

5-27-2011

Friends of Minidoka v. Jerome County Clerk's Record v. 2 Dckt. 38113

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LAW CLERK
IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

IN THE MATTER OF: THE JEROME
COUNTY BOARD OF COMMISSIONERS;
DECISION DATED SEPTEMBER 23, 2008
APPROVING A LIVESTOCK CONFINEMENT OPERATION PERMIT
FOR DON MCFARLAND, DBA BIG SKY

FRIENDS OF MINIDOKA, DEAN & EDEN DIMOND, HAROLD & CAROLYN
DIMOND, WAYNE SLOAN, guardian of JAMES SLOAN, THE IDAHO RURAL
COUNCIL, INC., IDAHO CONCERNED AREA RESIDENTS FOR THE
ENVIRONMENT, INC., THE JAPANESE AMERICAN CITIZENS LEAGUE, INC.,
THE NATIONAL TRUST FOR HISTORIC PRESERVATION, INC., PRESERVATION
IDAHO, INC.,

Petitioners-Appellants-Cross Respondents,
vs.

JEROME COUNTY, JOSEPH DAVIDSON, CHARLES HOWELL, DIANA ORENAUER,
SOUTHVIEW DAIRY, TONY VISSER, WILLIAM DE JONG, RYAN VISSER,
Members of the JEROME COUNTY BOARD OF COMMISSIONERS

Respondent-Respondent on Appeal-Cross Appellants,
and

SOUTH VIEW DAIRY, an Idaho general partnership, TONY VISSER, WILLIAM DE
JONG, and RYAN VISSER, general partners.

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

Hon. ROBERT ELGEE, District Judge

PATRICK D BROWN

X Attorney for Appellant

MICHAEL J SEIB

X Attorney for Respondent

FILED - COPY
Filed this
MAY 27 2011
By
Supreme Court Court of Appeals
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day of _____, 20 _____

Clerk

Deputy

38113

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ENVIRONMENT, INC., THE JAPANESE)
AMERICAN CITIZENS LEAGUE, INC.,)
THE NATIONAL TRUST FOR HISTORIC)
PRESERVATION, INC., PRESERVATION)
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Respondents,)

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JEROME COUNTY, JOSEPH DAVIDSON,)
CHARLES HOWELL, DIANA OBENAUER,)
SOUTHVIEW DAIRY, TONY VISSER,)
WILLIAM DE JONG, RYAN VISSER,)
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partnership, TONY VISSER, WILLIAM DE)
JONG, and RYAN VISSER, general partners,)
-----)

2013

CLERK'S RECORD ON APPEAL

VOLUME II

Supreme Court Docket No. 38113

Fifth Judicial District
Jerome County

Honorable Robert Elgee
District Judge

Patrick D Brown
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Twin Falls, ID 83303-0207

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FOSSIL FUEL

A combustible solid, liquid, or gaseous material, rich in carbon, formed from the remains of plants and animals. Common fossil fuels include coal, natural gas, and derivatives of petroleum such as fuel oil and gasoline.

FUTURE LAND USE MAP

One of the components found in the Comprehensive Plan to show where the County has designated future land use designations.

GOVERNING BODY

Shall refer to the Planning and Zoning Commission or the Board, whichever is the applicable entity that is conducting the hearing.

GOVERNMENTAL PROTECTION FACILITY

Governmental Protective Facility is any agency designated by Jerome County to provide ambulance, fire and police protection.

HEARING

The convening of a quorum of a governing body for purposes of hearing public testimony, evidence and or comment, which is mandated by Idaho Code or this Ordinance, and which the consideration of such will be necessary for the conducting of county business at a subsequent meeting.

LAND DIVISION A-1

The minimum land division size within A-1 Agriculture Zone shall be 40 acres. Property owner may split a home site off from the original parcel. If the home site is not sold as part of the original parcel, it is subject to the Jerome County Subdivision and Land Division Ordinance. A deed is recorded at the Jerome County Courthouse. Divisions that result in lots of 40 acres or more are not regulated by this Ordinance. All divisions of a lot, tract or parcel into fewer than 5 parcels at least 1 acre and smaller than 40 acres require a Land Division Permit.

LOT LINE ADJUSTMENT

The adjusting of common property line(s) or boundaries between adjacent lots, tracts or parcels where an equal or lesser number of lots, tracts or parcels are created and where any existing or resulting parcel(s) is not reduced below the minimum requirements established by the zoning ordinance.

MEETING

The convening of a quorum of a governing body for purposes of conducting authorized county business, the nature of which does not necessitate public input, and where such input is not mandated under Idaho Code or this Ordinance.

ORIGINAL LOT, TRACT OR PARCEL

A lot, tract or parcel of land from the date of reference of March 11, 1985. Any remaining portions of a lot, tract or parcel of land that results from partial rezoning of the lot, tract or parcel of land.

PETITION

A formal written request to review and consider a text amendment to one or more items within the Jerome County Zoning Ordinance or Comprehensive Plan. A petition may be generated by one or more person(s).

PLANT, FERTILIZER

A site for manufacturing or production of chemical fertilizer.

PLANT, INDUSTRIAL MANUFACTURING/PROCESSING

Any establishment (not including a rendering plant) engaged in a series of continuous actions that changes one or more raw materials into a finished product and/or a product that is distributed or packaged and shipped for additional processing or fabrication.

PLANT-ENERGY PRODUCING, NON-CONVENTIONAL

Any facility or installation such as a windmill, hydroelectric unit or solar collecting or concentrating array, which is designed and intended to produce energy from natural forces such as wind, water, sunlight, or geothermal heat, or from biomass for offsite use.

PLANT-THERMAL ENERGY PRODUCING, CONVENTIONAL

Any facility which is designed and intended to convert energy from one or more energy sources, including but not limited to fossil fuels for either the transmission from the generation facility to a power distribution system or to final consumers.

PUBLIC UTILITIES

Structures or facilities essential to supplying the public with electricity, power, gas, water, water treatment, transportation, communication and public services. The definition includes power plants, electrical substations, gas regulator stations, and water treatment plants.

SETBACK

The shortest distance between the recorded property line and any building, structure or item. All minimum yard and lot line setback requirements are subject to Jerome County Zoning Ordinance.

SPECIAL USE PERMIT

A document issued by the Administrator of this Ordinance upon the specific action of the Planning and Zoning Commission. The document defines the use(s) as well as the condition(s) limiting those uses in response to a request from an individual who seeks permission to use a piece of real property in a specific way for a specific purpose.

STAFF

Employees of the Jerome County Planning, Zoning or Building Departments or other persons identified by a governing body, who are authorized by the Board, Ordinance or Idaho Code, to prepare documents or otherwise assist a governing body with planning and zoning matters.

UTILITIES

Installation(s) to conduct and provide service(s) such as the generation, transmission or distribution of water, sewage, gas, electricity and communication; the collection and treatment of sewage and solid waste; the collection, storage or diversion of surface water, storm water, and ancillary facilities providing services to the public. These services may be provided by a public or private agency.

The following definitions have been repealed from Chapter 2: GUESTHOUSE, TAVERN OR LOUNGE, CONDITIONAL USE, CONDITIONAL USE PERMIT, AND FAMILY FOOD PRODUCTION.

CHAPTER 3

3-4.01 f. When the Text of this Ordinance and the Maps of this Ordinance do not agree, the Maps shall prevail. The only exception is those listed sites in Jerome County Zoning Ordinance Chapter 4-8.05. When the provisions of the sections of the text of this Ordinance do not agree, the most stringent provisions shall prevail.

CHAPTER 5, CHART 5-1

Add Commercial Truck Washing Facility with "S" under the A-1 zone indicating a Special Use Permit is required.

CHAPTER 5, CHART 5-4

Changing Miscellaneous Products from S-1 to S; adding the category for Plant-Energy Producing, Non-Conventional (adding "S" in every zone), Plant-Industrial, Manufacturing/Processing and Plant-Thermal Energy Producing, Conventional (adding "S" in the IH zone).

CHAPTER 5, CHART 5-12

Changing Farm Equipment Sales by adding an "S" in the IMP Zone.

CHAPTER 6.

6-2. SUPPLEMENTAL, SETBACK AND HEIGHT REGULATIONS.

6-2.01

e. EXCEPTIONS TO THE SETBACK REGULATIONS

The setback limitations contained in the Official Schedule of District Regulations do not apply to utility structure(s) within the road right-of-way or approved utility easement(s) as long as the appropriate highway district or the entity that is responsible for the maintenance of the road(s) or utility easement(s) approves the utility structure(s).

CHAPTER 13

13-6.01 PUBLIC-NOTICE AND INSPECTION

- a. The Administrator shall cause notice of the filing of an application for a LCO Permit to be published in a newspaper of general circulation in Jerome County, Idaho. The Administrator shall also send notice by mail to all property owners within one mile of the boundaries of the contiguous property that is to contain the proposed LCO. The property owner shall be responsible to forward Notice of Hearing to all primary residents on the property. The applicant for the LCO Permit, in addition to the application fee, shall pay all costs of publication and notice.
- b. The application shall be available for public inspection in the Administrator's office.

13-6.02 PUBLIC HEARING AND APPEAL

- a. One Public Hearing shall be heard before the Planning and Zoning Commission on applications brought pursuant to this chapter. At such hearing, all members of the public desiring to present oral or written comment, or documentary evidence, shall be allowed to do so, subject to the hearing procedures (including limits of time) as set forth in Chapter 23 of this Ordinance. The Planning and Zoning Commission will forward their recommendation to the Board.
- b. One Public Hearing shall be heard before the Board on applications brought pursuant to this chapter. At such hearing, all members of the public desiring to present oral or written comment, or documentary evidence, shall be allowed to do so, subject to the hearing procedures (including limits of time) as set forth in Chapter 23 of this Ordinance.
- c. The decision granting or denying an application brought pursuant to this chapter shall be in writing and shall conform to the standards and criteria set forth in Idaho Code Section 67-6535, as it may be amended from time to time.

13-6.03 AMENDMENTS DURING CONSTRUCTION

13-6.04 OCCUPANCY PERMIT

13-6.05 OPERATION

- 13-7.01. Any LCO owner, who has not filed a LCO Permit or Livestock Siting Permit with the Planning & Zoning Administrator within 60 days of written notification from the Administrator that this is required, shall be in violation of the Jerome County Zoning Ordinance. The owner may not continue operation and must apply for a LCO Permit.

CHAPTER 14

- 14-2.01 The provisions of this Chapter shall apply to all land divisions in the County, per definition of Land Division found in Chapter 2, with the following exceptions.

1. Divisions of 40 acres or more.

- 14-5.01 The Administrator shall use the following criteria when determining whether or not the proposed division complies with this Ordinance:

14-5.01-A. SURVEY

10. All lots must be a minimum of one (1) acre with the following exceptions:
 - a. Property that is being used for utility structures that do not require a septic system.
 - b. A lot, parcel or tract of land that will connect into a community water and sewer system in an area zoned A-2 Agriculture Residential, commercial or industrial.

12. Original Parcel exceptions:
 - a. If a portion of a lot, tract or parcel is divided from the original property resulting from an approved zone change, lots, tracts or parcels shall be considered an "Original Parcel".
 - b. When a County or State Road divides a lot, tract or parcel into two (2) or more parcels each resulting portion shall become an "Original Parcel".
 - c. When an application for a Land Division Permit is approved for utility structures on less than one (1) acre, the resulting portion shall become an "Original Parcel" and will not be considered in the total number of land divisions of the originating lot, tract or parcel.
 - d. When a lot, tract or parcel creates a new legal description of the property without creating any additional lots, tracts or parcels (defined as a lot line adjustment) and the property is surveyed and a deed is recorded the resulting parcels will retain their status as defined under "Original Lot, Tract or Parcel".

13. Existing residential dwelling(s) designated within an A-1 Agricultural Zone on a parcel less than forty acres existing prior to the date of adoption of this amendment shall be allowed one or more land divisions provided said divisions do not create a subdivision. The parcel that does not contain the dwelling(s) shall be deemed unbuildable. A Land Division Survey shall be recorded with the remaining lot, tract or parcel designated as unbuildable as stated by the Jerome County Zoning Ordinance.

14. The applicant/developer must provide a plan for all community ditches to ensure the delivery of water from the head gate through the existing developing property to all the property which is entitled to receive water and if necessary to ensure delivery or for safety reasons the developer may be required to place community ditches underground by tile, culvert, or etc., through the developing property. The location of any underground ditch shall be recorded.

15. Upon final approval by the Administrator, the land division survey shall be recorded. Health certificate for sanitary restriction and Administrator's approval shall be recorded on the Land Division Survey. Building Permits shall not be issued and construction shall not commence until the proposed land division has been recorded.

14-5.01-B. SETBACKS

1. The setback requirements for Livestock Confinement Operations as found in Chapter 13 of this Ordinance shall also apply to new residences involved in any land division proposal.

14-6. LOT LINE ADJUSTMENT

14-6.01. A lot line adjustment of lot lines of a recorded parcel with the Jerome County Courthouse shall be prohibited unless application for such lot line adjustment is submitted to the Planning & Zoning Office and is approved by the Administrator.

14-6.02. Applicability

1. The lot line adjustment shall not create any new lots, parcels or tracts of land.
2. All lot line adjustment parcels shall comply with all minimum acreage and setback requirements of this Ordinance.

14-6.03 Application

Persons requesting a division of a lot or adjustment of lot lines or a recorded deed shall submit:

1. A parcel map from the Jerome County Assessor's Office showing the location of the new lot lines.
2. A parcel map showing the location of all existing structures, canals, roads and ditches.
3. Provide a legal description and a real property summary sheet of all the properties that are affected by the lot line adjustment(s).

14-6.04 Proof of Approval

1. The Administrator may require proof of approval of the lot line adjustment(s) by the following agencies.
 - a. South Central District Health Department
 - b. Appropriate Highway District
 - c. Appropriate Irrigation District
2. A new legal description shall be submitted of each parcel that changes its lot lines.
3. The new legal description(s) shall be approved by the Jerome County Assessor's Office.
4. The property shall be surveyed and a copy of the recorded survey shall be filed with Jerome County Planning & Zoning Office.

14-7 FEES

CHAPTER 20

20-14.01 Violation of any section or provisions of this Ordinance or failure to comply with any of its requirements shall constitute a misdemeanor. Each day such violation continues shall be considered a separate offense. Any person convicted of a violation of any section or provision of this Ordinance, where no other

penalty is set forth, shall be punished by a fine not to exceed one thousand dollars (\$1,000.00), or by imprisonment not to exceed six (6) months, or by both such fine and imprisonment, for any offense. Any person, including but not limited to, a landowner, tenant, sub divider, builder, or public official person who, participates in, assists in, or maintains such violation may be found guilty of a separate offense. Nothing herein contained shall prevent the Board or any other public official or private citizen from taking such lawful action as is necessary to restrain or prevent a violation of this Ordinance or of the Idaho Code.

23-1. PURPOSE

23-1.01 The purpose of this Chapter is to establish orderly procedures for the conduct of the formal business of the Planning and Zoning Commission and Board. The procedures are intended to provide adequate opportunity for the citizens in Jerome County to promote and to protect their rights under the concept of due process. These procedural requirements are established pursuant to the provisions of the Local Planning Act of 1975 as presently codified in Idaho Code, Title 67, Chapter 65 as it now exists and as it may be amended.

23-2 BY-LAWS

23-2.01 The Planning and Zoning Commission shall adopt, amend or repeal the Bylaws in accordance with a decision of the Board, this Ordinance or the Idaho Code. All such action shall occur at a meeting and will become effective upon majority vote.

23-3. ORDER OF BUSINESS

23-3.01 The Order of Business at regular meetings of the Planning and Zoning Commission shall be:

23-4. RECORD OF MEETING

23-4.01 An accurate record of all business transacted at meetings and hearings of the Planning and Zoning Commission shall be kept through the use of recording equipment and/or through the presence of a clerk/stenographer making a verbatim record. A meeting or hearing of the Planning and Zoning Commission shall not proceed unless it is being properly recorded.

23-5. HEARING PROCEDURES OF THE PLANNING AND ZONING COMMISSION AND THE BOARD

23-5.01 BURDEN OF PROOF

The burden of proving that the governing body should act favorably toward the applicant/appellant rests solely upon the applicant/appellant.

23-5.02 CONDUCT OF HEARING

Hearings before the governing body shall be conducted in general conformance with each of the procedures set out in the individual paragraphs below, although the order that such paragraphs are taken at any particular hearing does not have to be the order shown below. The chairman shall determine the appropriate order for a particular hearing and shall announce it prior to the start of that hearing.

- A. Generally: All individuals presenting evidence at the hearing shall be sworn or affirmed before the governing body. The Chair of the governing body may limit testimony and scope of the hearing. With permission from the Chair, members of the governing body may at any time during the hearing freely inquire of anyone at the hearing, including staff, without limit of time. The Chair of the governing body shall rule on all questions of procedure and the admission of evidence, with such ruling being made in accordance with the Bylaws of the applicable governing body, this Ordinance or the Idaho Code.
- B. Report: Hearings before the governing body may commence with a report from staff. Such report will be given without limit of time. The report may be written or oral, at the pleasure of the governing body and may include testimony from witnesses. The report may contain recommendations, however the governing body shall not be bound by any such recommendations.
- C. Applicant/Appellant Comments: The applicant/appellant, and those favoring the applicant/appellant's position shall be allowed an opportunity to support the applicant/appellant's position by presenting evidence in the form of oral or written testimony and/or documentary evidence presented in the manner prescribed in subsection F of this section. An applicant/appellant may be represented by counsel. Except as provided in subsection E of this section, at the chairman's discretion, testimony for and against an application may be presented in rotating order.
- D. Opponent and General Comments: Those opposing the applicant/appellant's position or having general questions or comments shall be provided an opportunity to refute the evidence presented on behalf of the applicant/appellant by presenting evidence in the form of oral or written testimony and/or documentary evidence presented in the manner prescribed in subsection F of this section.
- E. Applicant/Appellant Rebuttal: When the opponents, if any, have all concluded the presentation of their evidence, the applicant/appellant shall be allowed a brief period for rebuttal.
- F. Written testimony and documentary evidence: Those wishing to present written testimony and/or other documentary evidence at a hearing shall mail or hand-deliver the appropriate number of copies to the

Administrator's office seven days prior to the scheduled hearing. In hearings before the Board, five (5) is the appropriate number of copies; and in hearing before the Planning and Zoning Commission the appropriate number shall be thirteen (13) copies. The only exception is that a person present at the scheduled hearing may be allowed to present a one-sided document no larger than 8½ inches x 11 inches that is sufficiently legible, handwritten or typed in type size not less than 12 point or pica in any standard font provided the type may not be smaller than 12-point standard Times New Roman. In order to be considered as evidence, the original and five (5) or thirteen (13) copies as the case might be, of the one-sided document shall be presented to the governing body at the hearing, with the original being admitted into evidence and becoming part of the permanent record. This section does not apply to the applicant/appellant, the staff or witnesses called by the governing body.

23-5.03 RECORD

The staff report shall automatically become part of the record, as shall any documents submitted by the applicant/appellant, the proponents and/or the opponents, as shall all testimony given at the hearing. At the conclusion of the hearing, the governing body shall close the record unless the governing body determines, in its discretion, additional evidence is required, in which event, it may proceed as follows:

- 1) Close the record with the exception of allowing the submission of specifically requested information; or
- 2) Leave the entire record open for the submission of additional evidence to a date certain; or
- 3) Continue the hearing to a date certain for the purpose of receiving additional evidence and conducting such further proceedings as may, in its discretion, be advisable. The applicant/appellant shall always be provided a reasonable opportunity to rebut any additional evidence allowed into the record.

23-5.04 REOPENING THE RECORD IN MATTERS BEFORE THE BOARD

In matters before the Board, the Board may, prior to issuing a written decision, and for good cause demonstrated, reopen the record for the purpose of receiving additional evidence. Only the applicant/appellant or an affected person as defined under Idaho Code Section 67-6521 may seek to reopen the record by concurrently filing a timely motion to reopen the proceedings containing information therein to demonstrate good cause, along with a payment of the estimated costs that will be incurred by the Jerome County in having to comply with applicable law governing notice and hearings. If the actual cost is more than the estimated cost, the person seeking to reopen the hearing shall then pay the remaining amount before any action is taken on his motion. If the actual cost is less than the estimated cost, then the balance shall be returned to the payer of the estimated cost. The Board shall decide at a recorded meeting whether good cause has been demonstrated, and shall state such on the record. The Board may, within the time allowed herein, reopen the record for good cause on its own motion. If the Board determines to reopen the record, it shall thereafter

comply with applicable law governing notice and hearing procedures, including those set fourth in this Chapter.

23-5.05 DECISIONS

When the record has been closed, the governing body may then deliberate towards a decision based on the record, or it may take the matter under advisement for the purpose of deliberating towards a decision based on the record at a later date. After deliberating, the governing body shall, within one hundred eighty (180) days from the date when deliberations cease, render a decision in accordance with Idaho Code Section 67-6535, as it may be amended from time to time, or other applicable law.

The following sections were repealed: 23-6, -6.01, 6.02, 23-7 thru 8.

THIS 22nd day of Sept. 2008,

JEROME COUNTY BOARD OF COMMISSIONERS

Charles M Howell
Charles "Charlie" Howell, Chair

Joseph E Davidson
Joseph "Joe" Davidson, Commissioner

Diana Obenauer
Diana Obenauer, Commissioner

ATTEST:

Michelle Emerson
Michelle Emerson
Jerome County Clerk



AFFIDAVIT of PUBLICATION
RECEIVED

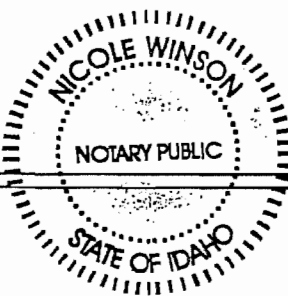
SEP 24 2007

State of Idaho } ss.
County of Jerome }

Norma Devoe, being first duly sworn, deposes and says that he/she is the printer (publisher) of the Jerome North Side News, a newspaper published every week in Jerome, County of Jerome, State of Idaho; that said newspaper has been continuously and uninterruptedly published for a period of seventy-eight consecutive weeks prior to the first publication of the annexed notice, and is a newspaper qualified to publish legal notices as provided by act of the 1919 session of the legislature of the State of Idaho, known as House Bill 145; that the annexed advertisement was published once each week for

1 consecutive issues in said newspaper proper and not in a supplement; that the date of the first publication of said advertisement was on the 20th day of September, 2007 and the date of the last publication was on the 20th day of September, 2007.

Norma Devoe
On this 20th day of September, in the year of 2007, before me, a Notary Public, personally appeared Norma Devoe, known or identified to me to be the person whose name subscribed to the within instrument, and being by me first duly sworn, declared that the statements therein are true, and acknowledged to me that he/she executed the same.



Notary Public for Idaho
Residing at Jerome
My commission expires: 5-14-2013

NORTH SIDE NEWS
Jerome, Idaho

COST OF PUBLICATION

Number of Picas per Line _____
Number of Lines in Notice _____
Number of Insertions 1

Lines tabular at _____ 8.0¢/Pica
2,642.57 Lines straight at 184.98 7.0¢/Pica

Subsequent lines at _____ 6.0¢/Pica
Affidavit Fee: 2.50
TOTAL COST 187.48 211

COPY OF NOTICE

(Paste Here)

Ord 2007-13
TITLE OF NOTICE

PLAINTIFF ATTORNEY

DEFENDANT

PLAINTIFF

Jerome Co. Landz
BILL TO

ORDINANCE 2007-6
AMENDING THE JEROME COUNTY ZONING ORDINANCE TEXT TO CHAPTERS 2, 6.2 & 2.01, 13, AND 23
Chapter 2 APPLICANT/ APPELLANT-The person or entity seeking a decision from the Board.
COMMUNICATION FACILITIES - Such uses and structures as radio and television transmitting and receiving antennas, radar stations, cellular towers, and microwave towers.
FAMILY, IMMEDIATE - A member of the immediate family includes any person who is a natural or legally defined offspring, spouse, sibling, grandchild, grandparent, or parent of the owner of the real property.
GOVERNING AUTHORITY - Shall refer to the Planning Commission, Zoning Commission or the Board, whichever is the applicable entity that is conducting the hearing.
LOT LINE ADJUSTMENT - The adjusting of common property line(s) or boundaries between adjacent lots; tracts or parcels where an equal or lesser number of lots, tracts, or parcels are created and where any existing or resulting parcel is not reduced below the minimum requirements established by the zoning ordinance.
PUBLIC UTILITIES - Structures or facilities essential to supplying the public with electricity, power, gas, water, water treatment, transportation, communication, or public services. The definition includes power plants, electrical substations, gas regulator stations and water treatment plants.
STAFF - Any Jerome County officer or employee present during the hearing.
UTILITIES - Installation(s) for providing service such as the generation, transmission or distribution of water, gas, electricity and communications; the collection and treatment of sewage and solid waste; the collection, storage or diversion of surface water and storm water, and ancillary facilities providing service to and used by the public. These services may be provided by a public or private agency, and Amendments summarized as follows: Chapter 6-2. Adding Setback to the title, SUPPLEMENTAL, SETBACK AND HEIGHT REGULATIONS. And adding paragraph e. EXCEPTIONS TO THE SETBACK REGULATIONS. The setback limitations contained in the Official Schedule of District regulations do not apply to utility structures within the road right-of-way or an approved utility easement as long as the appropriate highway district

or the entity that is responsible for the maintenance of the road(s) or utility easement approves the utility structures; and Chapter 13 Livestock Confinement Operations 13-2.01 REQUIREMENTS, addition of confinement and LCO's; (a) and (d) addition of produced by a LCO replacing livestock operation throughout the paragraphs. 13-2.03 LIVESTOCK CONFINEMENT OPERATIONS. Delete REQUIRING replace with REQUIRE A PERMIT. Delete definition and points (a),(b),(c),(d) and replace with All LCO's operating in Jerome County require a permit. 13-2.04 ANIMAL UNITS. Delete Livestock Confinement Operation replace with LCO. 13-2.05 Delete ZONES replace with PERMITTED LOCATIONS. Delete definition replace with New LCO operations shall only be allowed in A-1 Zones. 13-2.06 EXISTING LCO'S WITHOUT A LCO PERMIT. (a) delete of greater than 75 animal units, or more than 2.0 animal units per acre, (b) delete Planning and Zoning, (c) delete Planning and Zoning and of the requirements of 13-2.03, add that a Livestock Siting Permit is required. 13-2.07 EXPANSION OR MODIFICATION OF AN EXISTING LCO, STRUCTURES AND PROPERTY. (a) add with an existing permit delete holding a LCO or a Livestock Siting Permit, (b) add existing corrals, lagoons and wells that are part of an existing LCO, delete structures, as to location or otherwise, and delete of a LCO with an existing permit, and delete for corrals, lagoons and wells, (f) delete Jerome County Zoning replace with this. Delete 13-3, delete 13-3.01. 13-3.02 will become 13-3. 13-4.04 PROPERTY LINES. (c) add outlined and this, delete the Jerome County Zoning. 13-5.02 delete Jerome County Planning and Zoning and Jerome, Idaho, (e) delete Livestock Confinement Operation and add LCO. (g) delete Planning and Zoning. 13-5.02 (l) delete Planning and Zoning, of County Commissioners and Livestock Confinement Operations and add LCO. 13-5.06 delete Planning & Zoning 13-5.08 Replace Livestock Confinement Operation with LCO in a. and b. 13-6 Change section name to PUBLIC NOTIFICATION AND INSPECTION. 13-6.01 Delete PUBLIC NOTIFICATION, Planning & Zoning. 13-6.02 Delete PUBLIC COMMENT. Delete all but the application shall be available for public inspection during regular business hours at the Administrator's office. 13-7 replaces 13-6.03. Add PUBLIC HEARING AND APPEAL. 13-7.01 Delete of County Commissioners, add on applications brought pursuant to this chapter. At such hearing, all members of the public desiring to present oral or written comment or documentary evidence, shall be allowed to do so, subject to the hearing procedures (including limits of time) as set forth in Chapter 23 of this Ordinance. 13-7.02 Add The decision granting or denying an application brought pursuant to this chapter shall be in writing and shall conform to the standards and criteria set forth in Idaho Code Section 67-6535, as it may be amended from time to time. 13-7.03 replaces 13-6.04 There is no appeal of a decision made pursuant to Section 13-7.02. Judicial review may be sought under the procedures provided by Idaho Code, as it may be amended from time to time. 13-8 replaces 13-6.05 Add approved by the Board. Delete submitted to the Planning and Zoning Administrator.

of this chapter, delete in Chapter 23 of the Jerome County Zoning Ordinance 13-9 replaces 13-6.06. Heading change to OCCUPANCY PERMIT AND OPERATION. 13-9.01. delete Planning and Zoning, (a) add as approved by the Board, delete submitted to the Planning and Zoning Administrator, including. Add or according to. 13-9.02 replaces 13-6.07 delete OPERATION, delete LCO, add issued Occupancy, delete submitted in the application. 13-10 replaces 13-7. Add 13-10.01 Any person who operates a LCO, and who has not been issued a proper permit, shall have sixty (60) days from the date of receipt of written notification from the Administrator to file a LCO Permit or Livestock Siting Permit pursuant to the procedures outlined in this chapter. Failure to file such permit within the sixty (60) day period shall constitute a violation of this Ordinance and the LCO shall cease its operation until a proper permit has been issued. 13-7.02 Delete, and Amendments summarized as follows: Chapter 23 PROCEDURAL REQUIREMENTS FOR MEETINGS AND HEARINGS Jerome County Zoning deleted throughout. 23-1.01 ADD Zoning Commission and Board. Delete 23-3 and 23-3.01, 23-4 Order of Business will become 23-3, 23-3.01, 23-3.01 (e) delete Planning and Zoning. 23-5 Record of Meeting will become 23-4; through 23-4.03. 23-4.02 deleting Jerome County Zoning in front of Ordinance. 23-6 will become 23-5 through 23-5.02; 23-5.02 will add the Planning Commission and Zoning Commission after Chairman. 23-6 deleting Presentation of Evidence, replacing with Hearing Procedures of the Planning and Zoning Commissions and the Board. This is a new section describing the Hearing Procedures conducting a public hearing by all the governing bodies, Planning Commission, Zoning Commission and Board of County Commissioners Adding 23-6.01 Burden of Proof, 23-6.02 Conduct of Hearing, 23-6.03 Record, 23-6.04 Reopening the Record in Matters Before the Board, and 23-6.05 Decisions; deleting Sections 23-7, 23-7.01, 23-7.02, 23-7.03 and 23-8. WHEREAS, the requested Amendments are in accordance with the Jerome County Comprehensive Plan; and, WHEREAS, all notices and hearings required by County and State law have been given and held; and, WHEREAS, the Jerome County Planning Commission and Zoning Commission has recommended to the Board of County Commissioners that the requested amendments be approved; WHEREAS, the Jerome County Board of County Commissioners held a Hearing on August 20, 2007 and has reviewed the recommendations from the Planning Commission and Zoning Commission. THEREFORE, BE IT ORDAINED BY THE BOARD OF COMMISSIONERS of Jerome County, Idaho, that the Jerome County Zoning Ordinance Text be amended as above. This Ordinance shall become effective upon its passage, approval and publication according to Sections 31-715 and 715A of the Idaho Code. ADOPTED AND APPROVED THIS 10th DAY OF September, 2007
JEROME COUNTY BOARD OF COMMISSIONERS
Charles Howell, Chair
Joseph Davidson, Commissioner
Diana Obenauer, Commissioner
ATTEST:
Michelle Emerson, Jerome County Clerk
PUB: 9/20 _____ N55693

Affidavit of Publication
STATE OF IDAHO)
COUNTY OF TWIN FALLS) SS.

I, Ruby Aufderheide, being first duly sworn upon oath, depose and say that I am Legal Clerk of the TIMES-NEWS, published daily at, Twin Falls, Idaho, and do solemnly swear that a copy of the notice of advertisement, as per clipping attached, was published in the regular and entire issue of said newspaper, and not in any supplement thereof, for one ~~consecutive~~ publication, commencing with the issue dated 29th day of September, 2008 and ending with the issue dated 29th day of September, 2008

And I do further certify that said newspaper is a consolidation, effective February 16, 1942, of the Idaho Evening Times, published theretofore daily except Sunday, and the Twin Falls News, published theretofore daily except Monday, both of which newspapers prior to consolidation had been published under said names in said city and county continuously and uninterruptedly during a period of more than twelve consecutive months, and said TIMES-NEWS, since such consolidation, has been published as a daily newspaper except Saturday, until July 31, 1978, at which time said newspaper began daily publication under said name in said city and county continuously and uninterruptedly.

And I further certify that pursuant to Section 60-108 Idaho Code, Thursday of each week has been designated as the day on which legal notice by law or by order of any court of competent jurisdiction within the state of Idaho to be issued thereof Thursday is announced as the day on which said legal will be published.

Ruby Aufderheide
Ruby Aufderheide, Legal Clerk

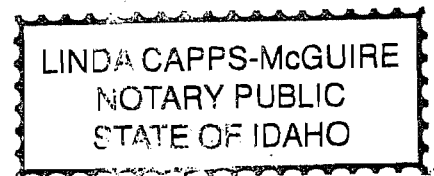
STATE OF IDAHO
COUNTY OF TWIN FALLS

On this 29th day of September, 2008, before me,

a Notary Public, personally appeared Ruby Aufderheide, Ruby Aufderheide known or identified to me to be the person whose name subscribed to the within instrument, and being by me first duly sworn, declared that the statements therein are true, and acknowledged to me that he executed the same.

Linda Capps McGuire
Notary Public for Idaho
Residing at Twin Falls, Idaho.

My commission expires: 5-19-09



JEROME COUNTY
CORRECTED ORDINANCE NO. 200
Amending The Text Of Various Sections
Jerome County Zoning Ordinance

11/10/2010 10:10:10 AM

WHEREAS the Jerome County Commissioners initiated processes for amending the Jerome County Zoning Ordinance and the Jerome County Commissioners in said processes for amending the Jerome County Zoning Ordinance to amend the Jerome County Zoning Ordinance text were received by the Jerome County Planning and Zoning Commission;

WHEREAS the Jerome County Planning and Zoning Commission held a public hearing and had discussions on the proposed amendments and recommended to the Board of Jerome County Commissioners that the amendments be approved; and

WHEREAS after receiving recommendations from the Jerome County Planning and Zoning Commission, the Board of Jerome County Commissioners held a public hearing and held discussions on the proposed amendments; and

WHEREAS the requested Amendments are in accordance with the Jerome County Comprehensive Plan; and

WHEREAS all notice and hearing procedures required by the Idaho Code and the Jerome County Zoning Ordinance, specifically Chapter 20, were followed and complied with; and

WHEREAS the Board approved and passed the proposed amendments hereby establishing Ordinance 2009-4; and

WHEREAS Ordinance 2009-4 contains an error of amendments to the text of the Jerome County Zoning Ordinance; and

WHEREAS a verbatim record was produced from the hearings and discussions held on the matter; and

WHEREAS based on the record in this matter, it was the clear intent of the Jerome County Planning and Zoning Commission and the Board of Jerome County Commissioners to include, among other, two specific types of amendments in Ordinance No. 2009-4, the first being to amend wherever found in the Jerome County Zoning Ordinance, the word "Planning Commission, Zoning Commission and/or Planning and Zoning Commission" with the term "Planning and Zoning Commission" and the second being to amend Section 13-6-02 in the following manner struck through language intended to be deleted; and, the language intended to be added:

b. ~~Whenever the applicant shall be available for public inspection for a period of 10 days after publication in the newspaper, during regular business hours, at the Planning and Zoning Commission's office. Any person, in accordance with Idaho Code 67-4409, may submit written comments and objections to the Planning and Zoning Commission of the notice of the newspaper. The comments and objections shall be made available to the public and shall be made a part of the record for the hearing before the Board of County Commissioners.~~

WHEREAS the scrivener's error caused the language intended to be deleted, as indicated above, to be retained, and caused the language intended to be added, as indicated above, to be omitted from Ordinance No. 2009-4; and

WHEREAS although the version of Ordinance 2009-4 that contains the scrivener's error has been approved and passed, it has not yet become effective, as it has not been published; and

WHEREAS the scrivener's error has been recognized and corrected prior to Ordinance 2009-4 being published;

THEREFORE BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS, JEROME COUNTY, IDAHO, that effective upon approval, passage and publication, the text of the following sections of the Jerome County Zoning Ordinance are amended as show below:

Chapter 2, Chapter 34.01(f), Chapter 3, Chapter 5.1, 5.4, 5.12, Chapter 6, 2.11e, Chapter 13.6.01, 02, 05, 04, and 7.01, Chapter 14.5.01 to 01N, 010, 010(a) and (b), 11.1, 14.5.01B, 4.6mm, 6.4, Chapter 20-11, Chapter 23

CHAPTER 2 DEFINITIONS

AGENCY means the federal, state, or local government, or any department, office, or administrative unit responsible for carrying out regulations.

APPLICANT APPELLANT

The person or firm whose application is filed with the Administrator of the Governing Body.

APPLICATION

The forms and accompanying documents, exhibits and fees required that applicant by the applicable department, Board or Commission of the County for any permit review, approval or certifying purposes.

APPLICATION COMPLETE

An application is complete when it contains the following: (1) a complete and complete of all applicable application forms; (2) submitted and required supporting application information by the applicant; (3) all required agency documents; (4) submit of a required fee.

BAR means a commercial enterprise whose primary activity is the sale of alcoholic beverages to be consumed on the premises. Bars include nightclubs, private clubs, hotel lounges and similar facilities serving alcoholic liquor. This definition does not include restaurants where the primary business is preparation of food.

BIOMASS

Plant material used for the production of such things as fuel, alcohol and non-chemical fertilizers. Biomass sources may be plant grown especially for that purpose or waste products from livestock harvesting, milling, or from agricultural production or processing.

COMMERCIAL VESTOCK TRUCK WASHING FACILITY

A facility that charges a fee to wash livestock trucks and trailers.

COMMUNICATION FACILITIES

Such uses are structures used and equipment transmitting and receiving wireless radio signals, cellular towers, telephone services and microwave towers.

COMMUNICATION UTILITY BUILDINGS AND STRUCTURES

A structure that is used for the transmission, transfer, or collection of telephone, local propane gas, natural gas, Internet or electrical services and related activities. This definition shall not be construed as a part.

ENERGY SYSTEM, NON-CONVENTIONAL

Power generated from natural forces such as wind, water, sunlight, geothermal, heat or from biomass.

ENERGY SYSTEM, THERMAL

Any energy system including supply elements, furnaces, tanks, boilers, raised controls and energy distribution components, which use any source of thermal energy. These sources include but are not limited to gas, oil, coal, and nuclear materials.

FACILITY

A structure or piece of built, installed, or established to serve a particular purpose.

FAMILY, IMMEDIATE

A member of the immediate family includes any person who is a natural or legally adopted offspring, spouse, sibling, grandchild, grandparent, or parent of the owner of the real property.

FERTILIZER WORKS

The manufacture of production of fertilizer from commercial composting.

FOSSIL FUEL

Accumulated solid, liquid, or gaseous material, or in combination, formed from the remains of plants and animals. Common fossil fuels include coal, natural gas, and derivatives of petroleum such as fuel oil and gasoline.

FUTURE LAND USE MAP

One of the components found in the Comprehensive Plan to show where the County has designated future land use designations.

GOVERNING BODY
 Shall refer to the Planning and Zoning Commission or the Board, whichever is the applicable entity, while conducting the hearing.

GOVERNMENTAL PROTECTIVE FACILITY
 Governmental Protective Facility is any agency designated by Jerome County to provide and maintain the site and protection.

HEARING
 The convening of a court or a governing body for purposes of bearing public testimony, evidence and of conducting which is required by the Ordinance and which the consideration of such will be necessary for the conduct of county business at a public meeting.

LAND DIVISION
 The minimum land division size within an Agriculture Zone shall be 40 acres. However, the minimum size shall be less than the original parcel if the home site is not sold as part of the original parcel. It is subject to the Jerome County Subdivision and Land Division Ordinance. A deed is recorded at the Jerome County Courthouse. The minimum size of 40 acres or more is not required by this ordinance. All divisions of a lot, tract or parcel into fewer than 5 parcels at least 1 acre and smaller than 5 acres require a Division Permit.

LOT LINE ADJUSTMENT
 The adjusting of common property lines or boundaries between adjacent lots, tracts or parcels where an equal or lesser number of lots, tracts or parcels are created and where any existing or resulting parcel is not reduced below the minimum requirements established by the zoning ordinance.

MEETING
 The convening of a court or a governing body for purposes of conducting authorized county business, the nature of which does not necessitate public input and where such input is not mandated from said court or governing body.

ORIGINAL LOT, TRACT OR PARCEL
 A lot, tract or parcel of land from the date of reference in Article 3 of this Ordinance. Any remaining portions of a lot, tract or parcel of land that result from partial rezoning of the lot, tract or parcel of land.

PETITION
 A formal written request to review and consider a text amendment to the Jerome County Zoning Ordinance or Comprehensive Plan. A petition may be generated by one or more persons.

PLANT FERTILIZER
 A site for manufacturing or production of chemical fertilizers.

PLANT INDUSTRIAL MANUFACTURING PROCESSING
 An establishment not including a rendering plant, engaged in a series of continuous operations that processes one or more raw materials into a finished product or semi-product that is distributed or packaged and shaped for additional processing or fabrication.

PLANT ENERGY PRODUCING NON-CONVENTIONAL
 Any facility or installation such as a windmill, hydroelectric unit or solar collecting or concentrating array which is designed and intended to produce energy from natural forces such as wind, water, sunlight, or geothermal heat, for on-site use.

PLANT THERMAL ENERGY PRODUCING CONVENTIONAL
 Any facility which is designed and intended to convert energy from one of many energy sources, including but not limited to the list below, for either the transmission from the generation facility to a power distribution system or to the consumer.

PUBLIC UTILITIES
 Structures or facilities essential to supplying the public with electricity, power, gas, water, wastewater, transportation, communication and public services. The definition includes power plants, electrical substations, gas regulator stations, and water treatment plants.

SETBACK
 The shortest distance between the recorded property lines and any building, structure or item. All minimum yard and/or the setback requirements are subject to Jerome County Zoning Ordinance.

SPECIAL USE PERMIT
 An agreement issued by the administrator of this Ordinance upon the specific action of the Planning and Zoning Commission. The document defines the use, as well as the conditions limiting those uses in response to requests from an individual who seeks permission to use a parcel of real property in a specific way for a specific purpose.

STAFF
 Employees of the Jerome County Planning, Zoning, Building departments or other persons, identified by a governing body, who are authorized by the Board, Ordinance or Board Code to provide documentation, otherwise assist a governing body with planning and zoning matters.

UTILITIES
 Facilities to conduct and provide services such as the collection, distribution, production of water, sewage, gas, electricity and communication, the collection and treatment of sewage and solid waste, the collection, storage and distribution of surface water, storm water and ancillary facilities providing services to the public. These services may be provided by a public or private agency.

The following definitions have been deleted from **CHAPTER 2 WEATHER USE (TAVERN, BUNGE, CONVENTIONAL USE) AND SIGNAGE PERMITTING, FAMILY HOME REGULATION**

CHAPTER 3
 3-4.01: When the text of this Ordinance and the Maps of this Ordinance do not agree, the Maps shall prevail. The only exception is this Ordinance shall prevail in Jerome County Zoning Ordinance Chapter 49.05 when the provisions of the sections of the text of this Ordinance do not agree, the most stringent provisions shall prevail.

CHAPTER 5 CHART 5-1
 Add Commercial Truck Washing Facility with a use code of CA-15. See 5-1.01 for a Special Use Permit is required.

CHAPTER 5 CHART 5-4
 Changing Special Use Production from 5-1 to 5-5 adding the category for Plant Energy Producing Non-Conventional (adding 5-5 in every zone) and Industrial Manufacturing Processing and Plant Thermal Energy Producing Conventional (adding 5-5 in the IR zone).

CHAPTER 5 CHART 5-12
 Changing Farm Equipment Sales by adding an 5-5 in the MP Zone.

CHAPTER 6
 6-2. SUPPLEMENTAL SETBACK AND HEIGHT REGULATIONS
 6-2.01
 a. EXCEPTIONS TO THE SETBACK REGULATIONS
 The setback limitations contained in the Official Schedule of District Regulations do not apply to utility structures within the road right-of-way or approved utility easement(s) as long as the appropriate highway district or the utility district is responsible for the maintenance of the road(s) or utility easement(s) across the utility structure(s).

CHAPTER 13
13-6 PUBLIC NOTICE AND INSPECTION

The Administrator shall cause notice of the filing of an application for a CO Permit to be published in a newspaper of general circulation in the County, Idaho. The Administrator shall also cause notice to be published in a newspaper of general circulation in the County, Idaho. The property owner shall be responsible to provide a copy of the newspaper to the Planning and Zoning Office. The property owner shall be responsible to provide a copy of the newspaper to the Planning and Zoning Office. The property owner shall be responsible to provide a copy of the newspaper to the Planning and Zoning Office.

13-8 PUBLIC HEARING AND APPEAL

a. One public hearing shall be held before the Planning and Zoning Commission on applications brought pursuant to this Ordinance. All members of the public desiring to present oral or written comments or documentary evidence shall be allowed to do so as subject to the hearing procedures including time of time as set forth in Chapter 23 of this Ordinance. The Planning and Zoning Commission will forward their recommendation to the Board of Commissioners. b. One public hearing shall be held before the Board on applications brought pursuant to this Ordinance. All members of the public desiring to present oral or written comments or documentary evidence shall be allowed to do so as subject to the hearing procedures including time of time as set forth in Chapter 23 of this Ordinance. c. The decision regarding the granting of a CO Permit shall be made by the Board of Commissioners and shall conform to the standards and criteria set forth in Idaho Code Section 47-2535, as it may be amended from time to time.

13-10 AVENUEMENTS DURING CONSTRUCTION

The owner of a lot with a CO Permit shall be responsible for the maintenance of the lot during construction. The owner shall be responsible for the maintenance of the lot during construction. The owner shall be responsible for the maintenance of the lot during construction. The owner shall be responsible for the maintenance of the lot during construction.

CHAPTER 14

The Board of Commissioners shall have the authority to amend the Ordinance from time to time. The Board of Commissioners shall have the authority to amend the Ordinance from time to time. The Board of Commissioners shall have the authority to amend the Ordinance from time to time.

14-5 ORIGINAL SURVEY

All lots must be a minimum of one (1) acre with the following exceptions: a. Property that is being used for utility structures that do not require a street right-of-way. b. A lot parcel or tract of land that will connect into a community water and sewer system in an area zoned A-1, Agricultural Residential, commercial or industrial. c. Original Parcel exceptions: 1. A portion of a lot or tract or parcel is divided from the original property resulting from an approved zone change. 2. A lot parcel or tract of land divided into two (2) or more parcels each resulting from a zone change. d. When an application for a Land Division Permit is approved for utility structures on less than one (1) acre the resulting portion shall become an Original Parcel and will not be considered in the total number of land divisions in the original tract or parcel. e. When a lot parcel or tract creates a new legal description of the property without creating any additional lot tracts or parcels the resulting lot parcel and the property is surveyed and recorded the resulting parcel shall be considered an Original Parcel. f. A lot parcel or tract of land divided into two (2) or more parcels each resulting from a zone change shall be considered an Original Parcel. g. The applicant developer shall provide a plan of a community water and sewer system that shows the delivery of water from the head pass to the existing sewer collection system. h. The applicant developer shall provide a plan of a community water and sewer system that shows the delivery of water from the head pass to the existing sewer collection system. i. The applicant developer shall provide a plan of a community water and sewer system that shows the delivery of water from the head pass to the existing sewer collection system.

14-6 ORIGINAL SURVEY

The applicant developer shall provide a plan of a community water and sewer system that shows the delivery of water from the head pass to the existing sewer collection system. The applicant developer shall provide a plan of a community water and sewer system that shows the delivery of water from the head pass to the existing sewer collection system.

14-7 ORIGINAL SURVEY

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14-8 ORIGINAL SURVEY

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14-9 ORIGINAL SURVEY

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14-10 ORIGINAL SURVEY

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14-11 ORIGINAL SURVEY

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14-12 ORIGINAL SURVEY

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14-13 ORIGINAL SURVEY

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14-14 ORIGINAL SURVEY

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14-15 ORIGINAL SURVEY

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14-16 ORIGINAL SURVEY

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14-18 ORIGINAL SURVEY

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14-19 ORIGINAL SURVEY

The applicant developer shall provide a plan of a community water and sewer system that shows the delivery of water from the head pass to the existing sewer collection system. The applicant developer shall provide a plan of a community water and sewer system that shows the delivery of water from the head pass to the existing sewer collection system.

14-20 ORIGINAL SURVEY

The applicant developer shall provide a plan of a community water and sewer system that shows the delivery of water from the head pass to the existing sewer collection system. The applicant developer shall provide a plan of a community water and sewer system that shows the delivery of water from the head pass to the existing sewer collection system.

23-1-01 The purpose of this Chapter is to establish orderly procedures for the conduct of the formal business of the Planning and Zoning Commission and Board. The procedures are intended to provide adequate opportunity for the citizens of Jerome County to promote and to protect their rights under the concept of due process. These procedural requirements shall establish the provisions of the local Planning Act of 1975 as presently codified in Idaho Code Title 67, Chapter 63, and any amendments and as it may be amended.

23-2-01 The Planning and Zoning Commission shall adopt, amend or repeal the Bylaws in accordance with a decision of the Board. The Ordinance of the Board. All such action shall occur at a meeting and will become effective upon majority vote.

23-3 ORDER OF BUSINESS

23-3-01 The order of business at regular meetings of the Planning and Zoning Commission shall be:

23-4 RECORD OF MEETING

23-4-01 An accurate record of all business transacted at meetings and hearings of the Planning and Zoning Commission shall be kept through the use of recording equipment and/or through the presence of a stenographer making a verbatim record. A meeting or hearing of the Planning and Zoning Commission shall not proceed in a case if being properly recorded.

23-5 HEARING PROCEDURES OF THE PLANNING AND ZONING COMMISSION AND THE BOARD

23-5-01 BURDEN OF PROOF: The burden of proving that the governing body should act favorably toward the applicant/appellant rests solely upon the applicant/appellant.

23-5-02 CONDUCT OF HEARING

A governing body shall determine the general conduct and order of the procedures set out in this section. The governing body shall determine the appropriate order for a particular hearing and shall announce it prior to the hearing. A governing body shall determine the appropriate order of testimony and shall announce it prior to the hearing. A governing body may limit the testimony and scope of the hearing. With permission from the Chair, members of the governing body may at any time during the hearing freely inquire of anyone at the hearing, including staff, without limit of time. The Chair of the governing body shall rule on all questions of procedure and the admission or exclusion of testimony, with such ruling being made in accordance with the Bylaws of the applicable governing body. It is the Ordinance of the Board.

B. Report: Hearings before the governing body may commence with a report from staff. Such report will be given without limit of time. The report may contain recommendations, however, the governing body shall not be bound by any such recommendations.

C. Applicant/Appellant Comments: The applicant/appellant and those preparing the application/appeal shall be allowed an opportunity to respond to the applicant/appeal's submission by presenting evidence in the form of oral or written testimony and/or documentary evidence presented in the manner prescribed in subsection E of this section. An applicant/appellant may be represented by counsel. Except as provided in subsection E of this section, the Chair of the governing body shall determine if an application/appeal may be presented in writing.

D. Opponent and General Comments: Those opposing the applicant/appeal's position or having general questions or comments shall be provided an opportunity to make the evidence presented on behalf of the applicant/appeal by presenting evidence in the form of oral or written testimony and/or documentary evidence presented in the manner prescribed in subsection E of this section.

E. Applicant/Staff/Recorder: When the testimony of any party is concluded the presentation of the testimony of the applicant/appeal shall be allowed a brief period of rebuttal.

F. Written testimony and documentary evidence: Those wishing to present written testimony and/or other documentary evidence shall submit the appropriate number of copies to the Administrative Office level days prior to the hearing. If hearings before the Board, five (5) or the appropriate number of copies, and in hearing before the Planning and Zoning Commission the appropriate number shall be fifteen (15) copies. The only exception is that a person present at the hearing may be allowed to present a one-sided document larger than 8 1/2 inches x 11 inches that falls under separate handwriting type size, not less than 12 point and in any handwriting provided the type may not be smaller than 12 point standard Times New Roman. In order to be considered as evidence, the original and five (5) or fifteen (15) copies as the case might be of the one-sided document shall be presented to the governing body at the hearing with the original being admitted into evidence and becoming part of the permanent record. This section does not apply to the applicant/appeal the staff of an agency called by the governing body.

23-5-03 RECORD

The staff report shall automatically become part of the record, as shall any documents submitted by the applicant/appeal and the opponents, as shall all testimony given at the hearing. At the conclusion of the hearing, the governing body shall determine if the record shall be made available to the public. Additional evidence received at an event may be added as follows:

1. Adds the record with the exception of adding the admission of specifically requested information or testimony; and
2. Adds the record upon the admission of additional evidence to a case; and
3. Continues the hearing to take care of the case of receiving additional evidence and conducting such further proceedings as may be necessary.

23-5-04 RECORDING THE RECORD IN MATTERS BEFORE THE BOARD

In matters before the Board, the Board may, or if to insure compliance with the provisions of a state good cause demonstrated record, the Board may, for the purpose of receiving additional evidence, only the applicant/appeal and affected persons as defined under Idaho Code Section 67-6527, may seek to reopen the record by announcing a timely motion to reopen the proceedings concerning a particular case. The applicant/appeal shall always be provided a reasonable opportunity to rebut any additional evidence received at the hearing. The applicant/appeal shall pay the estimated costs that will be incurred by the Jerome County in having to comply with applicable law governing costs and hearings. If the actual costs are more than the estimated cost, the person seeking to reopen the hearing shall then pay the remaining amount before any action is taken. If the actual cost is less than the estimated cost, then the balance shall be returned to the payer of the estimated cost. The Board shall record and record the hearing, whether good cause has been demonstrated, and shall state such on the record. The Board may, within the time allowed herein, reopen the record for good cause on its own motion. If the Board determines to reopen the record, it shall thereafter comply with applicable law governing notice and hearing procedures, including those set forth in this Chapter.

23-6 DECISIONS

When the record has been closed, the governing body may then deliberate towards a decision based on the record, or it may take the matter under advisement for the purpose of deliberating towards a decision based on the record at a later date. After deliberating, the governing body shall, within one hundred eighty (180) days from the date when deliberations cease, render a decision in accordance with Idaho Code Section 67-6535, as it may be amended from time to time, or other applicable law.

The following sections were repealed: 23-6-6-01, 23-7-10-01, 23-7-10-02, 23-7-10-03, 23-7-10-04, 23-7-10-05, 23-7-10-06, 23-7-10-07, 23-7-10-08, 23-7-10-09, 23-7-10-10, 23-7-10-11, 23-7-10-12, 23-7-10-13, 23-7-10-14, 23-7-10-15, 23-7-10-16, 23-7-10-17, 23-7-10-18, 23-7-10-19, 23-7-10-20, 23-7-10-21, 23-7-10-22, 23-7-10-23, 23-7-10-24, 23-7-10-25, 23-7-10-26, 23-7-10-27, 23-7-10-28, 23-7-10-29, 23-7-10-30, 23-7-10-31, 23-7-10-32, 23-7-10-33, 23-7-10-34, 23-7-10-35, 23-7-10-36, 23-7-10-37, 23-7-10-38, 23-7-10-39, 23-7-10-40, 23-7-10-41, 23-7-10-42, 23-7-10-43, 23-7-10-44, 23-7-10-45, 23-7-10-46, 23-7-10-47, 23-7-10-48, 23-7-10-49, 23-7-10-50, 23-7-10-51, 23-7-10-52, 23-7-10-53, 23-7-10-54, 23-7-10-55, 23-7-10-56, 23-7-10-57, 23-7-10-58, 23-7-10-59, 23-7-10-60, 23-7-10-61, 23-7-10-62, 23-7-10-63, 23-7-10-64, 23-7-10-65, 23-7-10-66, 23-7-10-67, 23-7-10-68, 23-7-10-69, 23-7-10-70, 23-7-10-71, 23-7-10-72, 23-7-10-73, 23-7-10-74, 23-7-10-75, 23-7-10-76, 23-7-10-77, 23-7-10-78, 23-7-10-79, 23-7-10-80, 23-7-10-81, 23-7-10-82, 23-7-10-83, 23-7-10-84, 23-7-10-85, 23-7-10-86, 23-7-10-87, 23-7-10-88, 23-7-10-89, 23-7-10-90, 23-7-10-91, 23-7-10-92, 23-7-10-93, 23-7-10-94, 23-7-10-95, 23-7-10-96, 23-7-10-97, 23-7-10-98, 23-7-10-99, 23-7-10-100.

JEROME COUNTY BOARD OF COMMISSIONERS

Charles Cherie, Board Chair

Joseph Joe Davidson, Commissioner

Dana O'Brien, Commissioner

ATTEST:

Michela Emerson, Jerome County Clerk

PUBLISHED: September 29, 2008

EXHIBIT C

JOHN HORGAN
Office of the Jerome County Prosecutor
Jerome County Judicial Annex
233 West Main
Jerome, Idaho 83338
TEL: (208) 644-2630
FAX: (208) 644-2639
ISB No. 3068

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

In the matter of:)
)
)
The Jerome County Board of Commissioners;)
Decision Dated September 23, 2008)
Approving A Livestock Confinement)
Operation Permit for Don McFarland, dba Big)
Sky Farms,)
_____)
)

Case No.: CV 2008-1081

AFFIDAVIT OF CLERK OF
JEROME COUNTY BOARD OF
COMMISSIONERS

Friends of Minidoka, Dean & Eden Dimond,)
Harold & Carolyn Dimond, Wayne Slone,)
guardian of James Slone, the Idaho Rural)
Council, Inc., Idaho Concerned Area)
Residents for the Environment, Inc., the)
Japanese American Citizens League, Inc., the)
National Trust for Historic Preservation, Inc.,)
and Preservation Idaho, Inc.)
)

Petitioners,)
_____)
)

vs.)
)

Jerome County, a Political Sub-Division of)
the State of Idaho, Joseph Davidson, Charles)
Howell, and Diana Obenauer, Members of the)
Jerome County Board of Commissioners,)
)

Respondent.)
_____)
)

Heading continued on next page

South View Dairy, an Idaho General)
Partnership, Tony Visser, William DeJong)
and Ryan Visser, general partners,)
)
Intervenor.)
_____)

STATE OF IDAHO)
 : ss.
County of Jerome)

Michelle Emerson, being first duly sworn upon oath, deposes and says as follows:

1. I am the Clerk/Auditor/Recorder of Jerome County.
2. Under my role of auditor, I am the ex officio clerk of the Jerome County Board of Commissioners ("Board").
3. Among my duties as Clerk of the Board is the recording of all proceedings of the Board, by way of written minutes or electronic voice recording.
4. As Clerk of the Board, it is my responsibility to then to keep such recordings per the provisions of Idaho Code Section 9-331 and 9-332.
5. I have diligently searched the records of the Board's proceedings, specifically looking at the dates of August 4, 2008, September 9, 2008, and September 22, 2008.
6. As to these dates, the Board did hold certain proceedings, specifically where Mr. Dean Dimond was present on August 4, 2008; where Lee Halper, Mr. John Lothspeich and Mr. Dean Dimond were present on September 9, 2008; and where Wendy Janson was present on September 22, 2008. The identified proceedings where these individuals were present

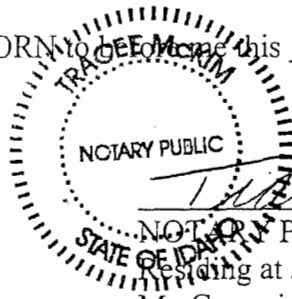
were recorded by me or one of my deputies by way of written minutes, which have been offered as part of the record in Case Number 2008-1081.

7. The Board made no request to have any of the specific proceedings identified above electronically recorded, and as a result no electronic recording was made by myself or by deputies, nor is any retained by me in my capacity as Clerk of the Board.
8. I am therefore unable to provide any transcripts of the proceedings specified above.

FURTHER, YOUR AFFIANT SAYETH NAUGHT.


Michelle Emerson

SUBSCRIBED AND SWORN to before me this 31 day of March 2009.




NOTARY PUBLIC for Idaho
Residing at Jerome, therein

My Commission Expires: 5/19/2014

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of March 2009, I served true and correct copies of the *Affidavit Of Clerk Of Jerome County Board Of Commissioners* upon the following persons, named below, in the manner indicated:

John B. Lothspeich
Fredericksen, Williams, Meservy &
Lothspeich, LLP
153 East Main Street
Post Office Box 168
Jerome, Idaho 83338

personal delivery
 U.S. Mail, postage prepaid
 telephone facsimile

Richard A. Carlson
Attorney at Law
Post Office Box 21
Filer, Idaho 8332

personal delivery
 U.S. Mail
 telephone facsimile

Patrick D. Brown
Hutchinson & Brown, LLP
PO Box 207
Twin Falls, Idaho 83301

personal delivery
 U.S. Mail
 telephone facsimile

Charles M. Tebbutt
Western Environmental Law Center
1216 Lincoln St.
Eugene, Oregon 97401

personal delivery
 U.S. Mail
 telephone facsimile



Jerome County Deputy Prosecuting Attorney

EXHIBIT D

JOHN HORGAN
Office of the Jerome County Prosecutor
Jerome County Judicial Annex
233 West Main
Jerome, Idaho 83338
TEL: (208) 644-2630
FAX: (208) 644-2639
ISB No. 3068

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

In the matter of:)
)
)
The Jerome County Board of Commissioners;)
Decision Dated September 23, 2008)
Approving A Livestock Confinement)
Operation Permit for Don McFarland, dba Big)
Sky Farms,)
_____)
)
Friends of Minidoka, Dean & Eden Dimond,)
Harold & Carolyn Dimond, Wayne Slone,)
guardian of James Slone, the Idaho Rural)
Council, Inc., Idaho Concerned Area)
Residents for the Environment, Inc., the)
Japanese American Citizens League, Inc., the)
National Trust for Historic Preservation, Inc.,)
and Preservation Idaho, Inc.)
)
Petitioners,)
_____)
vs.)
)
Jerome County, a Political Sub-Division of)
the State of Idaho, Joseph Davidson, Charles)
Howell, and Diana Obenauer, Members of the)
Jerome County Board of Commissioners,)
)
Respondent.)
_____)

Case No.: CV 2008-1081

SUPPLEMENTAL AFFIDAVIT OF
CLERK/AUDITOR/RECORDER
OF JEROME COUNTY

Heading continued on next page


South View Dairy, an Idaho General Partnership, Tony Visser, William DeJong and Ryan Visser, general partners,
Intervenor.
_____)
)
)
)
)
)
)

STATE OF IDAHO)
: ss.
County of Jerome)

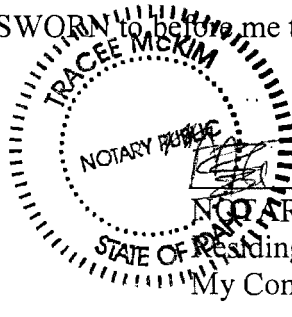
Michelle Emerson, being first duly sworn upon oath, deposes and says as follows:

1. I am making this affidavit as a supplement to my affidavit in this matter dated March 30, 2009.
2. Attached to my prior affidavit was Exhibit 3, which contained Jerome County Ordinances 2007-6, 2008-4 (not published and thus never in effect) and Corrected Ordinance 2008-4, dated September 22, 2008.
3. These three Ordinances show various amendments to, among others, Chapter 23 of the Jerome County Zoning Ordinance.
4. These three Ordinances are the only ordinances recorded with the auditor's office that show amendments to Chapter 23 of the Jerome County Zoning Ordinance since May 3, 2007.

FURTHER, YOUR AFFIANT SAYETH NAUGHT.


Michelle Emerson

SUBSCRIBED AND SWORN to before me this 31 day of March 2009.

A circular notary seal for Tracee McKim, Notary Public for Idaho, State of Idaho, Residing at Jerome, therein. The seal is partially obscured by the signature and text below it.
Tracee McKim
NOTARY PUBLIC for Idaho
Residing at Jerome, therein
My Commission Expires: 5/19/2014

1 Charles M. Tebbutt, *Pro Hac Vice*
2 Western Environmental Law Center
3 1216 Lincoln St.
4 Eugene, OR 97401
5 541-485-2471 (phone)
6 541-485-2457 (fax)

7 Attorneys for Petitioners

8 Patrick D. Brown, ISB No. 4413
9 Hutchinson & Brown, LLP
10 104 Lincoln St.
11 PO Box 207
12 Twin Falls, ID 83303-0207
13 208-733-9300 (phone)
14 208-733-9343 (fax)

15 Attorney for Petitioners Friends of Minidoka, Wayne Slone, guardian of James Slone, Idaho
16 Concerned Area Residents for the Environment, Inc., the Japanese American Citizens League,
17 Inc., the National Trust for Historic Preservation, Inc., and Preservation Idaho, Inc.

18 Richard A. Carlson, ISB No. 5971
19 P.O. Box 21
20 Filer, ID 83328
21 Telephone and fax: (208) 326-3686

22 Attorney for Dean & Eden Dimond, Harold & Carolyn Dimond, and the Idaho Rural Council, Inc.

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

25 In the matter of: The Jerome County Board of
26 Commissioners' Decision Dated September 23, 2008
27 Approving A Livestock Confinement Operation
28 Permit for Don McFarland, dba Big Sky Farms

) Case No: CV 2008-1081

) **REPLY IN SUPPORT OF**
) **PROPOSED ORDER**
) **REGARDING PETITIONERS'**
) **MOTION TO AUGMENT**
) **RECORD AND CORRECT**
) **TRANSCRIPT**

29 Friends of Minidoka, Dean & Eden Dimond, Harold
30 & Carolyn Dimond, Wayne Slone, guardian of James
31 Slone, the Idaho Rural Council, Inc., Idaho
32 Concerned Area Residents for the Environment,
33 Inc., the Japanese American Citizens League, Inc.,
34 the National Trust for Historic Preservation, Inc., and
35 Preservation Idaho, Inc.

36 Petitioners,

37 REPLY REGARDING PETITIONERS' MOTION TO AUGMENT RECORD

2008 APR 23 10 3 01
Michelle Emerson

1 v.)
 2 Jerome County, a Political Sub-Division of the State)
 3 of Idaho, Joseph Davidson, Charles Howell, and)
 4 Diana Obenauer, Members of the Jerome County)
 Board of Commissioners,)
 Respondents.)

6 South View Dairy, an Idaho General)
 7 Partnership, Tony Visser, William)
 8 DeJong and Ryan Visser,)
 general partners,)
 9)
 10 Intervenors.)

11 The parties, through counsel, Charles M. Tebbutt, Western Environmental Law
 12 Center, Patrick Brown, Hutchinson & Brown, LLP, and Richard A. Carlson for the Petitioners
 13 (hereinafter "Friends of Minidoka"), hereby submit this Reply in Support of Petitioners' Proposed
 14 Order to Augment the Record submitted to this Court by mail on April 2, 2009. Both Respondents
 15 and Intervenors objected to the proposed Order for different reasons. Because Friends of
 16 Minidoka believes that the Intervenors' objections and some of Jerome County's objections are
 17 now moot, only relevant parts of the six objections raised by Jerome County will be addressed in
 18 detail.
 19

20 Before addressing Jerome County's issues, Friends of Minidoka acknowledges that the
 21 certified copies of the ordinances have now been provided and are acceptable to Petitioners for
 22 purposes of this case. Thus, items 1 and 2 in Friends of Minidoka's Proposed Order have now
 23 been achieved and are therefore moot.
 24

25 Respondent's Issues Raised

27 REPLY REGARDING PETITIONERS' MOTION TO AUGMENT RECORD

1 Respondents first argue that “The proposed order covers matters not discussed or
2 addressed by the court.” In fact, the issues surrounding the documents to be produced were
3 discussed at length at the hearing on March 16. Friends of Minidoka has consistently requested
4 the items Mr. Seib refers to and the court made it clear at oral arguments that Jerome County
5 should provide the material requested, at least for purposes of a final ruling on the motion to
6 augment the record. While the Court did not order that any specific documents be made part of
7 the record, the Court did state that the records identified by Friends of Minidoka should be
8 provided by Jerome County to counsel and that Friends of Minidoka would have 14 days from
9 receipt of the documents to file a renewed motion as described in paragraph 4 of the proposed
10 order.
11

12
13 The second issue raised by Jerome County is that “The proposed order goes beyond the
14 scope of Friends’ motion.” Jerome County then objects to providing a “staff report” because it
15 states that no such document existed. There was, however, a staff report that eventually was made
16 part of the record. The question is whether one was available, complete or in draft form, at the
17 time Jim Stewart made his request (July 19, 2007) and Art Brown responded that one did not
18 exist. (A copy of Stewart's Public Records Request and the "not-in-existence" response by Brown
19 was in Friends’ Motion and Objection at #9). A later request by Dean Dimond was also made and
20 a similar response given, although Friends of Minidoka and Mr. Dimond cannot presently locate a
21 copy of that request and response. *See* Affidavit of Dean Dimond dated Jan. 12, 2009 (attached to
22 Petitioners’ Motion to Supplement Record filed on Jan. 13, 2009). If a draft was in existence at the
23 time of either of the requests, then such documentation should be made part of the record.
24

25 As to the “additional documents” discussed, at the telephonic hearing with the Court on
26

27 REPLY REGARDING PETITIONERS’ MOTION TO AUGMENT RECORD

1 March 30, the issue of notices of hearings and postings of agendas was discussed. The Court
2 asked, and Friends of Minidoka's counsel quotes from notes taken, counsel in the proposed order
3 to "leave room for documents not covered and the Court will fill them in." The order reflects that
4 instruction to the best of counsel's recollection and responds to the County's arguments
5 concerning this issue on page 5 of its response as well.
6

7 Jerome County's third objection, that "The proposed order is too vague and broad" has
8 limited merit. The items identified in the Objections to Record and Transcript of Proceedings are
9 mostly quite specific. To the extent the request is not specific with respect to Items 19 and 21,
10 Friends of Minidoka requests that any emails, notes or messages of the county clerk or Mr. Art
11 Brown with respect to the attempts by Ms. Hasse to provide evidence for the September 2007
12 hearing constitute the universe of documents sought. If no records of Ms. Hasse's attempts to
13 submit documents to the County exist, then, once again, the County need only attest to that fact.
14 A similar definition of the universe of documents related to Item 21 includes only documents
15 which are relevant to the correspondence between the County and the National Park Service
16 concerning requests by the National Park Service to have the Minidoka National Historic Site
17 recognized by the County as a special use designation. The timeframe and point of relevant
18 documents listed in Item 21 seems obvious. To provide further clarity, Friends of Minidoka
19 defines the time frame as 2006-2007 and the issue as that related to the request for special use
20 designation of the site during that period.
21

22 Objection four states "The proposed order would cause the court to legislate from the
23 bench." The Idaho Public Records Law has nothing to do with settling the record in this case.
24 This case, as the parties have stipulated, is governed by the Idaho Administrative Procedure Act.
25
26

27 **REPLY REGARDING PETITIONERS' MOTION TO AUGMENT RECORD**

1 Accordingly, this Court's inherent powers to obtain a complete and accurate record also apply.
2 The ability to decide motions and settle the record is directly within the Court's purview. The
3 timeframes for providing the documents and responses thereto were discussed by the parties and
4 the Court. The proposed order simply attempts to reflect the Court's conclusions. The issues
5 raised about the ordinances have been addressed by the "Affidavits of the Clerk/Auditor/Recorder
6 of Jerome County" filed by Mr Lothspeich and thus such objections are now largely moot.
7

8 With respect to the fifth issue, that "The proposed order misstates the agreed upon
9 controlling authority," Friends of Minidoka agrees that the proposed order should read as set forth
10 by Jerome County.

11 The last issue, that "The proposed order mandates Jerome County to perform a task that
12 they currently have no jurisdiction to do," is simply incorrect. The three corrections requested are
13 essentially clerical in nature. Jerome County does not dispute the requested corrections but
14 instead concocts a silly argument for not correcting the relatively minor errors. The example
15 involves the date of the hearing. The lead page and footer on all pages of the transcript identifies
16 the date of the hearing as August 11, 2008, but the certification states the date is October 9, 2007
17 (incorrectly listed in the request for correction as 2008). Such certification date is logically
18 impossible. The second correction was attested to by the husband of the correct speaker, Eden
19 Dimond. See Affidavit of Dean Dimond dated Jan. 12, 2009. The last issue relates to the spelling
20 of Ms. Hasse's name. Ms. Hasse submitted an affidavit earlier in the case that properly spells her
21 name.
22
23
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26

27 **REPLY REGARDING PETITIONERS' MOTION TO AUGMENT RECORD**

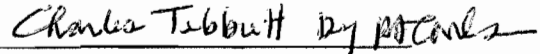
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CONCLUSION


The Court may modify the proposed order as it sees fit consistent with the discussions during the hearings and its discretion to manage this case.

Dated: April 28, 2009.

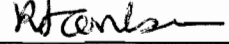
Respectfully submitted,


Charles M. Tebbutt (OSB No. 96579)
Western Environmental Law Center

Attorney for Petitioners


Patrick D. Brown
Hutchinson & Brown, LLP

Attorney for Petitioners Friends of Minidoka,
Wayne Slone, guardian of James Slone, Idaho
Concerned Area Residents for the
Environment, Inc., the Japanese American
Citizens League, Inc., the National Trust for
Historic Preservation, Inc., and Preservation
Idaho, Inc.


Richard A. Carlson
Idaho State Bar No. 5971

Attorney for Dean & Eden Dimond, Harold &
Carolyn Dimond, and the Idaho Rural
Council, Inc.

REPLY REGARDING PETITIONERS' MOTION TO AUGMENT RECORD

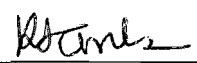
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of April, 2009, I served a true and correct copy of the foregoing document on the persons whose names and addresses appear below, by hand delivery::

John B. Lothspeich
Fredericksen, Williams, Meservy & Lothspeich, LLP
PO Box 168
Jerome, Idaho 83383

Michael J. Seib
Jerome County Prosecutor
233 W Main St
Jerome, Idaho 83338



Richard A. Carlson

REPLY REGARDING PETITIONERS' MOTION TO AUGMENT RECORD

100 JUN 5 10 10 55

Michelle Carson

Murphy

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

In the Matter of:)
)
The Jerome County Board of Commissioners')
Decision Dated September 23, 2008,)
Approving A Livestock Confinement)
Operation Permit for Don McFarland, d/b/a)
Big Sky Farms,)

Case No.: ~~CV~~-2008-1081

Friends of Minidoka, Dean & Eden Dimond,
Harold & Carolyn Dimond, Wayne Slone,
guardian of James Slone, the Idaho rural
Council, Inc., Idaho Concerned Area
Residents for the American Environment, Inc.,
the Japanese American Citizen's League, Inc.,
the National Trust for Historic Preservation,
Inc., and Preservation Idaho, Inc.

Petitioners,

vs.

**ORDER ON MOTION TO AUGMENT
AND SUPPLEMENT THE RECORD,
CORRECT TRANSCRIPT, AND
MOTION TO DISMISS**

Jerome County, a Political Subdivision of the
State of Idaho, Joseph Davidson, Charles
Howell and Diana Obenauer, Members of the
Jerome County Board of Commissioners,

Respondents.

South View Dairy, an Idaho General
Partnership, Tony Visser, William DeJong and
Ryan Visser, geneal partners,

Intervenors.

PROCEDURAL HISTORY

This matter is before the court on a petition for judicial review. Motions came before the court on March 16, 2009. Charles Tebbutt of Eugene, Oregon, and Patrick Brown of Twin Falls, represent the petitioners Friends of Minidoka, Wayne Slone, guardian of James Slone, Concerned Area Residents for the Environment, Inc., the Japanese American Citizens League, Inc., the National Trust for Historic Preservation, Inc, and Preservation Idaho, Inc; Richard Carlson of Filer represents petitioners Dean and Eden Dimond, Harold and Carolyn Dimond, and the Idaho Rural Council, Inc; John Lothspeich of Jerome represents the intervenors South View Dairy, an Idaho General Partnership; and Mike Seib, Jerome County Deputy Prosecutor, represents respondent Jerome County.

The difficulty in determining precisely what evidence was sought to be produced or augmented, and which category that evidence fell into, permeated the March 16 hearing. What remedy the court is able to provide depends to a great deal both on the showing made by a party seeking to add evidence into the record and the particular legal category that evidence might fall into. It is of paramount importance for the court to determine whether the agency below already considered evidence which might be added into the agency record (and thus, whether the court is simply “correcting” the record below), or whether the court is augmenting the agency record with new information not previously considered by the agency below. In the latter situation, a remand is usually necessary. *See* I.C. §67-5276(1)(a). In addition, the Idaho Supreme Court has made clear the agency record is not to be lightly disturbed. *See, e.g., Crown Point Development v. City of Sun Valley*, 144 Idaho 72, 156 P.3d 573 (2007).

Due to these identified difficulties, as well as others that appear below, it has been difficult for the parties to agree on what the court ordered during the March 16 hearing, and to formalize a written order. Accordingly, the court has reviewed a transcript of that hearing in the course of preparing its own order. The court has also listened to the recording of the telephone conference hearing held on March 30, 2009. This order will govern future proceedings in this action. Any objections to the form of this order must be filed within 10 days of the clerk's file stamp on this order.

This case has been the subject of a prior appeal to the Honorable Richard Bevan, who remanded proceedings back to Jerome County. Following additional proceedings at the county level, this matter is now the subject of a second judicial review proceeding before this court. This court entered an Order Re: Petition for Judicial Review on approximately December 22, 2008, which, among other things, directed the parties to settle the record before the agency below. The intervenors filed a Motion to Dismiss on the grounds that the petitioner's complaint impermissibly combined relief requesting declaratory judgment with an action for judicial review in violation of *Euclid Avenue Trust v. City of Boise*, 146 Idaho 306, 193 P.3d 853 (2008). The petitioners requested in their response to the Motion to Dismiss that they be allowed to amend their Petition for Review in order to delete any references to a request for declaratory relief, and tendered a proposed Amended Petition for Review to the court, which was file stamped by the clerk on March 6, 2009.

The hearing before the court on the Motion to Augment and Supplement the Record, and Correct the Transcript on March 16 was lengthy, and covered different aspects of the judicial review process. One of the primary difficulties for both the court

and the parties at hearing was discerning the difference between three categories of evidence that some of the parties seek to get before the court now or sought to get before the agency below.

The **first category** would be documents and evidence, which may have properly been before the Board of County Commissioners in proceedings below, but which might not have made it into the agency record. This evidence would be characterized as the agency record under I.C. § 67-5275 which the court may “correct” pursuant to subsection (3) of the statute. This would include transcripts of hearings not yet produced or transcribed or corrected pursuant to Idaho Code §67-5249(2)(e), or evidence which was offered and/or objected to pursuant to I.C. 67-5249(2)(d), or which may not have been included in the record on appeal, but should have been.

The **second category** would include additional evidence meeting the requirements of I.C. §67-5276(1)(a): evidence which is material, relates to the validity of the agency action, and there were good reasons for failing to present that evidence in the proceeding before the agency.

The **third category** of evidence might be that which could be characterized as a “procedural irregularity” under 67-5276(1)(b). This evidence may or may not have been available at the time of the agency hearing, and may require some discovery.

ORDER

1. **Motion to Dismiss**: The intervenor’s Motion to Dismiss is denied. Instead, the petitioner’s Amended Petition for Review, deleting any request for declaratory relief, is deemed filed as of March 6, 2009. Any responsive pleading due from the intervenors or the respondents should be filed within 20 days of the clerks filing of this order.
2. **Record of Prior Proceedings before Judge Bevan**: Counsel have stipulated that the record from the “phase one” proceedings before Judge Bevan shall be

included as a part of the agency record in this current judicial review proceeding, and this court hereby orders the same.

3. **Ordinances of Jerome County:** All parties and the court need to know the rules that governed the proceedings below. There is some question as to which ordinances were in effect at the time of the agency review, or at the time the application for a permit was made in proceedings below, or whether there were changes made in ordinances governing the procedural aspects of hearings before the Board of Commissioners while the present application has been pending, and thus which ordinances apply. It is the court's intention to promptly require production of all ordinances that may be applicable to these proceedings in order to determine which apply. By embarking on this course, the court is not inviting or allowing inquiry at this time into whether any applicable ordinance was validly enacted, properly published, or constitutes legislative activity, etc. The Jerome County Clerk/Recorder/Auditor is directed to produce any and all versions of the Livestock Confinement Ordinance or what may be commonly referred to as a Confined Animal Feeding Ordinance in effect or arguably in effect since the date of the intervenor's original application for a permit from Jerome County.

The Jerome County Clerk/Auditor/Recorder is also directed to produce any and all versions of ordinances in effect since the date of the intervenor's original application that govern the procedural aspects of hearings before the Board of Commissioners. By way of example, these may include, but are not limited to, the process by which the Board gives notice of or continues hearings, who may speak at hearings, what records of meetings are kept and how, how a person or party gets on a hearing agenda, who is entitled to notice of hearings, etc. "All versions" means each ordinance, and each and every amendment thereto, on the above topics arguably in effect since the intervenors filed their original application with the county.

The county shall also produce to the parties documents supporting the passage of these ordinances, such as the final meetings minutes and/or signature pages of the Board members adopting or approving these ordinances. The county may charge the parties a reasonable fee for copying and providing these documents. Ordinances produced, together with the documents supporting their passage, are to be accompanied by an affidavit of the clerk certifying the ordinances as true and correct copies of the records of Jerome County, and their effective date.

These ordinances shall be produced by Jerome County to all counsel within fourteen (14) days of the date of the filing of this order and filed with the court. Within 28 days of this order, counsel shall either all stipulate to the ordinances produced, and the effective dates of all produced ordinances, or shall file particularized objections to specific ordinances. If no objections are timely filed, the court will treat the ordinances produced as applicable and governing this case unless the court determines otherwise by written order. There will be no

inquiry into the process by which these ordinances became effective at this time. By stipulating to ordinances and/or their effective dates, counsel are not waiving objections or arguments that ordinances enacted after the filing of the intervenor's application may or may not govern proceedings thereafter, nor are counsel waiving arguments or objections as to the process by which any ordinance became effective. To the extent those issues exist, or may be raised in a judicial review proceeding, they will be dealt with later by a process determined by the court and counsel.

4. **Corrected Record or Additional Evidence:** The parties need to start over with the process of seeking augmentation of the record as more fully set forth below. As this is an appellate judicial review proceeding, there will be no discovery between the parties unless the court finds there has been a "procedural irregularity" and specifically authorizes discovery pursuant to I.C. §67-5276(1)(b).

Documents or evidence sought to be augmented into the record must be divided into either category (1) or (2) noted above. That is, evidence sought to be augmented or supplemented into the record must be submitted either as evidence which the court can admit into the record as "corrected" as generally defined in category #1 above, or it must now be offered into the record as "additional evidence" under I.C. § 67-5276(1)(a). Counsel need to clearly identify the factual and legal basis for each document or bit of evidence submitted, preferably by affidavit. These submittals may be made by group or class of evidence submitted. For example, if there were emails that were offered into the record that were refused, they may be grouped together and presented as a category 1 submittal with affidavits setting forth generally when or how they were offered, ruled upon, or refused. I.C. § 67-5249(2)(d). The petitioners should also distinguish between evidence sought to be entered at or before the first hearing, and evidence sought to be entered on "phase two." If counsel disagree on the factual basis under which this type of evidence to correct the record is offered, they may file counter-affidavits. The court will resolve any factual disputes. This evidence, once submitted, may be the subject of a motion to correct the record pursuant to I.C. §67-5275(3).

Evidence offered under category 2 above must be accompanied by affidavit or other satisfactory evidence showing such evidence meets the requirements of 67-5276(1)(a). This is the type of evidence, if allowed into the record, which could require a remand to the agency to consider prior to the court hearing the judicial review proceeding. I.C. § 67-5276(1)(a). Any submittals under this category should also be grouped or classed depending on its specific circumstances.

Category 3 would involve evidence that a party knows or suspects exists, and/or which might support a claim that an alleged irregularity has occurred. These might include, for example, evidence that a member of the hearing agency

has received ex parte communications, or that meetings took place that were not recorded or transcribed or were “off the record,” or consist of evidence offered into the agency record that was not preserved. For this type of evidence, a party must submit what evidence they have, preferably by affidavit, of an alleged irregularity, together with the other showings required by I.C. § 67-5276(1)(b), and the court will determine after hearing whether there has been an alleged irregularity, etc, and how the court “may take proof on the matter,” if at all. The parties are directed to an earlier decision of this court on this topic in *Cove Springs Development v. Blaine County*, Blaine County Case # CR 2008-22, entitled *Order on Motions to Allow Discovery* filed August 26, 2008. This may be available from the court by email or hard copy upon request.

5. **I.R.C.P. 84:** Counsel have stipulated, and the court hereby orders, that Rule 84, is not applicable to these proceedings.
6. **Transcripts of Hearings:** At hearing, the court ordered production of transcripts at the petitioner’s expense of the relevant portions of hearings before the Board or agency on August 4, 2008, Sept 9, 2008, and Sept 22, 2008. If these exist and are transcribed, they will not be included as part of the agency record on appeal without stipulation or court order. If transcripts of records of these hearings do not exist, counsel for Jerome County is directed to file and serve upon all parties an affidavit to that effect within 10 days of this order. If transcripts do not exist this may be treated as an “alleged irregularity” by the court and counsel may proceed under paragraph 4 above. Jerome County is entitled to reimbursement for reasonable copying costs.
7. **Corrections to the Prepared Record:** The record is not yet compiled or settled. Proposed corrections raised at hearing will be taken up at a later time.
8. **Timing of Motions or Submittals Under this Order:** Submittals of requested augmentations, or motions to “correct” the record, or motions to determine whether alleged irregularities exist under this order should be made within 21 days of the date of filing of this order. This time may be expanded by a timely request to the court or by stipulation of the parties, upon a showing of good cause, particularly if records ordered produced herein have not or cannot be timely produced, and the court may determine an “alleged irregularity” exists, in order to take proof on the matter and/or allow particularized discovery.
9. **Questions Raised by Prior Pleadings:** Any issues unresolved or unaddressed by this order remain pending and may be noticed for hearing at any time. For example, whether the Board had the authority or discretion to close the record following remand from Judge Bevan and refuse to consider new evidence. (By using examples in this order the court is not suggesting or limiting any course of action.).

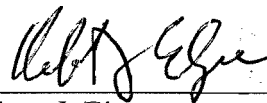
10. **Production of Records:** As noted herein, as this is an appellate proceeding and there will be no general discovery between the parties except as authorized or directed by the court. As further noted, if necessary, the court may determine in any particular instance that an "alleged irregularity" exists, or counsel can resort to requests for production of public records pursuant to Title 9, Chapter 3 of the Idaho Code. In the course of the prior hearings, it appears there are some records requested between counsel that have not been objected to, and/or that are generally acknowledged to exist, and which may have to be produced sooner or later so the court can make an intelligent decision as to their status in proceedings below, if any. In order to expedite matters, the court will order their production, subject to objection if made within 10 days of the date of this order. If no objection is filed, these records must be produced within 20 days of this order. If no such records exist, counsel for Jerome County, or the appropriate Jerome County clerk must so state by proper affidavit within the 10 days. If produced, with regard to these records only, the court will allow an expanded time of an additional 14 days after production for parties to file seeking inclusion of these records into category 1 or 2. Jerome County is entitled to reasonable costs for copies.

The records to be produced are:

- a.) Documents named in Section I of the petitioner's Objections to Record and Transcript of Proceedings as Incomplete, namely Nos. 3 and 9 (the staff report requested by the public records request provided with No. 9), 11-18, 19 (not including documents attempted to be submitted by Mrs. Hasse), 21 (all documents relevant to this request that were not provided as Exhibit 3).
- b.) Documents reflecting any notice of hearings, or meetings, or agendas for hearings for the meetings referenced above before the Board of Commissioners of Jerome County for August 4, 2008, Sept 9, 2008, and Sept. 22, 2008.

IT IS SO ORDERED.

DATED this 3 day of June, 2009.



Robert J. Elgee
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of June, 2009, I caused to be served a true copy of the foregoing ORDER, document by the method indicated below, and addressed to each of the following:

Charles M. Tebbut
Western Environmental Law Center
1216 Lincoln St.
Eugene, OR 97401

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- FAX

Patrick D. Brown
Hutchinson & Brown, LLP
104 Lincoln St.
PO Box 207
Twin Falls, ID 83303-0207
John Lothspeich
PO Box 168
Jerome, ID 83383

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- FAX
- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- FAX

Michelle Emerson
Jerome County Clerk
300 N. Lincoln, Rm. 310
Jerome, ID 83338

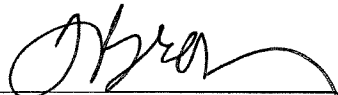
- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- FAX

Michael J. Seib
Jerome County Prosecutor
233 W. Main St.
Jerome, ID 83338

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- FAX

Rich Carlson
Box 21
Filer, ID 83328

us mail



Deputy Clerk

JOHN HORGAN
 Office of the Jerome County Prosecutor
 Jerome County Judicial Annex
 233 West Main
 Jerome, Idaho 83338
 TEL: (208) 644-2630
 FAX: (208) 644-2639
 ISB No. 3068

DISTRICT COURT
 FIFTH JUDICIAL DIST.
 JEROME COUNTY, IDAHO
 JUN 12 AM 11 31

BY Michelle Emerson
 DEPUTY CLERK

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

In the matter of:)
)
 The Jerome County Board of Commissioners;)
 Decision Dated September 23, 2008)
 Approving A Livestock Confinement)
 Operation Permit for Don McFarland, dba Big)
 Sky Farms,)
 _____)
 Friends of Minidoka, Dean & Eden Dimond,)
 Harold & Carolyn Dimond, Wayne Slone,)
 guardian of James Slone, the Idaho Rural)
 Council, Inc., Idaho Concerned Area)
 Residents for the Environment, Inc., the)
 Japanese American Citizens League, Inc., the)
 National Trust for Historic Preservation, Inc.,)
 and Preservation Idaho, Inc.)
)
 Petitioners,)
 _____)
 vs.)
)
 Jerome County, a Political Sub-Division of)
 the State of Idaho, Joseph Davidson, Charles)
 Howell, and Diana Obenauer, Members of the)
 Jerome County Board of Commissioners,)
)
 Respondent.)
 _____)


Case No.: CV 2008-1081
 RESPONSE TO COURT'S ORDER

Heading continued on next page

South View Dairy, an Idaho General)
Partnership, Tony Visser, William DeJong)
and Ryan Visser, general partners,)
)
Intervenor.)
_____)

COMES NOW, Jerome County, the Respondent (“Jerome County”), by and through the Jerome County Prosecutor, John Horgan, and responds to the order of the court dated June 3, 2009, by producing the attached documents for court and council.

RESPECTFULLY SUBMITTED this 12th day of June 2009.



Michael J. Seib
Jerome County Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of June 2009, I served true and correct copies of the Response To Court's Order upon the following persons, named below, in the manner indicated:

John B. Lothspeich
Fredericksen, Williams, Meservy &
Lothspeich, LLP
153 East Main Street
Post Office Box 168
Jerome, Idaho 83338

personal delivery
 U.S. Mail, postage prepaid
 telephone facsimile

Richard A. Carlson
Attorney at Law
Post Office Box 21
Filer, Idaho 8332

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Charles M. Tebbutt
Western Environmental Law Center
1216 Lincoln St.
Eugene, Oregon 97401

personal delivery
 U.S. Mail
 telephone facsimile

cc Judge Elger



Jerome County Deputy Prosecuting Attorney

October 31, 2007

Memo to: Charlie Howell, Joe Davidson and Mike Seib
Subject: Big Sky Farms Memorandum of Decision/Findings of Fact and
Conclusions of Law (FFCL)

Dear Charlie, Joe and Mike,

This memorandum is to formally and on the record object to your predetermined time and date of November 1st 2007 for me to complete my findings and conclusions in this matter. The FFCL is THE decision that will determine any litigation and our Ordinance allows 180 days for this decision. A month of formulation for a legal document required by statute is not a burdensome time for any party to wait. Jerome County has taken months to prepare other FFCL's and I hope to have these done and ready to sign by November 6th when Joe is on a conference call with us on the Canyon South Subdivision matter. I will get a copy to him before that for his review and if he needs to discuss any changes, I will be available by phone, fax and email.

I have reviewed Mr. Seib's assessment and find it severely lacking in relevant and defensible findings. His opinion that the FFCL can only be based on issues raised during the deliberation hearing is erroneous, as these are required to be based on the complete record and transcripts.

Any action that proceeds without me as one of the two Nay votes in this matter will have severe consequences for Jerome County. I ask that you withdraw the "decision" you have agenzized for November 1, 2007 at 9 A.M. and follow the blueprint I have supplied above.

Thank you,

A handwritten signature in black ink, appearing to read "Diana Obenauer", with a long horizontal flourish extending to the right.

Diana Obenauer
Jerome County Commissioner

JEROME COUNTY COMMISSIONERS AGENDA
(Agenda subject to change up to the time of the meeting or for an emergency)

DATE: MONDAY, JULY 28, 2008

9:00 ADMINISTRATIVE MATTERS

9:15 Read and approve minutes

9:30 Veteran's Officer

10:00 Denise Clifton re: two doors and Costco

10:30 Kyle Fisher - Grant

11:00 Big Sky – letter from counsel requesting discussion to be set on 8/11/08

11:30

12:00 Noon Recess

1:00 Steve Klein – Re: stairs

1:15 Budget work session

1:30 Terry Schultz – Solid Waste Budget issues

2:00 Executive Session – Indigent Matters

2:30 Budget work session

4:00 Department Head/Elected Officials Meeting *Steve Klein*

4:30 *Clint Blackwood Re: Disaster Declaration*

5:00 Recess of Meeting

Executive Sessions may be held pursuant to Idaho Code 67-2345 as needed during time such sessions are called.

NOTE: Any person needing special accommodations to participate in the meeting should contact the clerk (208-644-2700) at the Courthouse, 300 No. Lincoln, Jerome, Idaho seven (7) days prior to the meetings.

JEROME COUNTY COMMISSIONERS AGENDA
(Agenda subject to change up to the time of the meeting or for an emergency)

DATE: MONDAY, AUGUST 4, 2008

9:00 ADMINISTRATIVE MATTERS

9:15 Read and approve minutes

9:30 Courthouse maintenance

10:00 Dan Taylor Re: Appointment for Associate Counsel

10:30 Rocky Mountain Corrections (1/2 hr)

11:00 Compliance issue with BLM on APP Lease North Rim Park & Hazelton Land Fill (1 hr)

12:00 Noon Recess

1:00 Dean Dimond – Reopen Record – Big Sky

1:15

1:30 Fair Board

2:00 Executive Session – Indigent Matters

2:30 Clerk/Auditor – approval of proposed budget for FY2008-09 for publication/ Jerome County and Lifeline Ambulance (1/2 hr)

3:00 Rick Ustick

3:30 Extension Office – (1/2 hr)

4:00 Conseco – Cliff Jaro – presentation on alternative to supplemental insurance now offered by the County

4:30

5:00 Recess of Meeting

Executive Sessions may be held pursuant to Idaho Code 67-2345 as needed during time such sessions are called.

NOTE: Any person needing special accommodations to participate in the meeting should contact the clerk (208-644-2700) at the Courthouse, 300 No. Lincoln, Jerome, Idaho seven (7) days prior to the meetings.

JEROME COUNTY COMMISSIONERS AGENDA
(Agenda subject to change up to the time of the meeting or for an emergency)

DATE: MONDAY, AUGUST 11, 2008

9:00 ADMINISTRATIVE MATTERS -CLAIMS

9:15 Read and approve minutes

9:30 Solid Waste – Terry Schultz

10:00 Con Paulos, Bob Wright, Marlin Eldred, Arlin Crouch

10:30 P&Z Procedure – Changes due to Northside News closure

11:00 Clerk/Auditor – Adoption of proposed budget for FY2008-09 for Jerome County & Lifeline Ambulance; Resolutions; Clerk’s Conference; digital recorder; EMS Building (1 hr)

12:00 Noon Recess

1:00

1:15 Rick Ustick Re: Sheriff cars

1:30

2:00 Executive Session – Indigent Matters

~~2:30 Appeal Hearing – Indigent Case No. 0708-031~~ *continued*

3:00

3:30 Big Sky – Board Members’ Discussion after remand

4:00

4:30

5:00 Recess of Meeting

Executive Sessions may be held pursuant to Idaho Code 67-2345 as needed during time such sessions are called.

NOTE: Any person needing special accommodations to participate in the meeting should contact the clerk (208-644-2700) at the Courthouse, 300 No. Lincoln, Jerome, Idaho seven (7) days prior to the meetings.

JEROME COUNTY COMMISSIONERS AGENDA
(Agenda subject to change up to the time of the meeting or for an emergency)

DATE: TUESDAY, SEPTEMBER 2, 2008

9:00 ADMINISTRATIVE MATTERS

9:15 Read and approve minutes

9:30 Chris Stevenson Re: Insurance with Blue Shield

10:00 Terry Roemer – Blue Cross/Blue Shield

10:30 Idaho Power – Dan Olmstead-Randy Hill – No Trespassing Ordinance

11:00 Clerk – Budget information; general resolutions, if necessary.

11:30 Sharon Couch – Premier Insurance presentation

12:00 Noon Recess

1:00 Denise Clifton – Annex water heater

1:30 Airport – Bonnie Deitrick – Airport Grant

2:00 Executive Session – Indigent Matters

2:30 Discussion Big Sky Remand (1 ½ hr)

4:00 Chris Stevenson Re: Insurance

4:30 Department Head/Elected Officials meeting

5:00 Ambulance – Budget hearing

5:30 Jerome County – Budget hearing

6:00 Recess meeting

Executive Sessions may be held pursuant to Idaho Code 67-2345 as needed during time such sessions are called.

NOTE: Any person needing special accommodations to participate in the meeting should contact the clerk (208-644-2700) at the Courthouse, 300 No. Lincoln, Jerome, Idaho seven (7) days prior to the meetings.

**JEROME
COUNTY COMMISSIONERS AGENDA**

(Agenda subject to change up to the time of the meeting or for an emergency)

DATE: THURSDAY, SEPTEMBER 4, 2008

ADMINISTRATIVE MATTERS
9:00 Big Sky Discussion (1 hr)

10:00 Clerk/Budget matters/Health Insurance (1 hr)

11:00 Recess of Meeting

Executive Sessions may be held pursuant to Idaho Code 67-2345 as needed during time such sessions are called.

NOTE: Any person needing special accommodations to participate in the meeting should contact the clerk (208-644-2700) at the Courthouse, 300 No. Lincoln, Jerome, Idaho seven (7) days prior to the meetings.

JEROME COUNTY COMMISSIONERS AGENDA
(Agenda subject to change up to the time of the meeting or for an emergency)

DATE: TUESDAY, SEPTEMBER 9, 2008

9:00 ADMINISTRATIVE MATTERS

9:15 Jeff McCurdy/Steve Klein – Handicap accessibility up-date

9:30 Fair Housing – Jeff McCurdy/Rachel Evans

10:00 Canyon View Prelim Plat Extention – Anasazi Construction

10:15 Michelle Re: Budget Resolution Correction

10:30 Administrative Change to Ordinance 2008-4

Michelle Emerson Re: Budget Resolution Correction

11:00 Codification up-date Ordinance and Review of Index

11:30 – John Lothspeich – Request to present Authority on issues
being brought up in The Times News

12:00 Recess of Meeting

Executive Sessions may be held pursuant to Idaho Code 67-2345 as needed during time such sessions are called.

NOTE: Any person needing special accommodations to participate in the meeting should contact the clerk (208-644-2700) at the Courthouse, 300 No. Lincoln, Jerome, Idaho seven (7) days prior to the meetings.

JEROME COUNTY COMMISSIONERS AGENDA
(Agenda subject to change up to the time of the meeting or for an emergency)

DATE: MONDAY, SEPTEMBER 10, 2007

9:00 ADMINISTRATIVE MATTERS - Claims

9:15 Read and approve minutes

9:30 Courthouse Maintenance – New Tech

10:00 Sign Ordinance – Art Brown

10:30 Contract with Sunrise Engineering re: address map – Art Brown

11:00 Kathleen McKevitt – North Side News Editor

11:30 Discussion on Crossroad – Arlin Crouch

NOON RECESS

1:00 Veteran Service Officer/Social Services Deputy Clerk
Applicants (1:00 p.m. to 2:00 p.m.)

2:00 Executive Session – Indigent Matters

2:15 Hearing procedures – Mike Seib

2:30 Discussion of Richard Carlson's and National Trust for Historic Preservation letters

2:45 Discussion for resolutions on urban renewal —

3:15 Health care provider contract

3:30

4:00 Ambulance Budget Resolution and Jerome County Budget Resolution

4:30

5:00

RECESS OF MEETING

6:15 Meeting with subcommittee (pathogens), Chair Claire McClure

6:30 Meeting with subcommittee (odor), Chair Del Kohtz

Executive Sessions may be held pursuant to Idaho Code 67-2345 as needed during time such sessions are called.

NOTE: Any person needing special accommodations to participate in the meeting should contact the clerk (208-644-2700) at the Courthouse, 300 No. Lincoln, Jerome, Idaho seven (7) days prior to the meetings.

JEROME COUNTY COMMISSIONERS AGENDA
(Agenda subject to change up to the time of the meeting or for an emergency)

DATE: MONDAY, SEPTEMBER 22, 2008

- 9:00-ADMINISTRATIVE MATTERS
- READ AND APPROVE MINUTES
- 9:15-Big Sky Discussion
- EXECUTIVE SESSION RE: PERSONNEL
- 11:30-Corrected Ordinance 2008-4

- 12:00-Noon Recess

- 1:00-Chris Stevenson – Primary Health

- 1:15-Decision on medical insurance and buy-down

- 1:45-American Legion – Ron Poston (Post Commander)

- 2:00-~~Executive Session~~ – Indigent Matters

- 2:30-Wendy Janson – Hagerman Minidoka Monuments

- 3:00-Clerk – Resolutions, contracts, general business (1 hr)
- 3:30-Decision on Insurance and Buy Down
- 4:00-Alma Hass Re: Big Sky
- 4:30-Continue Big Sky Discussion

- 5:00-Recess of Meeting

Executive Sessions may be held pursuant to Idaho Code 67-2345 as needed during time such sessions are called.

NOTE: Any person needing special accommodations to participate in the meeting should contact the clerk (208-644-2700) at the Courthouse, 300 No. Lincoln, Jerome, Idaho seven (7) days prior to the meetings.

Final agenda 9/24/07
MLL

JEROME COUNTY COMMISSIONERS AGENDA
(Agenda subject to change up to the time of the meeting or for an emergency)

DATE: MONDAY, SEPTEMBER 24, 2007

9:00 ADMINISTRATIVE MATTERS

9:15 Read and approve minutes

9:30 Courthouse Maintenance

10:00 Breckenridge Oregon Trail Subdivision Final Plat

11:00 Sheriff Weaver – Inspection team recommendations and discuss water on the road enforcement with Clint Blackwood, Code Enforcement Officer, and Art Brown

NOON RECESS

1:00 Discussion on 504 Transition plan and committee

1:15 Joe Herring – Region IV funding (1:15 p.m. to 2:00 p.m.)

2:00 Executive Session – Indigent Matters

2:30 ~~Appeal Hearing – Indigent Case No. 0607-053~~ *Reconsideration of approval*

3:00

3:45 Land Acquisition

4:00 Art Brown/Mike Seib – Letter of improper notice regarding Big Sky LCO from Patrick Brown

4:15 Preparation for Big Sky hearing (4:15 p.m. to 5:00 p.m.)

5:00

RECESS OF MEETING

Executive Sessions may be held pursuant to Idaho Code 67-2345 as needed during time such sessions are called.

NOTE: Any person needing special accommodations to participate in the meeting should contact the clerk (208-644-2700) at the Courthouse, 300 No. Lincoln, Jerome, Idaho seven (7) days prior to the meetings.

JEROME COUNTY COMMISSIONERS
September 10, 2007

PRESENT: CHARLES HOWELL, CHAIR
JOSEPH DAVIDSON, COMMISSIONER
DIANA OBENAUER, COMMISSIONER
JANE ANDREASEN, DEPUTY CLERK

SCANNED

Meeting convened at 9 A.M.

ADMINISTRATIVE MATTERS—CLAIMS

The September claims were signed by the board as follows:

Clerk--\$27,146.25; Assessor--\$7,518.67; Treasurer--\$8521.58; Commissioner--\$7,534.00; Coroner--\$579.17; Civil Defense--\$2,845.26; County Agent--\$4,406.14; Data Processing--\$3,499.63; General--\$163,144.24; Planning & Zoning--\$13,472.97; Airport--\$39,200.97; District Court--\$19,107.92; Fair--\$28,809.93; Ambulance--\$28,664.93; Sheriff--\$126,363.21; Adult Probation--\$4,471.98; Prosecutor--\$18,458.45; Public Defender--\$25,584.58; Juvenile--\$19,321.47; General--\$38,727.38; Health--\$7,613.58; Indigent--\$43,470.02; Revaluation--\$30,126.43; Waterways--\$3,612.00.

A Motion by was made by Commissioner Obenauer to approve the minutes of August 27, 28, and 29 and September 4 as corrected and amended. It was seconded by Commissioner Davidson and passed unanimously.

Minutes of August 27 meeting were corrected:

DR. ELIZABETH SUGDEN—MEDICAL INFORMATION RE: CAFOS

Second paragraph is to be changed to read: Commissioner Davidson asked if Sugden were aware of the recommendations the board sent to the Planning Commission addressing her concerns.

Minutes of August 28 meeting were corrected and amended:

RON SHEFFIELD PRESENTATION ON THE NAEMS PROJECT

Last paragraph to read: Commissioner Howell advises clerk that the property owner of 601 Fourth Avenue East, Jerome, Idaho, has made arrangements for payment of delinquent taxes within one year. Mortgage holders of owners have paid both properties that were previously taken by tax deed in full.

Minutes of August 29 meeting were corrected:

PAULA MEUINER—SUBCOMMITTEE LCOs

The discussion did not include wages.

Minutes of September 4 meeting were amended:

PROSECUTOR & TREASURER—NACO PRESCRIPTION CARD

Crouch said he wonders why the county has not become more involved with helping the development and that an urban renewal district would help development.

Commissioner Obenauer asked what Crouch's plans are if an urban renewal district is not formed. He said he would keep working on the project but that it would be smaller and take longer. He said this area is experiencing a hot cycle for business at this time.

Meeting recessed at 12:05 P.M.

Board reconvened at 1:05 P.M.

VETERAN SERVICE OFFICER/SOCIAL SERVICES DEPUTY CLERK

1:30 P.M.—A Motion was made by Commissioner Obenauer to go into executive session per I.C. Section 67-2345(a) in order to interview applicants for a veterans service officer/social services deputy clerk. It was seconded by Commissioner Davidson. Roll call vote was Commissioner Howell, Davidson, and Obenauer aye; unanimous aye; motion carried.

2 P.M. Return to regular session

A Motion was made by Commissioner Obenauer to hire Terence Gabbert as veterans service officer/social services deputy clerk. It was seconded by Commissioner Davidson and passed unanimously. He will begin October 1 at \$12 per hour.

A Motion was made by Commissioner Davidson for the county to pay expenses for Gabbert to train with state veterans service officer Milt Smith. It was seconded by Commissioner Obenauer and passed unanimously.

INDIGENT MATTERS

A Motion was made by Commissioner Howell to accept or deny indigent requests as recommended by staff. Approvals were Nos. 0607-153; 0607-165; and 0607-177. Denials were Nos. 0607-154; 0607-176; 0607-146; 0607-162; 0607-183; and 0607-062. Withdrawn were Nos. 0607-125 and 0607-129. The motion was seconded by Commissioner Davidson and passed unanimously.

HEARING PROCEDURES—MIKE SEIB

County Attorney Mike Seib advised the board that limiting testimony at hearings to two minutes might be unconstitutional. He said the spokesperson's time could be shortened to allow more time for those testifying.

A Motion was made by Commissioner Obenauer to increase the maximum testimony time to four minutes and reduce the moderator's time. The number of pages that can be submitted if a person is not testifying orally will be increased from one to two. The motion was seconded by Commissioner Davidson and passed with unanimous ayes.

Planning and Zoning Administrator Art Brown will submit an amendment to hearing procedures to be published in the newspaper.

DISCUSSION OF RICHARD CARLSON'S AND NATIONAL TRUST FOR HISTORIC PRESERVATION LETTERS

The board discussed whether to delay the date of the hearing scheduled for two days on Big Sky. Commissioner Howell said he did not wish to delay a hearing because one person could not attend and that the applicants had already been delayed for six to eight months. Commissioner Obenauer asked the board to be fair and said there was ample time to make changes. She said two or three people were encumbered by the dates and she wanted to give everyone an equal chance.

A Motion was made by Commissioner Davidson to continue with the hearing on the Big Sky LCO as scheduled. It was seconded by Commissioner Howell and passed, with Commissioners Davidson and Howell voting aye and Commissioner Obenauer voting nay.

Commissioner Obenauer said no adequate council would be available to support those in opposition if the hearing date for the National Trust for Historic Preservation is not changed.

A Motion was made by Commissioner Howell to continue with the hearing for the National Trust for Historic Preservation. It was seconded by Commissioner Davidson and passed, with Commissioners Howell and Davidson voting aye and Commissioner Obenauer voting nay.

DISCUSSION FOR RESOLUTIONS ON URBAN RENEWAL

Present were Clerk Michelle Emerson, Treasurer Mary Childers, Assessor Rick Haberman, and County Attorney Mike Seib.

A requirement for land to be eligible for an urban renewal district is that the land is "blighted and worthless." Seib's opinion is that the land does not fit that definition and that a district could be found unconstitutional.

Emerson said her concern is that a substantial amount of money from the whole county will go to Urban Renewal. She said she doesn't want development on the back of the taxpayers.

Childers said a district is a displacement of tax revenue. She said \$1.6 million would go from the county into an urban renewal district.

Haberman told the board an urban renewal district is formed to attract business but he did not think the Crossroads location needs extra incentive to be attractive. He said the area would be developed but that it will just take longer without urban renewal. He added installation of city sewer and water lines has been holding up development. He said the great location of Jerome County is what brought the regional dispatch center here.

2 - Notes
(G)

JEROME COUNTY COMMISSIONERS
September 24, 2007

PRESENT: Charlie Howell, Commissioner
Joseph Davidson, Commissioner
Diana Obenauer, Commissioner
Jane Andreasen, deputy clerk

SCANNED

ADMINISTRATIVE MATTERS

Board convened at 9 A.M.

The commissioners signed the airport lease agreement between the board and John and Nancy Lane.

Art Brown presented a check for \$3000 collected for a violation at the Bettencourt Dairy. It is to go into the general county fund. Commissioner Obenauer requested Brown find out the specific violation.

READ AND APPROVE MINUTES

A Motion was made by Commissioner Obenauer to approve the minutes of September 10 with corrections and September 11 as written. It was seconded by Commissioner Howell and passed with unanimous ayes.

Corrections of September 10 are as follows.

Under "Courthouse Maintenance," a contract was not awarded for upgrading light fixtures in the clerk's office. The matter was tabled until "like" bids could be compared.

Under "Sign Ordinance—Art Brown," the motion was seconded by Commissioner Howell.

Under "Subcommittee (Odor) Meeting, Chairman Del Kohtz," all the commissioners commended the committees on their work.

COURTHOUSE MAINTENANCE

Custodian Denise Clifton reported to the board the tables for the Judicial Annex have been delivered, and Chairman Howell said the chairs for one courtroom need to be ordered. Clifton said attached chairs are preferred so they cannot be thrown but the number needed would not fit in the

leased to the taxing jurisdiction. Herring said it is not with conduit financing if the property is resold.

Commissioner Howell said a task force is needed.

INDIGENT MATTERS

Indigent cases were submitted to the board and approved or denied as advised by the staff. Approved were Case Nos. 0607-053; 0607-167; 0607-193. Denials were Case Nos. 0607-158; 0607-163; 0607-159; 0607-164; 0607-160; 0607-189; 0607-161 and 0607-192. Orders of withdrawal were signed in Case Nos. 0607-130; 0607-166; and 0607-175.

RECONSIDERATION OF APPROVAL

A Motion was made by Commissioner Obenauer to go into executive session per I.C. 67-2345(d) regarding an indigent settlement. It was seconded by Commissioner Howell; roll call vote; Commissioners Howell, Davidson and Obenauer aye; unanimous aye; motion carried.

LAND ACQUISITION

Chuck Marshall addressed the board regarding possible purchase of additional property for the fairgrounds. He said the board could have an option on the property for \$25,000 for six months. A year option would probably be \$40,000-\$45,000. The 8.7 acres is for sale for \$950,000, which includes the land, the building, and a railroad siding. Equipment would not be included.

ART BROWN/MIKE SEIB—LETTER OF IMPROPER NOTICE REGARDING BIG SKY LCO FROM PATRICK BROWN

County Attorney Mike Seib advised the board he did not see any deficiency in notifying Mr. Sloan of a hearing.

Art Brown said he was notified on September 8 and that the notice was for an LCO hearing, not a special use permit hearing.

PREPARATION FOR BIG SKY HEARING

The board discussed delaying the Big Sky hearing set for Sept. 25-26. Commissioner Obenauer said three attorneys have requested a delay and she favored making accommodations so both parties could come together. She

said she wanted a level playing field and that not delaying the hearing "smacks of bias."

Art Brown said it was not necessary to accommodate attorneys because it is not a law case. Mike Seib said there is nothing requiring the board to delay the hearing.

John Lothspeich, as attorney for the applicant, said his client has suffered inordinate delay already.

A Motion was made by Commissioner Obenauer to delay the Big Sky hearing to a time when all three parties could agree on a day. The motion died for a lack of second.

It was decided those who want to testify at the hearing will be asked to sign in as being either neutral, for, or against the application. Each person will be allowed to testify only once, and those testifying will be listened to in the order in which they sign in. Two bailiffs will be present, and those entering the courtroom will first be screened. The press will be allowed to sit in the jury box and will be required to have press passes. There will be two 30-minute breaks.

Meeting recessed at 5:05 P.M.

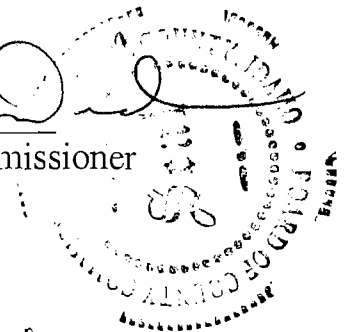
ATTEST:

Jane Andreasen
Jane Andreasen, Deputy Clerk

Charles M. Howell
Charles M. Howell, Chair

Joseph E. Davidson
Joseph E. Davidson, Commissioner

Diana Obenauer
Diana Obenauer, Commissioner



*Approved with
corrections
10/1/07
me*

SIGN IN SHEET

RE: BIG SKY NOTIFICATION

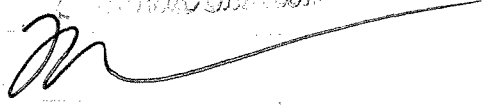
SCANNED

DATE: 9/24/09

PLEASE PRINT

NAME	AGENCY	TELEPHONE NO.
LEE HALPER		324-2240
Jim Stewart		404-2013
Harold Diamond		536-6347
Carolyn Diamond		536 6347
Xenia Williams		324 7613
John B. Tolpygo		324-2303
Art Brown		
Mike Seib		

Charles M. Tebbutt, Pro Hac Vice
Western Environmental Law Center
1216 Lincoln St.
Eugene, OR 97401
541-485-2471 (phone) 541-485-2457 (fax)

Patrick D. Brown


Attorneys for Petitioners

Patrick D. Brown, ISB No. 4413
Hutchinson & Brown, LLP
104 Lincoln St.
PO Box 207
Twin Falls, ID 83303-0207
208-733-9300 (phone) 208-733-9343 (fax)

Attorney for Petitioners Friends of Minidoka, Wayne Slone, guardian of James Slone, Idaho Concerned Area Residents for the Environment, Inc., the Japanese American Citizens League, Inc., the National Trust for Historic Preservation, Inc., and Preservation Idaho, Inc.

Richard A. Carlson, ISB No. 5971
P.O. Box 21
Filer, ID 83328
Telephone and fax: (208) 326-3686

Attorney for Dean & Eden Dimond, Harold & Carolyn Dimond, and the Idaho Rural Council, Inc.

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

In the Matter of:)	
)	
The Jerome County Board of	)	CASE NO. CV 2008-1081
Commissioners' Decision Dated)	
September 23, 2008 Approving A)	
Livestock Confinement Operation Permit	)	RENEWED MOTION TO
for Don McFarland, dba Big Sky Farms,	)	SUPPLEMENT RECORD
_____)	
Friends of Minidoka, Dean & Eden)	
Dimond, Harold & Carolyn Dimond,)	
Wayne Slone, guardian of James Slone,)	
the Idaho Rural Council, Inc., Idaho)	
Concerned Area Residents for the)	
Environment, Inc., the Japanese American)	

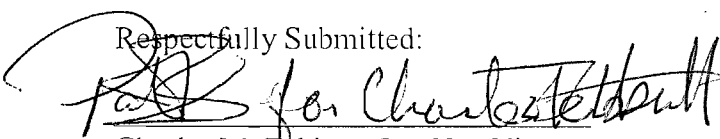
ORIGINAL

Citizens League, Inc., the National Trust)
for Historic Preservation, Inc., and)
Preservation Idaho, Inc.)
)
Petitioners,)
_____)
vs.)
)
Jerome County, a Political Subdivision)
of the State of Idaho, Joseph Davidson,)
Charles Howell and Diana Obenauer,)
Members of the Jerome County)
Board of Commissioners,)
)
Respondents.)
_____)
)
South View Dairy, an Idaho General)
Partnership, Tony Visser, William)
DeJong and Ryan Visser,)
general partners,)
)
Intervenors.)
_____)

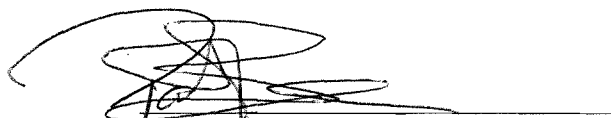
COME NOW the Petitioners by and through their respective counsel, Charles M. Tebbutt of the Western Environmental Law Center, Richard A. Carlson, Attorney at Law, Patrick Brown, of the law firm Hutchinson & Brown, LLP, and move the court for an order supplementing the record consistent with this Court's Order of June 5, 2009.

This motion is made pursuant to Idaho Code 67-5276 and is supported by the Affidavits of Charles M. Tebbutt, Patrick Brown, Dean Dimond, and Harold Dimond and the supporting exhibits attached thereto.

DATED this 26 day of June, 2009.

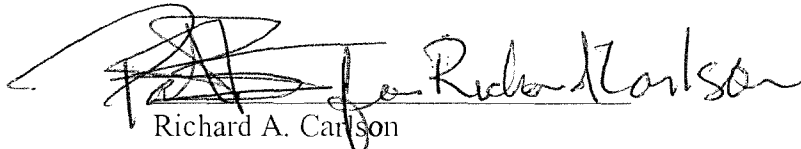
Respectfully Submitted:

 Charles M. Tebbutt, Pro Hac Vice
 Western Environmental Law Center

Attorney for Petitioners



Patrick D. Brown
Hutchinson & Brown, LLP

Attorney for Petitioners Friends of
Minidoka, Wayne Slone, guardian of
James Slone, Idaho Concerned Area
Residents for the Environment,
Inc., the Japanese American Citizens
League, Inc., the National Trust for
Historic Preservation, Inc., and
Preservation Idaho, Inc.



Richard A. Carlson
Idaho State Bar No. 5971

Attorney for Petitioners Dean &
Eden Dimond, Harold & Carolyn
Dimond, and the Idaho Rural
Council, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 26th day of June, 2009, (s)he served a true and correct copy of the within and foregoing document upon the following by depositing a copy thereof in the United States mail, postage prepaid, addressed to:

Charles M. Tebbutt, OSB No. 96579
WESTERN ENVIRONMENTAL LAW CENTER
1216 Lincoln St.
Eugene OR 97401
(for Petitioners)

fax (541) 485-2457

RICHARD CARLSON
Attorney at Law
1964 East 3550 North
P.O. Box 21
Filer ID 83328
(for Petitioners Dimonds & Idaho Rural)

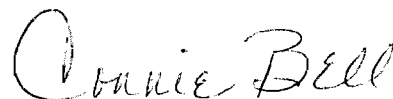
fax 326-3686

Mike Seib
JEROME COUNTY PROSECUTOR
233 W. Main
Jerome ID 83338
(for Jerome County)

fax 644-2639

John Lothspeich
FREDERICKSEN, WILLIAMS, MESERVY & LOTH SPEICH
153 E. Main St.
P.O. Box 168
Jerome ID 83338
(for Big Sky & South View)

fax 324-3135



Charles M. Tebbutt, Pro Hac Vice
 Western Environmental Law Center
 1216 Lincoln St.
 Eugene, OR 97401
 541-485-2471 (phone) 541-485-2457 (fax)

JEROME COUNTY
 DISTRICT JUDICIAL DISTRICT
 JEROME COUNTY, IDAHO
 2008 JUL 6 PM 2:11
 BY _____
 DEPUTY CLERK

Attorneys for Petitioners

Patrick D. Brown, ISB No. 4413
 Hutchinson & Brown, LLP
 104 Lincoln St.
 PO Box 207
 Twin Falls, ID 83303-0207
 208-733-9300 (phone) 208-733-9343 (fax)

Attorney for Petitioners Friends of Minidoka, Wayne Slone, guardian of James Slone, Idaho Concerned Area Residents for the Environment, Inc., the Japanese American Citizens League, Inc., the National Trust for Historic Preservation, Inc., and Preservation Idaho, Inc.

Richard A. Carlson, ISB No. 5971
 P.O. Box 21
 Filer, ID 83328
 Telephone and fax: (208) 326-3686

Attorney for Petitioners Dean & Eden Dimond, Harold & Carolyn Dimond, and the Idaho Rural Council, Inc.

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

In the Matter of:)	
)	
The Jerome County Board of	)	CASE NO. CV 2008-1081
Commissioners' Decision Dated)	
September 23, 2008 Approving A	)	OBJECTION TO RESPONDENTS'
Livestock Confinement Operation Permit	)	AND INTERVENORS'
for Don McFarland, dba Big Sky Farms,	)	PRODUCTION OF
_____	)	JEROME COUNTY'S
Friends of Minidoka, Dean & Eden	)	ORDINANCES AND RELATED
Dimond, Harold & Carolyn Dimond,	)	DOCUMENTS
Wayne Slone, guardian of James Slone,)	
the Idaho Rural Council, Inc., Idaho)	
Concerned Area Residents for the)	

Environment, Inc., the Japanese American)
Citizens League, Inc., the National Trust)
for Historic Preservation, Inc., and)
Preservation Idaho, Inc.)
)
Petitioners,)
_____)
vs.)
)
Jerome County, a Political Subdivision)
of the State of Idaho, Joseph Davidson,)
Charles Howell and Diana Obenauer,)
Members of the Jerome County)
Board of Commissioners,)
)
Respondents.)
_____)
)
South View Dairy, an Idaho General)
Partnership, Tony Visser, William)
DeJong and Ryan Visser,)
general partners,)
)
Intervenors.)

The Petitioners, by and through their respective counsel, Charles M. Tebbutt, Western Environmental Law Center, Patrick Brown, Hutchinson & Brown, LLP, and Richard A. Carlson hereby submit this Objection to Respondents' and Intervenors' Production of Jerome County Ordinances and Related Documents.

The Court's Order filed June 5, 2009 required Respondents' and Intervenors' counsel to serve Petitioners with a set of Jerome County ordinances and related documents. (See Order, p. 5-6). Intervenors' counsel has subsequently proposed a stipulation that several exhibits already filed with the Court be used to satisfy the Court's Order with regard to applicable Jerome County Ordinances and other related documents. Those exhibits had been filed by Intervenors' counsel attached to an *Objection* he had filed on or about April 9, 2009. (See **Exhibits A through D**, attached to Intervenors' *Objection to Proposed Order Regarding...* Dated April 9, 2009). **Exhibits A through D** do not contain all documents that the Court's Order required disclosure and production of in the following particulars (*in italics*):

EX. A: Contains Michelle Emerson's certification on copies of Ch. 13 and Ch. 23 of the JCZO as of 5- 3-07. These appear to be complete. However, **EX. A** *does not*

contain a copy of Ch. 19 which Petitioners requested in their Objection I-1 and the Petitioners contend is applicable in this proceeding.

EX.B: EX 1 is CH. 13 of the JCZO as of 8-2003

EX. 1-A is the related Affidavit of Publication

EX. 2 contains the following ordinances (and affidavits of publication) amending the 8-2003 version of CH. 13 after its adoption but **prior** to 5-3-07:

	Signed	Published
ORD. 2004-02	3-15-04	3-25-04
ORD. 2004-03	8-16-04	9-9-04
ORD. 2005-01	1-6-05	1-13-05
ORD. 2005-07	9-26-05	Note says "July 2005"
<i>(The affidavit of publication related to ORD. 2005-07 is missing.)</i>		
ORD. 2006-04	4-17-06	4-27-06
<i>(The affidavit of publication related to ORD. 2006-04 is missing.)</i>		
ORD. 2006-10	10-30-06	11-9-06

EX. 3 contains the following ordinances (and affidavits of publication except where noted) amending Ch. 13 **after** 5-3-07:

	Signed	Pub.
ORD. 2007-6	9-10-07	9-20-07
<i>(The affidavit of publication related to this ordinance is missing. It was recorded 4-25-08. This ordinance also mentions amendments from 8-20-07 and 8-22-07 which Petitioners have not been provided copies of).</i>		
ORD. 2008-4 (not published/never in effect)	8-5-08	not
ORD. 2008-4 (corrected and supposedly in effect 9-22-08)	9-22-08	9-29-08

In addition to missing items described above there are two other items the Respondents should have produced to comply with the Court's Order:

1. Jerome County Zoning Ordinance Chapter 1, and particularly the general ordinance section 1-6.01 governing LCO permit applications and related matters;
2. A copy of Board of Commissioners' Resolution 2007-4, signed 3-19-07 that says, in effect, that "all members of the public desiring to present oral comments at hearings provided for in JCZO 13-6.03 shall be allowed to do so, subject to hearing procedures set forth under current law, ordinances, and/or resolutions".

Petitioners contend that the above described documents are required to comply with the Court's Order.

DATED this 6th day of July, 2009.

Respectfully Submitted:

Charles Tebbutt by R. Carlson

Charles M. Tebbutt, Pro Hac Vice
Western Environmental Law Center
Attorney for Petitioners

Patrick Brown by R. Carlson

Patrick D. Brown
Hutchinson & Brown, LLP

Attorney for Petitioners Friends of
Minidoka, Wayne Slone, guardian of
James Slone, Idaho Concerned Area
Residents for the Environment,
Inc., the Japanese American Citizens
League, Inc., the National Trust for
Historic Preservation, Inc., and
Preservation Idaho, Inc.

R. Carlson

Richard A. Carlson
Idaho State Bar No. 5971

Attorney for Petitioners Dean &
Eden Dimond, Harold & Carolyn
Dimond, and the Idaho Rural
Council, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of July, 2009, I served a true and correct copy of the foregoing document on the persons whose names and addresses appear below, by hand delivery::

John B. Lothspeich
Fredericksen, Williams, Meservy & Lothspeich, LLP
PO Box 168
Jerome, Idaho 83383

Michael J. Seib
Jerome County Prosecutor
233 W Main St
Jerome, Idaho 83338

R. Carlson

JOHN HORGAN
 Office of the Jerome County Prosecutor
 Jerome County Judicial Annex
 233 West Main
 Jerome, Idaho 83338
 TEL: (208) 644-2630
 FAX: (208) 644-2639
 ISB No. 3068

DISTRICT COURT
 FIFTH JUDICIAL DISTRICT
 JEROME COUNTY, IDAHO
 2009 JUL 7 PM 2 29
 Michele Emerson
 CLERK
 BY 2
 DEPUTY CLERK

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

In the matter of:)
)
)
 The Jerome County Board of Commissioners;)
 Decision Dated September 23, 2008)
 Approving A Livestock Confinement)
 Operation Permit for Don McFarland, dba Big)
 Sky Farms,)
 _____)
)
 Friends of Minidoka, Dean & Eden Dimond,)
 Harold & Carolyn Dimond, Wayne Slone,)
 guardian of James Slone, the Idaho Rural)
 Council, Inc., Idaho Concerned Area)
 Residents for the Environment, Inc., the)
 Japanese American Citizens League, Inc., the)
 National Trust for Historic Preservation, Inc.,)
 and Preservation Idaho, Inc.)
)
 Petitioners,)
 _____)
 vs.)
)
 Jerome County, a Political Sub-Division of)
 the State of Idaho, Joseph Davidson, Charles)
 Howell, and Diana Obenauer, Members of the)
 Jerome County Board of Commissioners,)
)
 Respondent.)
 _____)

Case No.: CV 2008-1081

MOTION REQUESTING COURT TO
 IMPOSE ITS PRIOR ORDER AND DENY
 PETITIONERS' RENEWED MOTION TO
 SUPPLEMENT RECORD

Heading continued on next page

South View Dairy, an Idaho General)
Partnership, Tony Visser, William DeJong)
and Ryan Visser, general partners,)
)
Intervenor.)
_____)

COMES NOW, Jerome County, the Respondent (“Jerome County”), by and through the Jerome County Prosecutor, John Horgan, and moves the court to rule upon its June 5, 2009 order, finding that Petitioners have not complied with such order and accordingly the court should deny and dismissing Petitioners’ *Renewed Motion To Supplement Record*, signed June 26, 2009.

RESPECTFULLY SUBMITTED this 7 day of July 2009.



Michael J. Seib
Jerome County Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of July 2009, I served true and correct copies *Respondent's Motion To Issue Scheduling Order* upon the following persons, named below, in the manner indicated:

JOHN B. LOTH SPEICH
Fredericksen, Williams, Meservy &
Lothspeich, LLP
153 East Main Street
Post Office Box 168
Jerome, Idaho 83338

personal delivery
 U.S. Mail, postage prepaid
 telephone facsimile

RICHARD A. CARLSON
Attorney at Law
Post Office Box 21
Filer, Idaho 8332

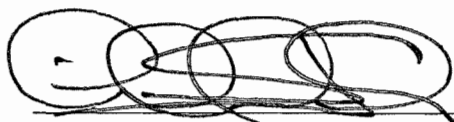
personal delivery
 U.S. Mail
 telephone facsimile

Patrick D. Brown
Hutchinson & Brown, LLP
PO Box 207
Twin Falls, Idaho 83301

personal delivery
 U.S. Mail
 telephone facsimile

Charles M. Tebbutt
Western Environmental Law Center
1216 Lincoln St.
Eugene, Oregon 97401

personal delivery
 U.S. Mail
 telephone facsimile



Jerome County Deputy Prosecuting Attorney

Michelle Emerson
[Handwritten Signature]

JOHN B. LOTH SPEICH
Idaho State Bar #4221
Williams, Meservy & Lothspeich, LLP
Attorneys at Law
153 East Main Street
Post Office Box 168
Jerome, Idaho 83338
Telephone: (208) 324-2303
Facsimile: (208) 324-3135
Attorneys for Intervenor

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

In the Matter of:)
)
The Jerome County Board of)
Commissioners' Decision Dated)
September 23, 2008 Approving A)
Livestock Confinement Operation Permit)
for Don McFarland, dba Big Sky Farms,)
)
Friends of Minidoka, Dean & Eden)
Dimond, Harold & Carolyn Dimond,)
Wayne Slone, guardian of James Slone,)
the Idaho Rural Council, Inc., Idaho)
Concerned Area Residents for the)
Environment, Inc., the Japanese American)
Citizens League, Inc., the National Trust)
for Historic Preservation, Inc., and)
Preservation of Idaho, Inc.)
)
Petitioners,)
)

CASE NO. CV 2008-1081

**INTERVENORS' BRIEF
IN OPPOSITION TO
PETITIONERS' MOTION TO
AUGMENT RECORD AND
RESPONSE TO COURTS' ORDER
ON MOTION TO AUGMENT
AND SUPPLEMENT THE
RECORD, CORRECT TRANSCRIPT,
AND MOTION TO DISMISS**

Heading continued on next page



vs.)
)
Jerome County, a Political Subdivision)
of the State of Idaho, Joseph Davidson,)
and Diana Obenauer, Members of the)
Jerome County Board of Commissioners,)
)
Respondents.)
<hr/>	
)
South View Dairy, an Idaho General)
Partnership, Tony Visser, William)
DeJong and Ryan Visser,)
general partners,)
)
Intervenor.)

COMES NOW, South View Dairy, an Idaho General Partnership, Tony Visser, William DeJong and Ryan Visser, general partners, successors in interest to Don McFarland, dba Big Sky Farms, the Intervenor in this matter by and through its attorney, John B. Lothspeich, of the law firm Williams, Meservy & Lothspeich, LLP, and submits its brief in opposition to the Renewed Motion to Supplement Record, Affidavit of Patrick D. Brown in Support of Renewed Motion to Augment and Supplement Record, and Correct Transcript and Affidavit of Charles M. Tebbutt in Support of Renewed Motion to Supplement Record, and in Response to the Courts' Order on Motion to Augment and Supplement the Record, Correct Transcript, and Motion to Dismiss, as follows:

I. COURTS' ORDER ON MOTION TO AUGMENT AND SUPPLEMENT THE RECORD, CORRECT TRANSCRIPT, AND MOTION TO DISMISS.

On June 3, 2009, the Court issued the above referenced order. Within same order, the Court noted that it is a paramount importance for the Court to determine whether the agency below already considered which might be added into the agency record or whether

the Court is augmenting the agency record with new information not previously considered by the agency below. The Court noted that the Idaho Supreme Court has made clear the agency record is not to be lightly disturbed.

The Court clearly defined the categories of evidence that may be submitted for consideration for augmentation. The Court clearly delineated the specific requirements for each category of evidence specific to each item of evidence. On that basis, the Intervenor responds to the Courts' order as follows:

1. Motion to Dismiss. Previously, the Petitioner's had included declaratory judgment actions within its Petition for Judicial Review. At the March 6, 2009 court hearing, the court allowed for Amended Petition for Judicial Review to be filed deleting requests for declaratory relief. No responsive pleading is required to be filed since the matter is presently pending for judicial review at the present time. However, it should be noted, that though the specific reference to declaratory judgment actions have been deleted in the amended petition, the same prayers for relief are included specifically, (1) whether the Jerome County Zoning Ordinance is valid and enforceable as adopted; and (2) whether Jerome County has violated Idaho Law through its adoption and implementation of its Ordinance. These are inappropriately included within the Petition for Judicial Review under the Local Land Use Planning Act. That will be ultimately decided by the Court upon final submission and briefing as to the ultimate issues pending. It should be noted, that their inclusion is merely a subterfuge to avoid an independent action for declaratory judgment. This is converse to the Court's order at the March hearing. However, they can be addressed by the Court as to the ultimate ruling in this matter without filing independent motions that will only further delay this matter that has been pending for a substantial period of time.
2. Record of Prior Proceedings Before Judge Bevan. The record from the prior

proceedings, "Phase I", before Judge Bevan shall be included as part of the agency record in the current judicial review proceeding, and the Court ordered the same. It should be noted, that a substantial amount of similar items presently being requested by the Petitioners is included within the same record that will be further referenced below.

3. Ordinances of Jerome County. The relevant Jerome County Ordinances were provided to all counsel within Intervenor's Objection to Proposed Order Regarding Petitioners' Motion to Augment Record and Correct Transcript and Submission of Relevant Ordinances Pursuant to the Court's Prior Order dated April 9, 2009. Within same submission by Intervenor, was Exhibit "A", Certification of the Clerk of Jerome County Board of Commissioners that the attached exhibits are true and correct copies of Chapters 13 and 23 of the Jerome County Zoning Ordinance as they were on May 3, 2007. Filed concurrently as Exhibit "B", was the Affidavit of Clerk/Auditor/Recorder of Jerome County which sets forth any amendments or corrections to the ordinances prior to and subsequent to May 3, 2007 and all required publication notices; as Exhibit "C", is the Affidavit of Clerk of Jerome County Board of Commissioners which sets forth the specific duties of the Clerk regarding the matter; and submitted as Exhibit "D", is the Supplemental Affidavit of Clerk/Auditor/Recorder of Jerome County which sets for the correction stating which specific ordinances were the only ordinances of record as of May 3, 2007, regarding the County Zoning Ordinances: (a) relevant to the public hearings conducted on September 25 and 26, 2007, and the decision of the Board of County Commissioners on November 1, 2007, concerning Big Sky Farms Livestock Confinement Operation (LCO) Application filed on May 3, 2007; and (b) any amendments of modifications to the Jerome County Zoning Ordinances relevant to the decision of the Board of County Commissioners, dated September 23, 2008, on

remand from the decision of Judge Bevan from Jerome County case no. CV 2007-1242, dated June 27, 2008, on the same LCO Application.

In Petitioners' Reply in Support of Proposed Order Regarding Petitioners' Motion to Augment Record and Correct Transcript dated April 28, 2009, and signed by all counsel for Petitioners, it specifically noted on page 2 of same document, that the certified copies of the ordinances have now been provided and are acceptable to Petitioners for purposes of this case. Counsel for the Respondent and Intervenor, as well stipulated to the ordinances included in the Intervenor's Objection to Proposed Order Regarding Petitioners' Motion to Augment Record and Correct Transcript and Submission of Relevant Ordinances Pursuant to the Courts' Prior Order be deemed as the relevant ordinances at issue before this Court on this Petition for Judicial Review.

4. Corrected Record or Additional Evidence. The Court indicated that the parties will need to start over with the process of seeking augmentation of the record as more fully set forth within the Court's order. The Court noted different categories of evidence. First category, would be defining documents and evidence that may have been properly before the Board of County Commissioners but didn't make it into the agency record. This specifically would include transcripts of hearing not yet produced or transcribed or evidence which was offered and/or objected to pursuant to Idaho Code §67-5249(2)(d).

On June 12, 2009, counsel for Respondent submitted its Response to Courts' Order. Within same submission to the Court, are Jerome Commissioners' agendas and minutes from meetings as well as a sign in sheet dated 9/24/07 and memo from a Jerome County Commissioner, Diana Obenauer, relative to the Board of County Commissioners' initial determination in November of 2007 denying the application for an LCO permit on the part of Intervenor's predecessor in interest and are the only documents of record consistent with the first category referenced.

There are no additional transcripts of hearings to be produced pursuant to Idaho Code §67-5249(2)(e) and, there is no additional evidence which was offered and/or objected to pursuant to Idaho Code §67-5249(2)(d).

Therefore, it is contended, that the only evidence sought to be admitted, in the Petitioners' requirement to "start over" falls within the second category which includes additional evidence meeting the requirements of Idaho Code §67-5276(1)(a) which is "evidence which is material, relates to the validity of the agency action, and there were good reasons for failing to present that evidence in the proceeding before the agency."

Material evidence has been defined as "that quality of evidence which tends to influence the trier of fact because of its logical connection with the issue. Evidence which has an effective influence of bearing on question in issue is material." (*Black's Law Dictionary*, 5th Ed. 1979 West Publishing Co. pg. 881).

In *State v. Wilson*, 142 Idaho 431, 128 P.3d 968 (2006), material evidence was defined as evidence which is sufficiently helpful to the defense that it could affect the outcome of the proceeding. (See also *State v. Trumbel*, 113 Idaho 835, 748 P.2d 826 (1988)).

On June 26, 2009, Petitioners submitted a Renewed Motion to Supplement the Record. Attached to same document, is an Affidavit of Patrick D. Brown in Support of Renewed Motion to Augment and Supplement Record and Correct Transcript. Attached to the affidavit, as pages 1 through 19, are copies of correspondence with various officials of Jerome County. Attached to the affidavit as pages 20 through 23, are copies of what Brown claims is the only notice received. Mr. Brown does not submit, consistent with the Courts' Order, what category the additional evidence would fall within to correct the record or provide for additional evidence. The Court was explicit in its Order which stated "Documents or evidence sought to be

augmented into the record must be divided into either category one or two noted above. That is, evidence sought to be augmented or supplemented into the record must be submitted either as evidence which the Court can admit into the record as corrected “as generally defined in category one above” or it must now be offered into the record as additional evidence under Idaho Code §67-5276(1)(a).”

Mr. Brown has failed to comply with the Court’s Order, which mandates that its augmentation must be denied. In addition, it should be noted, that Mr. Brown’s client had notice of the hearing. The minimal requirements of due process is that there must be some process to ensure that the individual is not arbitrarily deprived of his rights in violation of the State or Federal Constitutions and this requirement is met when the individual is provided notice and an opportunity to be heard. (*Bradbury v. Idaho Judicial Council*, _____ Idaho _____, 28 P.3d 1006 (2001); see also *Spencer v. Kootenai County*, 145 Idaho 448, 180 P.3d 487 (2008)).

Also accompanying the renewed motion to supplement record is an Affidavit of Charles M. Tebbutt in Support of Renewed Motion to Supplement Record. It is respectively submitted that the documents sought to be augmented, within Mr. Tebbutt’s affidavit as exhibits, fall outside the category one definition. Category one includes documents to correct the record. All of Mr. Tebbutt’s documents are sought to augment the record. Therefore pursuant to Category two, it must be determined that the records are material and a good reason established as to why they were not submitted before the agency in the previous hearings below.

In *Crown Point Development v. City of Sun Valley*, 144 Idaho 72, 156 P.3d 573 (2007), the court ruled that the district court erred when it ordered that the record be augmented. The court wrote,

“By statute, judicial review of disputed issues of fact must be confined to the agency record for judicial review as defined in this chapter (I.C.

§67-5275(1)), supplemented by additional evidence taken pursuant to §67-5276, Idaho Code. Idaho Code §67-5277. Idaho Code §67-5276 allows additional evidence when, prior to the hearing date, it is shown of the satisfaction to the court that there were good reasons for failure to present it in the agency hearing or that there were alleged irregularities in procedure before the agency. Thus, generally judicial review is confined to the agency record unless the party requesting the additional evidence complies with one of the two statutory exceptions in Idaho Code §67-5276.”

In *Crown Point*, the court determined that the order to augment was inconsistent with the legal standards because *Crown Point* failed to meet the requirements of Idaho Code §67-5276.

In this case, the exact same finding must be made by this Court consistent with the Supreme Court’s ruling. The requirements of Idaho Code §67-5276 have not only been met by the Petitioners. They have not even been attempted. No statement clearly defines the materiality or good reasons as to why it was not submitted previously. A bold assertion of alleged irregularities, fails in this matter, since the original agency heard the matter at hearing on September 25 and 26, 2007.

The *Crown Point* finding was recently reiterated in *Wohrle v. Kootenai County*, 09.9 ISCR 450 filed April 14, 2009.

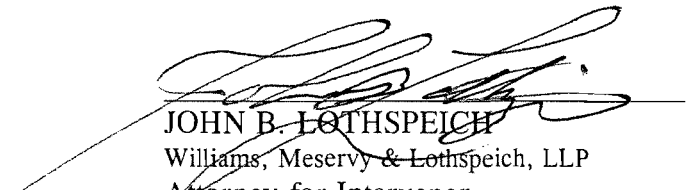
Mr. Tebbutt’s affidavit, and attached requested submissions, references letters from the Dimond extended family members and others. All of these individuals had ample opportunity to testify at the hearing before the agency. In addition, their documents related to Alma Hasse’s attempted submission of evidence which clearly lacked materiality. The attached agendas and minutes in Mr. Tebbutt’s affidavit are consistent with the Jerome County’s Response to the Courts’ Order dated June 12, 2009. Mr. Tebbutt failed to clearly identify the factual and legal basis for each document or evidence submitted. There is not a clear distinction that the documents were offered into the record and refused or even ruled upon. They’re

simply sought to be brought in as additional evidence in a record that has been closed for almost two years.

The attempted submission of the exhibits under category three, as “procedural irregularity” pursuant to Idaho Code §67-5276(1)(b), fails to identify how the procedural irregularity occurred in relation to the specific document sought to be augmented. Petitioners failed to comply with the Courts’ Order by not having described the specific procedural irregularity in connection with the proffered document to be augmented as well as evidence of an alleged irregularity within the confines of the hearings before the agency. Petitioners failed to specifically comply with the explicit directive of the Court in resubmitting documents sought to be augmented in the instant matter. For those reasons, the renewed motion to supplement the record must be denied in all respects.

For these reasons the Intervenor respectfully requests that the Court deny the renewed motion to augment and supplement the record.

RESPECTFULLY SUBMITTED this 7th day of July, 2009.


JOHN B. LOTH SPEICH
Williams, Meservy & Lothspeich, LLP
Attorney for Intervenor

CERTIFICATE OF SERVICE


I HEREBY CERTIFY that on the 7 day of July, 2009, I served a true and correct copy of the foregoing document on the persons whose names and addresses appear below by the method indicated:

Michael J. Seib, Chief Deputy Jerome County Prosecutor 233 W Main St Jerome, Idaho 83338	<input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Via facsimile <input checked="" type="checkbox"/> Hand delivery
---	--

Charles M. Tebbutt Western Environmental Law Center 1216 Lincoln St Eugene, Oregon 97401	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> via facsimile <input type="checkbox"/> Hand delivery
---	--

Patrick D. Brown Hutchinson & Brown, LLP PO Box 207 Twin Falls, Idaho 83301	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Via facsimile <input type="checkbox"/> Hand delivery
--	--

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DISTRICT COURT
FIFTH JUDICIAL DISTRICT
JEROME COUNTY, IDAHO

2009 JUL 13 PM 2:14
Michelle Emerson
BY _____
DEPUTY CLERK

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

In the Matter of)
)
The Jerome County Board of)
Commissioners' Decision Dated)
September 23, 2008 Approving A)
Livestock Confinement Operation Permit)
for Don McFarland, dba Big Sky Farms,)
)
Friends of Minidoka, Dean & Eden)
Dimond, Harold & Carolyn Dimond,)
Wayne Slone, guardian of James Slone,)
the Idaho Rural Council, Inc., Idaho)
Concerned Area Residents for the)
Environment, Inc., the Japanese American)
Citizens League, Inc., the National Trust)

CASE NO. CV 2008-1081
PETITIONERS' REPLY
IN SUPPORT OF RENEWED MOTION
TO SUPPLEMENT RECORD

for Historic Preservation, Inc., and)
Preservation Idaho, Inc.)

Petitioners,)

vs.)

Jerome County, a Political Subdivision)
of the State of Idaho, Joseph Davidson,)
Charles Howell and Diana Obenauer,)
Members of the Jerome County)
Board of Commissioners,)

Respondents.)

South View Dairy, an Idaho General)
Partnership, Tony Visser, William)
DeLong and Ryan Visser,)
general partners,)

Intervenors.)

Respondents' and Intervenors' responses to Petitioners' Renewed Motion to Supplement the Record conflate the distinctions between putting documents in the record that were part of the proceedings and proving the allegations on the merits. The motion to supplement seeks to get a complete record of transactions, official notices, deliberative documents, correspondence and related relevant documents that led up to the public hearings after which the County first denied the Big Sky LCO application on November 1, 2007 and then the board meetings at which the County reversed itself and granted the application on September 23, 2008.

The documents listed by Petitioners in the Affidavit of Charles M. Tebbutt are the type of documents that were part of the County's deliberative process. Petitioners merely seek to have a complete record before this Court so that the briefing on the merits can refer to the documents.

that comprise the relevant record before the County and argue how they apply to the decision-making process and alleged procedural irregularities. The County, however, seems to argue that Petitioners must prove the merits of their case through the record setting process. The County's position, and that of the Intervenors, misses the mark.

DOCUMENTS REQUIRING SUPPLEMENTATION TO RECORD

In order to winnow down the issues for the Court to decide, Petitioners withdraw the request set forth at paragraph 5(a) of the Tebbutt Affidavit. The document referred to is indeed already in the record. In addition, the County has essentially conceded, after protracted, incorrect arguments in opposition to supplementing the record, that documents numbered 1-7 set forth on page 18 of their response should be added to the record. Thus, the following requests set forth in the Tebbutt Affidavit should be ordered supplemented to the record without opposition:

- Paragraph 4(a), Exhibit 1 (October 31, 2007 memo);
- Paragraph 4(e), Exhibit 5 (September 10 and 24, 2007 agendas and minutes);
- Parts of paragraph 4(f), Exhibit 6 (pp. 5-10 and 24-27);
- Parts of paragraph 5(b), Exhibit 2 (pp. 5-7); and
- Paragraph 5(c), Exhibit 8 (Lothspeich letters).

The remaining items in contention are set forth below. The reasons why they should be made part of the record are set forth in the Petitioners' Affidavit of Charles M. Tebbutt and remain valid:

- 1) Paragraph 4(b)- the attempted submissions of comments by the Dimond extended family members and Blaine Miller;
- 2) Paragraph 4(c)- the relevant emails with County officials concerning the hearing process;

- 3) Paragraph 4(d)- the attempted submissions of comments and documents by Alma Hasse;
- 4) Paragraph 4(f)- the remaining letters concerning attempts to discern relevant ordinances;
- 5) Paragraph 4(g)- the admission by the County that it failed to give individual notice to Mr. Slone. This request should have actually been part of the Phase Two requests. As it turns out there is no document for the Court to decide upon as part of the record. It is the absence of notice to Mr. Slone on remand that is relevant. Issues of lack of notice will be taken up on the merits.
- 6) Paragraph 5(b)- The County has essentially conceded that pages 5-7 of Exhibit 2 to the Tebbutt Affidavit should be in the record. Petitioners contend that the supporting documents to the motion, pages 8-14 of Exhibit 2, should be part of the record as well. Pages 8-10 are the procedures provided by the County to Mr. Dimond. See Dean Dimond Affidavit of June 25, 2009, paragraph 1, found at Tebbutt Affidavit, Exhibit 2, page 1. The other documents were presented to the Board and accepted as part of the motion. Tebbutt Affidavit, Exhibit 2, page 1. The effect of the denial of the motion, and whether denial was proper, will be taken up in the briefing on the merits of the petition.
- 7) Paragraph 5(d)- The relevant 14 pages of emails from Phase Two are all emails from or to County officials about the initial hearing process or issues to be determined on remand from Judge Bevan. They are relevant to the County's deliberative processes and should be made part of the record. Their weight can be determined by this Court after briefing on the merits.

ORDINANCES

With respect to the outstanding information on ordinances relevant to this case, Petitioners request that Chapters 1 and 19 of the Jerome County Zoning Ordinance (JCZO) be provided by the County as well. Chapter 1 is the general ordinance that sets the stage for all the other ordinances. In fact, Chapter 13-3.01 of the LCO Ordinance specifically refers to the obligations to comply with the entire JCZO ("New LCO's [sic] shall be allowed only in Agricultural A-1 Zone, and only after compliance with the provisions of this Chapter and the JCZO.") (emphases added). In particular, Chapter 1-6.01 sets forth some of the basic substantive and procedural requirements to protect property interests that are directly at issue in this case. It

is essential that the certified ordinances be provided by the County. Similarly, Chapter 19 sets forth appeal rights, including the attempts to reopen the record which are part of this action.


Petitioners did earlier agree that what was provided was in acceptable form but never agreed that it was complete. The above listed ordinances and the supporting documents requested in Petitioners' Objection to Respondents' and Intervenors' Production of Jerome County Ordinances and Related Documents filed on July 6, 2009 are required to complete the documents necessary for the Court to consider in this case.

CONCLUSION


Petitioners respectfully request that their renewed motion to supplement the record be granted as set forth in the Affidavit of Charles M. Tebbutt and as so modified by this reply brief.

DATED this 15th day of July, 2009.

Respectfully Submitted:

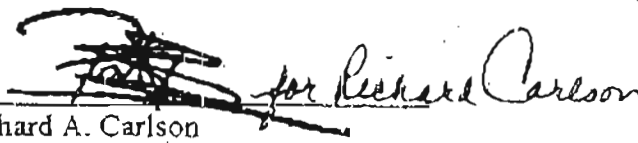


for Charles Tebbutt
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Attorney for All Petitioners



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American Citizens League, Inc., the
National Trust for Historic Preservation,
Inc., and Preservation Idaho, Inc.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 13th day of July, 2009, (s)he served a true and correct copy of the within and foregoing document upon the following by depositing a copy thereof in the United States mail, postage prepaid, addressed to:

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

In the Matter of:)

The Jerome County Board of)
Commissioners' Decision Dated)
September 23, 2008 Approving A)
Livestock Confinement Operation Permit)
for Don McFarland, dba Big Sky Farms,)

CASE NO. CV 2008-1081

AE
[REDACTED] ORDER REGARDING
PETITIONERS' MOTION TO CORRECT
TRANSCRIPT

Friends of Minidoka, Dean & Eden)
Dimond, Harold & Carolyn Dimond,)
Wayne Slone, guardian of James Slone,)
the Idaho Rural Council, Inc., Idaho)
Concerned Area Residents for the)
Environment, Inc., the Japanese American)
Citizens League, Inc., the National Trust)
for Historic Preservation, Inc., and)
Preservation Idaho, Inc.)

Petitioners,)
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 vs.)
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 Jerome County, a Political Subdivision)
 of the State of Idaho, Joseph Davidson,)
 Charles Howell and Diana Obenauer,)
 Members of the Jerome County)
 Board of Commissioners,)
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 Respondents.)
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 South View Dairy, an Idaho General)
 Partnership, Tony Visser, William)
 DeJong and Ryan Visser,)
 general partners,)
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 Intervenor.)

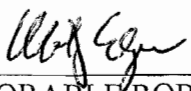
The parties, through counsel, Charles M. Tebbutt, Western Environmental Law Center, Patrick Brown, Hutchinson & Brown, LLP, and Richard A. Carlson for the Petitioners, Michael J. Seib for Respondents, and John Lothspeich, Williams, Meservy & Lothspeich, LLP for Intervenor, appeared before the Court on September 29, 2009. This Order is intended to address the three clerical issues of transcript correction raised by Petitioners' Motion to Augment and Supplement Record and Correct Transcript filed on January 13, 2009.

At the September 29, 2009 hearing, all parties stipulated to certain corrections to the transcript. IT IS HEREBY ORDERED THAT Petitioners' motion to change the transcript is GRANTED and that the following changes be made:

1. The transcriber's certificate (Tr., p. 74) incorrectly identifies the hearing date associated with the transcript as October 9, 2008. The correct date is August 11, 2008.
2. The record (R. p. 93) incorrectly identifies the speaker as Carolyn Dimond. The speaker was Eden Dimond.

3. All references in the Transcripts from Case No. CV2007-1242 to "Ms. Hesse" should be "Ms. Hasse".

So ORDERED this ^{November} 17 day of ~~October~~, 2009.



HONORABLE ROBERT J. ELGEE
DISTRICT COURT JUDGE

Presented by:
Charles M. Tebbutt
Counsel for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of October, 2009, I served a true and correct copy of the foregoing document on the persons whose names and addresses appear below, by e-mail:

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/s/Charles M. Tebbutt

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FILED
20 JUN 27 10:41 AM '09
BY [Signature]

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Attorney for Dean & Eden Dimond, Harold & Carolyn Dimond, and the Idaho Rural Council, Inc.

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

ORDER REGARDING PETITIONERS' MOTION TO SUPPLEMENT RECORD

<p>In the matter of: The Jerome County Board of Commissioners' Decision Dated September 23, 2008 Approving A Livestock Confinement Operation Permit for Don McFarland, dba Big Sky Farms</p> <p>Friends of Minidoka, Dean & Eden Dimond, Harold & Carolyn Dimond, Wayne Slone, guardian of James Slone, the Idaho Rural Council, Inc., Idaho Concerned Area Residents for the Environment, Inc., the Japanese American Citizens League, Inc., the National Trust for Historic Preservation, Inc., and Preservation Idaho, Inc.</p> <p style="text-align: center;">Petitioners,</p>	<p>) Case No:</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>) BE</p> <p>) ORDER</p> <p>) REGARDING PETITIONERS'</p> <p>) MOTION TO AUGMENT</p> <p>) RECORD</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>
<p>v.</p> <p>Jerome County, a Political Sub-Division of the State of Idaho, Joseph Davidson, Charles Howell, and Diana Obenauer, Members of the Jerome County Board of Commissioners,</p> <p style="text-align: center;">Respondents.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>

South View Dairy, an Idaho General Partnership, Tony Visser, William DeJong and Ryan Visser, general partners,

Intervenors.

The parties, through counsel, Charles M. Tebbutt, Western Environmental Law Center, Patrick Brown, Hutchinson & Brown, LLP, and Richard A. Carlson for the Petitioners, Michael J. Seib for Respondents, and John Lothspeich, Williams, Meservy & Lothspeich, LLP for

ORDER REGARDING PETITIONERS' MOTION TO AUGMENT RECORD

Intervenors, appeared before the Court on September 29, 2009. This Order pertains to the issues raised by Petitioners' Renewed Motion to Supplement Record filed on June 26, 2009 and the opposition papers filed by Respondents and Intervenors.

After review of the filings and hearing oral argument, the Court then received numerous oral stipulations from the parties concerning documents to be supplemented to the agency record. Supplementation of other documents not included in this Order was taken under advisement by the Court and will be the subject of a written Order and Opinion. In addition, the parties stipulated that the documents shall become part of the agency record pursuant to various subsections of 67-5249. The parties further stipulated that the documents listed hereunder as supplemented to the agency record **do not** trigger a remand pursuant 67-5276(1). Based on the stipulations in open court and decisions at the September 29 hearing, IT IS HEREBY ORDERED THAT the Respondents shall supplement the agency record in this case by adding the following documents:

- 1) October 31, 2007 memo from Commissioner Obenauer to the other Commissioners and Michael Seib, set forth in paragraph 4(a) of the Affidavit of Charles M. Tebbutt ("Tebbutt Affidavit"), dated June 25, 2009 and attached thereto as Exhibit 1 (one page).
- 2) The series of letters containing comments attempted to be submitted by Dimond extended family members, Blaine Miller and Harold and Carolyn Dimond and responses thereto denying submission for the record from the County. The documents are described in paragraph 4(b) of the Tebbutt Affidavit and are attached thereto as

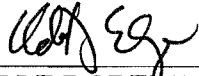
ORDER REGARDING PETITIONERS' MOTION TO SUPPLEMENT RECORD

Exhibit 2, pages 15-20, to the Affidavit of Dean Dimond and Exhibit 3, pages 2-5, to the Affidavit of Harold Dimond. These documents are ordered included, over the objections of Respondents and Intervenors, under IC 67-5249(2)(d) for the limited purpose of showing offers of testimony and the County's refusal to accept them, offered by Petitioners primarily for purposes of establishing standing as well as procedural irregularities.

- 3) Certain e-mails described in paragraph 4(c) of the Tebbutt Affidavit, and attached thereto as Exhibit 4, pages 5-8, 14, 25-27, 29 and 38-40. The Court will issue an opinion as to the remainder of the documents in Exhibit 4 [pages 1-4, 9-13, 15-24, 28, and 30-37], on which either Respondents or Intervenors, or both, object to inclusion as stated at the hearing. Respondents object to pages 1-4, 9-13, 15-17, 22-24, 28 and 30-37. Intervenors object to pages 9-13, 15-24 and 30-37.
- 4) The agendas and minutes from September 10 and 24, 2007, described in paragraph 4(e) of the Tebbutt Affidavit, and attached thereto as Exhibit 5, pages 1-9.
- 5) The Dean Dimond motion to reopen the record described in paragraph 5(b) of the Tebbutt Affidavit and attached thereto as Exhibit 2, pages 5-7 pursuant. Other documents described in paragraph 5(b) of the Tebbutt Affidavit, namely Exhibit 2, pages 8-14, are under taken advisement by the Court.
- 6) Two letters from Big Sky's counsel, John Lothspeich, described in paragraph 5(c) of the Tebbutt Affidavit and attached thereto as Exhibit 8, pages 1-3.

7) Thirteen of fourteen pages of e-mails to, among and between various county officials described in paragraph 5(c) of the Tebbutt Affidavit and attached thereto as Exhibit 9, pages 1-6 and 8-14. Respondents only object to page 7, which the Court takes under advisement subject to its later written ruling.

So ORDERED this 17 day of ~~October~~^{November}, 2009.



HONORABLE ROBERT J. ELGEE
DISTRICT COURT JUDGE

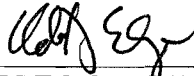
Presented by:
Charles M. Tebbutt
Counsel for Petitioners

CERTIFICATE OF SERVICE

ORDER REGARDING PETITIONERS' MOTION TO SUPPLEMENT RECORD

- 7) Thirteen of fourteen pages of e-mails to, among and between various county officials described in paragraph 5(c) of the Tebbutt Affidavit and attached thereto as Exhibit 9, pages 1-6 and 8-14. Respondents only object to page 7, which the Court takes under advisement subject to its later written ruling.

So ORDERED this 17 day of ~~October~~^{November}, 2009.



HONORABLE ROBERT J. ELGEE
DISTRICT COURT JUDGE

Presented by:

Charles M. Tebbutt
Counsel for Petitioners

CERTIFICATE OF SERVICE

ORDER REGARDING PETITIONERS' MOTION TO SUPPLEMENT RECORD

Page 6

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

In the Matter of:)
)
The Jerome County Board of Commissioners')
Decision Dated September 23, 2008)
Approving a Livestock Confinement)
Operation Permit for Don McFarland, dba Big)
Sky Farms,)

Friends of Minidoka, Dean & Eden Dimond,)
Harold & Carolyn Dimond, Wayne Slone,)
guardian of James Slone, the Idaho Rural)
Council, Inc., Idaho Concerned Area)
Residents for the Environment, Inc., the)
Japanese American Citizens League, Inc., the)
National Trust for Historic Preservation, Inc.,)
and Preservation Idaho, Inc.)

Petitioners,)

Case No.: CV-2008-1081

ORDER ON PETITIONERS' RENEWED
MOTION TO AUGMENT THE RECORD
AND SCHEDULING ORDER

vs.)
)
 Jerome County, a Political Subdivision of the)
 State of Idaho, Joseph Davidson, Charles)
 Howell and Diana Obenauer, Members of the)
 Jerome County Board of Commissioners,)
)
 Respondents.)
)
 _____)
 South View Dairy, and Idaho General)
 Partnership, Tony Visser, William DeJong and)
 Ryan Visser, general partners,)
)
 Intervenors.)
)
)
)
)
)
 _____)

PROCEDURAL HISTORY

Petitioner’s Renewed Motion to Augment the Record came before the court on the 29th day of September, 2009. Charles Tebbutt, Eugene, Oregon, Patrick Brown, Twin Falls, Idaho, and Richard Carlson, Filer, Idaho appeared for and on behalf of Petitioners. Michael Seib, Deputy Prosecuting Attorney appeared for and on behalf of Jerome County, and John Lothspeich, Jerome, Idaho, appeared for and on behalf of Intervenors. At the hearing, certain documents and records became the subject of stipulations between counsel, no objection was made to including some other documents into the record , and the court made some rulings on the court record. The court has previously entered two separate orders prepared by Petitioner’s counsel following hearing. The issues which remained unresolved were taken under advisement by the court.

References in the court record, and in this order, and in the two orders entered previously, refer alternatively to **paragraphs of** the Affidavit of Charles M. Tebbutt in

Support of Renewed Motion to Supplement Record dated July 25, 2009, or to **Exhibits** attached to that affidavit.

ISSUES PRESENTED

(1) Whether items described in paragraph 4(c), and attached as Exhibit 4, pages 1-4, 9-13, 15-24, 28, and 30-37 should be included in the record upon appeal.

(2) Whether items described in paragraph 4(d) as “Request 19” and “Request 20” should be included in the record on appeal.

(3) Whether items described in paragraph 4(f) of Tebbutt’s affidavit and Pat Brown’s Affidavit and letters, (Exhibit 6 to Tebbutt’s affidavit) should be included in the appellate record. Jerome County objects to pp. 11-15. Intervenors object to them in total.

(4) Whether, pursuant to paragraph 5(b) of the Tebbutt affidavit, Exhibit 2 to that affidavit (referred to as the Dimond Motion) pages 1-4 or 8-14 should be augmented into the record.

(5) Whether, pursuant to paragraph 5(d) of the Tebbutt affidavit, a group of 14 emails attached to the Tebbutt affidavit as Exhibit 9 should be augmented into the record. Intervenor has no objection to these and Jerome County objects to page 7 of that Exhibit 9.

ANALYSIS AND CONCLUSIONS

(a) Background

Until the last hearing, the court (and likely Jerome County and Intervenors as well) has been unclear on Petitioner’s reasons for seeking augmentation of documents into the record. Prior to the hearing on September 29, 2009 the court sent an email to the parties expressing the difficulties presented by different arguments that might be made as

to why documents or records should be “augmented” into an agency record. That is, some documents augmented into the record [if augmented pursuant to I.C. § 67-5276(1)(a)] may provoke an immediate remand to the agency for reconsideration in light of this “new” evidence.

Other documents or records, however, may be offered by a party to make a showing that “alleged irregularities” have occurred, and/or to request the court allow discovery or otherwise “take proof on the matter” pursuant to I.C. §67-5276(1)(b). A third purpose or reason for offering or requesting documents be included into the agency record is that they are *properly part of the record* pursuant to I.C. §67-5249(2). More particularly, in this case, there is an argument by petitioners that much or most of the items they seek to have included into the record here are “offers of proof” made pursuant to I.C. §67-5249(2)(d).

There are two distinct problems in this area. The first is, like any offer of evidence, that both the parties and the court be able to *identify the purpose of the request* for inclusion into the record. That is, it is necessary for all parties and the court to know early on whether a particular request for inclusion into the record is intended to provoke a remand to the agency for reconsideration, to support a request for discovery or a finding of a procedural irregularity, or to support an argument a party intends to make on appeal. The second problem, when examining a request to include documents into the record pursuant to I.C. §67-5249(2)(d), is whether offers of proof, as well as objections and rulings upon those offers of proof, were made before the agency below *upon some type of record*. If they were on some type of record, it is easy for the court to determine that the agency record should include them pursuant to the statute. However, if those offers of proof (or decisions involving their exclusion from evidence) are not made upon some type of record, it opens the door to arguments that the documents or records should be

“included into the record” or “augmented into the record” because they could be used to support arguments under any or all three claims for relief outlined above. This, as noted, can create substantial problems for all concerned.

The court makes these preliminary observations both to highlight these issues for future reference and to provide a backdrop to the current issues before the court. It was not until the hearing on September 29, 2009 the court was able to determine Petitioner’s reasons for seeking inclusion of these matters into the record. At the hearing, Petitioner’s made clear they are ***not*** seeking to include the requested information into the record in order to request that the court order a remand to the Board for reconsideration in light of these documents and records; rather, they seek to have these documents and records included into the record as “offers of proof” made before the agency pursuant to I.C. §675249(2)(d) and/or to support arguments they wish to make upon this appeal, and/or to show that they appeared in and during proceedings below in order to resist arguments they (or some of them) lack standing, or that they failed to appear below and raise arguments that might be considered upon appeal.

Petitioners further contend some of these documents and records support allegations or arguments that there have been “procedural irregularities” and thus come into the record under I.C. 67-5276(1)(b). Counsel have been warned via the court’s email sent out before the June 29 hearing (and made a part of the record) that the court cannot necessarily consider documents offered into the record, without foundation, as evidence or proof of any irregularity. Documents may, or may not be, self authenticating, and/or may or may not have a proper foundation for the court to consider them, and may or may not contain unsupported hearsay. In short, documents or records or emails, **even if “augmented into the record” as some claimed evidence of a procedural irregularity,**

may or may not allow the court to conclude that any procedural irregularity has occurred.

(b) Legal basis for Petitioner’s Amended Motion to Supplement Record

The reasons for Petitioner’s request that particular documents and records be included into the record have a substantial bearing on whether and how they should be included. For example, inclusion into the record for purposes of remanding to the agency for reconsideration in light of the “new” evidence, or to support a finding of a “procedural irregularity” require different findings or conclusions in order to support or provoke their particular claims or remedies. However, a request to include documents or records into the record of proceedings for appeal under I.C. §67-5249(2)(d) requires only that the court find that the documents or records constitute “offers of proof and objections and rulings thereon.” In the court’s view, whether there were *in fact* “objections and rulings thereon” made upon some type of record does not affect either whether the documents or records were offered, or should now be made part of the record. If in fact they were offered to the agency as evidence, it is the duty of the agency, not the party offering the evidence, to maintain the record. The first line of I.C. §67-5249(1) provides: “*An agency shall maintain* an official record of each contested case under this chapter for a period of not less than six (6) months...” (emphasis added) Subsection (2) immediately thereafter provides: “The record *shall include*:...(d) offers of proof and objections and rulings thereon;” (emphasis added)¹

¹ The court is considering the record here for purposes of judicial review pursuant to Idaho Code § 67-5249 because I.C. § 67-5275(1)(b) provides that the agency record shall consist of the record compiled under I.C. §67-5249 when the agency action was an order. The agency action here was an order granting a permit pursuant to I.C. 67-6521(1)(c).

For these reasons, the court concludes that if the documents and records Petitioners now seek to include into the record *were in fact offered*, they will be included in the record on appeal whether they were objected to or whether any objection was ruled upon. Moreover, it appears that if the documents or records constitute an offer of proof they should come into the record regardless of their evidentiary content. That is, by the plain terms of the statute they would be included as part of the record even if they were objected to at the agency level *and were rejected*. The court does not view its function *at this juncture* as any sort of gate-keeper whose duty it is to review the content or source of the document or offered record and/or to determine whether objections were properly sustained, or to determine whether the particular offered exhibit contains hearsay, or is prejudicial, or ill-informed, or was offered by a party that arguably lacked standing. The appeal record, pursuant to statute, is to include “offers of proof and objections and rulings thereon.”

(c) Rulings on Issues Presented

(1) Whether items described in paragraph 4(c) of the Tebbutt’s affidavit, and attached thereto as Exhibit 4, pages 1-4,9-13, 15-24, 28, and 30-37 should be included into the appellate record.

By virtue of the affidavit of Mr. Tebbutt, para. 4, the documents set forth in paragraphs 4(a-g) were part of the “Phase One” proceedings before the November 1, 2007 decision denying Intervenor’s application. Pursuant to stipulation of counsel, the record from the “Phase One” proceedings before Judge Bevan shall be included as part of this current judicial review proceeding, and this court has so ordered. *See* Order on Motion to Augment and Supplement the Record, Correct Transcript, and Motion to Dismiss dated June 3, 2009, pgs. 4,5.

The court determines and orders as follows:

Pages 1-4 of Exhibit 4 are a document offered into evidence (an offer of proof). It will be included into the record.

Pages 9-10 are an email purportedly sent to Art Brown. The email references that he is the Jerome County Planning and Zoning Director. In it, the writer is requesting clarification of the Jerome County Ordinances regarding the Big Sky LCO. The court cannot find that this is either an offer of proof or evidence of a procedural irregularity. It is excluded.

Pages 11, 12, and 13 are copies of an email series, copies of which were sent to Mr. Brown, and Mike Seib, the county's attorney. Part of the email on page 12 purports to be an email answer to Ms. Hasse's information request from Mr. Brown and delineates (a) what written information Jerome County will be accepting prior to the public hearing, (b) from whom, and (c) what information, and in what form, will be allowed to be presented at the hearing. Mr. Brown signed it as the "Planning and Zoning Administrator". Page 11 is Ms. Hasse's objections to the process. These pages will be included into the record. For one thing, they constitute "rulings" on offers of proof because they show, or might show, an advance determination from Jerome County as to what evidence would be accepted. It also tends to show that there is or was some "recommended order" under I.C. § 67-5249(2)(g) as to what to accept or reject, or it is itself an order from the administrator of the P and Z as to what evidence would be accepted. Finally, it evidences Ms. Hasse's attempts to participate in the process and the fact she raised objections to the proceedings before the agency. This tends to negate any objection from Jerome County or Intervenors that she waived objections or failed to participate (or at least attempt to participate) in proceedings before the agency. The parties have no other way to establish "lack of waiver" or that issues or objections were

raised, even if done outside of a record maintained by the agency, unless evidence of this kind can be made part of the record.

Pages 15-24 of Exhibit 4. These are a series of emails between Art Brown and Alma Hasse and others regarding “clarification” (or lack thereof) of the procedures Jerome County would be following with respect to the Big Sky application. These will be admitted into the record. They may or may not show a procedural irregularity exists; they do appear to show Mr. Seib’s interpretation of what, when, and how information could be submitted for the hearing (pg.19 of 40 of Exhibit 4), as well as what information Mr. Brown was communicating to others on the same topic. At least one of them also references an upcoming ordinance (13-06.02) regarding “public comment” and its effect on the hearing. (Pg 20 of 40 of Exhibit 4) These would appear to fall under (f) or (g) of §67-5249 in that they are either staff memoranda to or from the agency heads (Mike Seib as attorney for Jerome County or Art Brown as head of the Jerome P & Z), and/or are recommended or preliminary orders re what the hearing procedures would be. *See also* I.C. §67-5242(3)(b) re: “prehearing orders” that might affect the opportunity to respond and present evidence. They become part of the record on appeal pursuant to I.C. §67-5249(2)(e)(f) and (g). The court considers this evidence as generally reliable in that it would appear to be admissions of party.

Page 28 of Exhibit 4. This is an email from Alma Hasse to Charlie Howell, and a reply by Mr. Howell. From page 7 of Exhibit 4 the court can infer that Mr. Howell is one of the members of the Board of Commissioners of Jerome County. One basis to include this into the record is as some evidence of a “notice of proceeding” (or an arguable lack of notice of a proceeding) under I.C. §67-5249(a) because it contains Ms. Hasse’s complaints that a noticed hearing was postponed, and/or it contains her complaint to Mr. Howell that he has (per Ms.Hasse) been in communication with others re the Big Sky

application. This second ground arguably provides evidence that Ms. Hasse was present, and objected to a procedural event, or to a commissioner's disclosure, and thereby preserved her objection for the record. *See, Balser v. Kootenai County Bd. of Comm'rs*, 110 Idaho 37, 40, 714 P.2nd 6, 9 (1986). Page 28 will be included in the appellate record. To the extent this document shows a "lack of notice" rather than actual notice, it would be evidence of a claimed procedural irregularity, and the court would find it to be material and relates to the validity of the agency action.

Pages 30-37 of Exhibit 4. These documents are an email string between Alma Hasse and Mike Seib and Art Brown. Pages 33-37 appear to be a public records request by Ms. Hasse and responses to that request from Mr. Seib and Mr. Brown. The court can find no basis under I.C. § 67-5249 to include those documents in the record. Page 31, however, contains Ms. Hasse's request from Mr. Brown for public records supporting an alleged calculation or interpretation as to the allowed 15 day comment period, and records pertaining to the filing deadline for Big Sky's LCO application. This may relate to an argument that Ms. Hasse objected to deadlines, or their calculation, and suggests the possibility that some preliminary order (formal or informal) existed with respect to this hearing. That is, it suggests that some order or decision emanated from somewhere re: the hearing procedure to be followed. Any such order should be part of the record already pursuant to I.C. § 67-5249(2)(f), and if one was not formalized but indeed was followed, then this request might constitute some evidence of a procedural irregularity, and a party should be able to have it considered on appeal. Indeed, one of the arguments parties are permitted to raise on appeal under I.C. § 67-5279(3) is that the agency made a decision "upon unlawful procedure". *See* I.C. 67-5279(3)(c). The court finds page 31 to be material, and relates to the validity of the agency action. It does not, however, prove a procedural irregularity by itself. Page 31 will be included in the appellate record.

(2) The second issue is whether items described in paragraph 4(d) to Tebbutts affidavit should be included into the appellate record. These consist of “Request 19” and “Request 20”, and both relate in general terms to the attempts of Alma Hasse to submit evidence to the Board of Commissioners. Request 19 includes documents and evidence attached to the Affidavit of Alma Hasse dated January 9, 2009, and submitted with Petitioner’s original motion to augment the appellate record. The court has no knowledge whether it is filed in this court action as a separate affidavit, but the affidavit was attached to Petitioner’s Memorandum in Support of Motion to Augment and Supplement Record, and Correct Transcript filed herein January 13, 2009. The court has reviewed that affidavit. Ms. Hasse’s affidavit details her efforts to submit information to the county regarding the application at issue on both September 6, 2007, and again on September 26, 2007.² As such, the information contained in both her affidavit and the attachments thereto will be included in the record on appeal as “offers of proof” consistent with the court’s observations and analysis set forth in paragraph (b) above.

“Request 20” is a set of emails between Ms. Hasse and Jerome County officials regarding her attempts to provide testimony. They are attached to Tebbutt’s affidavit as Exhibit 10. It appears that pages 1-10 of Exhibit 10 are already to be included into the record as part of Exhibit 4. If not otherwise allowed into the record, the court would find them to be evidence of a procedural irregularity, material, and related to the validity of the agency action. Again, the court is making no determination here that these documents prove, or fail to prove any sort of procedural irregularity.

(3) The third issue presented is whether items described in paragraph 4(f) of Tebbutt’s affidavit, and attached thereto as Exhibit 6, should be included into the

² The affidavit itself also contains a statement by Ms. Hasse as to why Ms. Hasse was told her offers of proof would not be considered. That affidavit is at least some evidence of a “ruling”, which is properly part of the appellate record under I.C. §67-5249(2)(d).

appellate record. There are three parts to this exhibit. The first is the Affidavit of Patrick Brown in Support of Renewed Motion to Augment and Supplement Record and Correct Transcript. The second part is comprised of pages 1-19 attached thereto, which the affidavit establishes to be true and correct copies of correspondence between Patrick Brown and various Jerome County officials. The third part (pgs. 20-23) contains copies of “notices” received by Mr. Brown and/or the Slones from Jerome County.

The affidavit of Patrick Brown will be made part of the appellate record. It lays the foundation for the documents attached to it, the notices received by his clients, a claim of a lack of subsequent notice from Jerome County after September 14, 2007, establishes objections to the process and “lack of waiver”, and bears on questions of whether a procedural irregularity has occurred etc. The court finds it to be material and it relates to the validity of the agency action.

Pages 1-19 attached to Patrick Brown’s affidavit are marked by Petitioners as “Exhibit 6, pages 5 of 27 through 24 of 27”. Pages 5,6, and 7 establish, or might establish, “lack of waiver” by Mr. Brown or his clients as to the hearing date and the notice given by the County, a request for a continuance, and an objection to the notice given. Those pages will be included into the appellate record. Again, if nothing else, a party is entitled to argue upon appeal that a decision was made upon unlawful procedure. The court finds them to be material, and they relate to the validity of the agency action. Page 8 establishes a continuing objection to timing and notice. Pages 9 and 10 are fax verification sheets. Page 11 is a letter from the County confirming copies are ready and available to be picked up. Page 12 is another fax verification sheet. Those pages will be admitted into the appellate record.

Page 13 is a request for copies of applicable ordinances governing the application at issue, and pages 14-19 are correspondence back and forth between Patrick Brown and

Mike Seib and the Jerome County Clerk clarifying what Mr. Brown was asking for with regard to ordinances in effect and who had copies of them. There has been some question raised already in this case as to what ordinances governing this application were in effect, and when. This issue has been the subject of prior hearings before the court.³ These items may establish, or tend to establish, a procedural irregularity under I.C. §67-5276(1)(b). These documents will be made part of the record because Petitioners are entitled to raise on appeal whether decisions were made upon unlawful procedure. These documents may or may not establish any part of that claim, but they are material and relate to the validity of the agency action. In addition, a local ordinance *governing agency hearing procedures*, if one exists, would constitute a “preliminary order” under I.C. §67-5249(2)(g) because it would constitute an ordinance passed by the same Board of Commissioners that would be hearing the application, determining what it would hear and in what format, and whether it covered this application or several others. The documents at issue are also aimed at the question of whether such an ordinance, or others like it, do in fact exist, and/or whether an agency decision has been made upon unlawful procedure. The court finds them to be material, and they relate to the validity of the agency action. Pages 13 through 19 of Exhibit 6 to the Tebbutt’s affidavit will be included into the appellate record.

Pages 20-24 are copies of “notices of proceedings” and are properly part of the record pursuant to I.C. §67-5249(2)(a) and will be admitted into the appellate record.

(4) The fourth issue presented is whether pages 1-4 or 8-14 of Exhibit 2 to the Tebbutt’s affidavit should be admitted into the appellate record. They are referenced in the Tebbutt’s affidavit in paragraph 5(b). The court recognizes these documents and

³ This issue seems to have become a recent issue in other cases as well. The court notes the new procedural rule established by the Supreme Court (I.A.R. 30.2).

records are requested to be included into the appellate record as part of the “Phase 2” proceedings. Pages 1-4 are an affidavit of Dean Dimond. In it he details the notice that he received on Phase 1. As to that part, the court finds it to be material and relates to the validity of the agency action. As to the rest of the affidavit, it details from Mr. Dimond’s perspective his request to reopen the record under Phase 2. That part the court also finds to be material and relates to the validity of the agency action, and the court may consider it as evidence of a procedural irregularity. Mr. Dimond’s affidavit sets forth that pages 8-14 attached to his affidavit are copies of documents he wished to add to the record at the August 4, 2008 hearing. As such, they are either offers of proof that were rejected, or they are, or could be, evidence of a procedural irregularity. The court also finds them to be material and relate to the validity of the agency action. Pages 1-4 and 8-14 will be included into the appellate record.

(5) The fifth issue is whether page 7 of Exhibit 9 to the Tebbutt’s affidavit should be included into the appellate record. Counsel waived objections to the other pages contained in Exhibit 9, and they will be included into the appellate record. This particular page is a classic example of the problems raised by several of the other documents or records sought to be included into the appellate record. It contains an unsworn assertion from an unknown person that at some point there were different versions of the proposed changes to Jerome County Ordinance Chapter 13 online, and a claim that a hearing had been scheduled and was apparently going forward without proper notice. In and of itself, and on its face, the court finds it to be evidence of a procedural irregularity, that it is material, and that **IF TRUE** relates to the validity of the agency action. *The same thing could be said of many of the other documents or items of “evidence” the court has determined could be allowed “into the appellate record” that constitute some arguable evidence of a procedural irregularity.* However, as pointed out

in the court's email to all counsel before the last hearing, and to counsel at hearing, it is one thing to allow a document or item to be included into the record for purposes of appellate proceedings; *it is quite another for the court to be able to consider it as proof of a procedural irregularity, or come to any conclusion that a procedural irregularity has occurred, simply because someone has made some assertions (say, for example in an email) in writing. Thus, while the court can make the findings necessary to admit this particular document (and perhaps many others the court has reviewed in this order) into the appellate record, its value as proof of the facts asserted therein, without further foundation, is almost zero.*

Page 7 will be admitted into the appellate record as some (arguable) evidence of a procedural irregularity.

SCHEDULING ORDER

Pursuant to conference with counsel at the last hearing, the court considers this order as the order settling the appellate record. **Unless extended by the court for good cause shown, or by stipulation of the parties, Petitioner's brief is due 35 days from the date of the clerk's filing stamp upon this order. Simultaneous briefs from Intervenors and Jerome County are due 30 days after Petitioners brief is due. Petitioners have 15 days thereafter in which to file their Reply Brief.**

The court will take this opportunity to advise counsel and the Jerome County Clerk of the Court that it does not have copies, to its knowledge, of the following:

(a) a copy of Judge Bevan's original decision or a copy of the "record on appeal" in that case. That proceeding and this one bear separate case numbers, and this court has not been provided with copies of that record or of Judge Bevan's decision for purposes of

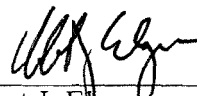
this case. If it is voluminous, the court will confer with the Jerome County Clerk to determine the best method to obtain or review copies.

(b) a copy of the ordinances which were in effect, or arguably in effect, in Jerome County which counsel believe govern this case. Although reference was made by the court at the last hearing to I.A.R. 30.2, the court believes counsel settled this matter between them at some earlier time. The court remains unsure if there is any dispute over the ordinances; whether there is or not, the court needs copies of the ordinances, and requests counsel provide them to the court as agreed upon by counsel, or advise the court at the earliest opportunity that a problem exists with regard to the ordinances, and the court will schedule a telephone status conference at the earliest opportunity to address the issue.

The court will also need to be provided a chambers copy of the final record on appeal in this case by either the Twin Falls Clerk of Court or one of the parties.

IT IS SO ORDERED.

Dated this 24 day of November, 2009



Robert J. Elgee
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of Dec. ~~November~~, 2009, I caused to be served a true copy of the foregoing ORDER, document by the method indicated below, and addressed to each of the following:

John B. Lothspeich
Fredericksen, Williams, Meservy &
Lothspeich, LLP
P.O. Box 168
Jerome, Idaho 83338

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- FAX

Michael J. Seib
Jerome County Prosecutor
233 W Main Street
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Charles M. Tebbutt
Western Environmental Law Center
1216 Lincoln Street
Eugene, OR 97401

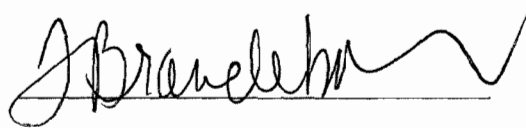
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Patrick D. Brown
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104 Lincoln Street
P.O. Box 207
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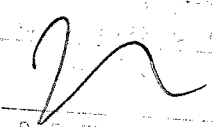
Richard A. Carlson
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Charles M. Tebbutt, Pro Hac Vice
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 470 W. Broadway
 Eugene, OR 97440
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DISTRICT COURT
 FIFTH JUDICIAL DISTRICT
 JEROME COUNTY
 2008 DEC 16 AM 10 28
 BY 
 DEPOSED

Attorney for Petitioners

Patrick D. Brown, ISB No. 4413
 Hutchinson & Brown, LLP
 104 Lincoln St.
 PO Box 207
 Twin Falls, ID 83303-0207
 208-733-9300 (phone) 208-733-9343 (fax)

Attorney for Petitioners Friends of Minidoka, Wayne Slone, guardian of James Slone, Idaho Concerned Area Residents for the Environment, Inc., the Japanese American Citizens League, Inc., the National Trust for Historic Preservation, Inc., and Preservation Idaho, Inc.

Richard A. Carlson, ISB No. 5971
 P.O. Box 21
 Filer, ID 83328
 Telephone and fax: (208) 326-3686

Attorney for Petitioners Dean & Eden Dimond, Harold & Carolyn Dimond, and the Idaho Rural Council, Inc.

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

In the Matter of:	)	CASE NO. CV 2008-1081
)	
The Jerome County Board of)	
Commissioners' Decision Dated	)	STATEMENT IN SUPPORT OF
September 23, 2008 Approving A	)	MOTION TO AUGMENT
Livestock Confinement Operation Permit	)	RECORD WITH ORDINANCES
for Don McFarland, dba Big Sky Farms,	)	OF JEROME COUNTY
)	
Friends of Minidoka, Dean & Eden)	
Dimond, Harold & Carolyn Dimond,)	

Wayne Slone, guardian of James Slone,)
the Idaho Rural Council, Inc., Idaho)
Concerned Area Residents for the)
Environment, Inc., the Japanese American)
Citizens League, Inc., the National Trust)
for Historic Preservation, Inc., and)
Preservation Idaho, Inc.)

Petitioners,)
_____)

vs.)
)

Jerome County, a Political Subdivision)
of the State of Idaho, Joseph Davidson,)
Charles Howell and Diana Obenauer,)
Members of the Jerome County)
Board of Commissioners,)

Respondents.)
_____)

South View Dairy, an Idaho General)
Partnership, Tony Visser, William)
DeJong and Ryan Visser,)
general partners,)
)

This STATEMENT is made in support of the attached MOTION TO AUGMENT
RECORD WITH ORDINANCES OF JEROME COUNTY.

The central focus of this case is the propriety of the decision by the Jerome County
Commissioners' to issue a livestock confinement operation (LCO) permit. Idaho law is
well-settled that when local zoning authorities review land use permit applications and
make decisions thereon the governing zoning ordinances are those in effect at the time a
zoning permit application is filed. *Southfork Coalition v. Board of Comm. of Bonneville
Co.*, 117 Idaho 857, 860-61, 792 P.2d 882, 885-86 (1990). The LCO permit application
in this case was filed with Jerome County on May 3, 2007.

Two chapters of the Jerome County Zoning Ordinance (JCZO) that were in effect on that date are Chapter 1: "TITLE, AUTHORITY, PURPOSE, INTERPRETATION AND ZONING MAP" and Chapter 19: "APPEAL, VARIANCE, AND ACTIONS BY AFFECTED PERSONS." Neither chapter has been made part of the record to date.

On July 6, 2009 Petitioners filed their OBJECTION TO RESPONDENT'S AND INTERVENOR'S PRODUCTION OF JEROME COUNTY'S ORDINANCES AND RELATED DOCUMENTS that specifically noted the absence of JCZO Ch.1 and Ch. 19 from ordinance-type documents that Respondent/Intervenor produced pursuant to previous Court orders. Both chapters must be included in the record so that the Court knows what ordinances governed- or at least arguably governed- the decision-making process.

Without the addition of those two chapters into the record Petitioners will not be able to address a variety of issues in this case including, but not limited to (1) whether or not the Board's decision was in compliance with the JCZO, and (2) whether or not the Board's decisions were made upon unlawful procedures.

Intervenors would not stipulate to these parts of the JCZO for the stated reasons that they are not relevant to the proceedings and that the ordinances had already been agreed upon. These objections were set forth in a letter from intervenors' counsel dated December 10. *See* attached letter of John Lothspeich. Intervenors do not apparently dispute the authenticity of the ordinances, but rather are persisting with stale arguments that have already been disposed of by this Court. The parties discussed this matter at the hearing on September 29 and petitioners thought they had reached an understanding that certified copies of the ordinances would be added to the record pursuant to I.A.R. 30.2.

These ordinances are directly relevant to claims made by petitioners that the County-respondents failed to consider material parts of the JCZO. The LCO ordinance specifically refers to requirements of compliance with the general ordinance (Chapter 1) and the Court allowed documents into the record in its Order Setting Record dated December 3, 2009, which refer to Dean Dimond's attempts to reopen the record on remand (Chapter 19). Petitioners do not seek a ruling on the merits at this juncture, but simply want to make sure that the Court has all the ordinances in front of it that will be argued in the merits briefing. Unfortunately, intervenors persist with causing procedural hurdles, one of which required the filing of the present motion..

Dated this 16th day of December, 2009

Respectfully Submitted:

Charles M. Tebbutt, by Attorneys
Charles M. Tebbutt, Pro Hac Vice
Attorney for All Petitioners

Patrick D. Brown, by Attorneys
Patrick D. Brown
Hutchinson & Brown, LLP

Attorney for Petitioners Friends of
Minidoka, Wayne Slone, guardian of
James Slone, Idaho Concerned Area
Residents for the Environment,
Inc., the Japanese American Citizens
League, Inc., the National Trust for
Historic Preservation, Inc., and

Preservation Idaho, Inc.



Richard A. Carlson
Idaho State Bar No. 5971

Attorney for Petitioners Dean &
Eden Dimond, Harold & Carolyn
Dimond, and the Idaho Rural
Council, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of December, 2009, I served a true and correct copy of the foregoing document on the persons whose names and addresses appear below, by hand delivery:

John B. Lothspeich
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PO Box 168
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Michael J. Seib
Jerome County Prosecutor
233 W Main St
Jerome, Idaho 83338



Richard A. Carlson

Williams, Meservy & Lothspeich, LLP
Attorneys at Law

153 East Main Street
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Jerome, Idaho 83338-0168



ROBERT E. WILLIAMS
JAMES C. MESERVY
JOHN B. LOTH SPEICH
BRIAN J. WILLIAMS - Associate
EUGENE D. FREDERICKSEN - retired

TELEPHONE: (208) 324-2303
TELECOPIER: (208) 324-3135
E-MAIL: JBLOTHSPEICH@CABLEONE.NET

December 10, 2009

Richard Carlson
carlsonr@filertel.com

RE: South View Dairy v. Jerome County

Dear Rich:

Thank you for providing copies of Chapters 1 and 19 of the Jerome County Zoning Ordinance. I've had an opportunity to review these ordinances consistent with your request on December 9, 2009.

Though it would appear that both Chapters were part of the Jerome County Zoning Ordinance in effect on May 3, 2007, I would object to them being part of the record in this case on the basis that they are irrelevant.

Chapter 19, Appeal, Variance and Actions by Affected Persons, deals with administrative appeals. We are not dealing with a variance in this matter regarding the LCO permit. Public hearing in Chapter 19 addresses solely administrative appeals to the zoning commission.

Under Chapter 13, the governing zoning ordinance at issue here, LCO permit hearings were heard by the Board of County Commissioners.

Chapter 1, Title, Authority, Purpose, Interpretation and Zoning Map, is also irrelevant. There is no question, in my mind, that the appropriate zone, that was repeatedly addressed in the public hearing at issue, is the proper zone for this permit to be issued within. The statements in Chapter 1 are simply broad policy statements. It is not applicable to the zoning at issue here.

Unless you can set forth a specific attack on the zoning in this matter, which to my recollection has never been raised before, I do not see how Chapter 1 is relevant for the court to review for purposes of judicial review at this time.

Also, please be reminded, that I submitted the relevant ordinances pursuant to the court's prior order on April 9, 2009.

On April 28, 2009, all counsel for Petitioners, in the Reply in Support of Proposed Order Re: Petitioners Motion to Augment Record and Correct Transcript, indicated that the certified copies of the ordinances have now been provided and "are acceptable to Petitioners for purposes of this case".

Why are we now requesting additional ordinances for the court to review in this matter, when the issue regarding applicable ordinances was resolved over seven months ago?

Frankly, all of us could spend substantial time and resources reviewing a whole slew of other irrelevant Jerome County Ordinances that were in effect at the time of permit application in 2007, to find some vague language to apply that would only impede the court's ability to rule upon the merits.

I do not see any utility in the use of the additional ordinances that you suggest should be included in the record. Please advise as to how they would be utilized by the court upon judicial review here.

Thank you for your kind assistance.

Sincerely,



JOHN B. LOTH SPEICH

JBL/vlp

cc: Client

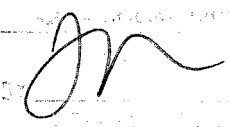
Seib (mseib@co.jerome.id.us)

Tebbutt (charlie.tebbuttlaw@gmail.com)

Brown (patbrown@cableone.net)

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Charles M. Tebbutt, Pro Hac Vice
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Eugene, OR 97440
Ph: 541-344-8312 Fax: 541-344-0188

DISTRICT COURT
JEROME COUNTY, IDAHO
2008 SEP 16 PM 10 26
BY 

Attorneys for Petitioners

Patrick D. Brown, ISB No. 4413
Hutchinson & Brown, LLP
104 Lincoln St.
PO Box 207
Twin Falls, ID 83303-0207
208-733-9300 (phone) 208-733-9343 (fax)

Attorney for Petitioners Friends of Minidoka, Wayne Slone, guardian of James Slone, Idaho Concerned Area Residents for the Environment, Inc., the Japanese American Citizens League, Inc., the National Trust for Historic Preservation, Inc., and Preservation Idaho, Inc.

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Filer, ID 83328
Telephone and fax: (208) 326-3686

Attorney for Petitioners Dean & Eden Dimond, Harold & Carolyn Dimond, and the Idaho Rural Council, Inc.

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

In the Matter of:)	
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The Jerome County Board of)	CASE NO. CV 2008-1081
Commissioners' Decision Dated)	
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for Don McFarland, dba Big Sky Farms,)	OF JEROME COUNTY
_____)	
Friends of Minidoka, Dean & Eden)	
Dimond, Harold & Carolyn Dimond,)	
Wayne Slone, guardian of James Slone,)	
the Idaho Rural Council, Inc., Idaho)	

Concerned Area Residents for the)
 Environment, Inc., the Japanese American)
 Citizens League, Inc., the National Trust)
 for Historic Preservation, Inc., and)
 Preservation Idaho, Inc.)
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 Petitioners,)
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 Jerome County, a Political Subdivision)
 of the State of Idaho, Joseph Davidson,)
 Charles Howell and Diana Obenauer,)
 Members of the Jerome County)
 Board of Commissioners,)
)
 Respondents.)
 _____)
)
 South View Dairy, an Idaho General)
 Partnership, Tony Visser, William)
 DeJong and Ryan Visser,)
 general partners,)
)
 Intervenor.)

COME NOW the Petitioners by and through their respective counsel, Charles M. Tebbutt, Attorney at Law, Richard A. Carlson, Attorney at Law, Patrick Brown, of the law firm Hutchinson & Brown, LLP, and move the court for an order augmenting the record to include certified copies of certain Jerome County ordinances the Petitioners contend are necessary for purposes of judicial review in this case. A certified copy of the ordinances is attached hereto. This motion is made pursuant to I.A.R.30.2 as amended July 1, 2009 and is supported by the statement attached hereto.

DATED this 16th day of December, 2009.

Respectfully Submitted:

Charles M. Tebbutt, by Richard A. Carlson
Charles M. Tebbutt, Pro Hac Vice
Attorney for All Petitioners

Patrick D. Brown, by Richard A. Carlson
Patrick D. Brown
Hutchinson & Brown, LLP

Attorney for Petitioners Friends of
Minidoka, Wayne Slone, guardian of
James Slone, Idaho Concerned Area
Residents for the Environment,
Inc., the Japanese American Citizens
League, Inc., the National Trust for
Historic Preservation, Inc., and
Preservation Idaho, Inc.

Richard A. Carlson
Richard A. Carlson
Idaho State Bar No. 5971

Attorney for Petitioners Dean &
Eden Dimond, Harold & Carolyn
Dimond, and the Idaho Rural
Council, Inc.

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PO Box 168
Jerome, Idaho 83383

Michael J. Seib

Jerome County Prosecutor
233 W Main St
Jerome, Idaho 83338



Richard A. Carlson

circulation within the jurisdiction fifteen (15) days prior to the date of the hearing, and give written notice to all parties as required for Special Use Permits. (Amended 5-12-97; Added 4-17-2003; 11-9-2006)

19-7.02 Upon receipt of the application for a Variance, the Zoning Commission shall hold a public hearing, publish a notice in the official newspaper or paper of general circulation within the jurisdiction fifteen (15) days prior to the date of the hearing, and give written notice to property owners adjoining the parcel under consideration for a Variance. (Added 5-12-97; 11-9-2006)

19-8. ACTION BY THE ZONING COMMISSION. (Amended 11-9-2006)

19-8.01 Within thirty (30) days after the public hearing, the Zoning Commission shall either approve, approve with appended conditions, or deny the request for Appeal or Variance. (Amended 11-9-2006)

19-8.02 Upon granting or denying an application, the Zoning Commission shall specify the Ordinance and standards used in evaluating the application, the reasons for the action of approval or denial, and the actions, if any, that the applicant might take with respect to a re-application for Appeal or Variance. (Amended 11-9-2006)

19-8.03 The applicant, or any affected person(s), who appears in person or in writing before the Zoning Commission may appeal the decision of the Zoning Commission to the Board provided that the Appeal is submitted to the Board within fifteen (15) days of the Zoning Commission signing the written Finding of Facts and Conclusions of Law. (Amended 3-25-2004; 11-9-2006)

19-9. NOTIFICATION TO APPLICANT.

19-9.01 Within ten (10) days after a decision has been rendered, the Administrator shall provide the applicant with written notice of that decision.

19-10. APPEAL TO THE BOARD OF JEROME COUNTY COMMISSIONERS.

19-10.01 Unless otherwise ordered by the Board the record and transcript shall be prepared as set out in this section. The staff report and all evidence admitted for consideration by the Planning and Zoning Administrator and Zoning Commission shall constitute the record. An estimate of cost for production of sufficient copies of the record and the transcription of all recorded hearings in front of the Zoning Commission and sufficient copies thereof shall within 10 days be provided to the person(s) appealing. The person(s) appealing shall have 14 days from the time they are mailed by regular mail notification of the estimate of cost to then pay for the estimate for the record and transcript and sufficient copies thereof on appeal and shall pay for any balance on the completion thereof. If the person(s) appealing do not pay for the estimated cost of the record and transcript and

sufficient copies thereof the appeal may be dismissed by the County. Upon payment by the person(s) appealing the record, transcript shall be prepared. Once the record and transcript are prepared the Board shall immediately set a hearing date. The Board shall decide to uphold, to conditionally uphold, or to overrule the decision of the Zoning Commission. The Board shall make its decision by a simple majority vote of the entire membership of the Board. (Amended 9-9-2004; 11-9-2006)

19-11. REQUEST FOR HEARING BY AN AFFECTED PERSON.

19-11.01 An affected person shall mean one having an interest in real property, which may be adversely affected by the issuance or denial of a permit authorizing the development. (Amended 6-5-2003)

19-11.02 Any affected person may at any time prior to final action on a Rezone, Special Use, Livestock Confinement Operation, Land Division or Variance Permit petition, in writing, the Board to hold a hearing as required by this Ordinance. (Amended 6-5-2003)

19-11.03 After a hearing, the Board shall either:

a. Grant a permit.

b. Deny a permit, or

c. Defer its decision for a specified time interval to enable additional study or hearing.

19-11.04 An affected person, aggrieved by a decision, may, after all remedies under local Ordinances have been exhausted, seek judicial review under the procedure provided by Idaho Code or as the section may be amended. (Amended 3-28-94)

CHAPTER 1

TITLE, AUTHORITY, PURPOSE, INTERPRETATION AND ZONING MAP

1-1. TITLE.

1-1.01 This ordinance is entitled and shall be known as the "JEROME COUNTY ZONING ORDINANCE", and it may be so cited and pleaded.

1-2. AUTHORITY.

1-2.01 This ordinance is adopted pursuant to authority granted by Title 67, Chapter 65, of the Idaho State Code and Article 12, Section 2, of the Idaho Constitution, as amended or subsequently modified.

1-3. PURPOSE.

1-3.01 This ordinance has been made in accordance with a comprehensive plan which has been designed to protect and promote the health, safety, morals, and general welfare of the community. It is intended, therefore to provide:

- a. Support of property values by preserving existing uses and guiding future development.
- b. Protection from the menace to the public safety that would result from placing buildings or other structures in locations and in manners that would interfere with present or future traffic movement.
- c. Pleasant appearances along highways and elsewhere in the county.
- d. Adequate public facilities and services.
- e. Support for the economy of the county.
- f. Protection for prime agricultural lands for production of food and fiber.
- g. Support for agriculture and other industry together with related uses.
- h. Assurance that the important environmental features of the county are protected and enhanced.
- i. Avoidance of undue concentrations of population.
- j. Assurance that land is developed appropriately for its physical characteristics.
- k. Protection for life and property in areas subject to natural hazards and disasters.
- l. Protection for fish, other wildlife, and recreational resources.
- m. Security against undue pollution of air and water.

1-4. DECLARATION.

1-4.01 In establishing the zones, the boundaries thereof, and in regulations applying within each of the zones, careful consideration has been given to, among other things, the suitability of land for particular uses with a view toward conserving the value of buildings and land for the best use by encouraging the most appropriate use of land throughout the county. The location of boundaries of cities and any other areas not subject to zoning regulations

by the Board of County Commissioners of Jerome County together with regulations applying within each city were also considered in the preparation of this ordinance.

1-5. INTERPRETATION AND INTENT.

1-5.01 It is the intent of the Board of County Commissioners of Jerome County that the regulations and restrictions as set forth in this ordinance shall be also interpreted and construed to further the purpose of this ordinance and the objectives and characteristics of the respective zones.

1-6. PRESERVATION OF PRIVATE PROPERTY RIGHTS.

1-6.01 This ordinance shall be interpreted in its various particulars to protect equally each citizen from the undue encroachment on his private property to the end that, within the plan established, each citizen shall have the maximum use of his property without placing undue burden upon that of his neighbor. Every citizen of Jerome County shall at all times have the right to appear in person or through his attorney or other agent before the Planning Commission, Zoning Commission or Board, as the case may be, in the proper order of business and before such Planning Commission, Zoning Commission or Board to freely petition for the relief of an alleged burden created by this ordinance, and to appeal a decision of the Planning Commission or Zoning Commission pursuant to the procedures herein set out to the Board and the Courts of the State of Idaho. In the enforcement of this ordinance it shall be deemed to apply similarly and equally to each person and property in similar circumstances and shall not be enforced to discriminate between one individual and another individual or between one group as compared to all others similarly situated. (Amended 11-9-2006)

1-7. OTHER LAWS AND PRIVATE RESTRICTIONS.

1-7.1. It is not intended that this ordinance impair or interfere with other regulations of effective State or Local law or with private restrictions on the use of land improvements and structures. Where this ordinance imposes restrictions which are greater than those imposed by prior law or private restrictions, this ordinance shall prevail.

1-7.2. In those instances where this ordinance does not address a specific matter of concern, the laws of the State of Idaho shall apply in the same manner as if those provisions of the Idaho law were an integral part of this ordinance. It is intended that this ordinance be in compliance with Idaho law at all times and in all circumstances.

1-8. CONFORMANCE REQUIRED.

1-8.01 Except as herein provided, no land, building, structure or premises shall hereafter be used, and no building or part thereof, or any other structure shall be located, erected, moved, reconstructed, extended, enlarged, or altered except in conformance with the requirements herein specified for the district or zone in which it is located.

1-9. PRIOR RIGHTS AND PERMITS.

1-9.01 The enactment of this ordinance shall neither terminate nor otherwise affect the rights, including plats, variances and permits having legal effect, acquired or authorized for work that is in progress under the provisions of any ordinance hereby repealed. Where a building permit has been issued for the construction of a building or structure having an authorized use and occupancy which is in accordance with the law prior to the effective date of this ordinance, said building or structure may be completed in conformance with the plans which had been approved by the already issued building permit, providing that construction of said building or structure commences, or has commenced, within 120 days of the effective date of the issued building permit and providing that the construction is diligently pursued until completion. (Amended 1-12-98)

1-10. ZONING MAP.

1-10.01 This ordinance consists of this text and the official Zoning Map which shall be designated as the "Jerome COUNTY ZONING MAP", as hereby adopted by the Board of County Commissioners as part of this ordinance. Zoning boundaries shall be the centerline of streets, alleys, waterways, and/or railroad rights-of-way unless such boundaries are otherwise indicated on the zoning map. The official JEROME COUNTY ZONING MAP shall be that which is on display in the Administrator's office.

1-11. SEPARABILITY CLAUSE.

1-11.01 If any section or provision of this ordinance is declared by the courts to be unconstitutional or invalid, such declaration shall not affect the validity of the ordinance as a whole or in any part thereof other than the specific portion declared to be unconstitutional or invalid.

1-12. APPLICABILITY.

The adoption and implementation of this ordinance is intended to include plans and needs of the State of Idaho for all agencies in accordance with Idaho Code 67-6528.

CHAPTER 1

TITLE, AUTHORITY, PURPOSE, INTERPRETATION AND ZONING MAP

1-1. TITLE

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1-2. AUTHORITY

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1-3. PURPOSE

1-3.01 This ordinance has been made in accordance with a comprehensive plan which has been designed to protect and promote the health, safety, morals, and general welfare of the community. It is intended, therefore to provide:

- a. Support of property values by preserving existing uses and guiding future development.
- b. Protection from the menace to the public safety that would result from placing buildings or other structures in locations and in manners that would interfere with present or future traffic movement.
- c. Pleasant appearances along highways and elsewhere in the county.
- d. Adequate public facilities and services.
- e. Support for the economy of the county.
- f. Protection for prime agricultural lands for production of food and fiber.
- g. Support for agriculture and other industry together with related uses.
- h. Assurance that the important environmental features of the county are protected and enhanced.
- i. Avoidance of undue concentrations of population.
- j. Assurance that land is developed appropriately for its physical characteristics.
- k. Protection for life and property in areas subject to natural hazards and disasters.
- l. Protection for fish, other wildlife, and recreational resources.
- m. Security against undue pollution of air and water.

1-4. DECLARATION

1-4.01 In establishing the zones, the boundaries thereof, and in regulations applying within each of the zones, careful consideration has been given to, among other things, the suitability of land for particular uses with a view toward conserving the value of buildings and land for the best use by encouraging the most appropriate use of land throughout the county. The location of boundaries of cities and any other areas not

subject to zoning regulations by the Board of County Commissioners of Jerome County together with regulations applying within each city were also considered in the preparation of this ordinance.

1-5. INTERPRETATION AND INTENT

1-5.01 It is the intent of the Board of County Commissioners of Jerome County that the regulations and restrictions as set forth in this ordinance shall be also interpreted and construed to further the purpose of this ordinance and the objectives and characteristics of the respective zones.

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1-7. OTHER LAWS AND PRIVATE RESTRICTIONS

1-7.01 It is not intended that this ordinance impair or interfere with other regulations of effective State of Local law or with private restrictions on the use of land improvements and structures. Where this ordinance imposes restrictions, which are greater than those imposed by prior law or private restrictions, this ordinance shall prevail.

1-7.02 In those instances where this ordinance does not address a specific matter of concern, the laws of the State of Idaho shall apply in the same manner as if those provisions of the Idaho law were an integral part of this ordinance. It is intended that this ordinance be in compliance with Idaho law at all times and in all circumstances.

1-8. CONFORMANCE REQUIRED

1-8.01 Except as herein provided, no land, building, structure or premises shall hereafter be

used, and no building or part thereof, or any other structure shall be located, erected, moved, reconstructed, extended, enlarged, or altered except in conformance with the requirements herein specified for the district or zone in which it is located.

1-9. PRIOR RIGHTS AND PERMITS

1-9.01 The enactment of this ordinance shall neither terminate nor otherwise affect the rights, including plats, variances and permits having legal effect, acquired or authorized for work that is in progress under the provisions of any ordinance hereby repealed. Where a building permit has been issued for the construction of a building or structure having an authorized use and occupancy which is in accordance with the law prior to the effective date of this ordinance, said building or structure may be completed in conformance with the plans which had been approved by the already issued building permit, providing that construction of said building or structure commences, or has commenced, within 120 days of the effective date of the issued building permit and providing that the construction is diligently pursued until completion. (Amended 1-12-98)

1-10 ZONING MAP

1-10.01 This ordinance consists of this text and the official Zoning Map, which shall be designated as the "Jerome COUNTY ZONING MAP", as hereby adopted by the Board of County Commissioners as part of this ordinance. Zoning boundaries shall be the centerline of streets, alleys, waterways, and/or railroad rights-of-way unless such boundaries are otherwise indicated on the zoning map. The official JEROME COUNTY ZONING MAP shall be that which is on display in the Administrator's office.

1-11 SEPARABILITY CLAUSE

1-11.01 If any section or provision of this ordinance is declared by the courts to be unconstitutional or invalid, such declaration shall not affect the validity of the ordinance as a whole or in any part thereof other than the specific portion declared to be unconstitutional or invalid.

1-11.02 APPLICABILITY

The adoption and implementation of this ordinance is intended to include plans and needs of the State of Idaho for all agencies in accordance with Idaho Code 67-6528.

CHAPTER 19

APPEAL, VARIANCE, AND ACTIONS BY AFFECTED PERSONS

- 19-1. GENERAL. The Planning and Zoning Commission shall consider Administrative Appeals where it is alleged that an error has been made by the Administrator, where a question arises concerning the terms of this Ordinance, and where an affected person(s) requests a hearing. (Amended 11-9-06, 10-20-08)
- 19-2. ADMINISTRATIVE APPEALS. Appeals to the Planning and Zoning Commission concerning interpretation or administration of this Ordinance may be initiated by a person(s) aggrieved by an officer or bureau of the legislative authority affected by a decision of the Administrator. Such Appeal shall be made within twenty (20) days following the questioned decision of the Administrator, and it shall be filed with the Administrator and with the Planning and Zoning Commission as a notice of Appeal, specifying the grounds for the Appeal. The Administrator shall make available to the Planning and Zoning Commission all materials, which constitute the record upon which the Appeal is based. (Amended 11-9-06, 10-20-08)
- 19-3. PERMIT ISSUANCE. No permit shall be issued until the time for appeal has expired. Commencing a permit before a permit is issued will constitute a violation of this Ordinance. The Administrator is only authorized to issue the permit after the appeal time has expired. (Amended 6-5-03)
- 19-4. VARIANCE. The Planning and Zoning Commission may authorize a Variance from the terms of this Ordinance if it is not contrary to the public interest and if, owing to special conditions, a literal enforcement of the provisions of this Ordinance would result in unnecessary hardship. A non-conforming use of neighboring lands, structures or building in the same district, or in other districts, shall not be considered as grounds for granting a Variance. A Variance shall be granted only when a strict application of the provisions of this Ordinance would result in unnecessary hardship because of the characteristics of the site and the Variance is not in conflict with public interest. (Amended 5-12-97, 11-9-06, 10-20-08)
- 19-5. APPLICATION AND STANDARDS FOR VARIANCE
- 19-5.01 A Variance from the terms of this Ordinance shall not be considered by the Planning and Zoning Commission unless a written application for a Variance has been submitted to the Administrator and the Planning and Zoning Commission containing the following: (Amended 11-9-06, 10-20-08)
- a. The name, address, and telephone number of the applicant(s).

- b. Legal description of the property.
- c. Description of the nature of the Variance requested.
- d. A narrative statement indicating the ways in which the requested Variance conforms to the following standards:
 - (1) That special conditions and circumstances exist which are not applicable to other lands, structures or buildings in the same district.
 - (2) That a literal interpretation of the provisions of this Ordinance would deprive the applicant of rights commonly enjoyed by other properties in the same district under the terms of this Ordinance.
 - (3) That special conditions and circumstances do not result from the actions of the applicant.
 - (4) That granting the Variance will not confer on the applicant a special privilege that is denied by this Ordinance to uses in other lands, structures, or buildings in the same district.

19-5.02 When it grants a request for Variance, the Planning and Zoning Commission shall declare those specific findings from the presented evidence which demonstrate that the standards for Variance have been satisfied. (Amended 11-9-06, 10-20-08)

19-5.03 All applications for Special Use Permit, which include a structure that exceeds the maximum height requirement of this Ordinance, shall include a Variance request with the application and the Special Use Permit and Variance shall be considered in one application. All existing uses that have a Special Use Permit shall obtain a Variance if a structure which exceeds the maximum height requirement of this Ordinance is added to the site. (Added 3-21-02)

19-6. SUPPLEMENTARY CONDITIONS AND SAFEGUARDS

19-6.01 The Planning and Zoning Commission shall not grant an Appeal or Variance which would allow a use prohibited under the terms of this Ordinance in the district involved, or any use expressly or by implication prohibited by the terms of this Ordinance in said district. In granting an Appeal or Variance, the Planning and Zoning Commission shall prescribe the appropriate conditions and safeguards in conformity with this Ordinance. Violation of such conditions and safeguards, when they have been made a part of the terms under which the Appeal or Variance is granted, shall be a violation of this Ordinance. (Amended 11-9-06, 10-20-08)

19-7. PUBLIC HEARING

19-7.01 Upon receipt of the application for an Administrative Appeal, the Planning and Zoning Commission shall hold a public hearing, publish a notice in the official newspaper or paper of general circulation within the jurisdiction fifteen (15) days prior to the date of the hearing, and give written notice to all parties as required for Special Use Permits. (Amended 5-12-97, Added 4-17-03, 11-9-06, 10-20-08)

19-7.02 Upon receipt of the application for a Variance, the Planning and Zoning Commission shall hold a public hearing, publish a notice in the official newspaper or paper of general circulation within the jurisdiction fifteen (15) days prior to the date of the hearing, and give written notice to property owners adjoining the parcel under consideration for a Variance. (Added 5-12-97, 11-9-06, 10-20-08)

19-8. ACTION BY THE PLANNING AND ZONING COMMISSION. (Amended 11-9-06, 10-20-08)

19-8.01 Within thirty (30) days after the public hearing, the Planning and Zoning Commission shall either approve, approve with appended conditions, or deny the request for Appeal or Variance. (Amended 11-9-06, 10-20-08)

19-8.02 Upon granting or denying an application, the Planning and Zoning Commission shall specify the Ordinance and standards used in evaluating the application, the reasons for the action of approval or denial, and the actions, if any, that the applicant might take with respect to a re-application for Appeal or Variance. (Amended 11-9-06, 10-20-08)

19-8.03 The applicant, or any affected person(s), who appears in person or in writing before the Planning and Zoning Commission may appeal the decision of the Planning and Zoning Commission to the Board provided that the Appeal is submitted to the Board within fifteen (15) days of the Planning and Zoning Commission signing the written Finding of Facts and Conclusions of Law. (Amended 3-25-04, 11-9-06, 10-20-08)

19-9. NOTIFICATION TO APPLICANT

19-9.01 Within ten (10) days after a decision has been rendered, the Administrator shall provide the applicant with written notice of that decision.

19-10. APPEAL TO THE BOARD OF JEROME COUNTY COMMISSIONERS

19-10.01 Unless otherwise ordered by the Board the record and transcript shall be prepared as set out in this section. The staff report and all evidence admitted for consideration by the Planning and Zoning Administrator and Planning and Zoning Commission shall constitute the record. An estimate of cost for production of sufficient copies of the record and the transcription of all recorded hearings in front of the Planning and

Zoning Commission and sufficient copies thereof shall within 10 days be provided to the person(s) appealing. The person(s) appealing shall have 14 days from the time they are mailed by regular mail notification of the estimate of cost to then pay for the estimate for the record and transcript and sufficient copies thereof on appeal and shall pay for any balance on the completion thereof. If the person(s) appealing do not pay for the estimated cost of the record and transcript and sufficient copies thereof the appeal may be dismissed by the County. Upon payment by the person(s) appealing the record, transcript shall be prepared. Once the record and transcript are prepared the Board shall immediately set a hearing date. The Board shall decide to uphold, to conditionally uphold, or to overrule the decision of the Planning and Zoning Commission. The Board shall make its decision by a simple majority vote of the entire membership of the Board. (Amended 9-9-04, 11-9-06, 10-20-08)

19-11. REQUEST FOR HEARING BY AN AFFECTED PERSON

- 19-11.01 An affected person shall mean one having an interest in real property, which may be adversely affected by the issuance or denial of a permit authorizing the development. (Amended 6-5-03)
- 9-11.02 Any affected person may at any time prior to final action on a Rezone, Special Use, Livestock Confinement Operation, Land Division or Variance Permit petition, in writing, the Board to hold a hearing as required by this Ordinance. (Amended 6-5-03)
- 19-11.03 After a hearing, the Board shall either:
- a. Grant a permit.
 - b. Deny a permit, or
 - c. Defer its decision for a specified time interval to enable additional study or hearing.
- 19-11.04 An affected person, aggrieved by a decision, may, after all remedies under local Ordinances have been exhausted, seek judicial review under the procedure provided by Idaho Code or as the section may be amended. (Amended 3-28-94)

c. Description of the nature of the Variance requested.

d. A narrative statement indicating the ways in which the requested Variance conforms to the following standards:

- (1) That special conditions and circumstances exist which are not applicable to other lands, structures or buildings in the same district.
- (2) That a literal interpretation of the provisions of this Ordinance would deprive the applicant of rights commonly enjoyed by other properties in the same district under the terms of this Ordinance.
- (3) That special conditions and circumstances do not result from the actions of the applicant.
- (4) That granting the Variance will not confer on the applicant a special privilege that is denied by this Ordinance to uses in other lands, structures, or buildings in the same district.

19-5.02 When it grants a request for Variance, the Zoning Commission shall declare those specific findings from the presented evidence which demonstrate that the standards for Variance have been satisfied. (Amended 11-9-2006)

19-5.03 All applications for Special Use Permit, which include a structure that exceeds the maximum height requirement of this Ordinance, shall include a Variance request with the application and the Special Use Permit and Variance shall be considered in one application. All existing uses that have a Special Use Permit shall obtain a Variance if a structure which exceeds the maximum height requirement of this Ordinance is added to the site. (Added 3-21-2002)

19-6. SUPPLEMENTARY CONDITIONS AND SAFEGUARDS.

19-6.01 The Zoning Commission shall not grant an Appeal or Variance which would allow a use prohibited under the terms of this Ordinance in the district involved, or any use expressly or by implication prohibited by the terms of this Ordinance in said district. In granting an Appeal or Variance, the Zoning Commission shall prescribe the appropriate conditions and safeguards in conformity with this Ordinance. Violation of such conditions and safeguards, when they have been made a part of the terms under which the Appeal or Variance is granted, shall be a violation of this Ordinance. (Amended 11-9-2006)

19-7. PUBLIC HEARING.

19-7.01 Upon receipt of the application for an Administrative Appeal, the Zoning Commission shall hold a public hearing, publish a notice in the official newspaper or paper of general

CHAPTER 19

APPEAL, VARIANCE, AND ACTIONS BY AFFECTED PERSONS


- 19-1. GENERAL. The Zoning Commission shall consider Administrative Appeals where it is alleged that an error has been made by the Administrator, where a question arises concerning the terms of this Ordinance, and where an affected person(s) requests a hearing. (Amended 11-9-2006)
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- 19-5. APPLICATION AND STANDARDS FOR VARIANCE.
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- a. The name, address, and telephone number of the applicant(s).
 - b. Legal description of the property.

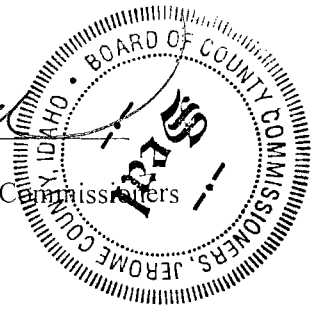
CERTIFICATION

The undersigned hereby certifies as Clerk of the Jerome County Board of Commissioners that the attached or foregoing exhibits are true and correct copies of certain records, specifically Chapters 1 and 19 of the Jerome County Zoning Ordinance as they were on May 3, 2007, with such records being made by the regularly conducted business activity of the Jerome County Board of Commissioners and its administrative assistants, and kept as part of the regular practice and business activity of the Jerome County Board of Commissioners.

The undersigned further certifies that she is the custodian of such records or otherwise qualified to have access to such records and to make this certification.

DATED this 24th day of November, 2009.

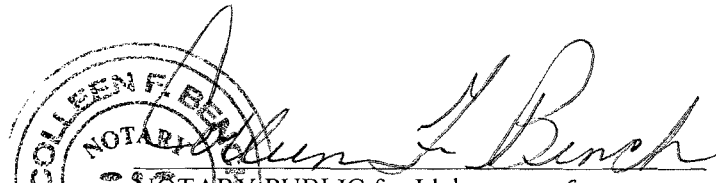

Michelle Emerson
Clerk of the Jerome County Board of Commissioners



State of Idaho)
County of Jerome) ss

On this 24th day of November, 2009, before me, the undersigned, a Notary Public, personally appeared Michelle Emerson, known to me to be the person whose name is subscribed to the within and foregoing instrument, and who acknowledged to me that he or she executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and seal, the day and year in this certificate first above written.



COLLEEN F. BEACH
NOTARY PUBLIC for Idaho
Residing at: Jerome Idaho
Commission Expires: 6/15/2015

STATE OF IDAHO)
 : ss.
County of Jerome)

Art Brown, being first duly sworn upon oath, deposes and says as follows:

1. I am the Jerome County Planning and Zoning Administrator.
2. Part of my duties as the P&Z Administrator is to assist the Jerome County Board of Commissioners with updating and amending the Jerome County Zoning Ordinance.
3. All documents and filing to amend the zoning ordinance originate with my office and are kept in my office as well.
4. As a result, not only am I familiar with what the current version of the ordinance as it now stands, I am also familiar with how it looked in the recent past, before various amendments were made.
5. I have reviewed chapters one and nineteen of the Jerome County Zoning Ordinance and can assert with reasonable certainty that the attached accurately reflect how these two chapters appeared on May 3, 2007.
6. Also attached are various documents that reflect the amendments made to chapters one and nineteen between May 3, 2007 and present.

FURTHER, YOUR AFFIANT SAYETH NAUGHT.



Art Brown

SUBSCRIBED AND SWORN to before me this 20TH day of November
2009.



Nancy L. Marshall
NOTARY PUBLIC for Idaho
Residing at Jerome, therein
My Commission Expires: 01/30/2013

DISTRICT COURT
FIFTH JUDICIAL DISTRICT
JEROME COUNTY

2010 JAN 7 PM 3 33

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

FRIENDS OF MINIDOKA, ET AL.,)
)
 Petitioners,)
 _____)
 JEROME COUNTY, ET AL.,)
)
 Respondents.)
 _____)
 SOUTH VIEW DAIRY, ET AL.,)
)
 Intervenors.)
 _____)

Jerome County Case No. CV2008-1081

NOTICE OF FILING
SUPPLEMENTAL RECORD
VOLUMES I AND II

TO THE ABOVE NAMED ATTORNEYS OF RECORD:

YOU ARE HEREBY NOTIFIED PURSUANT TO I.R.C.P 84(k) that the Supplemental Record Volumes I and II in the above-named case was filed with the District Court on the 7th day of January, 2010.

MICHELLE EMERSON
Clerk of the District Court

By Michelle Emerson

CERTIFICATE OF DELIVERY

I, the undersigned, do hereby certify that on the 7th day of January, 2010, a true and correct copy of the foregoing Notice of Filing Supplemental Record Volumes I and II with the District was delivered in the manner indicated below:

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By 

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2008 JUN 13 PM 12 04

BY: 
LETT

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Attorney for Petitioners Dean & Eden Dimond, Harold & Carolyn Dimond, and the Idaho Rural Council, Inc.

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

In the Matter of:)	
)	
The Jerome County Board of	)	CASE NO. CV 2008-1081
Commissioners' Decision Dated)	
September 23, 2008 Approving A	)	ORDER REGARDING
Livestock Confinement Operation Permit	)	PETITIONERS' MOTION
for Don McFarland, dba Big Sky Farms,	)	TO SUPPLEMENT RECORD
_____	)	WITH ORDINANCES
Friends of Minidoka, Dean & Eden)	
Dimond, Harold & Carolyn Dimond,)	
Wayne Slone, guardian of James Slone,)	
the Idaho Rural Council, Inc., Idaho)	

Concerned Area Residents for the)
 Environment, Inc., the Japanese American)
 Citizens League, Inc., the National Trust)
 for Historic Preservation, Inc., and)
 Preservation Idaho, Inc.)
)
 Petitioners,)
 _____)
 vs.)
)
 Jerome County, a Political Subdivision)
 of the State of Idaho, Joseph Davidson,)
 Charles Howell and Diana Obenauer,)
 Members of the Jerome County)
 Board of Commissioners,)
)
 Respondents.)
 _____)
)
 South View Dairy, an Idaho General)
 Partnership, Tony Visser, William)
 DeJong and Ryan Visser,)
 general partners,)
)
 Intervenor.)

THIS MATTER having come before the Court upon the Petitioners' MOTION TO AUGMENT RECORD WITH ORDINANCES OF JEROME COUNTY filed December 16, 2009 and the Court having considered any briefs or memoranda in opposition thereto filed by the Respondents or Intervenor and otherwise being fully advised;
 NOW, THEREFORE, IT IS SO ORDERED that Petitioners' MOTION TO AUGMENT RECORD WITH ORDINANCES OF JEROME COUNTY be GRANTED/DENIED.

pursuant to I. A. R. 30.2.
(JSC)

DATED this 4 day of January, 2010.



HONORABLE ROBERT J. ELGEE
DISTRICT COURT JUDGE

Presented by:

Charles M. Tebbutt, Pro Hac Vic
Counsel for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of December, 2009, I served a true and correct copy of the foregoing document on the persons whose names and addresses appear below, by hand delivery:

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Fredericksen, Williams, Meservy & Lothspeich, LLP
PO Box 168
Jerome, Idaho 83383

Michael J. Seib
Jerome County Prosecutor
233 W Main St
Jerome, Idaho 83338



Richard A. Carlson

CERTIFICATE OF MAILING

I, Traci Brandebourg, hereby certify that a true and correct copy of the foregoing was delivered this 13th day of January, 2010, to the following:

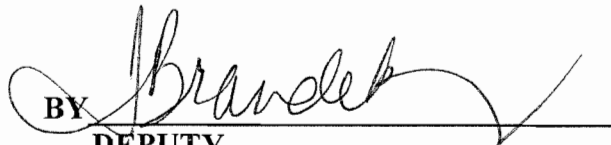
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Patrick Brown
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Richard Carlson
P.O. Box 21
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Mike Seib
233 W Main
Jerome, ID 83338
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JB Lothspeich
P.O. Box 168
Jerome, ID 83338
(annex box)

BY 
DEPUTY

Cc: Michelle Emerson

Charles M. Tebbutt, *Pro Hac Vice*
Law Offices of Charles M. Tebbutt
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CLERK OF DISTRICT COURT
JH
JEROME COUNTY

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Attorney for Petitioners Friends of Minidoka, Wayne Slone, guardian of James Slone, Idaho
Concerned Area Residents for the Environment, Inc., the Japanese American Citizens League, Inc.,
the National Trust for Historic Preservation, Inc., and Preservation Idaho, Inc.

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Telephone and fax: (208) 326-3686

Attorney for Dean & Eden Dimond, Harold & Carolyn Dimond, and the Idaho Rural Council, Inc.

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

In the matter of: The Jerome County Board of) Case No: CV 2008-1081
Commissioners' Decision Dated September 23, 2008)
Approving A Livestock Confinement Operation)
Permit for Don McFarland, dba Big Sky Farms) **PETITIONERS'**
_____) **MEMORANDUM IN SUPPORT**
) **OF PETITION FOR REVIEW**
Friends of Minidoka, Dean & Eden Dimond, Harold)
& Carolyn Dimond, Wayne Slone, guardian of James)
Slone, the Idaho Rural Council, Inc., Idaho)
Concerned Area Residents for the Environment,)
Inc., the Japanese American Citizens League, Inc., the)
National Trust for Historic Preservation, Inc., and)
Preservation Idaho, Inc.)
)
)
Petitioners,)
_____)

v.

Jerome County, a Political Sub-Division of the State
of Idaho, Joseph Davidson, Charles Howell, and
Diana Obenauer, Members of the Jerome County
Board of Commissioners,

Respondents.

South View Dairy, an Idaho General Partnership,
Tony Visser, William DeJong and Ryan Visser,
general partners,

Intervenors.

EXPLANATION OF RECORD CITATION

Due to the length and complexity of the way the Record has been prepared in this case, petitioners provide the following explanation of the methods used in this brief for citations to Record documents. “Phase I” refers to the proceedings that occurred prior to the remand of the Board’s original disapproval of the Big Sky application. Phase I documents constitute the record used in the first proceeding- In Re: Don McFarland, dba Big Sky Farms v. Jerome County. Phase I is separated into three volumes and the transcripts from the September 25 and 26, 2007 public hearing. Each volume of Phase I contains numerous subheadings, and each subheading contains its own numbering scheme. Citations to information contained in Phase I refer to these subheadings. Please note that there is some carryover in documents from Volume I into Volume II.

“Phase II” refers to the Record prepared by Jerome County in response to the Petition for Review in this case. Phase II consists of the “AGENCY RECORD” (AR) 130 pages, and the “TRANSCRIPTS OF TAPED PROCEEDINGS,” each identified by its own date.

The Supplemental Record consists of the documents that were supplemented into the record by orders of this Court and prepared by Jerome County as of January 7, 2010. The Supplemental Record contains two volumes. Volume I consists of pages 1-233. Volume II consists of pages 234-376.

Citation to Phase I documents are as follows: Phase I, Vol. #, [Subheading Title], p. #.

Citations to the September 25 and 26, 2007 public hearing transcript are as follows:
Phase I, Trans., p. #.

Citation to Phase II documents are as follows: Phase II, AR, p. #; Phase II, [date of hearing], p. #.

Citation to Supplemental Record documents are as follows: Supp. Rec., Vol. #, p. #.

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STATEMENT OF THE CASE

This case is before the Court for judicial review of a decision by the Jerome County Board of Commissioners (the “Board”) to grant a livestock confinement operation (“LCO”) permit to Don McFarland, dba Big Sky Farms Limited Partnership (“Big Sky”), now represented as South View Dairy. The permit would allow Big Sky to construct and operate an LCO consisting of 13,000 dairy heifers (8,000 animal units) on 1,204.61 acres located at 1453 US Hwy 24, Eden, Jerome County, Idaho.

COURSE OF PROCEEDINGS

Big Sky’s application for an LCO permit was filed with the Jerome County Planning & Zoning Administrator on May 3, 2007. Phase I, Vol. I, Exhibits submitted by Applicant, p.40. A public hearing on the application was held before the Board on September 25 and 26, 2007.

The Board held a public meeting for purposes of deliberating on the evidence on October 9, 2007. At that October 9, 2007 meeting, the Board denied the application.

On November 1, 2007, the Board issued its Memorandum Decision setting forth findings of fact and conclusions of law denying the application based largely on the failure to comply with the Jerome County comprehensive zoning plan. Phase I, Vol. III, Documentation marked as exhibits CC45-CC94, p. 47.

Big Sky filed a Petition for Judicial Review on November 13, 2007. Phase I, Vol. III, Appeal, p.2. On June 27, 2008, Judge G. Richard Bevan issued his Memorandum Decision reversing the Board’s decision and remanded the matter back to the Board for further consideration.

On August 4, 2008 Petitioner Dean Dimond appeared before the Board and attempted to file and be heard on his “motion to submit additional evidence” that the Board refused to hear or consider. Supp. Rec., Vol. I, p.163.

On August 11, and September 2, 4, 9, and 22, 2008, the Board held several meetings to

reconsider the LCO application and voted, 2-1, to approve it on Sept. 22, 2008. The Board's written Order approving the Big Sky LCO permit was issued on Sept. 23, 2008. Petitioners timely filed a Petition for Judicial Review on October 21, 2008.

STATEMENT OF FACTS

The site of the proposed LCO facility is approximately 1.25 miles upwind from the Minidoka National Historic Site (the "Minidoka Site"). The Minidoka Site is where the Minidoka Relocation Center, a World War II-era internment camp for Japanese Americans and their immigrant ancestors, operated from August 1942 to October 1945, housing 13,000 internees from Washington, Oregon and Alaska on a 33,000-acre site with over 600 buildings. Designated a National Monument in 2001 under the auspices of the National Park Service, the site, visited annually by thousands, represents an important part of our Nation's history about wartime division and subsequent post-war unification and settlement. In 2007, Congress passed legislation to expand Minidoka and call it a National Historic Site.

The proposed LCO is surrounded on all sides by resident farm families. Phase I, Vol. I, Agency, pp. 9-10. Big Sky's application immediately gained interest from these property owners, as the size and proximity of the proposed LCO would create significant negative social, economic, environmental and aesthetic impacts on the region.

Due to the proximity of the proposed LCO to the Minidoka Site, a large number of individuals, historic preservation and conservation organizations became intensely interested with the LCO permitting process. This interest was illustrated by the volumes of letters and e-mails received by the Board following the submission of the LCO application. One opponent of the LCO, Alma Hasse, Executive Director of petitioner ICARE, immediately sought information on how concerned citizens could participate in the permitting process. Supp. Rec., Vol. II, p. 255. Another concerned citizen, Jeff Itami, regional director of the Japanese American Citizens League, wrote to

Jerome County Planning and Zoning director, Art Brown, to express his organization's concerns about the proposed LCO's effects on the Minidoka Site. *Id.* at 259. The National Trust for Historic Preservation, a congressionally chartered organization intended to preserve historical sites for the benefit of our entire nation, Hartig Aff., at ¶ 3, wrote to the Jerome County Board of Commissioners (the "Board") on June 28 and September 6, 2007, urging the Board to adopt an open permitting process and expressing concern about the problems posed by an LCO. Phase I, Vol. I, Agency, pp 9-10, p. 24. Numerous other citizens – including the Dimond petitioners, local property owners – were especially concerned with the proposed siting of the Big Sky LCO.

The Board initially scheduled a public hearing on the proposed Big Sky LCO to be held on August 14-15, 2007.¹ In accordance with the Jerome County Zoning Ordinance ("JCZO"), on July 17, 2007, the Board sent written notice of the public hearing to some individuals owning property within one mile of the proposed LCO site. Phase I, Vol. I, Staff, p.12. The Board also published an announcement of the hearing dates in the Jerome North Side News on July 19, 2007. *Id.* at 8. Both of these notices established the procedures that would govern public participation before and during the August 14-15 public hearings. The procedures established by the Board imposed two key limitations on public participation. First, the public notices indicated that only those property owners having a "primary residence" within a one mile radius of the proposed LCO would be allowed to submit written comments to the Board. *Id.* at 9. Written comments from this limited group were required to be received within 15 days after publication of the published announcement in order to be considered by the Board. *Id.* The one mile limitation was based upon an ordinance within chapter 13 of the JCZO, dealing with the permitting and siting of LCOs. Second, public written and oral testimony during the hearing was to be severely limited: written testimony was

¹ The Board at the time was composed of three commissioners: Diana Obenauer, Charles Howell and Joseph Davidson.

limited to one 8.5” by 11” sheet of paper, single-sided; oral testimony was initially limited to two minutes, later expanded to four minutes, per person. *Id.*

Public comments began arriving at the County soon after publication in the paper. Not all public comments were handled the same, however; Planning and Zoning director Art Brown refused to accept comments from several individuals. Specifically, petitioner Dean Dimond attempted to hand-deliver public comments to Jerome County staff on August 3, 2007, exactly 15 days after the July 19, 2007 public notice publication. Supp. Rec., Vol. I, pp.185-193. The comments were from two of his immediate family members, his sisters Denette Ashcraft and Denise Steiner, and from Blaine Miller, a local dairyman and longtime resident of the area. *See id.* Art Brown refused to accept the documents and returned them on August 3, 2007. *Id.* at 187. Mr. Brown explained that, “the deadline for receiving information from all primary residence [sic] within one mile of the proposed Big Sky Farms LLC was 5 p.m. August 2, 2007.” *Id.* Mr. Brown also returned the comments received from Mr. Miller, but for a different stated reason than being late: because Mr. Miller was not “a residence [sic] within one mile of the proposed Big Sky Farms LLC.” *Id.* at 190.

Planning and Zoning personnel also refused to accept the comments, submitted on August 3, 2007, of Harold and Carolyn Dimond. The Dimonds own property that is contiguous with nearly one mile of the proposed LCO site. *Id.* at 191-92. Staff informed the Dimonds that they were not allowed to submit written comments for yet a third reason: because they were not “a residence” of that particular property. *Id.* at 193. While Harold and Carolyn Dimond do not actually reside on that property, they do maintain a farm on the land. As such, they were particularly concerned about the excess dust, manure, and flies that the proposed LCO would produce and that Big Sky planned to set up corrals along their fence line. *Id.* at 191-92.

On August 6, 2007, the Board cancelled the August 14-15 public hearing. The Board, recognizing that Mr. Brown had improperly interpreted the JCZO,² Phase I, Vol.I, Staff, p. 21, stated that cancellation was necessary because of the refusal to accept the submission of the above described written comments, Supp. Rec., Vol. I, pp.185-193, provided by Dean Dimond. To rectify that error, the Board rescheduled the public hearing for September 25-26, 2007. *Id.* On August 15, 2007, some property owners living within one mile of the proposed LCO received a mailed notice of the rescheduling. Phase I, Vol. I, Staff, pp 30-39. On August 23, 2007, public notice of the hearing was published for one day. This time, the public announcement made clear that the 15-day comment period closed on September 7, 15 days after the August 23 publication date. *Id.* at 36. The hearing procedures contained identical limitations on public comments as the original August 14-15 procedures. *Id.*

The Board held a meeting on September 10, 2007, in which it determined, based on comments from County Prosecutor Mike Seib, that the two minute testimony limitation it had imposed on oral testimony for the upcoming public hearing might be unconstitutional. Supp. Rec., Vol. I, p.172. The Board voted to increase the time for oral testimony to four minutes. If a person elected not to testify orally, they would be allowed to submit one additional 8.5" by 11" sheet of written testimony. *Id.* During the meeting, the Board considered delaying the hearing a second time, as several attorneys for entities opposing the proposed LCO had indicated that they could not be present to represent their clients during the September 25-26 time frame. *Id.* at 173.

Commissioner Obenauer noted that Richard Carlson, representing the Dimond family, and separate counsel for the National Trust for Historic Preservation would be unable to attend the hearing. *Id.* The Board, however, voted 2-1 against another delay. *Id.* The inability of various counsel for

² Specifically, Art Brown interpreted JCZO 13-6.02's 15-day public comment period to include the date of publication in the newspaper. *Id.*

opponents to attend the public hearing was a recurrent discussion at Board meetings, all resulting in a refusal to change the hearing dates. *See, e.g.*, Supp. Rec., Vol. I, pp. 173, 175-76 (motion to reschedule hearing “died for a lack of second”), 203. The new procedural limitations for the September 25-26 public hearing were mailed out to some citizens owning property within one mile of the proposed LCO site on September 11, 2007, Phase I, Vol. I, Staff, p. 39, and published in the newspaper on September 13. *Id.* at 60.

On September 13, 2007, the Board received a letter from attorney Patrick Brown, who had been hired the previous day to represent Wayne Slone, guardian of James Slone. Supp. Rec. Vol. I, pp. 303-305. The Slones own property located approximately 300 yards southeast of the proposed LCO site. *Id.* Under JCZO Chapter 13-6.01, the Slones were entitled to timely individual notice of both the August 14-15 and the September 25-26 hearings. *Id.* The Slones, however, received no such notice from Jerome County. *Id.* In his letter, Mr. Brown specifically requested that the hearing be delayed because his client required proper notice and because Mr. Brown was unavailable on those dates and his client had the right to be represented by counsel and to prepare for the hearing. *Id.*

The Planning and Zoning department delivered notice to the Slones by mail on September 14, 2007. Phase I, Vol. I, Staff, p. 45. On September 17, Art Brown explained to the Board that the Slones had not originally received notice from his office because there was no residence on the property. *Id.* at 46. Art Brown had incorrectly interpreted JSZO 13-6.01 as requiring that notice be sent only to property owners who resided on their property. *Id.* As a result of the improper notice, the Board considered delaying the hearing in its September 24 meeting. Phase I, Vol. I, Board of County Commissioners, pp. 58-59. County Prosecutor Seib informed the Board that he did not see any deficiency in notifying Mr. Slone of the hearing, this despite the fact that by the time Mr. Slone received notice the comment period for written testimony had already closed. *Id.* Mr. Seib also

informed the Board that nothing required them to delay the hearing any further. *Id.* Against Patrick Brown's and the Slones's insistence, the Board decided not to delay the hearing. *Id.*

The Big Sky LCO public hearing commenced on September 25, 2007. Phase I, Trans., p. 2. Opponents to the LCO were limited to four minutes of oral testimony and one sheet of 8.5" by 11" paper, single-sided, for written testimony. *See* Phase I, Vol. I, Staff, p. 9. John Lothspeich, attorney for Big Sky, opened the hearing by asking Commissioners to focus solely on whether the Big Sky application had met the requirements of JCZO Chapter 13. Phase I, Trans., p. 4. He stated that, "these are the sole and focal issues, the criterion for this Board to decide." *Id.* After reciting the requirements listed in Chapter 13, and how the Big Sky application purportedly met the requirements, Mr. Lothspeich reiterated that satisfaction of the Chapter 13 requirements "mandates LCO permit issuance in this matter." *Id.* at 13.

Opponents of the proposal then expressed their chief concerns related to the environmental and aesthetic problems posed by a 13,000-head LCO, including excessive odor pollution, flies, dust, light pollution, water consumption, the impact on the local water table, potential for respiratory illness, water pollution of nearby wells, and local traffic problems caused by the increase of large trucks. *See e.g.*, Phase I, Trans., pp. 19, 22-23, 42-44, 46-48, 58-59, 67. For instance, Ms. Ayers pointed out that the Board was required to consider other sections of the JCZO outside of Chapter 13, including the general ordinance that requires Jerome County to "protect each citizen from the undue encroachment on his private property[.]" *Id.* at 18. Xenia Williams believed that the 13,000-head facility would place an undue burden on the local water table and produce an excessive amount of manure. *Id.* at 22.

Neil King, superintendent of the Minidoka Site for the United States National Park Service, was extremely concerned that the proposed LCO's location – only 1.25 miles upwind from Minidoka – would have significant negative impacts on the integrity of the site. *Id.* at 28. Karen

Yoshitomi, regional director for the Japanese American Citizens League, testified that Chapter 13 of the JCZO only set the minimum standards that the Big Sky application was required to meet. *Id.* at 63. She testified, as did many others at the public hearing, that the proximity of the Minidoka Site to the proposed LCO was a circumstance compelling enough to justify denying the application. *Id.* Ms. Yoshitomi also showed the Board a picture of her family when they were prisoners at the Minidoka Site. *Id.* at 65. Some confusion arose as to whether the mere showing of a photograph constituted a submission of evidence for the record. *Id.* at 71. Ms. Yoshitomi thought the Board could benefit from her leaving the picture as an exhibit. *Id.* John Lothspeich, Big Sky's counsel, objected, pointing out that a person could only submit an 8.5 by 11 inch sheet of paper. *Id.* Ms. Yoshitomi was forced to remove the picture from its frame so that it conformed with the requirements imposed by the Board on written testimony. *Id.* at 72; *see also* Aff. of K. Yoshitomi at ¶ 8.

Cheri Candie expressed her disapproval of the proposed LCO by describing the potential effects 13,000 head of cattle would have on a nearby wildlife preserve. Phase I, Trans., p. 42. The Stewarts testified as to two issues. Fred Stewart, a resident within one mile, noted that the applicant's well map did not include a culinary well located on his property. *Id.* at 46. Janeil Stewart argued that the Big Sky application did not include any measures to protect the public against dust, flies, odor, and manure. *Id.* at 65. Lee Halper, an ICARE member, *see* Hasse Aff., ¶ 15, was adamant that the Board violated his due process rights by failing to accept numerous pieces of documentary evidence from him. *Id.* at 90. He had attempted to resubmit the information at the hearing, but was also limited to only one page. *Id.* at 88.

At the September 26 hearing, Carolyn Dimond testified that her due process rights had been violated by the Board's failure to provide her with individual notice, the Board's refusal to accept her written testimony, and the fact that her attorney, Richard Carlson, could not be present for the

public hearing. *Id.* at 217. There was, in her own words, “no way that in four minutes I can even begin to address what we have to say about this permit.” *Id.* Harold Dimond similarly testified that “there is no way that I can submit all my evidence [against the LCO] in four minutes or two pages.” *Id.* at 221. He was concerned about waste draining from the LCO onto his farm property, arguing that this constituted an undue burden, *id.* at 222, that Commissioners Davidson and Howell had denied him the opportunity to have an attorney present, and that Art Brown had denied him an opportunity to submit evidence prior to the hearing. *See e.g., id.* at 220, 222-226. Commissioner Howell questioned whether the Board had ever told Harold Dimond that he “could not bring an attorney.” *Id.* at 223. Mr. Dimond explained that his attorney, Richard Carlson, had another prior commitment to attend. *Id.* When he and his attorney requested the hearing be moved, the Board said that a lack of representation during the public hearing was “not a factor to be considered” and was “irrelevant.” *Id.* at 224.

Commissioner Howell pointed to documents in the record that the Board had received from Richard Carlson. *Id.* at 225. Howell believed that these letters demonstrated that Harold Dimond had been allowed to submit evidence. *Id.* at 226. Harold Dimond disagreed, pointing out that the letters received by the Board were from Richard Carlson acting on behalf of Dean Dimond, not him. *Id.* at 225. Further, he described how Art Brown had returned the evidence he tried to submit prior to the hearing date. Supp. Rec., Vol. I, pp. 191-93. Mr. Dimond was clear that, “[w]e [Harold and Dean Dimond] may have the same attorney, but we may not have the same opinion on 100 percent of the things that’s going on.” Phase I, Trans., p. 226. Later, Commissioner Howell asked County Prosecutor Seib to address “the discussion of who was not allowed to bring an attorney.” *Id.* at 250. Mr. Seib noted that Mr. Carlson could not be present, but flippantly pointed out that Harold Dimond was not restricted to just that attorney – “The yellow pages are full of them, I guess[.]” *Id.* Further, Mr. Seib said that “there is not necessarily a right, I guess, [to have an

attorney].” *Id.*

Eden Dimond spoke next, echoing the comments made before her, and noting her particular concern about the effects that the LCO would have upon her children’s health. *Id.* at 229. One of her children was born with underdeveloped lungs, making him especially susceptible to the kind of contaminants that an LCO produces. *Id.* at 230. Approval of the LCO, she stressed, would “effectively evict us from our home.” *Id.* at 231.

Alma Hasse asked the Board to clarify some procedural questions. *Id.* at 259. Commissioner Howell deferred to Mr. Seib, who indicated that Ms. Hasse had four minutes, regardless of the substance of her testimony. *Id.* Ms. Hasse protested, pointing out that the County’s notice said that the public would have four minutes of substantive testimony. *Id.* at 260. She requested that her procedural questions not be subject to the same time limit. *Id.* John Lothspeich objected: “Four minutes is four minutes.” *Id.* The Board limited Ms. Hasse to a total of four minutes. *Id.* at 261.

Alma Hasse’s testimony highlighted numerous negative impacts that the proposed LCO would have upon public health and the environment. *Id.* at 261. She noted that there were multiple members of ICARE living within several miles of the proposed LCO, and that those members had a property interest at stake. *Id.*; *see also* Hasse Aff. ¶¶ 6, 12-14. She then objected to the limitations imposed by the Board on public testimony, noting the tremendous amount of information to adequately evaluate the Big Sky application. Phase I, Trans., p. 263. She requested to submit six exhibits (many consisting of numerous pages) into the record, including eight audio CDs containing testimony from a different LCO-siting case that concerned state-wide nutrient management plans. *Id.*; *see also* Supp. Rec., Vol. II, pp. 271-273 (identifying documents attempted to be submitted). The Board denied the submission of any of these exhibits. Phase I, Trans., p. 264. Ms. Hasse noted that the procedures established by the Board pertained only to written

testimony, not to electronic media. *Id.* The Board dismissed this notion, relying on Mr. Lothspeich's opinion that the notice described the "intent of the commission that its written evidence to be submitted, exclusive to written evidence[.] And the [audio CD's] on that basis don't even fall within the criteria of the resolution." *Id.* at 265. Mr. Seib agreed, noting that "the intent [of the Board] was the one-sided document." *Id.* at 266. Commissioner Obenauer, however, wanted to have the information available if she needed to look at some other documents that had been "withheld because of our indecision as far as the 15 days and some other kinds of things." *Id.* at 267. Art Brown interjected that if "you're going to look at [the audio CD's and other exhibits], then it becomes evidence." *Id.* at 268. Commissioner Howell ended the discussion because he felt it conflicted with the advice obtained from Mr. Seib. *Id.*

Ms. Hasse then requested that she be allowed to question Big Sky's experts. *Id.* at 269. Commissioner Howell interrupted her in the midst of this request, informing her that time had expired. *Id.* at 271. Ms. Hasse responded: "I haven't had the ability to put forth my case." Howell responded that he "understood" that, but that the Board was not "going to run past the four minutes." *Id.*

Commissioner Obenauer then asked Ms. Hasse a set of questions relating to the Big Sky Nutrient Management Plan. *Id.* at 271-272. Ms. Hasse explained that, in a LCO hearing in a different county, she had submitted information showing that the amount of phosphorous excreted per cow was approximately double what Big Sky had indicated in its application. *Id.* This information suggested that Big Sky's nutrient management plan was faulty in that regard. *Id.* at 277. When Commissioner Obenauer responded, "Thank You," Ms. Hasse continued in her answer, as her sentence had not been completed. Immediately, John Lothspeich objected, saying that "She said, 'thank you.' That answered the question." *Id.*

Next, the Board heard testimony from Mr. Nelson, a member of the Jerome County

Planning and Zoning Commission. *Id.* at 278. Pertinent here is that Mr. Nelson requested that the Board listen to a tape recording of a Planning and Zoning hearing relating to the Minidoka Site. *Id.* at 279. The information contained in the tapes suggested that Neil King, director of the Minidoka Site, knew about the possibility of an LCO being placed nearby the facility. *See id.* at 278-280. When the Board began considering whether to introduce the tape into evidence, Mr. Seib and Mr. Lothspeich interjected. While the Board initially believed that they had to disallow the tapes due to the procedures they established for accepting testimony, *see id.* at 283, Mr. Lothspeich posited a different idea. He informed the Board that they could take official notice of the Planning and Zoning tapes pursuant Title 67 of the Idaho Administrative Procedure Act. *Id.* at 286. Mr. Seib believed that the Board could also introduce the tapes into evidence, but based upon the Board's own procedures it established for the Big Sky public hearing. *Id.* at 292. Ms. Hasse objected, but was never allowed to finish her statement, as Commissioner Howell requested that a bailiff remove her from the hearing. *Id.* at 287.

The Board then considered holding open the record so that Ms. Hasse's exhibits and Mr. Nelson's tapes could be considered. *Id.* at 297. The Board believed they could extend the public hearing for one hour the following Monday. *Id.* at 298. Mr. Lothspiech objected, stating that his client wanted "the hearing closed today at 12:00." *Id.* The decision to extend the hearing turned on Commissioner Davidson, who in the end wanted it closed that day. "I just see it getting out of control," he stated. *Id.*

Michelle Dimond then stated that she feared that the LCO's pollution would exacerbate her child's asthma and allergies. *Id.* at 299. She was concerned that the LCO would dramatically impact the quality of her and her children's lives, as they would no longer be able to enjoy the outdoors around their property. *Id.* at 300. Dennis Dimond testified that he was particularly worried about increases in the traffic along Highway 25, as his property is located on the blind side

of a hill very near the proposed LCO, and a bus stop was in close proximity to both properties. *Id.* at 303-304. Finally, Mr. Dimond pointed out – like many at the hearing – the numerous environmental problems the LCO would create, especially with regard to the local water table. *Id.* at 305.

Jim Stewart concluded the public testimony. Similar to Harold and Carolyn Dimond, Mr. Stewart was unable to have his attorney present at the public hearing. *Id.* at 308-09; 311. He urged the Board to consider his rights and those of the parties who were not granted the ability to participate fully in the hearing, such as the Slones. *Id.* at 309. Mr. Stewart told the Board to take a close look at JCZO Chapter 13-1.01, which required considering the entire ordinance when making an LCO permitting decision. *Id.* at 310. After pointing out numerous ways that the application was incomplete, including the incompleteness of the Hillsdale Highway letter, Phase I, Vol. I, Agency, p. 6, and lack of letter from the Valley School District until July 28, over two months after the application was filed, Phase I, Trans., p. 313, Mr. Stewart concluded: “I don’t care if [Big Sky] puts a million cows over there. I’ll help [them] go pour the cement as long as he’s got some way to keep the flies and the dust and the odor and the pathogens off my property....But he can’t, at least not yet...and so, he doesn’t have a right to go there.” *Id.* at 316-317.

At the conclusion of the September 26 hearing, Mr. Lothspeich pointed out that the application was complete in all aspects. *Id.* at 320. He urged the Board that they must approve the application if it met the Chapter 13 requirements of the JCZO. *Id.* He finished his closing remarks by telling the Board that its “sole inquiry” was whether the applicant satisfied the criteria in Chapter 13. *Id.* at 325. If so, “you’re mandated to issue a permit in this case.” *Id.* Following Mr. Lothspeich’s statement, Mr. Seib reminded the Board that it had to determine whether or not it would accept the exhibits Ms. Hasse wished to provide. *Id.* at 330. Commissioner Howell said he would let them be submitted in an envelope, given to Art Brown. *Id.* at 336. But in terms of

examining the exhibits, Howell stated that, “[w]e will not open the envelope and will not present it to the Board at this time to be considered.” *Id.*

The Board concluded the hearing by announcing that it would reach a final decision at its October 9, 2007 meeting.³ *Id.* at 335. At the October 9 meeting, Patrick Brown, attorney for the Slones, again told the Board that his client’s rights had been violated by the lack of notice and opportunity to be heard in this matter. Phase I, Vol. III, Docs marked exhibits CC45-CC94, p. 85.⁴ Mr. Brown requested that the Board vacate the September 25-26 hearings and schedule a new hearing so that the Slones could present their testimony. *Id.* Mr. Seib informed the Board that Mr. Brown’s comments were irrelevant, and that its decision to approve or deny the application must be based on the appropriate ordinances. *Id.* Commissioner Obenauer expressed concern about well contamination, the health of residents near the cow confinement facility, local wildlife, including burrowing owls, and the effect of the LCO on the Minidoka Site. *Id.* Commissioner Davidson believed that approval of the LCO would increase the number of cows in Jerome County to a level that would exceed a “one-cow-per-acre” rule. *Id.* Davidson then made a motion to deny the application, which was seconded by Commissioner Obenauer. *Id.* at 86. The Big Sky LCO application was denied 2-1. *Id.*

The Board approved a memorandum decision discussing its rationale for denying the Big Sky LCO application on November 1, 2007.⁵ *Id.* at 95; *see also id.* at 47. The bulk of the opinion

³ Commissioner Obenauer did not agree with the vote to close the record. She wished to visit the Big Sky site for herself, as well as to consider the various exhibits that had not been allowed into the formal record. *Id.* at 337.

⁴ No transcript of this proceeding was kept, only minutes, constituting another procedural irregularity.

⁵ Commissioner Obenauer sent an October 31, 2007 memo to Commissioners Howell and Davidson objecting to their determination that November 1, 2007 was the cut-off for finishing findings of facts and conclusions of law. Obenauer believed more time was required to adequately complete the County’s written decision on the Big Sky application. Supp. Rec., Vol.

discussed the completeness of the application with regards to JCZO Chapter 13. *Id.* at 48-51. The decision noted that, while the application satisfied the requirements of JCZO Chapter 13, it must also comply with the County's comprehensive plan, which set forth standards "considered relevant by the Board to this particular application." *Id.* at 51. Specifically, the decision noted that the LCO did not adequately address concerns about phosphate pollution and its impacts on the local soil. *Id.* at 51-52. The application was therefore denied, ensuring that, "Jerome County soils remain vibrant for future generations to come, and do not die from an ever-increasing accumulation of phosphate pollution." *Id.* at 52.

Don McFarland and Big Sky appealed the Board's decision to the Jerome County District Court. Phase I, Vol. III, Appeal, p. 3. Big Sky asserted that the Board's sole reliance upon the County comprehensive plan in denying its application was an improper application of the County's ordinances. Phase II, AR, p.26. Specifically, Big Sky argued that the ordinances merely required an applicant to meet the exact criteria listed in Chapter 13, and nothing more. *Id.* The District Court issued its amended memorandum decision on July 8, 2008, holding that the Board could not *solely* rely upon the County comprehensive plan in denying the application. *Id.* at 34. Judge Bevan did not accept Big Sky's position that Chapter 13 alone applied, but instead noted that the Board "may find some other valid basis upon which to deny Big Sky's LCO permit application." *Id.* at 38. The court reversed the Board's decision and remanded the case back to Jerome County for further proceedings. *Id.* at 43.

The Board first addressed the District Court's remand on July 28, 2008. *Id.* at 45. Without making specific reference to any part of the Court's decision, Mr. Seib informed the Board that the County's ordinances did not allow the Board to consider any information other than whether the

I, p. 161. Commissioner Obenauer later noted that she had been excluded from the process of approving the Board's factual findings. Supp. Rec., Vol. II, p. 334.

Big Sky application was complete. *Id.* On August 4, Dean Dimond requested that the Board consider reopening the record for the Big Sky permit.⁶ *Id.* at 55; *see also* Supp. Rec., Vol. I, pp. 215-217. Mr. Dimond insisted that he had additional evidence for the Board to consider before it rewrote its decision on the application. Supp. Rec., Vol. I, p. 215. The JCZO, Mr. Seib opined, did not allow the Board to approve or deny an application except on the basis of whether it was complete. Phase II, AR, p. 55. Commissioners Howell and Davidson then voted against reopening the Big Sky record, with Commissioner Obenauer voting for reopening. *Id.* at 56.

On August 11, 2008, the Board again discussed the Big Sky remand. Phase II, Trans., Aug. 11, 2008, pp. 3-72. Mr. Seib again opined that the Board could only consider whether the application was complete, and nothing more.⁷ *Id.* at 4. Commissioner Obenauer wished to discuss a memorandum she had prepared on the Big Sky application. *Id.* at 5. Mr. Seib protested, advising the Board not to conduct independent research – stating his legal opinion that the judge on remand had instructed the Board to consider “limited issues.” *Id.* at 20. Mr. Seib did not cite any part of the opinion to back up his position. *See id.* at 20-23. Commissioner Obenauer disagreed with Mr. Seib’s opinion. *Id.* at 33-35. Richard Carlson, attorney for the Dimond families, asked that he, as well as Mr. Lothspeich, be granted 15 minutes to present argument to the Board concerning the meaning of the Court’s decision. *Id.* at 23, 31. Mr. Lothspeich responded, arguing that the Court “said this LCO permit should have been granted” and that the application was “egregiously overdue.” *Id.* at 32. The Board acceded to Mr. Lothspeich’s demand as there were no more arguments on the matter by counsel.

⁶ Again, no transcript of the August 4, 2008 hearing was made.

⁷ Interestingly, when Commissioner Obenauer suggested that the Board would need to consider Article 1 of the Idaho State Constitution – “All men by nature, free and equal have certain unalienable rights” – Mr. Seib rejected that notion. Whether or not a permit was in accord with the Idaho State Constitution was “not going to be an application requirement.” *See id.* at 10.

After discussion about placing conditions on approval of the application (such as requiring a turn-out for school buses), and incompleteness of the application based on the failure to submit complete agency comment letters, sink holes, and well maps, the Board turned to what it could actually consider in rewriting its decision. *See e.g., id.* at 43-44, 46-48. Commissioners Davidson and Howell both insisted that the application was complete, and there was concern that if they did not approve the application a court would again reverse the Board's decision. Phase II, AR, p. 63. Commissioner Davidson stated that, "as far as I'm concerned, I think we have to approve it. Let's get away from it, I'm sick of it." Phase II, Trans., p. 71. While no formal vote was held, it was apparent that Commissioners Howell and Davidson were for approving the permit, with Obenauer against. *See id.* at 72. It was agreed that Mr. Seib would write a decision reflecting the majority view. *Id.* at 73.

On September 2, 2008, Richard Carlson, the Dimonds' attorney, requested that he be allowed to comment on the Big Sky discussion. Phase II, AR, p. 68.⁸ Mr. Lothspeich objected to any commentary, stating it would impermissibly reopen the record. *Id.* Mr. Lothspeich believed that, because the Board tentatively voted to approve the application at the August 11 hearing, all that was now permitted was having "the decision handed to us." Phase II, Trans., p. 9. The Board, however, agreed to allow Carlson to speak, but did not record it. *Id.* Mr. Carlson began by noting that the Board had previously stated that it was searching for a reason to deny the application. He suggested that he could prepare a memorandum that would support a denial. Phase II, AR, p. 68. He also suggested that counsel for Big Sky could do the same. The Board rejected this proposal, and Commissioner Howell stated, again unrecorded, that he believed the Board's legal counsel, Mr. Seib, had done a satisfactory job handling the legal issues. *Id.* at 69. The Board tentatively stated

⁸ The transcripts did not reflect parts of the discussion that were represented in the minutes. Yet another procedural irregularity.

that it had decided to approve the Big Sky application, but was going to apply conditions to the approval. *Id.* at 68. Those conclusions would be discussed at a later hearing. *Id.*

During some point in 2008, the Big Sky LCO property was sold to defendant South View Dairy, an Idaho general partnership. Mr. Lothspeich appeared before the Board on September 9, 2008 to address an article that had been published in the local newspaper. Phase II, AR, pp. 90-91. He urged the Board not to delay the Big Sky application any further, pointing out that the permit ran to the land, not to the owner of the land. *Id.* at 91. Dean Dimond, present at the meeting, objected to any discussion of the Big Sky matter, as it was not part of the Board's agenda for that day. *Id.* at 90. The Board refused to allow Mr. Dimond to speak, reminding him that his attorney, Richard Carlson, had been told that neither attorney was permitted to add evidence to the record. *Id.* Mr. Lothspeich, however, was able to complete his remarks. *See id.*

The final Big Sky hearing after remand took place on September 22, 2008. *Id.* at 93. Commissioner Howell had prepared a statement on the matter in which he reminded the Board that it needed to be free of any bias in reaching a decision and stressed that the Board could only consider the completeness of the application, and nothing more. *Id.* Eden Dimond objected to this statement, but was refused an opportunity to speak. *Id.*; *see also* Phase II, Trans., Sept. 22, 2008, p. 6. She believed that Mr. Lothspeich had been granted an opportunity to present additional evidence into the record where others had not. *Id.* The Board then outlined the conditions it required for an approval of the application, including the Hillsdale Highway district letter and the requirement that a turnout be built for school bus access and that a leaching study be completed. *Id.* at 6-10. After a brief recess, the Board reconvened to hear a statement by Alma Hasse. Phase II, AR, p.109.⁹ Commissioner Obenauer believed the record required reopening, but the rest of the Board

⁹ Once again, the Board failed to record Ms. Hasse's statement, creating further procedural irregularity.

disagreed. *Id.* The Board then voted 2-1 to approve the Big Sky application. *Id.*

In its written memorandum decision, dated September 23, 2008, the Board noted that it could only consider three factors in deciding the outcome of the application: (1) whether the application is complete; (2) whether the site is located in an Agricultural A-1 Zone; and (3) whether the application complies with the provisions of Chapter 13 and the JCZO. Phase II, AR, p. 112. Because it believed the application satisfied the requirements of Chapter 13, the Board, by a 2-1 vote, decided that the permit was required to be issued. *Id.* at 113. Absent from the Board's decision is any mention of whether the application complies generally with the requirements of the JCZO. Also absent was a reasoned discussion of the opposition's documentary evidence and testimony.

On October 21, 2008, petitioners herein timely appealed the Board's decision to approve Big Sky's 13,000-head LCO application.

ISSUES PRESENTED FOR REVIEW

- A. Did the failure to give notice and opportunity to comment to a landowner within one mile of the proposed facility, and the failure to continue the hearing to allow participation of counsel, violate procedural due process requirements in violation of constitutional or statutory provisions and ordinances?
- B. Did the Board's invocation of Idaho Code § 67-6529 and Jerome County Zoning Ordinance 13-6.02 to restrict written testimony from affected individuals who lived more than one mile from the proposed facility violate state and federal constitutional due process rights to meaningfully present and rebut evidence?
- C. Was the Board's decision to grant the LCO application based upon unlawful procedure because the Board failed to apply its own ordinances?
- D. Were the decisions of the Board arbitrary, capricious, or an abuse of discretion?
- E. Did the Board fail to follow the provisions of Jerome County ordinance Chapter 19 relating to the requirement for appeals of decisions to reopen the record?
- F. Were the decisions of the Board consistent with the provisions of Jerome County ordinances relating to the requirement for completeness of applications for livestock confinement operations?

- G. Did the Board's decision violate Idaho Code § 67-6535 to the extent that it failed to provide a "reasoned statement" for its decision?
- H. Are Petitioners entitled to attorney's fees incurred in bringing this Petition pursuant to Idaho Code § 12-117?

STANDARD OF REVIEW

Idaho's Local Land Use Planning Act (LLUPA), Idaho Code § 67-6501, *et seq.*, allows for judicial review of local government decisions concerning land use permits issued or denied pursuant to the LLUPA. I.C. § 67-6519(4)(c) provides that the review pursuant to the procedures described in the Idaho Administrative Procedure Act (IDAPA), I.C. § 67-5201, *et seq.*

I.C. § 67-5279 provides that a reviewing court shall not substitute its judgment for that of the agency as to the weight of the evidence. I.C. § 67-5279 (1). The court shall affirm the agency's decision unless the court finds that the agency's findings, inferences, conclusions, or decisions were: in violation of constitutional or statutory provisions; in excess of the statutory authority of the agency; made upon unlawful procedure; not supported by substantial evidence in the record as a whole; or arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). There is a strong presumption in favor of the validity of the action of zoning boards. *Howard v. Canyon County Bd. of Comm'rs*, 128 Idaho 479, 480, 915 P.2d 709, 711 (1996); *Evans v. Bd. of Comm'rs of Cassia County Idaho*, 137 Idaho 428, 50 P.3d 443 (2002). However, the discretion of the governing board of the county in zoning matters "is not unbounded." *Sanders Orchard vs. Gem County, ex. rel. Bd. of County Comm'rs*, 137 Idaho 695, 698, 52 P.3d 840, 843 (2002) (citing *Urrutia vs. Blaine County*, 134 Idaho 353, 2 P.3d 738 (2000)).

The court should defer to the Board's interpretation of its zoning ordinance unless that interpretation or application is arbitrary, capricious, or an abuse of discretion. *Rural Kootenai Organization, Inc. v. Bd. of Comm'rs*, 133 Idaho 833, 842, 993 P.2d 596, 605 (1999). The party challenging a Board's action must also show that substantial rights of the party have been or will be

prejudiced. I.C. § 67-5279 (4); *Casteneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998).

A party is entitled to reversal of a land use decision if it demonstrates that a land use decision will cause actual harm or if the process results in a violation of fundamental rights. I.C. § 67-6535. If the Board's action is not affirmed, "it shall be set aside, in whole or in part, and remanded for further proceedings as necessary." I.C. § 67-5279(3).

ARGUMENT

The Board's decision to grant the Big Sky LCO permit must be reversed for any or all of the following reasons. First, the Board failed to give the required notice to a landowner within one mile of the proposed facility in violation of its own ordinance and due process requirements. Second, the procedures established by the Board both before and during the Big Sky hearing are unconstitutional violations of procedural due process in that they denied affected persons the right to present and rebut evidence, including having counsel present. Third, JCZO 13-6.02 and Idaho Code § 67-6529 are unconstitutional because they violate petitioners' substantive due process rights under the state and federal constitutions. Fourth, the Board failed to follow the *entire* JCZO throughout the process, making its approval of the Big Sky permit tainted by unlawful procedure. Fifth, the Board improperly denied the motion to reopen the hearing on remand to take into account new evidence. Sixth, the Board acted arbitrarily, capriciously, and outside the limits of its discretion when it wrongly found that the Big Sky application was complete. And seventh, the Board failed to provide a reasoned statement of its decision to approve the application. Because of these numerous legal shortcomings, this Court should reverse the approval of the Big Sky application, find I.C. § 67-6529 and JCZO 13-6.02 unconstitutional, and instruct the Board to properly consider and apply all of its ordinances on remand, including JCZO 1-3.01 and 1-6.01. Such remand would require, among other things, new public hearings with proper notice and a

meaningful opportunity to present and rebut evidence.

I. Petitioners herein have standing to challenge the Board's approval of the Big Sky application.

As a threshold matter, petitioners herein have standing to challenge the Board's approval of the Big Sky application. First, the Dimond and Slone petitioners, in their individual capacities, have standing as they are real property owners in proximity to the proposed LCO site adversely affected by the Board's approval of the application. Second, the petitioner organizations have standing because the interests implicated by this case are germane to the purposes of the organizations, at least one of their individual members has standing in her own right, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Where one petitioner is found to have standing, the remainder of the petitioners are presumed to have standing. *See Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. 252, 264, and n. 9 (1977) (courts need not consider standing as to every plaintiff; it is enough that one plaintiff meet the standing requirement).¹⁰

Idaho's Local Land Use Planning Act ("LLUPA"), I.C. § 67-6501, et seq., (2009), allows an affected person to seek judicial review of an approval or denial of a land use application. *Evans v. Teton County*, 139 Idaho 71, 74, 73 P.3d 84, 88 (2003). Specifically, standing is conferred upon "affected persons" that are aggrieved by a local land use decision. I.C. § 67-6521(d). "Affected persons" are those who have "an interest in real property which may be adversely affected by the issuance or denial of a permit authorizing the development." I.C. § 67-6521(a). Idaho courts will not look to predetermined distances in determining whether an interest in real property may be

¹⁰ Idaho courts generally follow U.S. Supreme Court precedent in determining whether an organization has standing. *See Glengary-Gamlin Protective Ass'n v. Bird*, 106 Idaho 84, 87 (Idaho Ct. App. 1983) (applying U.S. Supreme Court precedent to determine whether organization had standing).

adversely affected. *Evans*, 139 Idaho at 75. Rather, “the existence of real or potential harm is sufficient to challenge a land use decision.” *Id.* at 76; *see also Schneider v. Howe*, 142 Idaho 767, 772, 133 P.3d 1232, 1237 (2006) (standing may be predicated on threatened harm or past injury).

All petitioners have standing to challenge the Board’s approval of the Big Sky permit due to the proposed existence of a 13,000-head LCO threatening significant harm to their land, persons and interests. The relief requested herein will substantially redress Petitioners’ injuries. They all attempted to meaningfully participate in the LCO process and were significantly impaired from doing so, as discussed throughout this brief and as supported by the record.¹¹

II. Jerome County, by and through the actions of its Board of Commissioners and Planning and Zoning staff, violated petitioners’ constitutional procedural due process rights.

Jerome County violated petitioners’ constitutionally protected due process rights. The 14th Amendment to the United States Constitution provides, in part, that, “no State shall make or enforce any law which shall...deprive any person of life, liberty, or property, without due process of law[.]” Additionally, the Idaho State Constitution states in Article 1, Section 13 that, “[n]o person shall...be deprived of life, liberty or property without due process of law.” While the scope of Idaho’s due process clause is considered solely with regard to the Idaho State Constitution, *Cootz v. State*, 117 Idaho 38, 40 (1989), Idaho courts supplement their due process analysis by turning to the U.S. Supreme Court’s interpretation of the 14th Amendment. *See, e.g., State v. Peterson*, 81 Idaho 233, 236 (1959).

¹¹ All Petitioner organizations have submitted affidavits that establish their respective standing to challenge the Board’s action. Some petitioners have members who live within one mile of the proposed LCO (*see, e.g., ICARE/Hasse Aff.* ¶¶ 12-13; *IRC/Carlson Aff.*, p.1 (Dimonds are members), while others’ organizational members visit, and will continue to visit, the Minidoka Site regularly. *See Momohara Aff.*, ¶ 5; *Yoshitomi Aff.*, ¶ 12; *Hartig Aff.*, ¶ 5; *Everhart Aff.*, ¶ 7. Petitioners do not intend to go into further detail about the contents of those affidavits and their application to the law on standing unless necessary.

A. Procedural Due Process Violations.

Procedural due process ensures that the process whereby a government deprives an individual of life, liberty, or property is fair and adequate. Under this doctrine, due process takes on a flexible approach, calling for such procedural protections as are warranted by a particular situation. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). In essence, it requires that some process be provided to guarantee that an individual is not arbitrarily deprived of his or her rights in violation of the state or federal constitutions. *Cowan v. Bd. of Comm'rs of Fremont County*, 143 Idaho 501, 510, 148 P.3d 1247, 1256 (2006) (citing *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 91, 982 P.2d 917, 926 (1999)). In the planning and zoning context, procedural due process requires: “(a) notice of the proceedings, (b) a transcribable verbatim record of the proceedings, (c) specific, written findings of fact, and (d) an opportunity to present and rebut evidence.” *Chambers v. Kootenai County Bd. of Comm'rs*, 125 Idaho 115, 118, 867 P.2d 989, 992 (1994). This court may exercise free review of due process violations, as they are generally matters of law. *See Idaho Historic Preservation Council, Inc. v. City Council of City of Boise*, 134 Idaho 651, 654, 8 P.3d 646, 649 (2000).

Jerome County violated petitioners’ procedural due process rights in two primary ways. First, the County failed to provide actual notice of the Big Sky hearing to all property owners within one-mile of the proposed LCO site. Second, the County failed to provide petitioners an opportunity to present and rebut evidence by limiting the substance of public comment and written testimony both prior to and during the September 25-26, 2007 public hearing and by denying certain petitioners the opportunity to be represented by counsel.

1. Jerome County violated petitioner James and Wayne Slone’s procedural due process rights.

Jerome County violated the Slones’ procedural due process rights by failing to provide them

with individual notice of the Big Sky hearing as required by Jerome County ordinance. Wayne and James Slone own property located approximately 300 yards from the proposed LCO site. Supp. Rec., Vol. I, pp. 303-305. A fundamental requirement of procedural due process is notice. *Cowan*, 143 Idaho at 510. As such, the absolute failure to provide notice of a public hearing has been found to violate procedural due process. See *Cooper v. Bd. of County Comm'rs*, 101 Idaho 407, 411 (Idaho 1980) (board's failure to provide notice of second hearing on land use application, among other things, held unconstitutional).

In the present case, JCZO § 13-6.01, Supp. Rec., Vol. I, p. 20, as it stood at the time the Big Sky application was submitted, governed the County's notice requirements. See *Payette River Prop. Owners Ass'n v. Bd. of Comm'rs*, 132 Idaho 551, 555 (1999) ("Idaho law is well established that an applicant's rights are determined by the ordinance in existence at the time of filing an application for the permit"). In pertinent part, the ordinance provided that, "[t]he Administrator shall...send the notice [of hearing] by mail to all property owners within one mile of the boundaries of the contiguous property owned by the applicant of the proposed LCO pursuant to Idaho Code 67-6529."¹²

Two additional Idaho cases discuss the notice issue, but neither is directly on point like the *Cooper* case. In the first case, a board's defective notices of a public hearing were found not to violate procedural due process. *Cowan*, 143 Idaho at 510. The plaintiff there argued, *inter alia*, that his procedural due process rights were violated by the Fremont County Board of Commissioner's issuance of defective notices of hearing dates. *Id.* at 513. The notices were allegedly defective because they failed to include a number of items required by the county's ordinance. *Id.* Fremont County conceded that two of the three notices were defective and

¹² As Commissioner Howell ironically noted in the context of hearing testimony procedures: "We have no discretion in this matter as we must follow our ordinances and law." Phase I, Vol. I, Staff, p. 7.

subsequent notices were issued. *Id.* That the notices were defective, however, was not enough to violate procedural due process. *Id.* The Court found that plaintiff had not demonstrated that his rights had been “substantially prejudiced” by the defective notices. *Id.* In particular, the plaintiff and his attorney had physically attended a Board of Commissioner’s meeting where they formally objected to the defectiveness of the notices. *Id.* According to the Court, plaintiff’s actions demonstrate that he was not prejudiced by the notices, because he “clearly had notice of the meeting” as exemplified by his attendance. *Id.*

In the second case, a board’s failure to provide notice of a final hearing on a subdivision application was found not to violate procedural due process. *Neighbors for a Healthy Gold Fork v. Valley County*, 145 Idaho 121, 128 (2007). The plaintiffs in that case alleged a violation of due process because they were unsure which plat the board was considering approving – an initially proposed preliminary plat or a modified plat. *Id.* The two facts that were key to the Court’s holding that no constitutional violation had occurred were first that the plaintiff’s attorney had been present at the *initial* hearing where the Board discussed the possibility of considering the modified plat, thus the plaintiffs had been effectively put on notice that revisions to the preliminary plat were in the works. *Id.* Second, the county had sent plaintiff’s attorney a copy of the modified plat on April 20, 2005, approximately two weeks before the final hearing took place. *Id.* These circumstances led the Court to conclude that no due process violation had occurred.

In this case, the Slones, property owners within one mile of the proposed facility, did not get *any* required notice until *after* the comment period for written testimony was already closed. Patrick Brown, on behalf of the Slones, informed the Board of this defect by letter on September 13, 2007, Supp. Rec., Vol. II, pp. 303-05, and gave them an opportunity to cure the defect, but the Board failed to correct the problem. Instead, on September 14, just 11 days before the hearing, the

County, after realizing its failure to comply with its own ordinance, sent notice to the Slones.¹³

Phase I, Vol. I, Staff, p. 45. The defective notice could not be cured, however, because the written testimony period had closed on September 7, fifteen days after publication of notice in the newspaper. Phase I, Vol. I, Staff, p. 36.

To further compound the due process violations, I.C. § 67-6529(2) provides in part that, “[o]nly members of the public with their primary residence within a one (1) mile radius of a proposed [LCO] site may provide comment at the hearing.” No doubt the respondents will raise this state-available limitation as an excuse for why the Slones weren't legally prejudiced. But such argument fails for a number of reasons. The first reason is that the ordinance required notice and none was given until too late in the process. The second reason is that the one mile residency requirement is unconstitutional both as applied and on its face. Furthermore, the state limitation applied only to public testimony *at the hearing* and Jerome County had already altered the eligibility for testifying at the public hearing as allowed by the statute. *Id.*, (“distance may be increased by [any county] board”); Phase I, Vol. I, Staff, p. 37. The County could not, however, change the plain language of the notice requirement without amending its ordinance (which it did well after the hearing- *see, e.g.*, Supp. Rec., Vol. II, p. 334).

In addition, Mr. Brown, in the same letter of September 14, also requested that, because he was not available on those dates, the September 25-26 hearing be rescheduled so that he could represent the Slones at the hearing. Supp. Rec., Vol. II, p. 304. The Board denied the request to move the hearing. Supp. Rec., Vol. I, pp. 175-76.

Unlike the plaintiff in *Cowan*, who was not “substantially prejudiced” by his receipt of defective notices, here the Slones had not received *any notice at all* of the proposed LCO facility.

¹³ P&Z Director Art Brown incorrectly represented to the Board that he had served the Slones by letter on September 8, 2007. *See* Supp. Rec., Vol. I, p. 175; *cf.* Phase I, Vol. I, Staff, p. 45 (showing notice not sent until Sept. 14).

This substantially prejudiced the Slones, as they had no knowledge whatsoever about the Big Sky hearing until it was too late to meaningfully participate. Patrick Brown's letter to the Board expressing as much does not rise to the same level of involvement that the attorney had in *Cowan*. There, the attorney was able to be *physically present* and *formally object* to the defective notices in front of the board. This is far different from Patrick Brown's letter, which focused on the absolute lack of notice. *Neighbors* is likewise inapposite. Whereas the plaintiff's attorney in *Neighbors* had been present for the first subdivision meeting, here Patrick Brown's only involvement at this point was the letter addressed to the Jerome County Board of Commissioners. Mr. Brown also had not received anything in terms of a formal record, quite unlike the *Neighbors* attorney who had full access to the modified plat two weeks before the final hearing. As such, Jerome County violated the Slones's procedural due process rights when it failed to provide them adequate notice of the Big Sky hearing.

2. Jerome County violated petitioners' procedural due process rights by drastically limiting public comments and written testimony prior to and during the September 25-26 hearing.

Jerome County violated petitioners' procedural due process rights by denying them the opportunity to meaningfully participate in public comments and written testimony prior to and during the September 25-26, 2007 public hearing. As set forth above, procedural due process in the planning and zoning context requires that individuals be granted the right to present and rebut evidence. *Chambers*, 125 Idaho at 118. This opportunity to be heard must take place "at a meaningful time and in a meaningful manner." *Cowan*, 143 Idaho at 513 (*citing* Castenda, 130 Idaho at 926). The right to be heard is so fundamental to due process that the Idaho Legislature mandates that, at a minimum, all hearing procedures established by a board of commissioners "shall provide an opportunity *for all affected persons* to present and rebut evidence," I.C. § 67-6534 (2009) (emphasis added), regardless of any predetermined distance. *Evans*, 139 Idaho at 75.

The opportunity to be heard must be more than just available, it must also be meaningful. The opportunity to present and rebut evidence is an element of due process which is inferred from the right to notice. *Chambers v. Kootenai County*, 125 Idaho at 117 (citing *Gay v. County Comm'rs of Bonneville County*, 103 Idaho 626, 651 P.2d 560 (Ct. App. 1982)).

For instance, within the public hearing context, the Idaho Supreme Court has suggested that limiting public comments to a mere two minutes is “not consistent with affording an individual a meaningful opportunity to be heard.” *Cowan*, 143 Idaho at 512. Further, there is an implied impairment of procedural due process rights when an individual’s *attorney* is not allowed an opportunity to present and rebut evidence. *See, e.g., Neighbors for a Healthy Gold Fork*, 145 Idaho at 133 (no due process violation where plaintiffs’ attorney *had* chance to present a binder of evidence and present oral testimony); *Cowan*, 143 Idaho at 513 (no due process violation where plaintiff’s attorney *had* chance to speak at length and present evidence at multiple hearings). In this case, three of the petitioners sought the opportunity for counsel to present and rebut evidence, Supp. Rec., Vol. I, pp. 175-76, but were unconstitutionally thwarted from being represented by counsel.

The Board of Commissioners established the following guidelines for the presentation and rebuttal of evidence at the September 25-26 public hearing:

Oral testimony for the Principal representatives for the applicant shall have 20 minutes, the principal for the opposition shall have 15 minutes and each interested party shall have 4 minutes. Only one-sided document no larger than 8½” X 11” that is sufficiently legible, handwritten or typed in any standard font provided the type size not less than 12 point pica in any standard font provided the type may not be smaller than 12-point standard Times News roman. An individual may submit two page(s) document(s) no larger than 8 1/2” X 11” that is sufficiently legible, handwritten or typed in any standard font provided the type size not less than 12 point pica in any standard font provided the type may not be smaller than 12-point standard Times News roman if they don’t give any oral testimony the night of the hearing.

Phase I, Vol. I, Staff, p. 37.

These restrictions did not grant interested persons an opportunity to present and rebut

evidence in a meaningful way. Although the Board allowed oral and written comment from individuals living outside the one mile radius during the public hearing, neither one or two pages of written testimony, nor four minutes of oral presentation without the ability to provide relevant written testimony, were adequate for meaningful participation. For instance, Alma Hasse, executive director of ICARE, had twice unsuccessfully attempted to submit six exhibits, comprising scores of pages and additional audio files, into the record. *See* Supp. Rec., Vol. II, pp. 271-75. The Board eventually agreed to accept the exhibits, but noted that it would not look at or consider the evidence in reaching its decision. Phase I, Trans., p. 336. Having been denied the opportunity to submit, and have considered, meaningful evidence of the environmental and health harms caused by large concentrated feeding operations (named “LCOs” in the Jerome County Zoning Ordinances) such as Big Sky, Ms. Hasse attempted to present and rebut evidence orally, but was cut off when her four minutes of allotted time expired. *Id.* at 270. When she stated that, “I haven’t had the ability to put forth my case,” the Board was unfazed. It was not, “going to run past the four minutes.” *Id.* at 271.

Petitioners are not claiming that they should have all been given unlimited time to present testimony, but just that if their time was going to be so limited that they must then have had the opportunity to present substantiated written evidence. Limiting to one or even two pages of written documents does not allow for meaningful participation for a facility as potentially devastating as a large concentrated animal feeding operation such as proposed by Big Sky. The Big Sky application alone was 400 pages. Phase I, Vol. I, Exhibits submitted by Applicant, pp. 4-519. Further, many of the parties – including the National Trust for Historic Preservation, the Dimond families, the Stewarts, and the Slones– were unable to have their attorneys present at the Big Sky hearing. Counsel for the applicants, however, was in attendance the entire time.

LCO siting is a fact-intensive process. The consequences are great on all sides. Because it is impossible for local governments to test the exact impacts of the LCO on the particular land and individuals in close proximity to the LCO, the government must rely on outside evidence in order to realize the possible implications of its decision. The Board's severe limitations on public comment and testimony during the Big Sky hearing adversely affected this process, decreasing the amount of information available to the Commissioners in making this important decision.¹⁴ By failing to provide the public with a meaningful opportunity to present and rebut evidence, the Board violated petitioners' procedural due process rights.¹⁵

B. I.C. § 67-6524 and JCZO 13-6.02 are unconstitutional because they violate petitioners' substantive due process rights.

I.C. § 67-6529 (2) and JCZO 13-6.02 are also unconstitutional because they violate petitioners' substantive due process rights. Both the Idaho Constitution and the Federal Constitution ensure that every citizen is guaranteed due process under the laws.¹⁶

¹⁴As discussed, *supra* at Section VI, the Board also failed to reasonably consider the evidence that was allowed to be submitted by opponents of the proposed LCO.

¹⁵ In addition to the procedural due process problems, alternatively the Board acted in excess of statutory authority by denying affected persons a right to present and rebut evidence. I.C. § 67-6534 requires that a governing board "adopt procedures for the conduct of public hearings." At a minimum, "such hearing procedures shall provide an *opportunity for all affected persons to present and rebut evidence.*" *Id.* (emphasis added).

¹⁶ Section 13, Article I of the Idaho Constitution states, in pertinent part:

No person shall be twice put in jeopardy for the same offense; nor be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property without due process of law.

The Fourteenth Amendment to the U.S. Constitution states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Substantive due process protects individuals from arbitrary government actions by requiring a sufficient relationship between the government action and the interest the government seeks to advance. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). If a governmental action works to interfere with the basic rights protected by due process – life, liberty, and property – then a substantive due process violation has occurred. Whether that violation is invasive enough to justify overturning the government action turns on the type of “right” being infringed upon and the governmental interest in depriving that right.

When examining legislation that involves social or economic interests, Idaho courts assume a deferential standard of review. *Matter of McNeely*, 119 Idaho 182, 190 (1990). The Idaho Supreme Court defines this deferential standard as requiring a law to bear a reasonable relationship to a permissible legislative objective. *Id.* A substantive due process violation occurs when “the government body could have had no legitimate reason for its decision.” *State v. Bennett*, 142 Idaho 166, 169 (2005). Where a law’s provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare, or other legislative purpose, then it must be declared unconstitutional. See *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

I.C. § 67-6529(2) and its embodiment in JCZO 13-6.02 are unconstitutional because the distinction they make between those owning and living on property within a one mile radius of the proposed facility and those who reside outside the boundary, or may not own land, are arbitrary and unreasonable. The Idaho Supreme Court has directly held that its courts will not look to predetermined distances in determining whether an interest in real property may be adversely affected. *Evans*, 139 Idaho at 75. I.C. § 67-6529(2) restricts who may testify at an LCO public hearing to only those members of the public with a primary residence within one mile of the proposed site; those outside one mile are precluded from a meaningful opportunity to provide and

rebut evidence.¹⁷ JCZO 13-6.02 restricts who may submit written comments to Jerome County Planning and Zoning staff to “primary residents,” referencing the one mile statute. Supp. Rec., Vol. I, p. 20. While the County did relax the standard to allow non-landowners within one mile and others outside the one mile radius to testify, the limitation on presentation of evidence still violates substantive rights. Petitioners’ counsel obtained and reviewed the legislative history of I.C. § 67-6529 and found no legitimate reason for the limitation on the rights of affected persons to present and rebut evidence. The state law and county ordinance work in concert to deny affected citizens living outside the one mile zone the right to meaningfully participate in the local planning process.

The only governmental interest that such an arbitrary distinction can be based upon is expediency, an interest that has no relation to the public health, morals, general welfare, (on which the Jerome County ordinance was purportedly based) or any other permissible legislative purpose. *See New Jersey Dep't of Env'tl. Protection & Energy v. Gloucester Env'tl. Mgmt. Servs.*, 866 F. Supp. 826, 835 (D.N.J. 1994) (appraisal procedure that applied a standardized diminution figure to all claimants violated substantive due process; government’s interest in avoiding expense and time of having teams of appraisers insufficient interest). “Neither expense nor expediency may justify abandoning [the] standards of substantive due process.” *Id.* The one mile distance requirement is particularly troubling because of the extremely harmful health impacts that may result from poorly sited, planned, and operated LCOs.¹⁸ Such negative impacts include, but are not limited to, overpowering offensive odors from volatile chemicals given off by animal digestive processes and excretions, airborne and waterborne pathogens, dust, pest infestation, increased traffic, lower air

¹⁷ I.C. § 67-6529 permits a Board of Commissioners to increase this distance.

¹⁸ Even the Idaho Legislature, despite its unconstitutional limitation on participation in hearings concerning large confined animal feeding operations, recognizes that: “Confined animal feeding operations increase social and environmental impacts in areas where these facilities are located.” I.C. § 67-6529B. This finding directly contradicts any legitimate purpose the state or county could claim in limiting public testimony.

quality, waste discharge and run-off, groundwater contamination, culinary well contamination and water shortage. *See e.g.*, Phase I, Trans., pp. 19, 22-23, 42-44, 46-48, 58-59, 67. Reports on other economic and social impacts were similarly excluded by the limits on written submissions. The one mile clause necessarily promotes the endangerment of the public health, safety, morals, and general welfare by limiting the information the Board could consider rather than providing the Board with the information available to protect the public as it is charged with doing under its own ordinances.

Because the one mile clause in I.C. § 67-6529 and its embodiment in JCZO 13-6.02 is arbitrary, unreasonable, and does not bear a rational relationship to the public health, safety, morals, the general welfare, or any other permissible legislative objective, it violates petitioners' substantive due process rights and should be found unconstitutional.

III. The Board failed to follow the complete JCZO.

The Board failed to follow the JCZO throughout the Big Sky process, making its approval of the Big Sky permit tainted by unlawful procedure. A county's failure to follow its own ordinances may substantially prejudice the rights of the public.¹⁹ *Cf. Spencer v. Kootenai County*, 145 Idaho 448, 453 (Idaho 2008). Boards are required to substantially comply with their own ordinances. *Taylor v. Bd. of County Comm'rs*, 124 Idaho 393, 401 (Ct. App. 1993).

In addition to the notice failures previously described, the Board failed to follow its ordinances in other critical ways. The Board failed to apply the entire JCZO when it approved the Big Sky application and also failed to allow reopening of the record (*supra* Section IV).²⁰

¹⁹A local land use ordinance is not a "statutory provision" under IDAPA. *Evans*, 137 Idaho at 432. As such, I.C. § 67-5279(3)(c) does not apply.

²⁰Alternatively, the Board's failure to apply its own ordinances is arbitrary, capricious, and outside the limits of its discretion. While Idaho Courts give special consideration to a County's interpretation and application of its own zoning ordinance, a County's action will be overturned if it is arbitrary, capricious, or discriminatory. *South Fork Coalition v. Bd. of Comm'rs.*, 117 Idaho 857, 860 (1990). An action is arbitrary and capricious if it is taken without a rational basis, in disregard of the facts and circumstances presented, or without adequate determining

While JCZO Chapter 13 provides the nuts and bolts of permitting LCOs in Jerome County, section 13-3.01 states that, “[n]ew LCO’s shall be allowed only in Agricultural A-1 Zone, and only *after compliance with the provisions of this Chapter and the JCZO.*” Supp. Rec., Vol. I, p. 14. (emphasis added). Clearly, the approval of an LCO permit must not only comply fully with the specific requirements of Chapter 13, but must also comply with the County’s zoning ordinances as a whole. Both JCZO 1-3.01 (compliance with comprehensive plan) and 1-6.01 (protecting property rights) apply to all zoning decisions. JCZO Chapter 1-3.01 states, in its entirety:

This ordinance has been made in accordance with a comprehensive plan which has been designed to protect and promote the health, safety, morals, and general welfare of the community. It [meaning the comprehensive plan] is intended, therefore to provide:

- a. Support of property values by preserving existing uses and guiding future development.
- b. Protection from the menace to the public safety that would result from placing buildings or other structures in locations and in manners that would interfere with present or future traffic movement.
- c. Pleasant appearances along highways and elsewhere in the county.
- d. Adequate public facilities and services.
- e. Support for the economy of the county.
- f. Protection for prime agricultural lands for production of food and fiber.
- g. Support for agriculture and other industry together with related uses.
- h. Assurance that the important environmental features of the county are protected and enhanced.
- i. Avoidance of undue concentrations of population.
- j. Assurance that land is developed appropriately for its physical characteristics.
- k. Protection for life and property in areas subject to natural hazards and disasters.
- l. Protection for fish, other wildlife, and recreational resources.
- m. Security against undue pollution of air and water.

Supp. Rec. Vol. II, p. 359.

Additionally, JCZO 1-6.01, entitled “PRESERVATION OF PRIVATE PROPERTY RIGHTS,” states that:

principles. *Am. Lung Ass'n*, 142 Idaho at 547 (citing *Enterprise, Inc. v. Nampa City*, 96 Idaho 734, 739 (1975)).

This ordinance shall be interpreted in its various particulars to protect equally each citizen from the undue encroachment on his private property to the end that, within the plan established, each citizen shall have the maximum use of his property *without placing undue burden upon that of his neighbor*. Every citizen of Jerome County shall at all times have the right to appear in person or through his attorney or other agent before the Planning Commission, Zoning Commission or Board, as the case may be, in the proper order of business and before such Planning Commission, Zoning Commission or Board to freely petition for the relief of an alleged burden created by this ordinance, and to appeal a decision of the Planning Commission or Zoning Commission pursuant to the procedures herein set out to the Board and the Courts of the State of Idaho. In the enforcement of this ordinance it shall be deemed to apply similarly and equally to each person and property in similar circumstances and shall not be enforced to discriminate between one individual and another individual or between one group as compared to all others similarly situated.

Id. at 360 (emphasis added).

It is clear that a board of commissioners may consider its comprehensive plan when approving or denying a permit, so long as it looks to other relevant factors (such as the ordinance it is grounded on). *Urrutia*, 134 Idaho at 359. A county may not, however, rely *solely* on a comprehensive plan in denying an application. *Id.* For instance, an application for a residential subdivision was properly denied when the county considered both the comprehensive plan *and* a general purpose statement located in the zoning ordinance. *Sanders Orchard v. Gem County*, 137 Idaho 695, 700 (2002). The general zoning ordinance for subdivisions required the board to consider, “[t]he conformance of the subdivision with the Comprehensive Plan.” *Id.* at 698 (emphasis added). While the existence of that statement did not incorporate by reference the entire comprehensive plan, the plan itself contained numerous statements about, “the need to protect ground water resources and the desirability of central sewer in the area of city impact.” *Id.* at 699-700. As such, denial of the application based upon the comprehensive plan *and* the general purpose statement was proper. *Id.* at 700.

Similar to the ordinance in *Sanders Orchard*, JCZO 13-3.01 *requires* the Board to consider the *entirety* of its county ordinance. Even stronger than in *Sanders*, in this instance JCZO 1-3.01 specifically incorporates select provisions of the comprehensive plan into the county ordinance.

The Board must, therefore, give due consideration to the enumerated factors listed in 1-3.01, as well as 1-6.01, before approving an LCO permit.

In its original Big Sky decision, the Board denied the LCO solely on the basis of the comprehensive plan. In its decision, the Board stated that while the applicant had met the requirements of Chapter 13-5.02, the applicant had failed to address concerns that its operation of an LCO would damage Jerome County's soils. Phase I, Vol. III, Docs marked as Exhibits CC45-CC94, p. 51. Nowhere in the memorandum, however, are the references to JCZO Chapter 1. The District Court remanded the denial, citing *Urrutia's* holding that a county cannot deny an application for a permitted land use *solely* based on the County's comprehensive plan. Phase II, AR, p. 35. The Court found that the Board must consider three things when granting or denying an LCO application: (1) whether the application is complete, in that it meets the requirements of Chapter 13-5.02; (2) whether the proposed site is in Agricultural A-1 zone; (3) whether the application complies with the JCZO.²¹ *Id.* at 31. Further, the Court noted that the Board was not required to approve the application, as it could find some other valid reason for denying the Big Sky application. *Id.* at 38. The Court merely stated that the Board could not rely *solely* on the comprehensive plan – there must be some additional basis for denying the application. *See id.*²² The County could simply have cited to these applicable sections of the JCZO and upheld its initial denial.

The Board, relying on the advice of County Prosecutor Seib, mistakenly believed that the

²¹ The District Court believed that the language in JCZO 13-3.01 was “vague and generalized.” *Id.* Whether or not the requirement is general, however, does not change the fact that an LCO must comply with the entire JCZO as a whole, including JCZO 1-3.01 and 1-6.01.

²² While there was dispute among the commissioners about whether the application was complete, Phase II, Trans., Aug. 11, 2008, pp. 43-44, 46-48, petitioners contend that the failure to comply with the JCZO is sufficient by itself to require remand for a new hearing to reconsider all claims and to allow all written evidence in compliance with due process requirements.

District Court's remand decision *required* approval of the Big Sky application if the requirements of Chapter 13-5.02 were met. *See* Phase II, AR, p. 45. That is, the Board constrained its consideration upon remand to the "limited issue" of whether the application was "complete." *Id.*; *see also* Phase II, Trans., Aug. 11, 2008, pp. 4-5, 10, 20-21, 69. In its 2008 Memorandum Decision Upon Remand, the Board approved, 2-1, the Big Sky application based on its belief that Big Sky had met the requirements listed in Chapter 13-5.02. Phase II, AR, p. 117. Petitioners challenge, as did one of the commissioners, *see, e.g.*, Supp. Rec., Vol. I, p. 161; Vol. II, p. 334, whether the application was indeed complete. *See supra*, Section V. Nevertheless, as to whether the applicant had complied with the whole of the JCZO, as required by 13-3.01, the Board stated:

[It] did not discuss these matters in its earlier decision as a result of the evidence presented on these factors was unchallenged and thus no issue or dispute was raised for the Board's determination. That is, Big Sky addressed [whether the site was in A-1 agricultural and whether application satisfied the whole of the JCZO] at the hearing, supporting each with credible evidence, *which was not disputed by any other evidence presented to the Board.*

Phase II, AR, p. 112 (emphasis added).

This discussion conclusively shows that the Board's decision on this point was, at the very least, arbitrary and capricious. The Big Sky public hearing lasted two days. The Board heard testimony (albeit abbreviated because of the restrictions put in place) from numerous members of the community that the siting of a 13,000-head LCO facility in their backyards would, in fact, have devastating effects on their property and quality of life. Members of the public were consistently concerned about the environmental impacts posed by the LCO and even cited to the provisions of JCZO 1-6.01 as a basis for denying the application. *See, e.g.*, Phase I, Trans., pp. 316-17.

Other testimony from opponents also directly raised a number of issues covered by JCZO 1-3.01, including supporting property values by preserving existing uses (Harold and Carolyn Dimond feared harm to their farm caused by the presence of an LCO. Phase I, Trans., p. 221); protection from the menace to the public safety that would result from increased traffic (*Id.* at 303-

304); pleasant appearances along highways and elsewhere in the county (Yoshitomi Aff., ¶ 8); support for the economy of the county (Neil King stressed that the Minidoka Site had significant tourism value, but that would be diminished by the LCO, *Id.* at 26-28); and security against undue pollution of air and water (*Id.* at 42, 65, 229, 261, 305).

There was also direct testimony about the undue burdens citizens would be forced to bear because of the size and location of the Big Sky LCO. These issues required consideration of JCZO 1-6.01, which guarantees that, “each citizen shall have the maximum use of his property without placing undue burden upon that of his neighbor.” Supp. Rec., Vol. II, p. 360. For instance, Xenia Williams believed that the LCO would greatly reduce the local water table, forcing local neighbors to dig new and deeper wells. Phase I, Trans., p. 22. Ms. Ayers specifically pointed out that the Board was required to consider JCZO 1-6.01, which requires the Board to “protect each citizen from the undue encroachment of his private property.” *Id.* at 18. Harold Dimond was very concerned that excess waste would drain from the LCO property onto his farm land, affecting his farming operations and constituting an undue burden. *Id.* at 721. Others’ testimony consistently stressed that the LCO would place undue burdens upon them for the benefit of one landowner.

It is incontrovertible that the Board heard testimony, however improperly limited, that disputed the evidence put forth by the applicant. Dean Dimond was able to get some of these supporting documents in the record, but others tried and failed to get more supporting documents in the record because of the one mile residency requirement. *See, e.g.,* Hasse Aff., ¶ 9. The Board was required to consider the issues listed in JCZO 1-3.01 and 1-6.01 in its approval of the Big Sky application. The advice it received from County Prosecutor Seib was simply *wrong* - JCZO Chapter 13 *requires* consideration of the entirety of the zoning ordinance when approving or denying an LCO application. The action was taken without a rational basis and in complete disregard of the facts and circumstances presented. *See Am. Lung Ass’n*, 142 Idaho at 547. As

such, the approval of the Big Sky application must be remanded; the Board *must* consider JCZO 1-3.01 and 1-6.01 in approving or denying an LCO application.

IV. The Board failed to follow its own procedures by refusing to consider Dean Dimond's Motion to Reopen the Record.

Petitioners Dean and Eden Dimond received written notice of the September 25-26, 2007 hearing that included a copy of Jerome County's procedure for "Reopening the Record." Supp. Rec., Vol. II, p. 323, 327-29.

On August 4, 2008, Mr. Dimond attempted to present to the Board his written "motion to present additional evidence in the Big Sky Case," along with additional oral testimony and documentary evidence. Supp. Rec., Vol. I, pp. 215-217. Although the motion was made at a time prior to the Board's decision in this matter (after Judge Bevan's remand) and consistent with Jerome County's procedures for reopening the record, the Board flatly refused to consider it. Phase II, AR, p. 56. The failure to even consider the motion constitutes unlawful procedure on the Board's part, or alternatively, constitutes an arbitrary and capricious decision.

V. The Big Sky application was incomplete.

The Board's decision to approve Big Sky's LCO permit relied upon a core finding that the application was "complete." Phase II, AR, p. 112. Generally, a permit cannot be issued until an applicant has established *all* of the underlying requirements of a county's land use ordinance. *See Fischer v. City of Ketchum*, 114 Idaho 349, 354, 109 P.3d 1091, 1096 (2005) (emphasis added). This "completeness" requirement ensures that affected individuals have a meaningful chance to publicly comment on all issues an application raises. *Id.* The right to comment is encroached upon when a board approves an incomplete application, and necessitates remand. *See id.* at 355.

Here, the Board approved the Big Sky application despite its incompleteness. The application was incomplete for three reasons. The first reason is that all agencies had not

completed their review and submitted letters before the application was filed as required by JCZO 13-5.02(l). Supp. Rec., Vol. I, p. 18. The Hillsdale Highway letter citing the need for a traffic impact study prior to application consideration, Phase I, Vol. I, Agency, p. 6, and lack of a letter from the Valley School District until July 28, over two months after the application was filed, *see e.g.*, Phase I, Trans., pp. 313-314, both rendered the application incomplete.

The second reason is that the application did not include on its required map, a well on Fred Stewart's property. All wells within a one mile radius of the facility were required to be identified on the application map. *See* JCZO 13-5.02 (e)(1); Supp. Rec., Vol. I, pp. 16-17.

The third reason is that there is no evidence in the application, or the record elsewhere, of a binding contractual agreement to export waste, as required by JCZO 13-2.01. Rather, the application contained a one-page document merely suggesting that some type of arrangement *might be* in place between Big Sky and local farmer Mike Gott. Phase I, Vol. I, p. 209. This document does not satisfy the ordinance, which mandates that *any and all* LCOs that export waste include in their waste management plan evidence that "the operator has *agreed* with another party to disperse animal waste products" elsewhere. Supp. Record, Vol. I, p. 12 (emphasis added). Waste management plans are a necessary component of an LCO application pursuant to JCZO 13-5.02(h). Supp. Rec., Vol. I, p. 17.

The Board incorrectly found that there was an agreement even though it had been informed that Mike Gott had not entered, and did not intend to enter, into an actual contract with Big Sky. Phase I, Vol. III, p. 494.

VI. The September 23, 2008 Decision does not constitute a reasoned statement.

Idaho Code 67-6535 (b) provides as follows:

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 upon the applicable provisions of the comprehensive plan, relevant ordinance and statutory provisions, pertinent constitutional principles and factual information contained in the record.

The Board's written decision failed to give reasonable weight to the documentary evidence provided by petitioners Dean and Eden Dimond submitted in opposition to the permit. That evidence, consisting of more than 700 pages of written statements and supporting documentation and comprising virtually all of Volume II and half of Volume III of the record, was virtually ignored by the Board in its decision.²³ The same can be said of written evidence in the record submitted by, among others, the following agencies, organizations, and adjoining landowners: (1) U.S. Department of Interior- National Park Service (Phase I, Vol. 1, Agency, pp. 12-20); (2) National Trust for Historic Preservation (*Id.* at 9-11, 24-28, 32-35); (3) Idaho State Historical Society (*Id.* at 22-24); and (4) James and Janiel Stewart Family (Phase I, Vol. III, Residents continued from Vol. II, pp. 799- 851).

Petitioners contend, and one commissioner appeared to agree,²⁴ that the Board's written decision fell short of the requirements of Idaho Code 67-6535 to the extent that it did not include a discussion of what amounted to more than an entire volume and one-half of relevant evidence in the record.

Petitioners contend that the "reasoned decision making" standards described in *Woodfield v. Bd. Of Professional Discipline*, 127 Idaho 738, 905 P. 2d 1047 (Ct. App. 1995) should apply in

²³ As a result of a well-documented mistake by the Jerome County Planning and Zoning Administrator regarding a filing deadline for written comments, some comments from the Dean and Eden Dimond family were submitted on August 3, 2007 (Phase I, Vol. II, Residents, pp. 3-489) and some on Sept. 7, 2007 (Phase I, Vol. III, Residents, pp.492-798). There is a considerable amount of overlap in the two sets of comments.

²⁴ Commissioner Obenauer remarked, Supp. Rec., Vol. I, p.161, that the final decision was "severely lacking in relevant and defensible findings," because, as she later noted, she was "left out of ... the approval of the Big Sky facts and findings hearing that [Commissioners Howell and Davidson] did without [her]." Supp. Rec., Vol. II, p. 334.

this case. Idaho Supreme Court Justice Jones has written about this in dissenting opinions in two recent Idaho Supreme Court cases: *Davisco Foods Intern. v. Gooding County*, 141 Idaho 784, 794-5, 118 P.3d 116, 126-7 (2005) and *Turner v. City of Twin Falls*, 2007 144 Idaho 203, 212-214, 159 P.3d 840, 849-51 (2007). In both dissents he pointed out that to comply with the “reasoned decision making” requirement of the Administrative Procedure Act, state agencies have to render decisions which articulate substantially more of the thought process than courts have so far been required to do in land use cases, but that there is no logical reason for distinguishing the two types of decision requirements- both types of hearings require written decisions evidencing “reasoned decision making”.

The Board’s decision referred to a tiny fraction of the “relevant contested facts relied upon” – much of it presented in oral testimony at the public hearing- while omitting mention of the voluminous written evidence submitted prior to the hearing. The Board’s decision has not demonstrated that “relevant contested facts” in the record were considered, as required by I.C. § 67-6535(b).

VII. Attorneys fees should be awarded to petitioners.

Pursuant to Idaho Code 12-117, attorney’s fees are appropriate to award to a party who prevails in a land use permitting case where the court finds the agency “acted without a reasonable basis in fact or law.” *Fischer vs. City of Ketchum*, 141 Idaho 349, 356, 109 P.3d 1091, 1098 (2005). Petitioners request fees in this case because Jerome County acted without a reasonable basis in fact and law on numerous fronts.

CONCLUSION

For the reasons outlined above, this Court should hold I.C. § 67-6524 and JCZO 13-6.02 unconstitutional and remand the approval of the Big Sky LCO permit with instructions that the Board give proper notice to all parties, that a new hearing be held, and that the Board give proper

consideration to the entire JCZO.

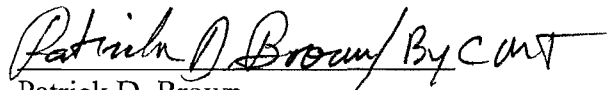
Dated: January 18, 2010.

Respectfully submitted,



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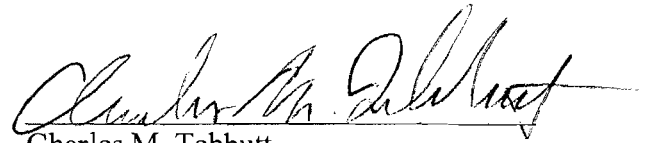
On the brief:
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of January, 2010, I served a true and correct copy of the foregoing document on the persons whose names and addresses appear below, by electronic mail and U.S. mail, postage-paid:

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