All due and legal petitions have been made,

(b) All due and legal notices have been given, and

(c) All due and legal hearings have been held.

2. After the holding of a public hearing in accordance with legal requirements the Planning and Zoning Board of Bingham County, Idaho, has recommended the granting of the Petition for a zone change on the real property described on Exhibit "A", attached hereto and incorporated herein by reference, from "A" Agricultural Zone, as described in Chapter 1, Section VI, of said Bingham County Zoning Ordinance, to "M" Manufacturing Zone, as described in Chapter 1, Section IX of said Bingham County Zoning Ordinance.

3. In a public hearing held in accordance with legal requirements on May 13, 1981, before the Board of County Commissioners, an opportunity was given to interested parties to express their views concerning the petitioned zoning change. All Commissioners were present at said public hearing.

4. That the following are goals of the Bingham County Comprehensive Plan.

(a) To promote and encourage economic growth;

(b) To encourage the location of industrial development on marginal agricultural ground;

reviewing court if it is obviously wrong. "Whether a zoning ordinance is "in accordance" with the comprehensive plan is a *factual question,* which can only be overturned where the fact found is *clearly erroneous.*" *Id.* at 731 (emphasis in the original). "[T]he determination of whether a zoning ordinance is 'in accordance with' the comprehensive

---

(c) That an adequate amount of suitable land should be zoned for light and heavy industry to insure new and expanding industries will develop in areas suitable for that use;

(d) Industries and other facilities should be encouraged to locate away from congested metropolitan areas;

(e) Consistent with human environmental values, sufficient economic growth should be promoted to provide full employment for present residents of the area and former residents who wish to return.

5. The Comprehensive Plan is a policy document intended to be used as a guide. It should be followed as closely as reason, justice and its own general character make practical and possible.

6. The Comprehensive Plan is not a precise plan and does not show nor intend to show the exact outline of use districts. It shows, rather, the general location, character and extent of such land use patterns.

7. That Bingham County has many unemployed residents who could benefit from the rezoning because of the potential job opportunities that would be provided.

8. That for every job created by such an industry, a potential of two or three more jobs would be created by service and related type occupations thereby reducing the unemployment of Bingham County and promoting the county's economic growth.

9. That said rezoning with the accompanying industrial development would result in an increase in the tax base of the county which would benefit the county as well as the Snake River School District.

10. That the capital outlay required for such an industry as well as its yearly operating budget would promote and benefit the economy of the county.

11. That there is an inadequate amount of suitable zoned for industry and that said rezoning is necessary to encourage industrial expansion in the county.

12. That the rezoning of the land in question involves marginal agricultural ground because of the many outcropings of rocks and the shallow topsoil.

13. That there exists suitable and adequate rail and road transportation as well as electrical power near the proposed site.

14. That the rezoning and the accompanying industry would not adversely affect electrical power availability to other residents and uses in the county.

15. That the Groveland Road would handle most of the traffic created by any new industry on the rezoned side and that said road is capable of handling the anticipated traffic adequately.

16. That cobalt is important to the Government of the United States in that it is a strategic metal to the United States.

17. The operation of the proposed plant is basically environmentally safe in that:

(a) There will be no discharge of water off the property;

(b) The tailings produced are not hazardous;

(c) There will be no significant air pollution;

(d) There will be no significant problem with the arsenic produced in that the arsenic produced is the most insoluble form and there will be no problems with it leaching into the soil;

(e) The site can be adequately reclaimed.

18. That the information supplied by the petitioners concerning the environmentally safe operation of the plant was supported by independent sources retained by the Board of County Commissioners.

BASED UPON THE FOREGOING FINDINGS, the Board of County Commissioners of Bingham County, State of Idaho, conclude that the proposed zone classification is justified and in the general welfare of the County; and, further, that it is in accordance with the intent and policy of the Comprehensive Plan and that there is good and compelling cause to adopt the Ordinance....

plan is one of fact. As a question of fact, the determination is for the governing body charged with zoning—in the present case the Board of County Commissioners." *Balser v. Kootenai County Bd. of Comm'rs,* 110 Idaho 37, 39, 714 P.2d 6, 8 (1986).

In the present case the County found that the proposed use was not in accordance with the Comprehensive Plan. The Plan states that the area North of Driggs was intended to be a gateway, that there should be a sense of arrival that was harmonious with the Tetons and surrounding mountains. The County could not rectify a 75 foot tall by 62 foot wide industrial building with the vision of the Area of Impact's Comprehensive Plan and therefore found that the proposed use conflicted with the plan. Unless the Court finds that this conclusion is "clearly erroneous" the decision to deny the CUP on the grounds that it conflicts with the Plan cannot be challenged successfully.

H. THE VARIANCE ISSUE IS PROPERLY ADDRESSED

i. The Board's Finding that Burns Should Have Pursued a Variance is not Foreclosed by the Court's Earlier Remand

For its first argument in its brief, Petitioner claims that the Board cannot raise the "variance argument" because to do so violates the law of the case doctrine. The authority relied upon for this assertion is *Urrutia v. Blaine County*. Once again, Respondent wonders if Petitioner has actually read the *Urrutia* case as it clearly declares that the law of the case is not applicable when a reviewing court remands a matter back for further findings: "The doctrine does not apply in the present case because the district judge did not announce some principle of controlling law; rather, he sent the case back for further factual findings." *Urrutia v. Blaine County*, 134 Idaho 353, 360, 2 P.3d 738 (2000). The same is true in the present case. The only disposition of the case was a remand to the BOCC for better Findings.

The Law of the Case doctrine states that: "where an appellate court states a principle of law in deciding a case, that rule becomes the law of the case and is controlling both in the lower court and on subsequent appeals as long as the facts are substantially the same." *Sun Valley Ranches, Inc. v. Prairie Power Co-op., Inc.* 124 Idaho 125, 129, 856 P.2d 1292, 1296 (Ct. App.1993) quoting *Office of State Eng'r v. Curtis Park Manor*, 101 Nev. 30, 692 P.2d 495, 497 (1985). In order to establish this precedent it must be a decision and it must be on an issue of law.

> The doctrine is well established in Idaho and is limited to the appellate court's *legal pronouncements*. It is similar to the doctrine of stare decisis, which requires that a *statement of law be necessary to the ultimate disposition of the case* in order to be binding on the lower courts. Otherwise, the statement is considered to be dictum and not controlling.

Id (emphasis added); citing *Frazier v. Neilsen,* 118 Idaho 104, 106, 794 P.2d 1160, 1162 (Ct.App.1990). In the present case, the District Court stated in its Decision that the variance struck the Court as unfair. The Court's feeling of fairness is not a legal pronouncement, nor did the Decision on Review result in an ultimate disposition of the case. Because there was no legal decision, the law of the case doctrine clearly does not apply.

ii. The Variance Issue has been Raised for Over Two Years and has been Continually Ignored by Petitioner.

For over two years the County has questioned whether petitioner's application should have been for a variance. On September 13, 2007, two months before the November 17, 2007 hearing where the CUP was denied, Petitioner appeared in front of the BOCC on a procedural issue regarding the CUP application. Two Driggs City residents had appealed the Driggs' City Planning and Zoning Commission's recommendation of approval of the CUP to the BOCC. At that hearing the BOCC

clarified that the Driggs' Planning and Zoning Commission's recommendation could not be appealed as it was merely a recommendation to the BOCC. While they were discussing procedure Chairman Young repeatedly questioned the nature of the application. "Well then, shouldn't we be hearing a variance?" 15:8-9. Mr. Burns responded: "No. The City of Driggs ... The City of Driggs has height variances as a CUP." 15:10,12-13. A little later Chairman Young again queried: "Then why aren't we hearing a variance?" 27: 8-9. Dale Storer, Petitioner's attorney during this entire process, stated that "in view of this confusion ... the only issue that is before this court [sic] is the question of whether or not a conditional use permit for the additional height should or should not be granted. That's the only issue." 28:18-23. Shortly after this statement Chairman Young again pointed out that everyone was using the terms CUP and variance interchangeably and Dale Storer responds: "I'm not much for labels. I think the question is can we build a plant 75 feet high, period. You put whatever label you want, but I think that's the issue." 30:22-25. It is obvious from these statements that Petitioner was aware that the County had doubts about the appropriateness of the application. Yet the Commissioners were repeatedly assured by the Petitioner and his attorney that there was no issue – that you could call it a CUP or a variance, the label did not matter. The confusion regarding whether the CUP application was being properly brought continued with references to "variance" occurring at least 20 times during the November 17, 2007 hearing.

> 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 stated in their Findings, the County was aware that the Driggs Area of Impact Ordinance may have caused confusion, but they tried to address that confusion several times during two public hearings where Petitioner was represented by competent counsel. That Petitioner chose to continue on with his CUP application was not solely the responsibility or fault of the Board.

In the County's initial brief for the first judicial review the question as to whether a CUP was the proper form of application for a height modification was also raised.

> What is significant about Petitioner's CUP application is that is 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 the height of buildings is defined as a variance.

Respondent's Brief, Page 9. The brief goes on to explain that a variance is much more difficult to obtain than a CUP; a variance requires a showing of hardship and a showing of physical constraint and a CUP does not. The absence of this showing is pointed out in the brief as one of several problems with the application. The appropriateness of the CUP application not a "new argument" as Petitioner has led this Court to believe, it has been raised from the beginning at every public hearing on the matter and in every brief written during the judicial review process.

iii. The Plain Language of a Local Ordinance must be Ignored when it Conflicts with State Law

Petitioner is correct, the law of statutory interpretation dictates that when a statute is ambiguous meaning and effect must be given to every word, clause and sentence. But, Respondent is not claiming that the Driggs ordinance is ambiguous and in need of

interpretation. Rather Respondent states a fact of law: "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). Statutory interpretation has nothing to do with conflict of laws. The Driggs Area of Impact ordinance is not ambiguous, it is clear -- clearly in conflict with State law. "[A] county ordinance cannot conflict with LLUPA." *Johnson v. Blaine County*, 146 Idaho 916, 925, 204 P.3d 1127, 1136 (2009) *citing In re Quesnell Dairy,* 143 Idaho 691, 694, 152 P.3d 562, 565 (2007); *see also Gumprecht v. City of Coeur d'Alene,* 104 Idaho 615, 618, 661 P.2d 1214, 1217 (1983). In *Johnson v. Blaine County* there was an issue regarding the appealability of a Board decision. The Blaine County ordinance provided for an appeal only upon a final decision whereas LLUPA allows for an appeal if as a result of a decision the developer can alter the land. "[I]t does not matter if the ordinance states that the issuance of the permit is or is not appealable. It is appealable under LLUPA." *Id.* Another on point case concerns an applicant who was denied a CUP for the operation of a towing business. The Shoshone County ordinance stated that an applicant had 60 days to appeal a Board decision, whereas LLUPA provided for only 28 days. The applicant filed a petition for judicial review within the 60 day period allowed for by local ordinance, but after the 28 day period provided for by State law. In response to his argument that his petition was timely the Court stated: "This argument is unmeritorious because the ordinance's provision allowing sixty days for a petition for judicial review conflicts with the twenty-eight-day limitation in I.C. § 67-6521(1)(d) and is therefore ineffective." *Arthur v. Shoshone County*, 133 Idaho 854, 861, 993 P.2d 617, 624 (Idaho

App.2000); citing *Envirosafe Serv. of Idaho v. County of Owyhee, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987).* The Court went on to state "A local ordinance that conflicts with a state law or is preempted by state regulation of the subject matter, is void." *Id.* Although the issue of estoppel was not raised, the Court indicated that it would be barred because the Petitioner's attorney was aware of the conflicting statute. *Id.* at 862. It is well settled law that you may not assert estoppel if you knew or should have known the truth. [8] In the present case, Petitioner's attorney cannot say that he unaware of the law or that he could not have discovered the law, especially when the issue was raised so many times in his presence and during briefing.

I. COMMISSIONER RINALDI'S SIGNATURE ON THE AMENDED FINDINGS DID NOT VIOLATE PETITIONER'S CONSTIUTIONAL RIGHT TO AN IMPARTIAL TRIBUNAL

Kathy Rinaldi's signature on the Amended Findings was inconsequential to the outcome of the Burns Concrete CUP application as she was one of three commissioners who signed the Amended Findings, and Commissioner Rinaldi did not participate in the decision to deny the conditional use permit application as she was not a commissioner at the time. As a present commissioner Kathy Rinaldi agreed with and signed the Amended Findings, but she was one of three decision makers so that any vote she had could be disregarded and the outcome be the same. Also, Kathy Rinaldi was not even present at the Board's November 9, 2009 regularly scheduled meeting where the remaining two commissioners approved the Amended Findings. Chairman Young and Commissioner Benedict were part of the discussion regarding the Amended Findings of

[8] The elements of estoppel are: (1) a false representation or concealment of a material fact with actual or constructive knowledge of the truth, (2) the party asserting estoppel did not know or could not discover the truth, (3) the false representation or concealment was made with the intent that it be relied upon, and (4) the person to whom the representation was made or from whom the facts were concealed, relied and acted upon the representation or concealment to his [or her] prejudice. *Regjovich v. First Western Investments, Inc.*, 134 Idaho 154,158, 997 P.2d 615, 619 (2000).

Fact and Conclusions of Law, Commissioner Benedict made the motion to approve the Amended Findings and Chairman Young seconded.

The Idaho Supreme Court has addressed the problem of Commissioner bias several times. In *Floyd v. Board of Comm'rs of Bonneville County, et al.*, 137 Idaho 718, 52 P.3d 863 (2002) the Court reviewed a decision of a Board of Commissioners regarding a road validation and found the bias of a commissioner who had spoken publicly about the public status of the road in question prior to the hearing sufficient to disqualify the commissioner. The Court nevertheless determined that due process would be satisfied by simply disregarding that commissioner's vote, which was not a "swing vote" among the three commissioners. *Id.* at 726.

> Initially, the court must determine whether a member with a disqualifying interest cast the decisive vote. If so, the ordinance must be invalidated. If the ordinance would have passed without the vote of the conflicted member, the court should examine the following three factors: (1) whether the member disclosed the interest or the other council members were fully aware of it; (2) the extent of the member's participation in the decision; and (3) the magnitude of the member's interest.

Id.; quoting Griswold v. City of Homer, 925 P.2d 1015 (Alaska 1996). Kathy Rinaldi did sign the Amended Findings, but she did not participate in the determination to approve the Amended Findings. Her signature on the Amended findings could simply be disregarded should the Court find that its presence affects Petitioner's constitutional rights in any way. Petitioner cites no legal authority, or any authority at all, for its contention that Kathy Rinaldi's signature on the Amended Findings somehow impaired Petitioner's constitutional rights, especially as she was not a commissioner at the time he was denied.

J. TETON COUNTY IS ENTITLED TO ATTORNEY FEES ON THIS REVIEW BECAUSE THE PETITION FOR REVIEW LACKS A REASONABLE BASIS IN FACT OR LAW

In Petitioner's Brief he claims that he should get attorney fees because the Board had earlier held that the rezone "expressly limited the building height to 45 feet. When confronted with the written transcript showing otherwise, the Board quietly dropped this conclusion in their next written findings." *Brief in Support of Second Amended Petition for Judicial Review* p. 30. The height of the building was a continuing theme throughout the Board's Amended Findings. What Petitioner represented to the Board at the rezone hearing was not dropped, but rephrased as was mandated by the Court when it remanded the case back to the Board for clearer Findings. The Board chose to not re-hash the fact that they were misled during the zone change in their Amended Findings; instead they provided deeper insight into their denial as asked by the Court. But, since Petitioner has raised the issue, the County feels compelled to clarify for the Court the claims made by Petitioner at the rezone hearing. The transcript clearly shows that Petitioner represented that his concrete batch plant would be 45 feet or less. At the February 26, 2007 zone change hearing Chairman Young asked: "So, you're talking about a rectangular building of what square footage and what height?" 25:7-9. Mr. Kirk Burns responded:

> We don't have that worked out. We're shooting to get the 45 foot limit. Concrete plants are difficult on that. We discussed the five and ten foot possible variance. We're going to come in looking for clearance (inaudible) and we are working on getting that plant to be within the restricted heights now.

25:10-16. Shortly after this Chairman Young stated:

> And I guess I am concerned about a 45 foot high building. I am trying to think of how high the biggest hangars at the airport are. I doubt any of them are over 35 feet, but that's just my guess. So, we're talking about a pretty big building. … What kind of building appearance are you envisioning?

31:10-18.

A voice, presumably Mr. Burns, replied:

> Well, it's going to be similar to what you see a hanger – it will look very similar to a hangar. *It will be small in size than a hangar, by – substantially.* ... There's a high part of the plant that's probably 30-by-40 maybe -- 30-by-40 that will be up in those upper areas, and the rest will be down probably in the 35 minus.

31:19-25; 32:1-5 (emphasis added). It is no wonder that the County noted in their initial Findings that the height of the building had been represented as 45 feet or less. Their underlying concern regarding the height of the building was apparent in the initial Findings, and it is also a part of the Amended Findings. Thus, no issue was covertly dropped (by the County at least) as Petitioner indicates. However, in considering an award of attorney fees the County urges to take this behavior into account – in this Second Judicial Review Petitioner has wasted this Courts and the County's time on irrelevant and misleading issues.

Throughout this process Petitioner has told only partial truths. In this Second Judicial Review, Petitioner again attempts to make the BOCC's raising of the variance argument appear disingenuous. As discussed above, the variance issue was raised throughout the process and is very familiar to Petitioner. Furthermore, far from being disingenuous, the BOCC continues to raise the variance issue because it is necessary to address the elephant in the room; to ignore a conflict with State law is disingenuous. The confusion that the County felt by the language in their adopted Driggs Ordinance is manifest throughout the hearings and yet they were repeatedly assured by Petitioner and his counsel that the only issue the Board should focus on was the granting of the CUP, that their confusion should be set aside as labels did not matter. In light of the fact that the Board had every reason to deny the CUP application, Petitioner's attorney is correct

in a manner, the label is somewhat superfluous. As has been demonstrated, the Commissioners' denial of the CUP application is valid - without the variance question being answered. Yet because the issue was raised throughout the process the BOCC felt it should be addressed in their written decision. In the First Judicial Review this Court felt that the County should be sanctioned for raising an issue that was part of the proceedings all along. Hopefully now that the Court has been better informed of the facts and law it will award the County its attorney fees because Petitioner has repeatedly ignored the facts and the law.

In support of his claim for attorney fees, Petitioner once again erroneously points to the *Urrutia* case. As explained in detail above, *Urrutia* is about a subdivision denial so its analysis of the use of Comprehensive Plans is completely distinguishable from the present case. I.C. § 12-217(1) states that the Court shall award attorney fees "if the party against whom the judgment is rendered acted without a reasonable basis in fact or law." Petitioner's Second Amended Statement of Issues on Judicial Review is comprised of frivolous and irrelevant questions on settled areas of law, and Petitioner's Brief, far from adding any backbone to these issues, raises additional issues that have no basis in fact or law. "Award of attorney fees incurred for appeal may be made if court is left with abiding belief that appeal was brought, pursued or defended frivolously, unreasonably or without foundation." *Moser v. Coca-Cola Northwest Bottling Co.*, 129 Idaho 709, 714, 931 P.2d 1227, 1232 (Idaho App.1997). Petitioner's only reason for bringing its Second Amended Petition is to force this Court into believing that the County did not have the right to deny the CUP even when all legal support says otherwise.

In its request for attorney fees Petitioner goes so far as to ask the Court to remand the case with instructions to the County to grant the CUP. Petitioner's reason for asking this of the Court is extremely disingenuous -- it wants the Court to take this unprecedented step to enable Petitioner to collect attorney fees. In support of its unusual proposal, Petitioner cites *Workman* and *Bonner General Hospital*, neither of which allow the Court to *order* a Board to grant a conditional use permit. In explaining why remand is appropriate in rezone cases the *Workmnan* court states:

> To hold otherwise would be to authorize the district court to substitute its judgment for that of the agency despite the express provision prohibiting such action in I.C. § 67-5215(g). Furthermore, this Court's decision in *Cooper* that a denial of a rezone application is a quasi-judicial act which requires procedural due process, cannot be read as authorizing district courts to interfere with the substantive decision making process in rezoning cases such as this one. To sanction such interference in the ordinary case would undermine the important role local agencies play in the land use planning process and possibly negate meaningful participation by the public in the decision making process.

Workman Family Partnership v. City of Twin Falls, 104 Idaho 32, 39, 655 P.2d 926, 939 (1982). *Bonner General Hospital,* 133 Idaho 7, 981 P.2d 242, (1999) is an indigency case which has received some negative treatment on this subject in the more recent case, *Mercy Medical Center v. Ada County, Bd. of County Commissioners of Ada County*, 146 Idaho 226, 192 P.3d 1050 (2008). Furthermore, the substantial right portion of review is usually quite clear in indigency cases and award of indigent benefits is controlled by an entirely different set of laws than zoning decisions, many of which have override provisions should the board of county commissioners not act in a timely or fit manner (e.g. I.C. § 31-3511(4)). This case does not set any legal precedent for the issue that the Court is currently reviewing.

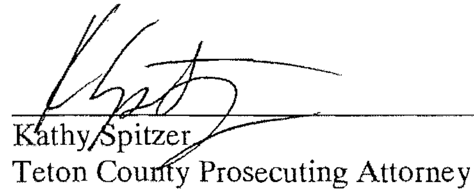
Even in the face of valid, well-reasoned findings, Petitioner refuses to accept no for an answer. Petitioner has proven he will go to great lengths in order to get the response he desires; misleading and wasting the time of both the County and this Court. Petitioner ignores the relevant legal issues such as prejudice to a substantial right, and raises arguments completely devoid of foundation in fact or law. It has been incredibly time consuming for a county of limited resources to defend this action, the easy thing would have been to give up and allow Petitioner to build his 75 foot building. The County has instead chosen to properly represent its taxpayers and defend against this unreasonable attack that clearly has no basis in fact or law. According to I.C. § 12-117, this Court must award fees because this appeal was pursued frivolously.

CONCLUSION

Through reason, fact and evidence the Amended Findings demonstrate the Commissioner's belief that a height of 75 feet is not contemplated by the ordinance, is not compatible with surrounding properties, and is in conflict with the Comprehensive Plan. Not only is their decision discretionary, local ordinance declares denial to be mandatory if certain conditions cannot be met. Petitioner has made several failed legal arguments regarding the BOCC's ability to consider aesthetics, public comment and the comprehensive plan. Petitioner has failed to prove that the Board of County Commissioners erred in any legal sense and has failed to prove that the Board's decision prejudiced a substantial right of Petitioner. The County has now issued an oral answer as well as two sets of written findings all telling the Petitioner the same thing: No. The County now respectfully requests the Court to affirm its Amended Findings, award the County its attorney fees and deny Petitioner.

DATED this 10th day of March, 2010.

Respectfully submitted,



Kathy Spitzer
Teton County Prosecuting Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of March, 2010, the foregoing was filed, served, or copied as follows:

DOCUMENT FILED:

Honorable Gregory Moeller	☒	U. S. Mail
Madison County Courthouse	☐	Hand Delivered
P.O. Box 389	☐	Overnight Mail
Rexburg, ID 83440-0389	☐	Facsimile
	☐	E-mail

SERVICE COPIES TO:

Dale Storer	☒	U. S. Mail
Holden, Kidwell, Hahn & Crapo	☐	Hand Delivered
P.O. Box 50130	☐	Overnight Mail
Idaho Falls, ID 83405	☐	Facsimile
	☐	E-mail

Jan Clemons

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. The CUP could not be granted because a height of 75 feet is not conditionally permitted by the specific terms of the ordinance.

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

---

[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. The CUP could not be granted subject to the ability of political subdivisions, including school districts to provide services for the proposed use.

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

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
Idaho Falls, Idaho 83402
P.O. Box 50130
Idaho Falls, Idaho 83405-0130
Telephone: (208) 523-0620
Facsimile: (208) 523-9518

FILED
MAR 2 4 2010
TIME: 3:23
TETON CO. ID DISTRICT COURT

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 **REPLY BRIEF IN SUPPORT OF SECOND AMENDED PETITION FOR JUDICIAL REVIEW**
BURNS HOLDINGS, LLC, Petitioner and Applicant, v. TETON COUNTY BOARD OF COMMISSIONERS, Respondent.	

COMES NOW Petitioner, Burns Holdings LLC, and submits the following Reply Brief in Support of Second Amended Petition for Judicial Review.

1. The County's Finding Do Not Comply with Idaho Code § 67-6535.

Notwithstanding the County's assertions to the contrary, the Amended Findings of Fact and Conclusions of Law ("Third Findings") do not comply with the requirements of

Idaho Code § 67-6535. The County's Reply Brief asserts that the Board "take[s] the points of law provided by State Code and local ordinance and appl[ies] them to the facts." Resp'ts Br. at 7. However, nowhere does the County's Brief cite to the transcript of the proceedings below to explain how the Third Findings complied with the requirements of § 67-6535. The County's Brief, just like the Third Findings, contain no citations to the record, nor any explanation of the basis for their assertion that they indeed applied the appropriate law to the facts at hand. Both are nothing more than bald assertions with no support whatsoever in the record.

By now, the reasons for the County's failure to cross reference its findings and Brief below to the record should be quite obvious, to wit: there is nothing in the record that supports *any* of their conclusions. Specifically, there is nothing in the record that would support a finding that the height of Burns' plant would be incompatible with surrounding industrial uses. The County's failure to explain why the mitigating design elements proposed by Burns would not work further underscores the Board's intransigent refusal to base its decision upon a considered application of law to facts in the record. Burns proposed a landscaped wall to shield adjoining properties from the view of the building and noise produced by the facility, landscaping intended to break up the external profile and roof line of the building and a building color intended to harmonize with adjacent industrial and agricultural uses. Indeed the height the building itself was necessary to mitigate noise, vibration, dust, sound and impact upon adjoining uses. There is absolutely nothing in the record nor in the Third Findings explaining why these mitigating elements would not be

effective. Small wonder then why the County stubbornly refuses to cite to the record in its Findings and Brief.

Unfortunately for the County, continued repetition of a premise does not, by itself, make the premise true. In the context of land use decisions, "[c]onclusory statements are not sufficient." *Cowan v. Bd. of Comm'rs of Fremont County*, 143 Idaho 501, 511, 148 P.3d 1247, 1257 (2006). Just as the County's Brief omits any supporting citations to the record, the Third Findings do not clearly state the relevant facts nor explain how the Board applied the law to those facts. Because they do not clearly state the facts and appropriate legal principles upon which it based the Board decision to deny Burns' CUP application, the Third Findings are insufficient under Idaho Code § 67-6535.

Simply stated, there is nothing in the record that would support an inference or finding of incompatibility. For that reason, this Court should again reject the Third Findings.

2. The County's Discretion Has Limits

The County points out that "the grant or denial of a conditional use permit is a *quasi judicial* act within the discretion of the governing body." Resp'ts Br. at 15. Burns does not disagree with that premise. However, the Board does not have unbridled discretion or discretion to act in an arbitrary and capricious manner. There are limits on the Board's discretion. The County appears to believe that because its decisions are "discretionary," the Board can make any decision it chooses — however outrageous or however unsupported by the record. *See* Resp'ts Br. At 38 ("The County has now issued an oral decision as well as two sets of written findings all telling Petitioner the same thing: No."). The County appears

to claim "unfettered discretion" to arbitrarily deny permits, a claim which is a "retreat from the rule of law to the rule of men, something which our constitutional system of justice has abhorred from its inception." *Condie v. Mansor*, 96 Idaho 345, 347, 528 P.2d 907, 909 (1974) (Bakes, J., dissenting). Moreover, by arguing that Burns must submit to its broad discretion to deny permits without factual support in the record, the County ignores the provisions of the Idaho Administrative Procedures Act which expressly authorize an affected person to challenge a governing board's decision when it is arbitrary and capricious and not supported by the record. Idaho Code § 67-5279.

Courts should not sustain an agency's action that is "not supported by substantial evidence on the record as a whole" or that is "arbitrary, capricious, or an abuse of discretion." Idaho Code § 67-5279. Courts sitting in an appellate capacity should uphold an agency's discretion only "if the findings are clear, dispositive and supported by the record." *Angstman v. City of Boise*, 128 Idaho 575, 579, 971 P.2d 409, 413 (Ct. App. 1996). The County claims that the "Board's Decision was supported by substantial evidence." Resp'ts Br. at 8. Again, simply asserting that findings are supported by substantial evidence does not make it so. As Burns illustrated in its Brief in Support of Second Amended Petition for Judicial Review, the County's Third Findings are not "clear, dispositive, and supported by the record." Pet'rs Br. at 10-18. Nowhere do the Third Findings cite to any evidence in the factual record which shows that Burns proposal would be incompatible with the surrounding industrial uses. Because they are "not supported by substantial evidence on the record as a whole" and are arbitrary and capricious, the Third Findings exceeded the limits of the County's discretion.

Because the County abused its discretion, the Third Findings are entitled to no deference from this Court.[1]

3. The County's Continued Efforts to Justify the Variance Argument Are Arbitrary and Capricious

The case of *Urrutia v. Blaine County* sets forth the "law of the case" principle which is applicable to, and controlling in, this case. 134 Idaho 353, 2 P.3d 738 (2000). That principle states that where an appellate court "states a principle of law" in a decision, that principle is controlling on remand. *Id.* at 360, 2 P.3d at 745. In its earlier decision, this Court rejected the County's use of the variance argument, noting that the Driggs ordinance specifically directs those seeking to construct a building higher than forty-five feet to proceed via a CUP application. Decision on Review at 12. The Court did not remand this matter back for additional factual findings regarding whether a variance was appropriate. The Court's statement on the issue was clear and conclusive: the County's argument was disingenuous and not warranted under the applicable ordinance. Thus, under *Urrutia* the Court's Order rejecting the variance argument was a principle of law which the County was obliged to respect on remand. The County simply ignored the Court's previous Order and again denied the permit on the basis that Burns should have sought a variance rather than a CUP.

The County's Brief also misstates the issue regarding the variance. The issue is not, as the County now suggests, whether Burns had *notice* that pursuing a variance was another

---

[1] The County claims that it is entitled to special deference in the interpretation of *its own* ordinances. Resp'ts Br. at 7-8. It should be noted that the CUP ordinance at issue here is the Driggs City Zoning Ordinance, not a Teton County ordinance. Furthermore, the dispute here does not involve differing interpretations of the Driggs Ordinance— indeed the ordinance is very clear. Rather what is at issue here is a complete absence of any evidence to support the County's Finding and conclusions.

option or whether the opponents testifying at the hearing thought it was a variance application. Regardless of what the witnesses at the September 13, 2007, hearing thought the process should have been called, the Record clearly shows that the Chairman Young knew the matter was properly considered as a CUP application.

> CHAIRMAN YOUNG . . . I had a brief procedural discussion about the next item, which is a public hearing, which was advertised as the Burns Concrete CUP . . .

Page 3, ll. 4-7.

> CHAIRMAN YOUNG The application for a conditional use permit in the impact area has come to us with a recommendation from the Driggs Planning and Zoning Commission.

Page 13, ll. 22-25.

> CHAIRMAN YOUNG What was advertised is: Burns Concrete conditional use permit, Burns Holdings are requesting a conditional use permit to build and operate a cement batch plant.

Page 23, ll. 21-24.

> KIRK BURNS . . . this is strictly a CUP for height.

Page 26, l. 12.

Moreover, contrary to what the County has suggested, counsel for Burns repeatedly stated at that hearing, that a CUP was the proper vehicle for Burns to use to get the height it desired.

> MR. STORER . . . we believe that the only issue that is before this court is the question of whether or not a conditional use permit for the additional height should or should not be granted. That's the only issue.

Page 28, ll. 19-23.

MR. STORER ... I think the only issue is the CUP.

Page 35, l. 15.

The only reason Burns' counsel used the phrase "you can put whatever label you want," was to avoid getting hung up on the witnesses' confusion about the proper name for the proceeding.

Fundamentally, the central issue is whether, pursuant to the Driggs ordinance, Burns should have pursued a CUP or a variance. The Driggs ordinance clearly states that a CUP is the correct way to pursue a building higher than forty-five feet. DCZO § 2(13)(C). This Court pointedly advised the County, both in oral argument and in the Decision on Review, that the County's variance argument was "disingenuous." To again use that premise as the basis for the County's denial in the Third Findings, was frivolous and borderline contempt.

4. The County's Use of Aesthetics Was Inappropriate in this Case

As is true elsewhere in its brief, the County significantly overstates its case with regard to aesthetic considerations. The County cites to *Marcia T. Turner, L.L.C. v. City of Twin Falls* for the proposition that a local government did not abuse its discretion by denying a special use permit based, in part, on aesthetic considerations. 144 Idaho 203, 212, 159 P.3d 840, 849 (2007). That case is easily distinguishable from this case. In that case the city had an ordinance requiring the zoning commission to evaluate, *inter alia*, whether the proposed use will "result in the destruction, loss or damage of a natural, scenic or historic features of major importance." *Id.* at 207 n.1, 159 P.3d at 844. The use of specific, identifiable aesthetic standards specified by ordinance in that case provided guidance and parameters for the

commission's evaluation of aesthetic concerns and put the applicant on notice that asthestic considerations were relevant. Such is not the case here.

By contrast, the County's use of aesthetics in this case is entirely without any basis in the ordinance and provided no definable standard informing the applicant of the manner in which aesthetic parameters could be considered. No aesthetic standards are to be found in the Driggs ordinance. In fact, the Driggs Ordinance implicitly rejects aesthetic or scenic considerations by its establishment of a scenic corridor that does not include the Burns' property. *See* DCZO § 4(2)(A)(1). In the Third Findings, the County attempted to justify its reliance on aesthetics by citing to the Comprehensive Plan's vague statements about an "attractive, functional, and memorable gateway." Third Findings at 6. However, the Comprehensive Plan[2] in effect when Burns submitted its CUP application clearly states that "[n]o official gateway has been identified or developed at either end of Driggs on Hwy 33." Comprehensive Plan at 59. The statement the County relies on is simply Driggs' "vision" for the community. Without specific, codified standards which the Board could use to evaluate Burns' project, the Board's use of vague, nonspecific terms such as "memorable gateway" was impermissible and constitutionally void. *See Anderson v. City of Issaquah*, 70 Wash.App. 67, 77, 851 P.2d 744, 752 (1993) (holding that using vague terms as standards when evaluating land use permits is unconstitutional).

Additionally, the County's aesthetics evaluation fails in this case because — assuming *arguendo* that the County did use sufficiently concrete and specific standards — the County

[2]A copy of the Comprehensive Plan was included as an attachment to the CD-ROM included with Petitioner's first brief in this protracted matter.

failed to cite to any facts in the record which support its conclusion that Burns concrete plant "cannot be adequately shielded in the area that Driggs would like to see become a memorable gateway."[3] Third Findings at 6. The County merely states its conclusion without identifying the specific area comprising the "gateway" or what aspects of Burns' proposal justified that conclusion. The County's use of aesthetic considerations was "not supported by substantial evidence on the record as a whole," and thus violated Idaho Code § 67-5279.

5. There Is No Merit to the County's Continued Attempt to Justify its Denial on the Basis of an Earlier "Conditional Rezone"

The County's attempt to breathe new life into the argument that the earlier rezone "was expressly limited to a building height of 45 feet" is also frivolous. *See* Resp'ts Br. at 37-38. As Burns pointed out in its supplemental brief in this matter[4] there are two problems with the County's argument. First, the factual record simply does not support the conclusion that the rezone was "expressly conditioned" on a forty-five foot high building. Nothing in the Commission's motion approve the rezone at the February 27, 2007, hearing suggests that the rezone was conditioned on a forty-five foot height limit. Rezone Tr., p. 36, l. 18 through p.37, l. 7. Even the dialogue which the County cites shows that forty-five feet was a merely a goal Burns was shooting for, not a condition of the rezone. Resp'ts Br. at 33-34.

Second, conditions which are not clearly stated in the record are not enforceable. "Conditions that are not stated on the permit may not be imposed on the permittee." *In re*

---

[3] As Burns pointed out in its earlier brief, the proposed building will be well outside of the Scenic Corridor. Thus, contrary to the Board's assertion, the building is not located in the "memorable gateway" but will be constructed in a spot specifically identified by the Comprehensive Plan as being "an appropriate industrial area because of the noise impacts of the airport and the fairgrounds." Comprehensive Plan at 82.

[4] Petitioner's Supplemental Brief, filed May 26, 2009, Section II, pp. 12-15.

Alfred Kostenblatt, 161 Vt. 292, 640 A.2d 39 (1994). The reasoning for requiring conditions to be expressly stated in the permit are obvious, to wit: If land uses were governed by unstated or vaguely articulated conditions or witness representations in a hearing, then a prospective purchaser of land would have an impossible task of ascertaining restrictions or conditions imposed upon his or her use of the land. Absent a record of limiting conditions upon the use of the land, both the applicant and any subsequent purchasers would have no idea or notion of the conditions to which he or she would be bound. Because the County imposed no height restriction upon its approval of the earlier rezone application, it was clear error for it to premise its denial of the CUP upon a non-existent condition precedent.[5]

6. Petitioner's Substantial Rights Were Prejudiced

The County argues for the first time that under Idaho Code § 67-5279, Burns failed to show that its substantial rights have been prejudiced. Resp'ts Br. at 11. Specifically, County argues that Burns has suffered no harm because even without the CUP, Burns "is able to conduct a myriad of activities on his property." Resp'ts Br. at 12. If the standard set forth by the County were accurate, then no person could ever petition for judicial review of a variance or a CUP because the petitioner could always make *some* use of the property which did not require the variance or CUP. Clearly, this is not what the Legislature intended when it adopted I.C. § 67-5279.

This Court has already held that:

---

[5]Had the County so conditioned the earlier rezone, it would have been the denial of Burns' procedural due process rights. Specifically, the Driggs Ordinance contemplates a separate application process for building heights in excess of forty-five (45) feet (i.e. a CUP). It would have been an abuse of the County's discretion to impose such limitation without affording Burns a separate hearing thereon.

> 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.

Decision on Review at 12. Further, the Idaho Supreme Court has held that an applicant "has a substantial right to have its application evaluated properly" under appropriate zoning laws. *Lane Ranch Partnership v. City of Sun Valley*, 145 Idaho 87, 91, 175 P.3d 776, 780 (2007). Procedural errors and prejudicial actions on the part of a local government can also violate an applicant's substantial rights. *Lane Ranch Partnership v. City of Sun Valley*, 144 Idaho 584, 591, 166 P.3d 374, 381 (2007).

Once again, the County treads dangerously close to contempt. This Court has already held that Burns has demonstrated the existence of a "substantial right." This finding of law by the Court also became the "law of the case." The County again flaunts the Court's earlier ruling and provides yet another illustration of the County's "moving target" proclivity in this case. The "substantial rights" argument has never been heretofore asserted by the County despite a plethora of Briefs and two earlier Hearings. Once again, the County takes the disingenuous approach of throwing up new arguments very late in the case, once Burns points out that the County's findings do not hold water.

In this case, Burns had a substantial right to have his permit evaluated under the criteria established by the Driggs ordinance. Instead, he received an evaluation based on vague, undefined, visionary goals and subjective aesthetic considerations not found in the Driggs ordinance. Clearly, Burns' substantial rights have been prejudiced.

7. This Court Should Remand with Instructions to Grant the CUP

As Burns has argued in its earlier brief, courts may remand with instructions to grant a permit where findings are not supported by substantial and competent evidence and where there is no indication in the record that further findings can be made that would affect the outcome of the case. *Bonners General Hosp. v. Bonner County*, 133 Idaho 7, 981 P.2d 242 (1999). Further, the Court may direct issuance of the permit "in a case in which an agency refuses to comply with the orders of a district court." Pet'rs Br. at 28; *Workman Family Partnership v. City of Twin Falls*, 104 Idaho 32, 38 n.8, 655 P.3d 926, 933 (1982). The County flaunts this Court's authority by its continued resort to the variance argument and by its "no substantial right" argument — both arguments which were previously disposed of by the Court in its last ruling. If ever there was a situation where the extraordinary step of remanding with instructions to grant the Permit was appropriate, it is this case.

This matter has been before this Court three times. This Court has twice instructed the County to prepare findings which comply with Idaho Code § 67-6535. Twice the County has disregarded the Court's instructions. The County clearly has no intent to comply with Idaho law in this respect. There are no facts in the record which, when considered in light of proper CUP considerations, justify the County's denial of the CUP. Pet'rs Br. at 18-22. Consequently, this Court should remand this matter back to the County with instructions to grant the Permit.

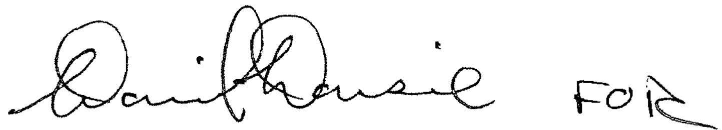
CONCLUSION

This Court has already noted that the County has issued findings that do not comply

with Idaho Code § 67-6535 and that the substantive grounds the County used to justify its denial are unreasonable. Decision on Review at 14. Like the Findings previously issued by the County, the Third Findings again do not comply with ILLUPA and the Court's previous Orders. The County has based the Third Findings on grounds already foreclosed by this Court. The County has abused its discretion by denying the permit based on undefined and unguided aesthetic considerations.

There simply is no justification in the factual record for the County's continued denial of Burns' CUP. With each new attempt to justify its denial, the arguments the County puts forth are increasingly frivolous. Now is the time for this Court to bring this matter to a close. The Court should remand this matter to the County with instructions to grant the CUP.

DATED this 22 day of March, 2010.



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

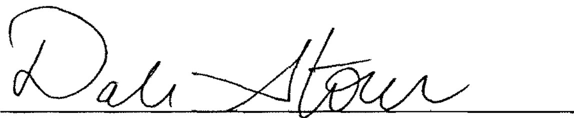
CERTIFICATE OF SERVICE

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 22nd day of March, 2010.

DOCUMENT SERVED: REPLY BRIEF IN SUPPORT OF SECOND AMENDED PETITION FOR JUDICIAL REVIEW

ATTORNEY SERVED:

Kathy Spitzer Teton County Prosecutor 89 N. Main Street, #5 Driggs, ID 83422	(✓) Mail ( ) Hand Delivery ( ) Facsimile ( ) Courthouse Box
Honorable Gregory Moeller Madison County Courthouse P.O. Box 389 Rexburg, ID 83440-0389	(✓) Mail ( ) Hand Delivery ( ) Electronic mail ( ) Courthouse Box



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

G:\WPDATA\DWS\14688 - Burns Holdings\14688.000 Burns v. Teton County\Petition for Judical Review\Pleadings\Second Amended Petition.Reply Brief v5.wpd:np

COURT MINUTES

CV-2007-0000376

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

Hearing type: Hearing

Hearing date: 4/20/2010

Time: 3:02 pm

Judge: Gregory W Moeller

Minutes Clerk: PHYLLIS HANSEN

Dale Storer Plaintiff's Attorney

Kathy Spitzer Defendant's Attorney

J calls case; ids those present

PA – been remanded twice

Concerns building facade in excess of 45 feet

County doesn't present reason for denial - complete lack of evidence

J – qualitative vs quantitative

J – other evidence submitted in writing?

Condition that would render compatible with surroundings

306

J – can commission make decisions without evidence or witnesses

PA – no; quasi judicial testimony

Must be facts supporting decision

J – just has to be some evidence

309

Height was there was to mitigate the impact on the neighbors

Esthetic concerns

Is "Gateway" term of art? No

312

Amended Findings of Fact

"Unless amended by conditional use permit"

J- 'unfortunate language

Bottom of page 2 – new argument

316

J – great legal disputes –

What is the controlling case on this issue

PA – comprehensive plan is the guide

No definition of gateway

320

PA – the heart of the case – there is no evidence to deny they CUP

Chapter 4 Section 2 of Driggs zoning ordinance

J – does Bach even live in the area

Don't think that even went to question of height

Mason said did not believe height could be mitigated

View of the Teton s was not an issue

J- what do you mean

326

Comments by Kathy Rinaldi

Trouble trying to mitigate height

330

PA – been remanded twice

Broad conclusiory statements that don't even point to the record

How long do we have to continue

J asking court would be pretty severe remedy in this case

Cited case deals with indigency

Reason county has not made factual findings is because there are none

Time to bring this case to an end

Don't think there is any reason to bring this to another eharingthink there would have to be some basis to ask for that

337

J – issue of Rinaldi's participation and her voting on that

PA – think another example of the cavalier matter in the County has dealt with this

Was inappropriate

338

DA – responds

Not contested hearings

J what about case where not violation of the law -

PA – that's where their discretion come in

351

J if this doesn't fit there, where does it fit

408

PA responds

416

J will take case under advisement

One issue Substantial right versus fundamental right do you want to brief

DA - will let you research it

PA - have that very issue in front of the Supreme Court as we speak

Has not been set for oral argument yet1

FILED IN CHAMBERS AT REXBURG,
MADISON COUNTY, IDAHO.
Date: June 10, 2010
Time: 10:45 p.m.
By: G. W. Moeller
DISTRICT JUDGE

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

THIRD DECISION ON REVIEW

I. BACKGROUND

This is a petition for judicial review of the January 12, 2010 decision of the Teton County Board of Commissioners ("County") entitled, "Amended Findings of Fact and Conclusions of Law." In its decision, the County once again denied Burns Holdings, LLC's ("Burns") application for a conditional use permit to construct a 75-foot concrete batch plant. This is Burns' third petition for judicial review. The Court will briefly reiterate the facts and procedural history.

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 now 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 an 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 ruled 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 sought judicial review of the County's second written decision. This Court again found in Burns' favor and remanded the case to the County to produce written findings consistent with Idaho law.

In January 2010 the County filed its Amended Findings of Fact and Conclusions of Law. While these new findings address some of the deficiencies noted in the Court's prior order, they also perpetuate some of the errors noted earlier.

II. ISSUES PRESENTED ON REVIEW

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

---

[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).

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 Boards 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-give (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 is 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 an 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?

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] The 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 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

[4] I.C. § 67-6519(4); I.C. § 6521(d).
[5] I.R.C.P. 84(e)(1).
[6] I.C. § 67-5279(3).

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]

IV. DISCUSSION

A. The Amended Findings and Conclusions Perpetuate Similar Errors Noted By the Court in its Previous Decision.

Two 2007 Idaho Supreme Court cases clarify when a local government zoning action is "arbitrary, capricious, or an abuse of discretion." In *Neighbors for a Healthy Gold Fork v. Valley County*, the Court found a county's interpretation of its development

[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).

code reasonable;[14] in *Lane Ranch Partnership v. City of Sun Valley*, the Court found the city's interpretation of its municipal code unreasonable.[15]

In both cases the Court applied the principles of statutory construction to interpret the ordinance at issue; then the Court looked at the local government interpretation to determine whether the local government interpretation was reasonable. In *Neighbors*, the county reasonably interpreted its zoning ordinance: the Court started with a strong presumption that the county's interpretation of its zoning ordinance was valid, and the county's reasoning supported its conclusions.[16]

But in *Lane Ranch* the Court found the City of Sun Valley acted arbitrarily: the city applied an irrelevant municipal code section because it assumed that a private road application was an application to build a subdivision, a successive subdivision application it had denied in the past. Because the county's denial was founded on an unsupported assumption, the denial lacked a rational basis.[17]

Idaho Code § 67-6535(b) requires a reasoned statement of the facts and the law justifying the decision.

> 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.

Burns argues that the County's decision was arbitrary and capricious for the following reasons:

(1) The County found that Burns should have pursued a variance rather than a conditional use permit after the fact;

(2) The County found 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,

---

[14] *Neighbors for a Healthy Gold Fork v. Valley County*, 145 Idaho 121, 176 P.3d 126 (Dec. 27, 2007).
[15] *Lane Ranch* 175 P.3d at 780.
[16] *Neighbors*, 176 P.3d at 136-142.
[17] *Lane Ranch*, 175 P.3d at 780.

(3) The County ignored the provision of the Driggs City Ordinance allowing buildings over forty-five when approved by a conditional use permit;

(4) The County found that a building with a height of more than forty-five (45) feet is not conditionally permitted by the Driggs City Ordinance,

(5) The County found 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,

(6) The County based its decision in part on "testimony" submitted by Board members, which testimony lacked evidentiary support in the record,

(7) The County denied 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.

There are portions of the Amended Findings of Fact and Conclusions of Law that continue to be both arbitrary and capricious. For example, the Court agrees with Burns on the following issues enumerated above: 1, 2, 3, 4, and 7.[18] While there are clearly errors in the City Ordinance and inconsistencies with state law, at this stage in the proceedings it is blatantly unfair for the County to rely upon these problems as the basis for denying Burns' application. Even if the County was correct in concluding that this application should have been made as a variance, not as a request for a conditional use permit is correct, due process demands that they be at least given a second opportunity to present their application. As this Court concluded in its last decision, the County's effort to ignore or rewrite the express directive for applicants to seek a conditional use permit for a structure over 45-feet tall is clearly unjust. Merely pretending that the confusion created by the County's own drafting errors does not exist is no solution. The County needs to correct this problem immediately.

Furthermore, the Court is not persuaded that the City of Driggs Ordinance 281-07, which requires height increases above 45-feet to be approved through a conditional use

[18] These issues coincide with issues (b), (c), (d), (g), (h), (l), and (m) in Burns' Second Amended Statement of Issues on Judicial Review.

permit, is inherently in conflict with I.C. § 67-6516. Just because the LLUPA refers to variances as a means of modifying "height of buildings," does not mean that a conditional use permit cannot be granted for the same purpose. There is no reason why a local government could not elect to regulate height through conditional use permits and zoning variances. Nothing in I.C. § 67-6516 can be read to specifically *exclude* such a practice. Because the LLUPA cannot be read to preempt such a practice; there is no conflict with state law for purposes of Article XII, § 2, of the Idaho Constitution. Any conflict now claimed by the County appears to be merely a convenient excuse to deny the application.

However, even if a conflict with state law existed, the Court has concluded that it is unnecessary for it to decide this case based on the apparent conflict between I.C. § 67-6516, the City of Driggs Ordinance 281-07 and Article XII, § 2, of the Idaho Constitution. As will be discussed below, the Court has concluded that sufficient grounds exist to affirm the County's denial of Burn's application as a conditional use permit on its own merits. Therefore, it is unnecessary for the Court to resolve the constitutional issues raised by the County at this time.

B. The County's Amended Findings of Fact and Conclusions of Law Satisfy Idaho Code § 67-6519(4) and *Workman*.

This Court has twice remanded the County's decision based on the finding that the County's decisions failed to meet the requirements of Idaho Code §§ 67-6535 and 6519(4). The Court found that the County's previous decisions denying Burns' application lacked a sufficient explanation of the contested facts, the facts relied upon, and the applicable law. Absent these elements, it was impossible for this Court to determine whether substantial evidence supports the County's decision.[19]

Idaho Code § 67-6519(4) 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:

[19] Decision on Review, p. 14 (Sept. 29, 2009).

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 purpose of 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."[20]

In its prior decision, this Court cited the 1982 Idaho Supreme Court case *Workman Family Partnership v. City of Twin Falls*, wherein the Idaho 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."[21] The Supreme 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."[22] 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 considering all the evidence, to be the relevant and important facts upon which its decision is based. Conclusions are not sufficient.*[23]

Based on this rationale, the Idaho Supreme Court in *Workman* 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.

As will be more fully developed below, the County's Amended Findings of Fact and Conclusions of Law satisfy Idaho Code § 67-6519(4) and *Workman Family*

---

[20] I.C. § 6535(c).
[21] *Workman Family Partnership v. City of Twin Falls*, 104 Idaho 32, 36, 655 P.2d 926, 930 (1982).
[22] 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)).
[23] *Workman*, 104 Idaho at 37, 655 P.2d at 931 (emphasis in the original).

Partnership v. City of Twin Falls. The County has stated a sufficient explanation of the contested facts, the facts relied upon, and the applicable law for this Court to conduct judicial review of its decision.

C. The County's Second Amended Findings of Fact and Conclusions of Law Do Not Violate Constitutional Provisions.

Burns raises three issues in its most recent petition for judicial review regarding due process rights: (1) whether Burns' due process rights were violated due to the County's interpretation of the Driggs City Ordinance, (2) whether the County used the Comprehensive Plan as a regulatory ordinance for evaluating and considering Burns' CUP application in violation of Burns' due process rights, and (3) whether Kathy Rinaldi's participation in the Board's November 9, 2009, decision violated Burns' constitutional right to an impartial tribunal.[24]

Burns' first two arguments pertain to the County's interpretation of the Driggs City Ordinance and the Comprehensive Plan. They claim the Findings and Conclusions are vague, often refer to aesthetic conditions, and lack principles of law. It is the Court's understanding that these two arguments go toward the issue of whether the County's decision to deny the CUP was sufficiently rooted in the rule of law, whether the County had specific facts, and whether its decision was arbitrary, capricious, or an abuse of discretion. Accordingly, the Court will address these two arguments under Sections IV(D) and (E), *infra*.

Petitioner's third argument is that Kathy Rinaldi's signature on the Amended Findings deprived Burns of an impartial tribunal. In the 2004 Idaho Supreme Court case *Eacret v. Bonner*, the Court stated that the Due Process Clause "entitles a person to an impartial and disinterested tribunal ..."[25] Since the *Eacret* decision cited by both parties, the Idaho Supreme Court further defined "impartiality" as it applies to a quasi-judicial body. In the 2007 case, *Turner v. City of Twin Falls*, the Idaho Supreme Court addressed

---

[24] These issues coincide with (e), (i) and (n) in the Second Amended Statement of Issues on Judicial Review.

[25] *Eacret v. Bonner*, 139 Idaho 780, 784, 86 P.3d 494, 498 (2004).

whether Twin Falls City Council acted as an impartial decision maker when it granted review of a planning and zoning decision.[26] While the facts of this case and *Turner* differ, the Idaho Supreme Court's definition of "impartiality" applies here:

> [Impartiality] means 'the lack of bias for or against either party to the proceeding. Impartiality in this sense assures equal application of the law. That is, it guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party.' In the context of due process, it does not mean 'lack of preconception in favor of or against a particular legal view. This sort of impartiality would be concerned, not with guaranteeing litigants equal application of the law, but rather with guaranteeing them an equal chance to persuade the court on the legal points in their case.' It does not mean having 'no preconceptions on legal issues, but [being] willing to consider views that oppose his preconceptions, and remain [ing] open to persuasion, when the issues arise in a pending case.' Impartiality under the Due Process Clause does not guarantee each litigant a chance of changing the judge's preconceived view of the law.[27]

The Idaho Supreme Court has addressed the problem of Commissioner bias and due process rights in the 2002 case *Floyd v. Board of Comm'rs of Bonneville County, et al.*[28] The Supreme Court listed three factors in determining whether commissioner bias resulted in a violation of an applicant's due process rights: "(1) whether the member disclosed the interest or the other council members were fully aware of it; (2) the extent of the member's participation in the decision; and (3) the magnitude of the member's interest."[29]

In this case, the Court finds that Rinaldi's participation did not violate Burns' right to an impartial tribunal. First, Rinaldi was not a swing vote. The Amended Findings of Fact and Conclusions of Law were signed by all three commissioners—the decision to deny Burns' CUP would have passed even without Rinaldi's signature.[30] Second, Rinaldi did not participate in the November 2009 hearing. The minutes, included in the record under the County's "Notice of Filing" on January 14, 2010, show

---

[26] *Turner v. City of Twin Falls*, 144 Idaho 203, 159 P.3d 840 (2007).
[27] *Id.* (citing *Republican Party of Minn. V. White*, 536 U.S. 765, 122 S.Ct. 2528 (2002)).
[28] *Floyd v. Board of Comm'rs of Bonneville County, et al.*, 137 Idaho 718, 52 P.3d 863 (2002).
[29] Id.
[30] Id. at 726.

that the only two commissioners present at the hearing were Bob Bennett and Larry Young.[31] For these two reasons, the Court finds that Ms. Rinaldi's signature on the Amended Findings of Fact and Conclusions of Law do not give rise to a claim that Appellant was denied an impartial tribunal.

D. The County's Decision to Deny Burns' Conditional Use Permit is Supported by Substantial Evidence in the Record.

Burns also objects to the County's decision to deny the CUP application on the grounds that the County lacked substantial evidence in the record. According to Burns, the County lacked substantial competent evidence in the record to support its finding that Burns' proposed 75-foot height was in conflict with the Driggs Comprehensive Plan and other local ordinances. Burns alleges that the County's Amended Findings of Fact and Conclusions of Law lacked substantial and competent evidence.

In Idaho, "[s]ubstantial 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."[32] A court will not substitute its judgment for that of the governing body as to the weight of the evidence on questions of fact.[33]

The critical evidence before the County concerned the location of the plant. Teton County considered the need of preserving the "gateway" at the north end of Driggs that leads into the City.[34] Such gateways are listed as a "need" under Section 9.3 of Driggs' Comprehensive Plan. Furthermore, the City of Driggs' Comprehensive Plan Section 9.4 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

[31] Notice of Filing (Jan. 14, 2010).
[32] *Marchbanks v. Roll,* 142 Idaho 117, 124 P.3d 993, 995 (2005) (internal quotations and citations omitted).
[33] *Whitted*, 137 Idaho at 121, 44 P.3d at 1176; I.C. § 67-5279(1).
[34] Burns Holding, LLC CUP Denial, Amended Findings of Fact and Conclusions of Law, p. 6

> ample landscaping, concealed parking and architecture that draws on the western and agricultural vernaculars...

The County explained that in their opinion, a 75-foot high structure clearly interferes with the City's objectives to preserve a "memorable gateway."[35] The Court finds no error in reaching such a conclusion by reference to the Comprehensive Plan.

When drafting its Comprehensive Plan, the one apparent intention was to ensure a dramatic view of the surrounding scenery. They expressed the need for buildings to be "setback" so they do not interfere with scenery. In its Findings, the County concluded that a 75-foot high by 60 foot wide building would noticeably interfere with the surrounding scenery and detract from its effort to maintain "memorable gateways."[36]

Burns argues that the County is impermissibly using their Comprehensive Plan as a regulatory tool, in violation of the Idaho Supreme Court's holding in *Urrutia v. Blaine County*, 2 P.3d 738, 134 Idaho 353 (2000). In *Urrutia* the Supreme Court held a board may "refer to the comprehensive plan as a general guide in instances involving zoning decisions." However, "the Board erred in relying *completely* on the comprehensive plan in denying [the] applications."[37]

The facts in *Urrutia* are distinguishable from the present case. While *Urrutia* concerned a subdivision application, the case in hand deals with a conditional use permit (which under the facts of this case, closely resembles a zoning variance). In *Urrutia*, Blaine County relied "solely" on its comprehensive plan in denying the application.[38] In this case, while Teton County has referenced its Comprehensive Plan,[39] it has primarily relied on the ordinances of the City of Driggs, such as (1) a height limitation on all buildings of 45 feet (Chapter 2, Section 13C of Ordinance 281-07), (2) the stated purposes of conditional use permits (Section 2 of Ordinance 274-07), (3) the stated purposes of the local ordinance (Chapter 1(D) of Ordinance 274-07), and (4) the

[35] Id.
[36] Amended Findings of Fact and Conclusions of Law, p.6.
[37] Id. 2 P.3d at 743-744, 134 Idaho at 358-359 (emphasis added).
[38] Id., 2 P.3d at 743, 134 Idaho at 358.
[39] The Comprehensive Plan is only discussed in Section 2(D) of the Findings. It constitutes only two paragraphs out of the entire seven page document.

conditions required by the ordinance for approval (Chapter 4, Section 2(A), Ordinance 274-07). While the Comprehensive Plan is referenced in Section 2(D) of the Findings, and there are other references to "gateways" and aesthetics, it is clear to the Court that Teton County was not "completely relying" on its comprehensive plan, as occurred in *Urrutia*.[40]

The concrete plant that Burns wishes to construct is a permitted use within the zone where the building will be erected. Therefore, the intended use of the plant is not the issue. The County was merely concerned with the *height* of the concrete plant, a height which would exceed the maximum 45 feet allowed by the Ordinance by 30 feet. The proposed structure would not just barely exceed the height limit, it would be almost 67% taller than currently allowed. In an effort to reach a compromise, the County inquired of Burns any plausible way to mitigate the extra 30 feet of height.

Burns was unable to assure protection and compatibility with the surrounding properties, uses and neighborhood to the County's satisfaction. "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."[41]

At the November 2007 hearing, Burns suggested that moving the building back from the edge of the property line would mitigate the additional 30 feet in height. However, the County found that the top of the building would still obstruct views of the Teton Mountains and would not be a plausible way of mitigating the extra height. No other building in the area exceeds the maximum allowable height of 45 feet. Thus, an additional 30 feet added onto such a large structure was considered to be simply too high. In reaching this conclusion, the Commissioners relied upon testimony and their own knowledge and familiarity with the location at issue. The site at issue is east of State Highway 33, the most traveled road in the County, and is familiar to any resident of Teton County. There is no rule of law requiring the Commissioners to divorce

---

[40] Id., 2 P.3d at 744, 134 Idaho at 359.
[41] Amended Findings of Fact and Conclusions of Law, p.6.

themselves of all knowledge and observations gained by personally viewing the location.

Burns offered "line-of-site" drawings at the hearing, which the Court has carefully considered. While it does appear to show that setting the tower back from the road somewhat mitigates the *apparent* height of the building, it is difficult to discern from the drawings its actual appearance in reality. The actual structure will not be a mere two-dimensional silhouette. The County had clear skepticism about the overall aesthetic impact of the structure, regardless of the setback. Arguably, even a building the size of the Empire State Building would be dwarfed by the adjacent Grand Teton mountain range, if it was set back far enough from the highway. While such concerns may be debatable, they are not unreasonable.

This Court finds that reasonable minds could deny Burns' CUP application based on the facts listed above. While a reasonable person may reach a different conclusion, these concerns, as stated in the findings, are neither arbitrary nor capricious. The commissioners based their decision on substantial evidence, which only needs to be "more than a scintilla but less than preponderance."[42] This Court will not substitute its judgment for that of the elected governing body as to the weight of the evidence on questions of fact.

E. The County's Amended Findings of Fact and Conclusions of Law are Not Arbitrary, Capricious, or an Abuse of Discretion.

Within the LLUPA, the Idaho Legislature set forth its intent for the requirements of findings of fact and conclusions of law:

> It is the intent of the legislature that decisions made pursuant to [the Local Land Use and Planning Act] should be founded upon sound reason and practical application of recognized principles of law. In reviewing such decisions, the courts of the state are directed to consider the proceedings as a whole and to 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

[42] *Marchbanks v. Roll,* 142 Idaho 117, 124 P.3d 993, 995 (2005) (internal quotations and citations omitted).

> violation of fundamental rights, not the mere possibility thereof, shall be entitled to a remedy or reversal of a decision.[43]

The County's decision, at its very essence, is a decision by elected officials in Teton County that a 75-foot concrete batch plant in the proposed location is just too big to be compatible with its local ordinances and its comprehensive plan. The County listed several reasons throughout its Findings why the plant is too big. For example, the County explained that their concern that the unusually tall structure would harm neighboring property values, affect economic values in an area dependent on its "scenic offerings," damage environmental assets by disrupting "scenic vistas," and more.[44] The County was obviously concerned about aesthetics, the plant's proximity to the scenic corridor, and its proximity to the "gateway" to the City of Driggs. The County was also plainly concerned about the considerable size of the structure relative to surrounding buildings: the plant was 75-feet high and 60-feet wide. This structure would be almost 67% taller than the tallest permissible structure in Teton County.

As stated above, Burns was given an opportunity to persuade the County that 75-feet is not too tall. Burns presented sight diagrams, landscaping plans, noise pollution studies, traffic studies, and still the County remained unassuaged. Burns was given an opportunity to present his case, but the elected decision-makers were not persuaded. Their denial was based on many findings of facts leading to one conclusion—a 75-foot structure was simply too tall based on the rules and ordinances in existence for this rural, tourist-oriented community. Although hotly contested by Burns, there are substantial facts in the record to support such a conclusion.

Elections have consequences. Whether the Commissioners' decision is viewed by Burns as personal or political is irrelevant, as long as it was founded on substantial facts in the record. It is simply not the role of this Court to force a decision upon the County that its elected officials have a right to make. Even assuming, *arguendo*, that the

---

[43] I.C. § 67-6535(c).

[44] Burns Holding, LLC CUP Denial, Amended Findings of Fact and Conclusions of Law, p. 4.

Commissioners' decision was unwise or short-sighted, such issues are almost always best remedied in the voting booth, not the courtroom.

F. Neither Party is Entitled to Attorney Fees on Appeal.

Both parties are seeking recovery of their attorney fees. The award of fees and costs are largely discretionary functions of the Court. Discretionary decisions require the Court to (1) rightly perceive the issue as one of discretion, (2) act within the outer boundaries of the discretion allotted, and (3) reach the decision through the exercise of reason.[45] Idaho Code § 12-117(1) states,

> Unless otherwise provided by statute, in any administrative or civil judicial proceeding involving as adverse parties a state agency, a city, a county or other taxing district and a person, the 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.

The Court finds that neither party is entitled to attorney fees on appeal. Although Teton County is the prevailing party, Burns did not act without a reasonable basis in fact or law.

As the Court has stated above, the County's Second Amended Findings of Fact and Conclusions of Law sufficiently stated the facts upon which it relied, and the County reached a reasoned decision based on the facts before it. However, Burns had a reasonable basis in law and fact to appeal the County's decision because of the issues set forth in Section IV(A) of this decision. The Court's concerns with portions of the County's Amended Findings of Fact and Conclusions of law are sufficiently stated above.

V. CONCLUSION

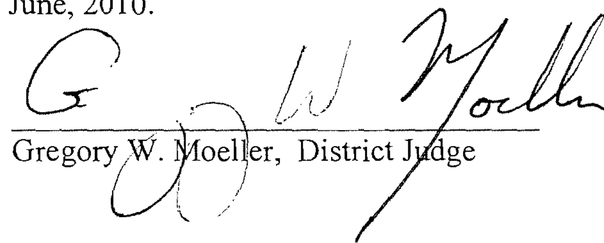
In accordance with the above, the County's decision denying Burns' application for a conditional use permit is AFFIRMED. However, inasmuch as the County has made it clear in their pleadings that Burns' application should have been pursued as a variance

[45] *Associates Northwest, Inc. v. Beets*, 112 Idaho 603, 605, 733 P.2d 824, 826 (Ct. App. 1987).

rather than a conditional use permit, justice demands that Burns have an opportunity to resubmit their request to build the disputed structure by seeking a variance, if they choose. This decision only affirms the County's determination denying the conditional use permit.

So Ordered.

Dated this 10th day of June, 2010.



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 14th day of June, 2010, served upon the following individuals via U.S. Mail, postage prepaid, unless otherwise indicated:

Dale W. Storer
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
P.O. Box 50130
Idaho Falls, ID 83405-0130

Kathy Spitzer
TETON COUNTY PROSECUTING ATTORNEY
89 N. Main Street
Driggs, ID 83455

Clerk of the Court

By: [signature]
Deputy Clerk

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
Idaho Falls, Idaho 83402
P.O. Box 50130
Idaho Falls, Idaho 83405-0130
Telephone: (208) 523-0620
Facsimile: (208) 523-9518

Attorneys for Petitioner, Burns Holdings, LLC

FILED
JUN 24 2010
TIME: 5:00
TETON CO. ID DISTRICT COURT

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 MOTION FOR RECONSIDERATION**

Pursuant to the provisions of I.R.C.P. 11(a)(2), Petitioner moves the Court for an Order reconsidering its Third Decision on Review dated June 10, 2010.

This Motion is made *inter alia* for the following reasons:

1. The Court failed to consider and did not address whether the phrase "memorable gateway" is unconstitutionally vague and ambiguous and whether enforcement

of such standard violates Petitioner's due process rights under the Idaho and U.S. Constitutions.

2. Notwithstanding the Court's determination that the County did not rely "solely" on its Comprehension Plan in denying Petitioner's Conditional Use, the County made no specific findings of fact with respect to any of the sections of the Driggs Ordinance quoted on page 13 of the Court's decision.

3. The County's finding quoted at footnote 41 of the Court's decision is completely conclusory and fails to include any factual finding explaining why Petitioner's proposed mitigative measures would not work nor did the County otherwise set forth any facts supporting their apparent conclusion that it was impossible to ensure compatibility with surrounding uses.

4. The Court's conclusion that the Commissioners may rely upon their knowledge and observations of the site is erroneous as a matter of law. See *Comer v. County of Twin Falls,* 130 Idaho 433, 942 P.2d 557 (1997).

5. The County's factual conclusion that granting a CUP would "harm neighboring property values, effect economic values and damage environmental assets" is arbitrary and capricious and without any factual support in the Record.

Petitioner will file a brief in support of this Motion within fourteen (14) days from the date hereof, setting forth its arguments in support of this Motion.

DATED this 24th day of June, 2010.

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 ____ day of June, 2010.

DOCUMENT SERVED: PETITIONER'S MOTION FOR RECONSIDERATION

ATTORNEY SERVED:

Kathy Spitzer Teton County Prosecutor 89 N. Main Street, #5 Driggs, ID 83422	(✓) Mail ( ) Hand Delivery ( ) Facsimile ( ) Courthouse Box
Honorable Gregory Moeller Madison County Courthouse P.O. Box 389 Rexburg, ID 83440-0389	( ) Mail ( ) Hand Delivery (✓) Facsimile ( ) Courthouse Box

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

G:\WPDATA\DWS\14698 - Burns Holdings\14698.000 Burns v. Teton County\Petition for Judicial Review\Pleadings\Reconsideration.MOT.wpd:np

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
Idaho Falls, Idaho 83402
P.O. Box 50130
Idaho Falls, Idaho 83405-0130
Telephone: (208) 523-0620
Facsimile: (208) 523-9518

Attorneys for Petitioner, Burns Holdings, LLC

FILED
AUG 16 2010
TIME: 5:00
TETON CO. ID DISTRICT COURT

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 IN SUPPORT OF MOTION FOR RECONSIDERATION

Petitioner, Burns Holdings, LLC respectfully submits the following Brief in Support of its Motion for Reconsideration.

INTRODUCTION

This case has a lengthy procedural history, as well as an extensive factual background relating thereto, none of which need to be recited for the purposes of Petitioner's Motion for

ORIGINAL

Reconsideration. Such procedural history and background have been set forth in great detail in the briefs before the Court and in the Court's Third Decision on Review. The instant Motion focuses upon the Court's Third Decision on Review dated June 10, 2010, wherein the Court denied Burns' Petition for Judicial Review.

ARGUMENT

I. The Board's Most Recent Decision Violates the Idaho and United States Constitutions and the Court Erred in Upholding That Decision.

The Board's last decision violates the constitutions of both the United States and the State of Idaho for three reasons. First, the use of the broad and visionary goals of the Driggs Comprehensive Plan as a basis for denying the CUP application is constitutionally impermissible under the void-for-vagueness doctrine. Second, the Board's use of the Comprehensive Plan as a regulatory measure is not justified by the Board's arbitrary application of the Driggs zoning ordinance and is contrary to the Idaho Supreme Court's holding in the *Urrutia* case. Third, the Board's use of extra-judicial evidence to deny the CUP violates Petitioner's due process rights. Because of these constitutional defects, the Court erred in sustaining the Board's decision.

A. The Court Erred in Failing to Address Petitioner's Arguments That Teton County's Use of the Comprehensive Plan as a Regulatory Measure Violates Petitioner's Due Process Rights.

Petitioner steadfastly urged throughout all the proceedings in front of this Court, including those before Judge Shindurling, that the County's use of the broad, visionary criteria contained in the Driggs Comprehensive Plan as a regulatory ordinance violated its

due process rights under the Idaho and United States Constitutions.[1] The Petitioner's void-for -vagueness argument is complimentary to, but entirely different from the Idaho Supreme Court's holding in *Urrutia v. Blaine County*,[2] wherein the Court held that a comprehensive plan should not be used as a regulatory ordinance. The *Urrutia* case was decided primarily on the basis of statutory construction of the Idaho Local Land Use Planning Act, rather than on principles of constitutional law. Although the void-for-vagueness argument and *Urrutia* statutory argument closely parallel each other, nevertheless they are separate and distinct bodies of law and were so treated in Petitioner's briefs. In the Court's Third Decision on Review, the Court discussed *Urrutia* and distinguished it from the facts of this case.[3] Importantly, however, this Court did not address the due process issue or the vagueness arguments raised in Petitioner's Brief. Petitioner now invites the Court to squarely address Petitioner's contention that County's reliance upon the "memorable gateway" language in the Comprehensive Plan was constitutionally defective.

Every comprehensive plan is necessarily broad, idealistic and visionary. In other words, a comprehensive plan is purposefully vague because it is only intended to serve as a guideline, rather than as legally controlling law. As noted in the *Urrutia* case and its predecessors, a comprehensive plan reflects the desirable goals and objectives or desirable future situations for land within a jurisdiction.[4] Precisely for this reason, it does not operate

---

[1] *See* Petitioner's Brief dated July 1, 2008, p. 25-30; Petitioner's Reply Brief dated August 26, 2008, p. 17-22; Petitioner's Brief in Support of Second Amended Petition for Judicial Review, at FN 14.

[2] 134 Idaho 353, 2 P.3d 738 (2000).

[3] Third Decision on Review at 13.

[4] *Urrutia*, 134 Idaho at 358, 2 P.3d at 743.

as legally controlling law — it serves only as a guide to advise governmental agencies responsible for making *zoning* decisions.[5] The goals and objectives contained in a comprehensive plan necessarily must be broad and general in nature. Thus, they are not well suited for the more precise task of applying specific facts to law. The broad, visionary statements are by their nature too vague and imprecise to meet constitutional standards of due process. Because a comprehensive plan lacks precise standards, its use as a regulatory measure inevitably leads to arbitrary and capricious decision making. Inherent in any comprehensive plan is a subjectivity with which the goals and objectives are necessarily are framed. The County's use of the term "memorable gateway" in this case to evaluate a land use application is a prime example of arbitrary, capricious and unconstitutional use of a comprehensive plan in violation of Petitioner's due process rights.

A statute which either forbids or requires the doing of an act so vague that men of common intelligence must necessarily guess as its meaning and differ as to its application, violates the first essential of due process of law. *Connally v. General Constr. Co.,* 269 U.S. 385, 391, 46 S. Ct. 126, 127, 70 L. Ed. 322 (1926). The purpose of the void-for-vagueness doctrine is to limit arbitrary and discretionary enforcement of the law. *Anderson v. Issaquah,* 70 Wash. App. 64, 75, 851 P.2d 744, 751 (1993). An ordinance must be sufficiently clear and definite as to give those reading it fair notice of prohibited [and permitted] conduct. *West Bloomfield Charter Township v. Karton,* 29 Mich. App. 43, 50, 530 N.W.2d 99, 103 (1995). An ordinance does not provide fair notice of proscribed conduct if it either forbids

---

[5] *Id.*

or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess as its meaning and differ as to its application. *Id.*; *See also In Re: Appeal of Jam Gold, LLC,* 185 Vt. 201, 969 A.2d 47 (2008) (holding that the city comprehensive plan did not give specific standards to guide enforcement by local authorities). When exercising discretion in zoning matters, a local board must be guided by standards which are specific in order to prevent the ordinance from being invalid and arbitrary. *Peterson Outdoor Advertising v. City of Myrtle Beach,* 327 S.C. 230, 489 S.E.2d 630 (1997).

The *Anderson* case contains an excellent explanation of why using broad, visionary statements to evaluate zoning and land-use applications is constitutionally impermissible. In that case, court was confronted with a zoning ordinance that employed vague and undefined terms which gave the commissioners no objective guidelines to follow:

> Because the commissioners themselves had no objective guidelines to follow, they necessarily had to resort to their own subjective "feelings." The "statement" Issaquah is apparently trying to make on its "signature street" is not written in the code. In order to be enforceable, that "statement" must be written down in the code, in understandable terms. The unacceptable alternative is what happened here. The commissioners enforced not only building design code, but their own arbitrary concept of the provisions of an unwritten "statement" to be made on Gilman Boulevard. The commissioners' individual concepts were as vague and undefined as those written in the code. This is the very epitome of discretionary, arbitrary enforcement of the law.[6]

Because of the broad, idealistic, and vague ordinance language used in that case, the court concluded that the code sections "do not give effective or meaningful guidance to applicants,

---

[6] *Anderson*, 70 Wash. App. At 77, 851 P.2d at 752.The city in that case was attempting to enforce a reference in its zoning ordinance to "signature streets."

to design professionals, or to the public officials of Issaquah who are responsible for enforcing the code." *Id.*

This Court in this case expressly condoned the County's use of the "memorable gateway" standard.[7] However, the phrase "memorable gateway" affords absolutely no guidance or ascertainable standard by which an applicant could formulate a plan. It made Petitioner's compliance subject to the subjective whims of the County Commissioners and allowed them to inject their capricious "feelings" into the determination. The "memorable gateway" standard is constitutionally defective not only because it employs the vague and subjective terms "memorable" and "gateway," but the Driggs Comprehensive Plan contains no definition of the area embraced within the "gateway." Indeed, the Comprehensive Plan specifically notes, "No official gateway as been identified or developed at either end of Driggs on Highway 33."[8] An applicant seeking a permit under the Commissioners' interpretation would have no idea whether or not his or her land is included within such "gateway" and no idea what standards will be used to evaluate his or her land use application.

As Petitioner noted in its earlier briefs, Teton County — which is responsible for implementation of the Driggs Comprehensive Plan in the area of impact — has adopted a "scenic corridor" which exactly paralleled both sides of Highway 33.[9] By creating a scenic corridor provision in the Teton County Zoning Ordinance, the County apparently sought to create the specific standards through which the visionary purposes of the Driggs

---

[7] Third Decision on Review at 12-13.

[8] *See* Section 9.1, Driggs Comprehensive Plan.

[9] It is undisputed that the property at issue in this case is located outside the scenic corridor.

Comprehensive Plan could be constitutionally implemented.[10] The scenic corridor was specifically defined as 330 feet on each side of Highway 33.[11] This process of specifically identifying an area in which scenic considerations became paramount is exactly what the Local Land Use Planning Act contemplates relative to the relationship between comprehensive plans and zoning ordinances. That is, the comprehensive plan articulates broad policy goals and the zoning ordinance implements them, with a greater degree of specificity and clarity than can be undertaken in the broad, visionary comprehensive plan. Implicitly, by adopting the scenic corridor ordinance, the Teton County officials concluded that scenic considerations were not paramount outside the corridor and the County's effort in this case to extend the concept of a "memorable gateway" beyond the scenic corridor appears to be nothing more than an arbitrary, completely subjective effort to extend the scenic corridor beyond what it was intended, in terms of area.

The County's use of the vague term "memorable" to deny Burns' CUP application is also completely subjective and violates the void-for-vagueness doctrine. The term "memorable" affords no guidance or direction whatsoever to an applicant attempting to submit a land use application. Nor does it provide the County Commissioners any objective standard by which to make a principled evaluation of any land use applications actually submitted. What is "memorable" to one, may not be memorable enough to another. Just like the "signature street" standard struck down in the *Anderson* case, the term "memorable

---

[10] *See* Teton County Zoning Ordinance § 8-5-2(D).

[11] *Id.*

gateway" gives no meaningful guidance to applicants, design professionals or public officials who are responsible for enforcing it. It is so vague that men and women of common intelligence must guess as to its meaning and differ as to its application. Because the County used an unconstitutionally vague standard to deny Petitioner's CUP application, the Court should grant the relief requested in the Petitioner's Second Amended Petition of Judicial Review.

B. The County's Arbitrary Use of the Driggs' Zoning Ordinance Does Not Justify Their Use of the Comprehensive Plan as a Regulatory Measure.

Throughout the briefing in this case Petitioner vigorously argued that the Board's use of the Driggs' Comprehensive Plan as a regulatory ordinance contravened the holding of the Supreme Court in *Urrutia v. Blaine County,* 134 Idaho 353, 2 P.3d 738 (S. Ct. 2000).[12] The Court disagreed with Petitioner's argument, holding that, "The facts in *Urrutia* are distinguishable from the present case."[13] Specifically, the Court noted that in *Urrutia,* Blaine County relied "solely" on its comprehensive plan in denying a subdivision application, unlike the facts in this case where, according to the Court, Teton County "primarily relied on the ordinances of the City of Driggs."[14]

Petitioner respectfully disagrees with the Court's reading of the *Urrutia* case. While the Court is correct that the *Urrutia* court reversed Blaine County's denial of the subdivision application because the County had relied exclusively on the comprehensive plan, the *Urrutia*

---

[12] *See* Brief in Support of Second Amended Petition for Judicial Review, p. 27; Section III of Petitioner's Initial Brief.

[13] Third Decision on Review, p. 13.

[14] *Id.*

court did not hold that had Blaine County appropriately used other zoning regulations (i.e. a zoning ordinance or subdivision ordinance), its reliance upon the comprehensive plan would have been justifiable. Rather, the Supreme Court's "exclusively" qualification merely means that if the County had other independent, justifiable reasons for denying the application, it's use of the comprehensive plan as a regulatory ordinance would not, *ipso facto*, mandate reversal. The Court did not hold that resort to such other grounds would have justified the County's inappropriate use of the comprehensive plan as a regulatory ordinance.

Petitioner does not dispute that if a county premises its denial of a permit upon appropriate standards contained in a subdivision or zoning ordinance and the denial is based upon substantial, competent evidence, the fact that it may have inappropriately used its comprehensive plan as a regulatory measure, would not necessitate reversal of the decision. Stated simply, a county's *appropriate* use of subdivision or zoning ordinances would not be negated by its misuse of the comprehensive plan as a regulatory measure. However, resort to such other ordinance provisions would not justify misuse of the comprehensive plan as controlling law. As explained by the *Urrutia* court, the "evil" of using a comprehensive plan as a regulatory measure is that it "affords the board unbounded discretion in examining a subdivision application and allows the board to effectively re-zone land based on the general language in the comprehensive plan."[15] An appropriate use of a zoning or subdivision ordinance as a basis for denial would not purge a County's arbitrary use of the

[15] *Urrutia,* 134 Idaho at 358, 2 P.3d at 743.

comprehensive plan as a regulatory measure — rather it would only justify upholding the denial on independent grounds.

In this case, the County held that Petitioner's proposed 75-foot structure interferes with the City's objectives to preserve a "memorable gateway." The Court, in examining that holding, then stated that, "The Court finds no error in reaching such a conclusion by reference to the Comprehensive Plan."[16] Thus, the Court has condoned the County's arbitrary use of the Comprehensive Plan as a regulatory ordinance, notwithstanding the holding in *Urrutia* that a comprehensive plan cannot be used as such.

The Court errs in its reading of *Urrutia* in this fashion. If the Court's analysis were correct, a county could be completely arbitrary in its denial of an application, premised upon an alleged non-compliance with the zoning or subdivision ordinance, and then use such arbitrary finding to justify its use of a comprehensive plan as a regulatory measure. Clearly, the court's holding in *Urrutia* cannot be circumvented that easily.

In this case, the County has not pointed to any evidence in the record that would justify the denial of Petitioner's CUP application. Thus, there are no valid grounds to justify the County's denial, independent of its misuse of the Driggs Comprehensive Plan. Petitioner has argued at great length that the County's findings with respect to Petitioner's compliance with the Driggs CUP ordinance were conclusory and arbitrary. There is no evidence in the record to support a finding that the additional height is incompatible with the adjoining industrial uses. Further, there is no evidence supporting the County's finding that it is

---

[16] Third Decision on Review, p. 13.

impossible to craft conditions that would mitigate the additional height *vis-a-vis* other adjoining industrial uses. The County provided no rationale for its conclusory finding that the mitigating measures put forth by Burns would not, indeed could not, mitigate the additional height. That finding is totally conclusory and without any rationale or support in the record.

In sum, the County's arbitrary use of the Driggs' zoning ordinance cannot justify its misuse of the Driggs' Comprehensive Plan as a regulatory measure. The potential for arbitrary decisions arising from the use of a comprehensive plan as a regulatory measure is not resolved by the County's equally arbitrary use of the Driggs zoning or subdivision ordinances. The Court's reading of *Urrutia* is misplaced.

C. The Commissioners' Reliance upon Their Own Knowledge and Familiarity with the Site as a Basis for Their Decision Violates Petitioner's Due Process Rights.

As the Court noted, the County found that the top of the building would obstruct the views of the Tetons and therefore Burns had not provided any plausible way for mitigating the extra height.[17] The Court also noted that, "In reaching this decision, the Commissioners relied upon testimony and their own knowledge and familiarity with the location at issue."[18] Burns has previously argued that the "view of the Tetons" was irrelevant under the Driggs' CUP ordinance, given the fact that the property was situated outside the scenic corridor and given that the scenic considerations were not relevant under the Driggs' CUP ordinance. Aside from the fact that a "view of the Tetons" is not a relevant consideration under the

---

[17] Third Decision on Review, p. 14.

[18] *Id.*

Driggs CUP ordinance, the Court's holding that, "There is no rule of law requiring the Commissioners to divorce themselves of all knowledge and observations gained by personally viewing the location," is contrary to the Idaho Supreme Court's holding in *Comer v. County of Twin Falls,* 130 Idaho 433, 942 P.2d 557 (1997) and the recent case, *Noble v. Kootenai County,* 148 Idaho 937, 231 P.3d 1034 (2010).

In *Comer,* the Supreme Court held that the Twin Falls County Board of Commissioners violated the appellant's due process rights when they viewed the property in question without notice and without giving the parties or their representatives the opportunity to be present.[19] Specifically, the court noted that because none of the parties were present during such extra-judicial viewing and because no record was made of the viewing, the parties have no way of knowing if the correct parcels of property were examined by members of the board.[20] The problem with extra-judicial site visits is obvious, to wit: the interested parties have no opportunity to ascertain exactly what knowledge is possessed by the county commissioners, nor do they have an opportunity to present evidence in rebuttal to whatever knowledge or erroneous conclusions the commissioners might have reached, premised upon such extra-judicial site visits. Reliance upon such extra-judicially obtained evidence is a clear violation of the Petitioner's due process rights.

In *Noble v. Kootenai County,* the Supreme Court also held that extra-judicial site visits, without proper notice, also violate the Idaho Open Meeting Act.[21] Specifically, in the

---

[19] *Comer,* 130 Idaho at 439, 942 P.2d 563.

[20] *Id.*

[21] *Noble v. Kootenai County,* 148 Idaho ___, 231 P.2d at 1040.

absence of proper notice, any action taken at a meeting held in violation of the open meeting act is necessarily void. See I. C. §67-2347.

In sum, the Court's holding here that the Teton County Commissioner's resort to their own knowledge obtained by extra-judicial site visits, does not comport with the Idaho Supreme Court's holding in *Comer* and *Noble*. To the extent their decision is premised upon such visits, the decision cannot stand.

II. The County's Most Recent Decision Does Not Comply with Idaho Code § 67-6535.

The Court acknowledged that much of the Board's most recent decision "continue[s] to be both arbitrary and capricious,"[22] but nevertheless upheld the Board's decision. The decision to uphold the Board's decision was erroneous for two reasons. First, the County's written decision to deny the CUP under the guise of the "memorable gateway" standard also contains no reasoned statement setting forth the relevant facts and applicable legal principles, as required by I. C. § 67-6535. Second, the Board's decision contains no rationale or explanation of how they reached the conclusion that there was no way to mitigate the proposed building's extra height and therefore does not satisfy the express requirements of I. C. § 67-6535.

A. The County's Finding Regarding the "Memorable Gateway" Are Conclusory and Do Not Meet the Standards in Idaho Code § 67-6535.

As noted in Petitioner's Brief in Support of Second Amended Petition for Judicial Review, the Idaho Local Land Use Planning Act requires a local government body to provide

[22] Third Decision on Review at 7.

0305

a reasoned statement that explains the criteria and standards considered relevant and explains the rationale for the decision. The Idaho Supreme Court has stated on a number of occasions the following principle:

> What is needed for adequate judicial review is a clear statement of what, specifically, the decision-making body believes, at the hearing and considering all of the evidence, to be relevant and important facts upon which its decision is based. *Conclusions are not sufficient.*[23]

The County's finding regarding the "memorable" gateway are completely conclusory and afford no rationale or explanation of how it arrived at its decision. Specifically, the County's finding regarding a "memorable gateway" was contained in a single sentence: "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 which Driggs would like to see become a memorable gateway."[24] The County affords no explanation of how it determined the area embraced within the "gateway" nor did it offer any rationale or explanation of how it made the "memorable" determination or even more importantly, why "shielding" was even necessary given Burns' use of design elements to render the building profile in harmony with surrounding uses. Indeed, one has to wonder how the Teton County Commissioners were able to determine that Burns' building was within an area that Driggs would "like to see become a memorable gateway" when in fact the City of Driggs' was itself unable to identify such area at the time it adopted its

---

[23] *Workman Family Partnership v. City of Twin Falls,* 104 Idaho 32, 37, 665 P.2d 926, 931 (1982) (Italics added); See also *Cowan v. Board of Commissioners of Fremont County,* 143 Idaho 501, 511, 148 P.3d 1247, 1257 (2006).

[24] See County's Amended Findings and Conclusions, p. 6.

Comprehensive Plan.[25] Further, the record is devoid of any testimony or evidence that the structure with the additional height was not "memorable". The County apparently assumes that industrial structures are not "memorable" by definition — a strange proposition indeed for structures located in an industrial zone.[26] The County's decision provides no factual support for its conclusion that the structure "cannot be adequately shielded" — nor does it identify from what facility or perspective the structure was to be shielded — and ignores the design elements of the building itself (i.e. color, texture, roofline, landscaping, set-back and other design features breaking up the building profile and making the building attractive). The County's finding includes no explanation of why these design elements were insufficient to make the building "memorable."

In sum, there is no "clear statement" as required by *Workman* and I.C. § 67-6536, nor is there any statement of the facts relied upon or any explanation of the County's rationale for its conclusions. The decision should be reversed for failure to comply with I.C. § 67-6535.

B. The Board's Finding That Burns Had Presented No Plausible Way to Mitigate the Additional Height Is Arbitrary and Fails to Meet the Standards Required under Idaho Code § 67-6535.

The Court noted the County's finding that, "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 ensure surrounding properties, uses, and neighborhoods'

---

[25] Section 9.1, City of Driggs Comprehensive Plan. Further, as noted above, Teton County later adopted a scenic corridor wherein it *did* identify an area where scenic considerations were identified. As noted in Petitioner's briefs, such area appears to be a specific implementation of the "memorable gateway" goal articulated earlier in the Comprehensive Plan.

[26] Given the inherent character of manufacturing and industrial uses permitted in the M-1 zone, one has to question the logic of requiring industrial structures to be "memorable" in the first place.

protection and compatibility with the additional 30 feet of height."[27] The Court then held that "This Court will not substitute its judgment for that of elected governing body as to the weight of the evidence on questions of fact."

In *Workman Family Partnership,* the Idaho Supreme Court held:

> What is needed for adequate judicial review is a clear statement of what, specifically, the decision-making body believes, after hearing and considering all evidence, to be the relevant and important facts upon which its decision is based. Conclusions are not sufficient.[28]

Further, Idaho Code § 67-6535 requires the governing board to "state the relevant contested facts relied upon and explain the rational for the decision . . ." The Board's decision here does none of the above. It does not explain its rationale, nor does it state the relevant facts relied upon. Rather, the Board simply makes the wholly conclusionary statement that there was no "plausible way to mitigate the extra 30 feet of height."

The record is replete with evidence submitted by Burns of the numerous means by which the visual aspect of the additional height could be mitigated, including the use of design elements of the building (i.e. color, texture, roofline, landscaping) and other design features breaking up the building profile and rendering the building in harmony with the adjoining industrial uses. The Board provides no explanation of why these design features would not work and why the additional height was incompatible with adjoining industrial and commercial uses. In contrast, no evidence was presented regarding incompatibility with

---

[27] Third Decision on Review, p. 14.

[28] *Workman Family Partnership v. City of Twin Falls,* 104 Idaho at 37, 665 P.2d at 931; *see also Cowan v. Board of Commissioners of Fremont County,* 143 Idaho 501, 511, 148 P.3d 1247, 1257 (2006).

adjoining uses, nor was evidence presented tending to establish that the design elements proposed by Burns would be ineffective. The County's conclusory decision making does not comport with *Workman Family Partnership* or Idaho Code § 67-6535.[29]

In sum, a "view of the Tetons" was not a relevant consideration, given the lack of standards regulating scenic views and given the fact that the property was located outside the scenic corridor. There is no evidence demonstrating that the additional height was incompatible with the adjoining industrial uses. Rather, the Commissioners simply *assumed* the extra height was incompatible with adjoining industrial uses and then found, without any explanation, that the design elements proposed by Burns could not mitigate the *assumed* incompatibility. The Commissioners' failure to point to any evidence demonstrating incompatibility and their failure to provide any explanation why the design elements proposed by Burns would not work is exactly the type of arbitrary decision making that the *Workman Family Partnership* and Idaho Code § 67-6535 were designed to prevent. The Court's decision appears equally arbitrary, because it too offers no citation to the record demonstrating facts upon which the Commissioners' conclusions were justifiably premised. The Court should not sanction the arbitrary process employed here and the County's decision should be reversed and remanded with instructions to approve the CUP application.[30]

---

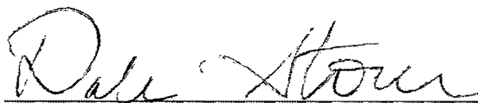
[29] *See* Petitioner's Brief in Support of Second Amended Petition for Judicial Review, p. 10, where this argument was set forth in greater detail.

[30] *See* Petitioner's Brief in Support of Second Amended Petition for Review, p. 28, for a discussion of the conditions under which such remand may be issued.

CONCLUSION

The Court's decision appears to condone arbitrary decision making which violates Idaho Code § 67-6535 and the holdings in *Workman Family Partnership.* The County's resort to the "memorable gateway" referenced in the Driggs' Comprehensive Plan violates the Supreme Court's holding in *Urrutia* and Petitioner's due process rights. The County's reliance upon the Commissioners' own personal knowledge also violates the Idaho Supreme Court's holding in *Comer* and *Noble.* Neither the Court or the County have pointed to any evidence in the record supporting the Board's finding that the proposed building, with the additional height, was incompatible with the adjoining industrial uses, nor is there any evidence or explanation of why the proposed design elements would not be effective, as required by Idaho Code § 67-6535. The Board's conclusions, without explanation, rationale or reference to the evidence, are arbitrary and capricious and should be reversed.

DATED this 3rd day of August, 2010.



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 3rd day of August, 2010.

DOCUMENT SERVED: PETITIONERS BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION

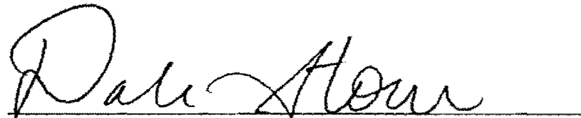
ATTORNEY SERVED:

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

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

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

(✓) Mail
( ) Hand Delivery
( ) Electronic mail
( ) Courthouse Box



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

G:\WPDATA\DWS\14688 - Burns Holdings\14688.000 Burns v. Teton County\Petition for Judical Review\Pleadings\Reconsider.MEMO.v.4.wpd:sm

Kathy Spitzer, Esq. [ISB No. 6053]
TETON COUNTY PROSECUTING ATTORNEY
89 N. Main Street
Driggs, Idaho 83455
208-354-2990
kspitzer@co.teton.id.us
Attorney for Respondent Teton County

FILED
AUG 10 2010
TIME: 1:12
TETON CO. ID DISTRICT COURT

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 REPLY BRIEF IN OPPOSITION TO PETITIONER'S MOTION FOR RECONSIDERATION

TABLE OF CONTENTS

I. Introduction 2

II. Argument 2

A. THE VOID FOR VAGUENESS DOCTRINE DOES NOT APPLY TO COMPREHENSIVE PLANS 2

B. HOWEVER BROAD, IDEALISTIC AND VISIONARY, COMPREHENSIVE PLANS MUST BE COMPLIED WITH WHEN MAKING CUP DECISIONS 4

C. THE COMMISSIONERS DID NOT BASE THEIR DECISION ON AN EXTRA-JUDICIAL SITE VISIT 7

D. Attorneys Fees 8

III. Conclusion 8

COMES NOW Respondent, Teton County Board of Commissioners, and submits this Brief in Opposition to Petitioner's Motion for Reconsideration.

I. INTRODUCTION

The Local Land Use Planning Act (LLUPA) grants broad planning and zoning authority to local governments. To guide elected officials in their planning and zoning decisions LLUPA mandates that local governments create and update their comprehensive plans. Because LLUPA mandates that the County make a finding of compliance with the broad visionary goals of the comprehensive plan prior to granting a conditional use permit, petitioners contention that the County erred in denying the application because it conflicted with the plan is meritless. Equally lacking in merit is Petitioner's argument that the void for vagueness doctrine applies to the comprehensive plan which is not a legally controlling zoning ordinance, but merely a flexible guide to aid the County in their discretionary zoning decisions such as the grant or denial of a conditional use permit. Lastly, Petitioner wrongly equates familiarity with ones County with extra-judicial site visits. The Commissioners have never conducted an extra judicial site visit of the subject property.

II. Argument

A. THE VOID FOR VAGUENESS DOCTRINE DOES NOT APPLY TO COMPREHENSIVE PLANS

The comprehensive *plan* is not a statute or ordinance, thus the void for vagueness doctrine is not applicable. The constitutional concept of vagueness can be invoked only in cases dealing with *statutory* terms. See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); *Karlin v. Foust*, 188 F.3d 446, 458-59 (7th Cir.1999); *Okpalobi v. Foster*, 190 F.3d 337, 357-58 (5th Cir.1999). A

0373

comprehensive plan imposes an obligation on the *County,* not on private citizens. It dictates how the County effectuates its land use planning and zoning obligations and decisions, one of which is the grant or denial of a conditional use permit (CUP). Decisions made in accordance with the plan are policy decisions that affect citizens, but their avenue for change is through the political process. Because a comprehensive plan is not legally controlling zoning law, Petitioner's due process rights could not been violated. "This Court has held that a comprehensive plan does not operate as legally controlling zoning law, but rather serves to guide and advise the governmental agencies responsible for making zoning decisions." *Urrutia v. Blaine County,* 134 Idaho 353, 357-358, 2 P.3d 738, 742 (2000). An ordinance, on the other hand, is the translation of the comprehensive plan's goals into measurable requirements for applicants. Comprehensive plans and zoning ordinances are "distinct concepts serving different purposes." *Id.* at 357. Petitioner is confusing the two, holding the Comprehensive plan to the same standards as an ordinance.

> The Board may, therefore, refer to the comprehensive plan as a general guide in instances involving zoning decisions such as revising or adopting a zoning ordinance. A zoning ordinance, by contrast, reflects the permitted uses allowed for various parcels within the jurisdiction. *See* I.C. § 67-6511.

Id. at 358. In deciding whether to allow a non-permitted use to take place in a zone, the County must follow the vision of the comprehensive plan – just as it does when crafting a zoning ordinance.

In *State v. City of Hailey,* the Court considered Hailey's comprehensive plan in light of a vagueness challenge. The City Council had annexed a piece of property and the annexation ordinance zoned approximately twelve acres as business property. The State alleged that the creation of a twelve-acre business zone in the annexed parcel violated

certain comprehensive plan provisions regarding commercial zoning and alternatively that the plan was too vague to be enforced because the terms "downtown", "city center" or "business core" were not defined. The plan stated that "(i)t is essential for the down town area to be attractive so as to stimulate business and maintain the business core within the city center." The Court acknowledged that plans are meant to be flexible in order to serve as a guide for elected officials in making their decisions and that the lack of definition of terms was not a problem.

> The mere fact that these terms are undefined does not render the plan too vague or indefinite to be enforced. To the contrary, block-by-block definition of the downtown core may rob the plan of its flexibility. It is clear that the above terms are subject to varying constructions, thus accommodating physical expansion at the downtown business sector. Nonetheless, the admittedly general language of the plan does serve to curb the exercise of discretion on the part of the zoning authority. For example, creation of a business sector on the north end of Northridge would clearly conflict with the plan. However, given the proximity of the newly-created business zone to existing commercial zoning, we cannot say the spirit or letter of the plan was violated.

State v. City of Hailey, 102 Idaho 511, 515, 633 P.2d 576, 580 (1981). The Court did not spend much time on the vagueness argument, pointing out simply that, given the function of the plan, this kind of flexibility is necessary.

B. HOWEVER BROAD, IDEALISTIC AND VISIONARY, COMPREHENSIVE PLANS MUST BE COMPLIED WITH WHEN MAKING CUP DECISIONS

The Local Land Use Planning Act's requirement of consistency with the comprehensive plan applies to zoning ordinances and conditional use permits (which are in essence "mini-zones") and not to other land use actions such as subdivisions. Idaho Code §§67-6511, 67-6512(a), 67-6513. Conditional use permits are zoning decisions, subdivisions are not. *Eacret v. Bonner County*, 139 Idaho 780, 786, 86 P.3d 494, 500 (2004). The Board of County Commissioners is specifically directed by Idaho Code §

67-6512(a) and by the Driggs Ordinance 274-07 Chapter 4, Section 2(A)(1) to find that the proposed conditional use is not in conflict with the comprehensive plan. Courts have consistently held that when evaluating a conditional use application conformance with the comprehensive plan must be determined. *Evans v. Board of Com'rs of Cassia County Idaho*, 137 Idaho 428, 434, 50 P.3d 443, 449, (2002).

Petitioner continues to misinterpret the *Urrutia v. Blaine County* case, believing it supports their proposition that the County erred by addressing compliance with the comprehensive plan, this time stating they could not rely upon it because it is a visionary document. Although Petitioner admits on page 3 of his brief that comprehensive plans are supposed to be "broad, idealistic and visionary", because of its vagueness he claims that the County cannot use it to make zoning decisions. His "analysis" is completely contrary to legislative law and judicial opinion. It is well established that a comprehensive plan is not a legally controlling law when governing bodies are analyzing ***subdivision*** applications, but the comprehensive plan is legally controlling in making zoning decisions such as the grant or denial of CUP applications. *Bone v. City of Lewiston,* 107 Idaho 844, 850, 693 P.2d 1046, 1052 (1984); *Urrutia v. Blaine County,* 134 Idaho 353, 357-358, 2 P.3d 738, 742-743 (2000). The *Urrutia* case is easily distinguished from the present case because it involved a subdivision application, not a conditional use permit (a zoning decision). While it is true that the comprehensive plan plays a limited role in subdivision applications, its role in zoning issues is different - zoning decisions must be in accordance with the comprehensive plan. I.C. § 67-6511; *State v. City of Hailey,* 102 Idaho 511, 514, 633 P.2d 576, 580 (1981). "Planning is a determination of public policy, and zoning, to be a legitimate exercise of police power should be in furtherance of that

policy." *Giltner Dairy, LLC v. Jerome County*, 145 Idaho 630, 633, 181 P.3d 1238, 1241 (2008). For subdivisions, the comprehensive plan guides the interpretation and exercise of a specific authority articulated in the ordinance but it cannot be used to create new requirements or obstacles at odds with land uses permitted under the ordinance. The applicant in *Urrutia* applied to subdivide property and his application complied with Blaine County's zoning and subdivision ordinances. *Id.* at 356. Because subdividing land into twenty-acre lots for single family residences was specifically permitted, the comprehensive plan could not alone be used to deny the applicant what they were otherwise by law permitted to do. Conditional use permits are different from subdividing. Their whole purpose is to allow something that is not otherwise permitted by law. Because there is no underlying zoning that affects them**, they are discretionary zoning decisions.** *Id.; SuperAmerica Group, Inc. v. City of Little Canada,* 539 N.W.2d 264, 266 (Minn.App.1995), *review denied* (Minn. Jan. 5, 1996). In *Howard v. Canyon County Bd. of Com'rs*, the applicant applied for a CUP and was denied. He argued that he satisfied all reasonable conditions of the Canyon County CUP ordinance and thus should get a CUP. The Court disagreed. *Howard v. Canyon County Bd. of Com'rs*, 128 Idaho 479, 481, 915 P.2d 709, 711 (1996). The Court concluded that the use was prohibited by the comprehensive plan and that this was a proper reason for denial.

> Moreover, we also affirm the decision that Howard's proposal is in conflict with the Comprehensive Plan. ... Substantial and competent evidence supports the Commissioners' conclusion that approval of Howard's subdivision in the middle of a large agricultural tract would be the "scattered nonfarm" use prohibited by the Comprehensive Plan and would cumulatively affect the area's character in conflict with the Comprehensive Plan.

Howard at 482.

For subdivision applications there is no need to address the comprehensive plan, because LLUPA mandates no "accordance" or "not in conflict" requirement for them. Section 67-6535 requires that the comprehensive plan be addressed where "appropriate" and "applicable," that is, in the case of a rezone or a conditional use permit. The reason for the special treatment of conditional use permits is that, by their nature, they allow uses not in accordance with the normal zoning for an area, they are, in essence, mini-zones.

In the present case the County found that the proposed use was not in accordance with the Comprehensive Plan. The Plan states that the area North of Driggs was intended to be a gateway, that there should be a sense of arrival that was harmonious with the Tetons and surrounding mountains. It is wholly within the discretionary authority of the Board of County Commissioner's to make this determination.

C. THE COMMISSIONERS DID NOT BASE THEIR DECISION ON AN EXTRA-JUDICIAL SITE VISIT

In the section of Petitioner's brief addressing extra-judicial site visits, two cases are cited and in both the commissioners intentionally went and viewed the subject properties as a group. The issue in *Noble v. Kootenai County*, 148 Idaho 937, 231 P.3d 1034, 1039 (2010) was whether the commissioners intentional avoidance of the public at their noticed site visit was improper. The issue in *Comer v. County of Twin Falls*, 130 Idaho 433, 942 P.2d 557 (1997) was that the commissioners did not provide notice and an opportunity to be present to the public. Never has there been a case in Idaho equating a decision-makers knowledge of the area with an extra-judicial site visit. The property is located adjacent to the County's main highway. Anyone who lives in the County or comes from the North to work in the County has driven by this property. Any judge

hearing this case would drive by this section of highway, and if Petitioner is correct, would have to give notice and an opportunity to be present to the parties each time he commutes past the site. Similarly, the Board of County Commissioners who must be residents of the County for whom they work would have to provide notice and an opportunity to be present to the public every time they drove past an area that had a pending application. Obviously this is ridiculous and not the result that the legislature or Court intended.

D. ATTORNEY'S FEES

According to § 12-117 this Court must award attorney's fees if it finds that the non-prevailing party acted without a reasonable basis in fact **or** law. As shown above, there is no reasonable legal basis for this reconsideration and the County should be awarded its legal fees.

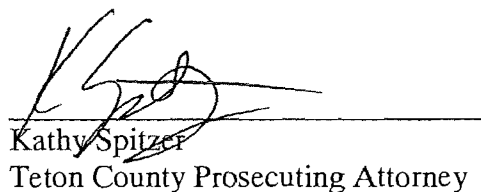
II. CONCLUSION

Conditional use permits are discretionary zoning determinations and the decision makers must rely upon a visionary comprehensive plan. The comprehensive plan is flexible, and a determination must be made by our elected officials as to a conditional uses conformance with the plan. The comprehensive plan must also guide elected officials in other policy decisions such as crafting zoning laws. If this court determined that the comprehensive plan is too vague to make a decision regarding a conditional use permit, then the plan would also be too vague to guide the County in crafting its ordinances. In his motion, Petitioner asks this Court to reach the absurd conclusion that Counties cannot rely upon their comprehensive plans when making policy decisions because they are broad. BUT the Local Land Use Planning Act mandates that they do

exactly that. Petitioner wants to hold the comprehensive plan to the same standards as our statutes and ordinances, but it is not a statute or ordinance. If Petitioner feels that the County should not have to comply with the comprehensive plan in making zoning decisions then Petitioner should challenge the statute and ordinance mandating conformance with the plan. If Petitioner feels that the comprehensive plan is too vague then he needs to challenge the plan itself, not the County's reliance upon it for zoning decisions.

DATED this 10th day of August, 2010.

Respectfully submitted,



Kathy Spitzer
Teton County Prosecuting Attorney

CERTIFICATE OF SERVICE

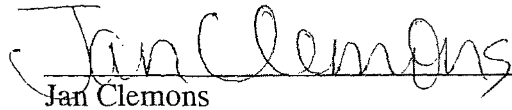
I HEREBY CERTIFY that on the 10th day of August, 2010, the foregoing was filed, served, or copied as follows:

DOCUMENT FILED:

Honorable Gregory Moeller Madison County Courthouse P.O. Box 389 Rexburg, ID 83440-0389	☐ ☐ ☐ ☐ ☐	U. S. Mail Hand Delivered Overnight Mail Facsimile E-mail

SERVICE COPIES TO:

Dale Storer Holden, Kidwell, Hahn & Crapo P.O. Box 50130 Idaho Falls, ID 83405	☐ ☐ ☐ ☐ ☐	U. S. Mail Hand Delivered Overnight Mail Facsimile E-mail



Jan Clemons

COURT MINUTES

CV-2007-0000376

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

Hearing type: Motion for Reconsideration

Hearing date: 8/17/2010

Time: 4:02 pm

Judge: Gregory W Moeller

Minutes Clerk: PHYLLIS HANSEN

Kathy Spitzer, Respondents Attorney

Dale Storer, Plaintiff's Attorney

J calls case; ids those present

Motion for Reconsideration

PA – are we a government of laws or are we a government of men

411

Did the board here just give "lip Service" to CUP we submit they did

Did they act arbitrarily and capriciously

Three witnesses

413

J – think remember witnesses

John Bach, Sandy Mason

J – what if no witnesses had testified

At least entitled to explanation; totally conclusiory

416

No evidence anywhere that it is incompatible

J recognize argument – phrase like compatible has element of subjectivity

418

J understand your argument

Did they have a right to make the decision

Has to do with quantum of evidence from which to draw their conclusion

There is a procedure to seek an exception

If they had wanted an absolute no more than 45 feet, they should have said so

They opened the door

422

J seven pages of findings and conclusions

426

J – focused on vagueness

Haven't addressed inappropriateness of viewing the site

PA – no nothing wrong in looking at the site

429

PA _ can't rely on that extraneous knowledge

Parties are entitled to know what evidence is on the table

433

RA argues

Arudia – subdivision case

442

PA – rebuts

0448 J will take under advisement.

FILED IN CHAMBERS AT
MADISON COUNTY, IDAHO.
Date: October 1, 2010
Time: 5:00 p.m.
By: Gregory W. Moeller
DISTRICT JUDGE

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** **AMENDED THIRD DECISION ON REVIEW**

I. INTRODUCTION

On June 10, 2010, the Court issued its Third Decision on Review which affirmed the January 12, 2010 decision of the Teton County Board of County Commissioners ("the County"). This matter now comes before the Court on Burns Holdings, LLC's ("Burns") motion for reconsideration. A hearing on Burns' motion took place on August 17, 2010. Following oral argument, the Court took the matter under advisement.

This "Amended Third Decision on Review" addresses the additional issues raised on reconsideration. It is intended to replace the Court's earlier decision of June 10, 2010.

II. BACKGROUND

This is a petition for judicial review of the County's January 12, 2010 decision entitled, "Amended Findings of Fact and Conclusions of Law." In its decision, the County once again denied Burns' application for a conditional use permit to construct a 75-foot concrete batch plant. This is Burns' third petition for judicial review. The Court will briefly reiterate the facts and procedural history.

Burns owns 6.5 acres north of the City of Driggs. 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 now 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 an 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 ruled 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 which denied Burns' application. Burns sought judicial review of the County's

---

[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).

second written decision. In September of 2009, this Court again found in Burns' favor and remanded the case to the County to produce written findings consistent with the requirements of Idaho law.[4]

In January 2010 the County filed Amended Findings of Fact and Conclusions of Law. While these new findings address some of the deficiencies noted in the Court's prior order, they also perpetuate some of the errors noted earlier.

III. ISSUES PRESENTED ON REVIEW

Petitioner's Second Amended Statement of Issues on Judicial Review presents the Court with the following issues on 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 Boards 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-give (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?

[4] Decision on Review (September 29, 2009).

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 is 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 an 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?

IV. 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.[5] The court reviewing a local governing body's decision bases its review on the record created before the governing body.[6]

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 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.[7] Local governing bodies enjoy a strong presumption that their actions, where they have interpreted and applied their own zoning and planning ordinances, are valid.[8]

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."[9] "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."[10] 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.[11] However, a reviewing court exercises free review over questions of law, including whether a governing body violated statutory or constitutional provisions.[12]

---

[5] I.C. § 67-6519(4); I.C. § 6521(d).
[6] I.R.C.P. 84(e)(1).
[7] I.C. § 67-5279(3).
[8] *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).
[9] *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).
[10] *Marchbanks v. Roll*, 142 Idaho 117, 124 P.3d 993, 995 (2005) (internal quotations and citations omitted).
[11] *Whitted*, 137 Idaho at 121, 44 P.3d at 1176; I.C. § 67-5279(1).
[12] *Friends of Farm to Market*, 137 Idaho at 196, 46 P.3d at 13.

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.[13] 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.[14]

V. DISCUSSION

This Court has twice remanded the County's denial of Burn's application for a conditional use permit because the County's decisions failed to meet the requirements of Idaho Code §§ 67-6535 and 6519(4). The Court found that the County's previous decisions denying Burns' application lacked a sufficient explanation of the contested facts, the facts relied upon, and the applicable law. Absent these elements, it was impossible for this Court to determine whether substantial evidence supported the County's decisions.[15]

Idaho Code § 67-6519(4) 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:
> o. The ordinance and standards used in evaluating the application;
> p. The reasons for approval or denial; and
> q. The actions, if any, that the applicant could take to obtain a permit.

The legislature has clearly stated the purpose of 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."[16]

In its prior decision, this Court cited the 1982 Idaho Supreme Court case *Workman Family Partnership v. City of Twin Falls*, wherein the Idaho Supreme Court found that a governing body must produce a written decision that gives a district court

---

[13] I.C. § 67-5279(4).
[14] I.C. § 67-5279(3).
[15] Decision on Review, p. 14 (Sept. 29, 2009).
[16] I.C. § 6535(c).

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."[17] The Supreme 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."[18] 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 considering all the evidence, to be the relevant and important facts upon which its decision is based. Conclusions are not sufficient.[19]

Based on this rationale, the Idaho Supreme Court in *Workman* 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.

As will be explained more fully below, the County's Amended Findings of Fact and Conclusions of Law, despite the ongoing problems noted in Section V(A), *infra*, satisfy Idaho Code § 67-6519(4) and the standard announced in *Workman Family Partnership v. City of Twin Falls*. The County has sufficiently set forth the contested facts, the facts relied upon, and the applicable law for this Court to conduct judicial review of its decision.

[17] *Workman Family Partnership v. City of Twin Falls*, 104 Idaho 32, 36, 655 P.2d 926, 930 (1982).
[18] *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)).
[19] *Workman*, 104 Idaho at 37, 655 P.2d at 931.

A. It was arbitrary and capricious for the County to deny Burns' application because it was filed as a conditional use permit, rather than as a variance.

The County's most recent decision denied Burn's application, in part, because they contend it should have been filed as a CUP rather than a variance.[20] They have once again reached this conclusion despite the fact that the applicable ordinance specifically directed Burns to file his application as a CUP. In so doing, they have ignored the Court's Decision on Review, dated September 29, 2009.[21]

Two recent Idaho Supreme Court cases clarify when a local government zoning action is "arbitrary, capricious, or an abuse of discretion." In *Neighbors for a Healthy Gold Fork v. Valley County*, the Court found a county's interpretation of its development code reasonable.[22] However, in *Lane Ranch Partnership v. City of Sun Valley*, the Court found the city's interpretation of its municipal code unreasonable.[23] In both cases, after first applying principles of statutory construction to interpret the ordinance at issue, the Court then looked at the local government's interpretation to determine whether it was reasonable. In *Neighbors* the Court started with a strong presumption that the county's interpretation of its zoning ordinance was valid. It then concluded that the county's reasoning supported its conclusions.[24]

In *Lane Ranch,* however, the Court found the City of Sun Valley acted arbitrarily when it applied an irrelevant municipal code section. This occurred because the City assumed that a private road application was an application to build a subdivision—a successive subdivision application it had denied in the past. Because the county's denial was founded on an unsupported assumption, the denial lacked a rational basis.[25]

Idaho Code § 67-6535(b) requires a reasoned statement of the facts and the law justifying the decision.

---

[20] Amended Findings of Fact and Conclusions of Law, Conclusion No. 1, pp. 1-2.
[21] Decision on Review, pp. 12-13 (September 29, 2009).
[22] *Neighbors for a Healthy Gold Fork v. Valley County*, 145 Idaho 121, 176 P.3d 126 (Dec. 27, 2007).
[23] *Lane Ranch* 175 P.3d at 780.
[24] *Neighbors*, 176 P.3d at 136-142.
[25] *Lane Ranch*, 175 P.3d at 780.

> 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.

Burns argues that the County's decision was arbitrary and capricious because (1) the County concluded that Burns should have pursued a variance rather than a conditional use permit after the fact, and (2) the county denied the CUP based on grounds that were neither discussed by the Board during the November 15, 2007 hearing nor mentioned in the initial Findings of Fact and Conclusions of Law prepared by the Board.[26] The Court agrees. While there are clearly errors in the City Ordinance, and perhaps even inconsistencies with state law, at this stage in the proceedings it is blatantly unfair for the County to rely upon confusion of their own creation as the basis for denying Burns' application. Even if the County was correct in concluding that Burns' application should have been made as a variance, rather than as a request for a conditional use permit, due process demands that Burns at least be given a hearing on the issue. As this Court concluded in its earlier Decision on Review (September 29, 2009), the County's effort to ignore or rewrite the express directive for applicants to seek a conditional use permit for a structure over 45-feet tall is clearly unjust. Merely pretending that the confusion created by the County's own drafting errors does not exist is no solution. The County needs to correct this problem immediately.

Furthermore, the Court is not persuaded that the City of Driggs Ordinance 281-07, which requires height increases above 45-feet to be approved through a conditional use permit, is inherently in conflict with I.C. § 67-6516. Just because the LLUPA refers to variances as a means of modifying "height of buildings," does not mean that a conditional use permit cannot be granted for the same purpose. There is no reason why a local government could not elect to regulate height through conditional use permits and

---

[26] These issues coincide with issues (b) and (m) in Burns' Second Amended Statement of Issues on Judicial Review.

zoning variances. Nothing in I.C. § 67-6516 can be read to specifically *exclude* such a practice. Because the LLUPA cannot be read to forbid such a practice; there is no conflict with state law for purposes of Article XII, § 2, of the Idaho Constitution. Any conflict now claimed by the County appears to be merely a convenient excuse to deny the application.

However, even if a conflict with state law existed, the Court has concluded that it is unnecessary for it to decide this case based on the apparent conflict between I.C. § 67-6516, the City of Driggs Ordinance 281-07 and Article XII, § 2, of the Idaho Constitution. As will be discussed in Section V(B), *infra*, the Court has concluded that sufficient grounds exist to affirm the County's denial of Burn's application as a conditional use permit on its own merits. Therefore, it is unnecessary for the Court to resolve the legal issues raised by the County at this time.

B. The Remaining Findings of Fact and Conclusions of Law Comply with Constitutional and Statutory Requirements.

Burns raised numerous issues in its most recent petition for judicial review. Those issues generally fall into three main areas: (1) whether the Findings and Conclusions improperly used the Comprehensive Plan as a regulatory ordinance for evaluating and considering Burns' CUP application, (2) whether the Findings and Conclusions are clearly erroneous due to insufficient facts supporting the County's decision, and (3) whether Kathy Rinaldi's participation in the Board's November 9, 2009 decision violated Burns' constitutional right to an impartial tribunal.[27]

(1) The County's Findings and Conclusions are Supported by Substantial Evidence, and Do Not Improperly Rely upon the Comprehensive Plan.

Burns objects to the County's decision to deny the CUP application on the grounds that the County lacked substantial evidence in the record. According to Burns,

---

[27] Although these issues specifically coincide with (e), (i) and (n) in the Second Amended Statement of Issues on Judicial Review, they also overlap with the remaining issues.

the County lacked substantial competent evidence in the record to support its finding that Burns' proposed 75-foot height was in conflict with the Driggs Comprehensive Plan and other local ordinances. Burns alleges that the County's Amended Findings of Fact and Conclusions of Law lack substantial and competent evidence.

In Idaho, "[s]ubstantial 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."[28] A court will not substitute its judgment for that of the governing body as to the weight of the evidence on questions of fact.[29]

The critical evidence before the County concerned the location of the concrete plant. Teton County considered the need of preserving the "gateway" at the north end of Driggs that leads into the City.[30] Such gateways are listed as a "need" under Section 9.3 of Driggs' Comprehensive Plan. Furthermore, the City of Driggs' Comprehensive Plan Section 9.4 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...

The County explained that in their decision that a 75-foot high structure, located squarely between the highway and the Teton Range, clearly interferes with the City's objectives to preserve a "memorable gateway."[31] While there are other areas in the County where these mountains are not visible from the highway, this location north of town is clearly a "dramatic" and "memorable" vista—the iconic view of the Teton Valley. The Court finds no error in reaching such a conclusion by reference to the Comprehensive Plan.

In reviewing the Comprehensive Plan, the most obvious intention was to ensure and preserve this dramatic view of the surrounding scenery. The Teton Range in general, and the Grand Teton in particular, are arguably the most famous and attractive part of the

---

[28] *Marchbanks v. Roll,* 142 Idaho 117, 124 P.3d 993, 995 (2005) (internal quotations and citations omitted).
[29] *Whitted,* 137 Idaho at 121, 44 P.3d at 1176; I.C. § 67-5279(1).
[30] Burns Holding, LLC CUP Denial, Amended Findings of Fact and Conclusions of Law, p. 6
[31] *Id.*

local scenery. The drafters of the Plan expressed the need for buildings to be "setback" so they do not interfere with this scenery. In its Findings, the County concluded that a 75-foot high by 60 foot wide building would noticeably interfere with the surrounding scenery and detract from its effort to maintain "memorable gateways."[32]

Burns argues that the County is impermissibly using their Comprehensive Plan as a regulatory tool, in violation of the Idaho Supreme Court's holding in *Urrutia v. Blaine County*, 2 P.3d 738, 134 Idaho 353 (2000). In *Urrutia* the Supreme Court held a board may "refer to the comprehensive plan as a general guide in instances involving zoning decisions." However, "the Board erred in relying *completely* on the comprehensive plan in denying [the] applications."[33]

The facts in *Urrutia* are distinguishable from the present case. While *Urrutia* concerned a subdivision application, the case in hand deals with a conditional use permit (which under the facts of this case, closely resembles a zoning variance). In *Urrutia*, Blaine County relied "solely" on its comprehensive plan in denying the application.[34] In this case, although Teton County references its Comprehensive Plan,[35] it has primarily relied on the ordinances of the City of Driggs, such as (1) the height limitation on all buildings of 45 feet,[36] (2) the stated purposes of conditional use permits,[37] (3) the stated purposes of the local ordinance,[38] and (4) the conditions required by the ordinance for approval.[39] While the Comprehensive Plan is referenced in Section 2(D) of the Findings, and there are other references to "gateways" and aesthetics in the Findings, it is clear to the Court that Teton County was not "completely relying" on its comprehensive plan, as occurred in *Urrutia*.[40]

---

[32] Amended Findings of Fact and Conclusions of Law, p.6.
[33] *Urrutia*, 2 P.3d at 743-744, 134 Idaho at 358-359 (emphasis added).
[34] *Id.*, 2 P.3d at 743, 134 Idaho at 358.
[35] The Comprehensive Plan is only discussed in Section 2(D) of the Findings. It constitutes only two paragraphs out of the entire seven page document.
[36] Driggs City Ordinance, Chapter 2, Section 13C of Ordinance 281-07.
[37] *Id.*, Section 2 of Ordinance 274-07.
[38] *Id.*, Chapter 1(D) of Ordinance 274-07
[39] *Id.*, Chapter 4, Section 2(A), Ordinance 274-07
[40] *Urrutia*, 2 P.3d at 744, 134 Idaho at 359.

Burns argues that the problem with relying on the comprehensive plan at all is that it uses inherently vague terms such as "memorable gateway." Burns cites substantial authority from other jurisdictions for the position that such provisions are "void for vagueness" because they inevitably lead to arbitrary and capricious decisions.[41] Burns asserts that "broad, idealistic, and vague language"[42] gives rise to rulings based on "feelings" and "arbitrary concepts" of the commissioners.[43]

The County correctly responds by noting that the void for vagueness doctrine only applies to statutes.[44] A comprehensive plan, as noted in *Urrutia*, "does not operate as legally controlling zoning law, but rather serves to guide and advise the governmental agencies responsible for making zoning decisions." Idaho Code § 67-6508 specifically sets forth a wide variety of appropriate items a comprehensive plan may cover: "[t]he plan shall consider previous and existing conditions, trends, desirable goals and objectives, or desirable future situations for each planning component. . . ."[45] LLUPA specifically allows comprehensive plans to address issues such as "preservation,"[46] "natural resources,"[47] "future corridors,"[48] areas with "scenic significance,"[49] and "standards for community . . . beautification."[50] It is also noteworthy that I.C. § 67-6508 concludes by noting: "Nothing herein shall preclude the consideration of additional planning components or subject matter."

Idaho Code § 67-6512(a) specifically mandates that a conditional use permit should only be granted "when it is not in conflict with the plan." This is consistent with the Idaho Supreme Court's holding in *Evans v. Board of Com'rs of Cassia County Idaho*, 137 Idaho 428, 50 P.3d 443 (2002), which expressly recognized the need for county commissioners to consider the objectives of the comprehensive plan. Therefore, the

---

[41] *Anderson v. Issaqua*, 70 Wash. App. 64, 75, 851 P.2d 744, 751 (1993).
[42] Petitioner's Brief in Support of Reconsideration, p. 5 (August 6, 2010).
[43] *Anderson*, 70 Wash. App. at 77, 851 P.2d at 752.
[44] *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 33 L.Ed.2d 222(1972).
[45] I.C. § 67-6508
[46] I.C. § 67-6508(e)
[47] I.C. § 67-6508(f)
[48] I.C. § 67-6508(i)
[49] I.C. § 67-6508(k)
[50] I.C. § 67-6508(m)

Court concludes as a matter of law that given the breadth of appropriate subject matter for a comprehensive plan, the County's reference to the phrases "scenic corridor" and "memorable gateway" is appropriate. Rather than using the comprehensive plan for "evil" as a regulatory tool,[51] the County has referenced the plan as just a part of its broader vision or "desirable goal" for the community. The local ordinance, with its relatively low height restrictions, appears to reflect the greater vision of the Comprehensive Plan. This is exactly what a comprehensive plan is intended to accomplish.

The concrete plant that Burns wishes to construct is a permitted use within the zone where the building will be erected. Therefore, the intended use of the plant is not the issue.[52] The County was primarily concerned with the *height* of the concrete plant, a height which would exceed the maximum 45 feet allowed by the Ordinance by 30 feet. The proposed structure would not just barely exceed the height limit, it would be almost 67% taller than currently allowed. In an effort to reach a compromise, the County inquired of Burns any plausible way to mitigate the extra 30 feet of height.

Burns was unable to assure protection and compatibility with the surrounding properties, uses and neighborhood to the County's satisfaction. "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."[53]

At the November 2007 hearing, Burns suggested that setting the building back from the edge of the property line several hundred yards could mitigate the additional 30 feet in height. However, the County found that the top of the building would still obstruct views of the Teton Mountains and would not be a plausible way of mitigating

---

[51] Petitioner's Brief in Support of Reconsideration, p. 9.

[52] Although Finding of Fact 2(D) mentions "use" in the heading, the text of the finding focuses on the inability to "shield" such a large building. Other references to "use" in the Findings also appear to be more concerned with aesthetics and not the intended purpose of the plant. Amended Findings of Fact and Conclusions of Law, p.6.

[53] *Id.*

the extra height. No other building in that area exceeds the maximum allowable height of 45 feet. Thus, an additional 30 feet added onto such a large structure was considered to be simply too high. In reaching this conclusion, the Commissioners relied upon testimony from the witnesses at the hearing, the common knowledge of the geographic features of their community, and their reasonable interpretation of the applicable ordinances. Although Burns characterizes the testimony as "weak," the Commissioners are entitled to rely upon it. Even in the absence of testimony, the Commissioners can still apply their reasoned judgment to interpreting their local ordinances.

Within LLUPA, the Idaho Legislature specifically sets forth its intent for decisions made pursuant to the Act:

> It is the intent of the legislature that decisions made pursuant to [the Local Land Use and Planning Act] should be founded upon *sound reason* and *practical application* of recognized principles of law. In reviewing such decisions, the courts of the state are directed to consider the proceedings as a whole and to 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, not the mere possibility thereof, shall be entitled to a remedy or reversal of a decision.

I.C. § 67-6535(c) (emphasis added).

This Court finds that although reasonable minds may differ, a denial of Burns' CUP application can be *reasonably* and *practically* supported based upon the existing ordinances, the comprehensive plan, and the facts in the record. While Burns understandably wishes the Commissioners had reached a different conclusion, their reasons were neither arbitrary nor capricious. The Commissioners based their decision on substantial evidence, which only needs to be "more than a scintilla but less than preponderance."[54] This Court will not substitute its own judgment for the "reasoned decision-making" of the duly elected governing body as to the weight of the evidence on questions of fact.[55]

---

[54] *Marchbanks v. Roll*, 142 Idaho 117, 124 P.3d 993, 995 (2005) (internal quotations and citations omitted).
[55] *Whitted v. Canyon County Board of Com'rs*, 137 Idaho 118, 121, 44 P.3d 1173, 1176 (2002).

(2) The County's Findings and Conclusions are not Clearly Erroneous.

At its very essence, the County's decision is a determination by elected officials that a 75-foot high and 60-foot wide concrete batch plant in the proposed location is just too big to be compatible with its local ordinances and its comprehensive plan. In its Findings, the County listed several reasons why Burns' proposal is incompatible. For example, the County was concerned that the unusually tall structure would harm neighboring property values, affect economic values in an area dependent on its "scenic offerings," damage environmental assets by disrupting "scenic vistas," and more.[56] The County was obviously concerned about aesthetics, the plant's proximity to the scenic corridor, and its proximity to the "gateway" to the City of Driggs. The County was also plainly concerned about the considerable size of the structure relative to surrounding buildings; the proposed structure would be almost 67% taller than allowed by the City's ordinance.

In an effort to rebut these concerns, Burns offered "line-of-site" drawings at the hearing, which the Court has carefully considered. While they appear to show that setting the tower back from the road somewhat mitigates the *apparent* height of the building and its damage to the view of the Teton Mountains, it is difficult to discern from the drawings its appearance in reality. The actual structure will not be a mere two-dimensional silhouette. The County had clear skepticism about the overall aesthetic impact of the structure, regardless of the setback. Arguably, even a building the size of the Empire State Building would be dwarfed by the adjacent Teton Mountains, if it could be set back far enough from the highway. While such concerns are debatable, they are not unreasonable.

In a further attempt to persuade the County that the proposed structure would be compatible, Burns presented landscaping plans, noise pollution studies, traffic studies, and still the County remained unassuaged. Although Burns was given a full hearing on

---

[56] Amended Findings of Fact and Conclusions of Law, p. 4.

its application, the elected decision-makers were not persuaded. The Commissioners' denial was based on many findings of facts, all leading to one conclusion—a 75-foot structure was simply too tall for this rural, tourist-oriented community. This conclusion was not based merely on a "feeling" of the Commissioners, but upon the existing local ordinances and comprehensive plan. The Commissioners' sensitivity to the uniqueness of their alpine community, and the preservation of its scenic vistas, cannot be disregarded as merely provincial thinking. These concerns are also echoed throughout the applicable ordinances and the comprehensive plan. Although capably contested by Burns, there are substantial facts in the record to support the County's conclusions.

At oral argument, Burns derisively characterized the County's decision as a "back door re-zone." It is difficult for the Court to share this view because there is little in the County's Findings and Conclusions which take great exception to the proposed industrial use of the facility. The County's clear intent was not to prevent industrial usage of the property. Rather, the primary concern of the County appears to be maintaining the current height restrictions mandated by their ordinance. It must be fairly noted that Burns is the party seeking to substantially deviate from the existing ordinances, not the County.

Nevertheless, the Court understands Burns' frustration. However, whether the Commissioners' decision is viewed by Burns as personal, provincial, or political is irrelevant, as long as it was founded on substantial facts in the record. It is simply not the role of this Court to force a decision upon the County that its elected officials have the right to make. Even assuming, *arguendo*, that the Commissioners' decision was unwise or short-sighted, such issues are almost always best remedied in the voting booth, not the courtroom.

(3) The Inclusion of Kathy Rinaldi's Signature does not Invalidate the Amended Findings and Conclusions.

Petitioner's third argument is that Kathy Rinaldi's signature on the Amended Findings deprived Burns of an impartial tribunal. Rinaldi had earlier submitted a written opposition to the application. Both parties cited the 2004 Idaho Supreme Court case

Eacret v. Bonner, where the Supreme Court stated that the Due Process Clause "entitles a person to an impartial and disinterested tribunal ..."[57] Since the *Eacret* decision, the Idaho Supreme Court further defined "impartiality" as it applies to a quasi-judicial body. In the 2007 case, *Turner v. City of Twin Falls*, the Idaho Supreme Court addressed whether Twin Falls City Council acted as an impartial decision maker when it granted review of a planning and zoning decision.[58] While the facts of this case and *Turner* differ, the Idaho Supreme Court's definition of "impartiality" is equally applicable here:

> [Impartiality] means 'the lack of bias for or against either party to the proceeding. Impartiality in this sense assures equal application of the law. That is, it guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party.' In the context of due process, it does not mean 'lack of preconception in favor of or against a particular legal view. This sort of impartiality would be concerned, not with guaranteeing litigants equal application of the law, but rather with guaranteeing them an equal chance to persuade the court on the legal points in their case.' It does not mean having 'no preconceptions on legal issues, but [being] willing to consider views that oppose his preconceptions, and remain[ing] open to persuasion, when the issues arise in a pending case.' Impartiality under the Due Process Clause does not guarantee each litigant a chance of changing the judge's preconceived view of the law.[59]

The Idaho Supreme Court addressed the problem of Commissioner bias and due process rights in the 2002 case *Floyd v. Board of Comm'rs of Bonneville County, et al.*[60] The Supreme Court listed three factors in determining whether commissioner bias resulted in a violation of an applicant's due process rights: "(1) whether the member disclosed the interest or the other council members were fully aware of it; (2) the extent of the member's participation in the decision; and (3) the magnitude of the member's interest."[61]

In this case, the Court finds that Rinaldi's participation did not violate Burns' right to an impartial tribunal. First, Rinaldi was not a swing vote. The Amended

---

[57] *Eacret v. Bonner*, 139 Idaho 780, 784, 86 P.3d 494, 498 (2004).
[58] *Turner v. City of Twin Falls*, 144 Idaho 203, 159 P.3d 840 (2007).
[59] *Id.* (citing *Republican Party of Minn. V. White*, 536 U.S. 765, 122 S.Ct. 2528 (2002)).
[60] *Floyd v. Board of Comm'rs of Bonneville County, et al.*, 137 Idaho 718, 52 P.3d 863 (2002).
[61] *Id.*

Findings of Fact and Conclusions of Law were signed by all three commissioners—the decision to deny Burns' CUP would have passed even without Rinaldi's signature.[62] Second, Rinaldi did not participate in the November 2009 hearing. The minutes, included in the record under the County's "Notice of Filing" on January 14, 2010, show that the only two commissioners present at the hearing were Bob Bennett and Larry Young.[63] For these two reasons, the Court finds that Ms. Rinaldi's signature on the Amended Findings of Fact and Conclusions of Law do not give rise to a claim that Appellant was denied an impartial tribunal.

C. Neither Party is Entitled to Attorney Fees on Appeal.

Both parties ask the Court to award them their attorney fees. The awarding of attorney fees and costs is normally a discretionary function of the Court. However, Idaho Code § 12-117(1) takes some discretion from the Court:

> Unless otherwise provided by statute, in any administrative or civil judicial proceeding involving as adverse parties a state agency, a city, a county or other taxing district and a person, the 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.

(Emphasis added). The use of the word "shall" means that if the Court finds that Burns "acted without a reasonable basis in fact or law," it must award attorney fees to the County.

After reviewing the entire history of this matter carefully, the Court finds that neither party is entitled to attorney fees on appeal. Although Teton County is the prevailing party, Burns did not act without a reasonable basis in fact or law. In fact, up to this point Burns has prevailed on almost every contested issue. Burns raised legitimate issues of law and fact that were only resolved by this court after hours of research and sober reflection.

---

[62] *Id.* at 726.
[63] Notice of Filing (Jan. 14, 2010).

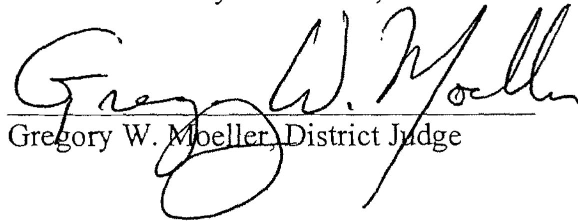
As the Court has stated above, the County's Second Amended Findings of Fact and Conclusions of Law sufficiently stated the facts upon which it relied, and the County reached a reasoned decision based on the facts before it. However, Burns had a reasonable basis in law and fact to appeal the County's decision because of the issues set forth in Section IV(A) of this decision. The Court's concern with certain portions of the County's Amended Findings of Fact and Conclusions of law are sufficiently stated above.

VI. CONCLUSION

In accordance with the above, the County's decision denying Burns' application for a conditional use permit is AFFIRMED. However, inasmuch as the County has made it clear in their pleadings that Burns' application should have been pursued as a variance rather than a conditional use permit, justice demands that Burns have an opportunity to resubmit its request to build the disputed structure by seeking a variance, if it so chooses. This decision only affirms the County's denial of the application for a conditional use permit. Both parties' requests for attorney fees are DENIED.

So Ordered.

Dated this 1st day of October, 2010.



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 5 day of October, 2010, served upon the following individuals via U.S. Mail, postage prepaid, unless otherwise indicated:

Dale W. Storer
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
P.O. Box 50130
Idaho Falls, ID 83405-0130

Kathy Spitzer
TETON COUNTY PROSECUTING ATTORNEY
89 N. Main Street
Driggs, ID 83455

Clerk of the Court

By: Phyllis a Hansen
Deputy Clerk

NOV 10 2010
3:55
CO. ID DISTRICT COURT

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
Idaho Falls, Idaho 83402
P.O. Box 50130
Idaho Falls, Idaho 83405-0130
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 - Appellant v. TETON COUNTY BOARD OF COMMISSIONERS, Respondent.	Case No. CV-07-376 **NOTICE OF APPEAL** Filing Category: I.4 Filing Fee: $101.00

TO: THE ABOVE NAMED RESPONDENT, TETON COUNTY BOARD OF COMMISSIONERS AND ITS ATTORNEY KATHY SPITZER AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named Appellant, Burns Holding, LLC, appeals against the above named Respondent to the Idaho Supreme Court from the Third Decision on Review dated June 10, 2010, issued by the Hon. Gregory Moeller.

ORIGINAL

2. Appellant has a right to appeal to the Idaho Supreme Court, and the judgment or order described in paragraph 1 above is an appealable order under and pursuant to Rule 11(a)(2).

3. Appellant intends to assert the following issues on appeal:

a. Whether there was substantial evidence supporting the Respondent's decision to deny Appellant's conditional use permit application.

b. Whether the trial court erred in holding that Respondent's resort to the Teton County Comprehensive Plan was not an impermissible attempt to use the comprehensive plan as a regulatory ordinance.

c. Whether the trial court erred in refusing to consider Appellant's argument that Respondent's use of the comprehensive plan as a regulatory measure violated its due process and equal protection rights under the Idaho and United States Constitutions.

Appellant reserves the right to assert other issues on appeal.

4. No Order has been entered sealing any portion of the record.

5. A reporter's transcript is not necessary or requested since the underlying matter involved a Petition for Judicial Review and no trial proceedings were conducted.

6. The Appellant requests the following documents to be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R.:

a. The entire record and transcripts of all proceedings before the City of Driggs, as lodged with the District Court.

b. The entire record and transcripts of all proceedings before Respondent Teton County Board of Commissioners, as lodged with the District Court.

c. All decisions and orders of the District Court.

d. All briefs filed in the District Court by Appellant and Respondent.

7. Appellant requests that all exhibits, documents, charts, maps and photographs attached to or included within the items listed above be copied and sent to the Supreme Court.

8. I certify that:

a. A copy of this Notice of Appeal has been served on the court reporter for the District Court of Teton County.

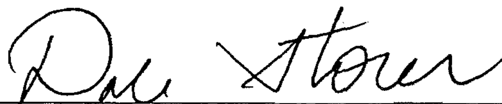
b. That the clerk of the District Court has been paid the estimated fee for preparation of the reporters transcript.

c. The estimated fee for the preparation of the clerk's record has been paid.

d. The appellate filing fee has been paid.

e. That service has been made upon all parties required to be served pursuant to Rule 20.

DATED this 10th day of November, 2010.



Dale W. Storer
Holden, Kidwell, Hahn & Crapo, PLLC

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the following described pleading or document on the individuals listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, on this 10th day of November, 2010.

DOCUMENT SERVED: NOTICE OF APPEAL

INDIVIDUALS SERVED:

Kathy Spitzer Teton County Prosecutor 89 N. Main Street, #5 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
Court Reporter for Judge Moeller Teton County Courthouse 150 Courthouse Drive, #307 Driggs, ID 83422	(✓) Mail ( ) Hand Delivery ( ) Facsimile ( ) Courthouse Box

Dale W. Storer
Holden, Kidwell, Hahn & Crapo, PLLC

G:\WPDATA\DWS\14688 - Burns Holdings\14688.000 Burns v. Teton County\S. Court Appeal\Notice of Appeal.frm:sm

FILED
NOV 30 2010
TETON CO., ID
DISTRICT COURT

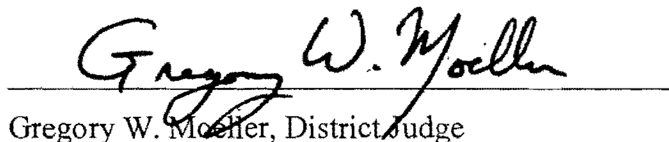
IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR TETON COUNTY

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** **FINAL JUDGMENT**

The Court having issued its Amended Third Decision on Review, dated October 1, 2010, which denied Petitioner's appeal and both parties' requests for attorney fees, and all matters before the Court now having been fully adjudicated;

NOW THEREFORE, Petitioner's appeal is hereby dismissed with prejudice. This shall be deemed as a final judgment pursuant to I.R.C.P. 54(a) and Idaho Appellate Rule 11(a)(2).

SO ORDERED this 30th day of November, 2010.



Gregory W. Moeller, District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing FINAL JUDGMENT was this 30 day of November, 2010, served upon the following individuals via U.S. Mail, postage prepaid, unless otherwise indicated:

Dale W. Storer
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
P.O. Box 50130
Idaho Falls, ID 83405-0130

Kathy Spitzer
TETON COUNTY PROSECUTING ATTORNEY
89 N. Main Street
Driggs, ID 83455

Clerk of the Court

By: Phyllis A Hansen
Deputy Clerk

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/ Appellant, - vs - TETON COUNTY BOARD OF COMMISSIONERS Respondent-Respondents on Appeal.	Supreme Court No. 38269-2010 TETON COUNTY CASE NO. CV 2007-376 CERTIFICATE OF EXHIBITS

I, Phyllis A. Hansen, Deputy Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Teton, do hereby certify that the following is a list of exhibits, offered or admitted and which have been lodged with the Supreme Court or retained as indicated:

Exhibits	Sent
Agency Record	Yes
CD – Respondent's Brief	Yes
Transcript dated January 16, 2007	Yes
Transcript dated February 26, 2007	Yes
Transcript dated September 13, 2007	Yes
Transcript dated November 15, 2007 (CD 2)	Yes
Transcript dated November 15, 2007 (CD 3)	Yes

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 20 day of January, 2011.

Mary Lou Hansen

by Phyllis A Hansen

Phyllis A. Hansen, Deputy

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/ Appellant, - vs - TETON COUNTY BOARD OF COMMISSIONERS Respondent-Respondents on Appeal.	Supreme Court No. 38269-2010 TETON COUNTY CASE NO. CV 2007-376 CLERK'S CERTIFICATE

I, Phyllis A. Hansen, Deputy Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Teton, do hereby certify that the above and foregoing record in the above-entitled cause was complied and bound under my direction as, and is a true, full and correct record of the pleadings and documents under Rule 28 of the Idaho Appellate Rules.

I do further certify that all documents, charts and pictures requested in the above entitled cause will be duly lodged with the Clerk of the Supreme Court along with the Court Reporter's Transcripts and Clerk's Record as required by Rule 31 of the Idaho Appellate Rules.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 30 day of December, 2010.

Mary Lou Hansen

by Phyllis A Hansen
Phyllis A. Hansen, Deputy

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/ Appellant, - vs - TETON COUNTY BOARD OF COMMISSIONERS Respondent-Respondents on Appeal.	Supreme Court No. 38269-2010 TETON COUNTY CASE NO. CV 2007-376 CERTIFICATE OF SERVICE

I, Phyllis A. Hansen, deputy clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for Teton County, do hereby certify that I have personally served or mailed, by United States mail, postage prepaid, one copy of the Clerk's Record and any Reporter's Transcript to each of the parties or their attorney of record as follows:

Dale W. Storer, Esq. PO Box 50130 Idaho Falls, Idaho 83405	Kathy Spitzer, Esq. 89 N Main, # 5 Driggs, Idaho 83422

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said court this 30 day of December, 2010.

Mary Lou Hansen

By: Phyllis A Hansen
Phyllis A. Hansen, Deputy