5-27-2011

Friends of Minidoka v. Jerome County Clerk's Record v. 3 Dckt. 38113

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LAW CLER

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 OBENAUER, SOUTHVIEW DIARY, 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 this _____ *day of* _____, *20* _____

_____ *Clerk*

By _____ *Deputy*

38113

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

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

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CLERK'S RECORD ON APPEAL

VOLUME III

Supreme Court Docket No. 38113

Fifth Judicial District
Jerome County

Honorable Robert Elgee
District Judge

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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,

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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

RESPONDENT'S MEMORANDUM IN RESPONSE

Heading continued on next page

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

Intervenor.

RECORD CITATION

For the sake of consistency, Respondent Jerome County adopts the same citation style designed by the Petitioners, as set forth in their memorandum and below as well.

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 matter is before the court on judicial review brought by the several petitioners listed above (collectively "Friends"), who seek review of a decision made by the Jerome County Board of County Commissioners ("Board") concerning the issuance of a permit for a livestock confinement operation ("LCO") to Don McFarland, dba Big Sky Farms Limited Partnership ("Big Sky"), now represented by South View Dairy. This is the second time the matter has been brought on for judicial review; the first review ending in remand to the Board with this current action following that.

FACTUAL OVERVIEW

A quick and accurate overview of the facts in this matter can be found in the written decision of the Honorable, Judge G. Richard Bevan (Phase II, Agency Record p. 25), after the initial judicial review of the matter. A more detailed rendition of the facts, both before and after Judge Bevan's decision, is found in the record.

ADDITIONAL ISSUES ON REVIEW

Is Jerome County entitled to attorney's fees, pursuant to 12-117, incurred in having to respond to Friends' petition.

ARGUMENT

I. Friends Has Failed To Demonstrate That Petitioner Organizations Have Standing.

Friends claims that Petitioner Organizations have standing to participate in this law suit and support such claim not so much with facts or even argument, but rather with naked assertions only. The proper standard to establish such standing has been stated:

> [A]n association may have standing solely as the representative of its members. The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the case, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.

Selkirk-Priest Basin Assn., Inc. v. State, 127 Idaho 239 (1995) (*SPBA* I); (citations omitted). The *SPBA* matter went back before the court in *SPBA* II, where the standard was further developed with the court holding that in "order to possess standing, either the organization or its members must face 'injury'. *SPBA I,* 127 Idaho at 242, 899 P.2d at 952. The injury must be distinct and palpable and not be one suffered alike by all citizens in the jurisdiction." *Selkirk-Priest Basin Assn., Inc. v. State*, 128 Idaho 831 (1996) (*SPBA* II); (citations in original).

Friends attempts to satisfy this standard by stating:

> [T]he 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.

(*Petitioners' Memo*, at 22). This is it. This is the only thing Friends offers, asserts or points to in its claim of organizational standing. Friends does cite various cases (the holdings of which do pertain to organizational standing), but never applies the facts of this case to the cited law. Merely citing case after case (as Friends does in much of its brief) without ever applying such to the facts being asserted (as Friends also does in much of its brief), does not provide support for Friends' assertions of organizational standing. Instead, it leaves them bare and conclusory. As a result, the unsupported assertions of Friends does not even come close to satisfying the elements of organizational standing.

In fact, instead of satisfying these elements, Friends' assertions only raise more unanswered questions. For example, Friends assert that this case is germane to the purposes of the organizations. Really? How? Friends assert that at least one of the organizations individual members have standing in their own right. Really? Who? And how, because aren't the perceived injuries of FOM, ACL and National Trust members of the nature suffered alike by all citizens?

Friends does attach several affidavits to its memorandum and states in a footnote that these affidavits are from Petitioner Organizations and "establish their respective standing to challenge the Board's action." (*Petitioners' Memo*, at 23). The very next sentence of this footnote states, "Some Petitioners have members who live within one mile of the proposed LCO... while others' organizational members visit, and will continue to visit, the Minidoka Site regularly." (*Id.*). The organizations that Friends refers to as only having members that visit the Minidoka Site are FOM, JACL and National Trust. This acknowledgement by Friends becomes more of an admission that

these three organizations do not have standing once it is analyzed whether any of such organizations had members who suffered an injury caused by the challenged action(s). *SPBA* I, *supra.*

Such an analysis begins with recognizing that in land use matters, one must be an "affected person" to bring suit. I.C. § 67-6521(1)(a). To be an affected person, one must have "an interest in real property which may be adversely affected by the issuance or denial of a permit authorizing the development." (*Id.*). The fact that Petitioner Organizations FOM, JACL and National Trust might have members that visit the Minidoka Site regularly, does not establish standing. Friends has failed to make a case that such "visitation" alone would allow these members to bring suit themselves; has failed to say anything in regard to any member having an interest in real property; and has failed to identify a distinct and palpable injury suffered by any member.

Further, even if for the sake of argument it were accepted that "visitation" did somehow give FOM, JACL and National Trust standing, there is still no showing that the Minidoka site even might be adversely affected by the permit issued in this case. Friends does attempt an argument to the contrary. But instead of starting at the beginning (as is customary), Friends starts on top of the false premise that the Minidoka Site has actually been shown to be adversely affected. As will be shown, such a false premise will prove to be a reoccurring theme in each of the claims Friends asserts. Regardless, suffice it to say the premise offered here does not establish the Minidoka site as having been injured under LLUPA

For all the above reasons, Friends has failed to satisfy the standard for organizational standing as to FOM, JACL and National Trust. Therefore, these Petitioner

Organizations must be excluded from participating in any further proceedings in this matter.

As to the two remaining Petitioner Organizations, ICARE and IRC, the relative affidavits attached to Friends' memorandum do identify certain members of these particular organizations, and which (at least in the case of ICARE) do indicate that such members are within one mile of the proposed LCO. However, merely being in "close proximity" of the proposed LCO, does not by itself establish individual standing. As indicated, section 67-6521(1)(a) holds: "As used herein, 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." (*Id.*; emphasis added). Therefore, 67-6521(1)(a) sets forth two relevant requirements one must obtain to be an affected person and have standing to seek judicial review under the LLUPA. First, the person must have an interest in real property and second, the real property itself must be vulnerable to possible injury, the nature of which must be distinct and palpable. *SPBA* II, *supra.*

Applying this standard to ICARE, the affidavit submitted on its behalf identifies four specific members that are presumably offered as the individual members who could seek judicial review on their own. These four ICARE members are Brenda Hermann, Jim Stewart, Dick Helsley, and Lee Halper. The affidavit indicates that all these individuals, except for Mr. Halper,[1] live within a mile of the proposed LCO or in close proximity thereto. Regardless to this stated "close proximity," and as Friends itself points out in its memorandum,[2] "proximity" to the proposed LCO does not establish an

[1] The affidavit is silent as to where Mr. Halper lives in relation to the proposed LCO.
[2] Friends cite Evans v. Teton County, 139 Idaho 71, 74 (2003), which holds that a court will not look to a predetermined distance in deciding whether a property owner has, or does not have, standing to seek judicial review of a LLUPA decision.

"affected person." This is the only information given in regard to the property that the identified ICARE members live on. The affidavit does not indicate that any of the individuals have an interest in the property of their respective residences, nor does it describe any potential injury that is distinct and palpable to the property (which only even becomes relevant if it is assumed that the individuals do have an interest in the property). As a result, organizational standing has not been established by ICARE and it too may not participate in this suit any further.

IRC also attempts to establish organizational standing with an affidavit of its own, however it is only marginally better than that submitted by ICARE. In its affidavit, IRC states:

> IRC currently has in excess of 13 members in Jerome County, including several who own and farm real property adjacent to the proposed Big Sky CAFO and includes several who live on such real property. IRC members include Dean and Eden Dimond and Harold and Carolyn Dimond.
>
> Construction and operation of the Big Sky CAFO will likely cause a serious, immediate, and persistent decline in the air quality within at least a two mile radius of the proposed facility, with especially severe impacts to IRC members who farm and/or live adjacent tot eh facility. Surface and/or ground water quality impacts are also likely and will impair members' use and enjoyment of their properties.

(*Aff. of Rich Carlson*, dated December 16, 2009). As with ICARE, IRC discusses several "faceless" members, but only identifies four specific members: Dean, Eden, Harold, and Carolyn Dimond. Although the affidavit says several of it members "own and farm real property adjacent to the proposed" LCO, it does not state that any of the Dimonds are such members. For that matter, it is not even real clear that the Dimonds are in fact the individual members that IRC is seeking to gain standing through. Its affidavit simply states that the Dimonds are ICR members, but does not state whether

they do in fact have an interest in real property, and if so, whether such property might be injured in a distinct and palpable manner. The affidavit does set forth several conclusory statements that property within a two-mile radius of the proposed facility is "likely" to be adversely affected, but again does not state whether any of such property belongs to the Dimonds. Therefore, organizational standing has also not been established by IRC either, and it must also refrain from further participating in this suit.

In the event that a member of one or more of Petitioner Organizations is found to have an interest in real property that may suffer distinct and palpable injury, then clearly under applicable law, organizational standing would be established. However, it is important to keep in mind that a particular Petitioner Organization's standing would extend only as far as that organization's particular claim. *Cowan v. Bd. of Comm'rs of Fremont County*, 143 Idaho 501 (2006) (a party who has an interest in real property has standing to *pursue his or her* claim). The petitioners of Friends must identify *their* individual claims, pointing to the specific action of the county that each is attacking, and then illustrate that the board erred in a manner specified therein and show that *a substantial right of that particular petitioner* has been prejudiced. *Cowan*, at 508.

This point is stressed as a result of Friends' failures thought out its memorandum of identifying which specific petitioner(s) is attacking which specific action(s), and what specific petitioner(s) suffered what specific injury. This point will be explain in further detail and made clearer as it comes up below.

II. (A)(1) Friends Has Failed To Show That Petitioner Slones' Constitutional Procedural Due Process Rights Were Violated.

The main thrust of Friends' "procedural due process" claim is that Petitioner Slones' rights were violated as a result of not being sufficiently notified of the Big Sky

hearing on September 25 and 26, 2007. (*Petitioners' Memo*, at 24-28). In reply to this claim, it is first noted that Idaho Code Section 67-6529 is the provision of law that mandates a public hearing on LCO applications. Specifically, this section holds in applicable part that "a county's ordinance or resolution shall provide that the board of county commissioners shall hold at least one (1) public hearing *affording the public an opportunity to comment* on each proposed site before the siting of such facility." (I.C. § 67-6529(2); emphasis added). Jerome County complied with this code section by providing for and requiring a public hearing in front of the Board on all applications for an LCO permit. (JCZO, Sec. 13-6.03). Short of this, both section 67-6529 and chapter 13 are silent as to any notice requirements on LCO hearings. This is not to say that Jerome County is arguing that no notice of such hearings need be given, simply that it is difficult to understand Friends' argument of "improper notice" when there are no specific notice requirements controlling the county.

Given the present circumstances (no mandated notice requirements), Friends' claim then is similar to that made in *Castaneda v. Brighton Corp.*, 130 Idaho 923 (1998). There, it was asserted by appellants that the respondent city violated the appellants' minimum due process requirements when it approved a subdivision plat application through a method that was quasi-judicial in nature, but where the applicable law was silent as to notice procedure. (*Id.*, at 927). The court cited the controlling law in such a claim, and stated that the due process requirement of an opportunity to be heard is fulfilled when there is sufficient notice of an opportunity to be heard, and if the opportunity occurs at a meaningful time and in a meaningful manner. (*Id.*). The court found that the respondent city had given notice in three different ways: 1) it had posted

notice at the city hall twenty-four hours prior to the meeting approving the preliminary plat; 2) it had published notice in the newspaper; and 3) it had mailed individual notice to nearby property owners. (*Id.*). The court concluded that "sufficient notice was given and that the appellants were provided an opportunity to be heard at the most meaningful time, which was at the public hearing ..." (*Id.*).

Here, the Slones were provided with the same three kinds of notice that the *Castaneda* appellants were: 1) the posting of notice at the county courthouse (Phase I, Vol. # 1, *Staff*, p. 30 and 37); 2) published notice in the newspaper (Phase I, Vol. # 1, *Staff*, p. 36); and 3) mailed individual notice (Phase I, Vol. # 1, *Staff*, p. 45). In addition, the Slones where provided a fourth type of notice that was not mentioned in *Castaneda,* which was the posting of notice on the subject property (Phase I, Vol. # 1, *Staff*, p. 35). This fourth type of notice is significant because the record shows the posting on the subject property occurred as early as July 19, 2007; and as Friends admit, the Slones are a mere 300 yards away. (*Petitioners' Memo*, at 25).

In addition to having been provided with more notice of the public hearing than the appellants in *Castaneda*, the Slones were also provided with more of an opportunity to be heard. In addition to the public hearing in this matter (taking place over the course of two days and being held open for a total of ten hours) that was held for the public to submit comment (Phase I, Vol. # 1, *Staff*, p. 30 and 37; Phase I, Trans.), the Slones were also provided with the secondary way of providing written comment. The county would have accepted this written comment prior to the hearing if the Slones would have so in fact offered (Phase I, Vol. # 1, *Staff*, p. 30 and 37). If, for some reason the Slones were unable to attend the two day, ten hour long opportunity to submit oral comment, they

could have taken advantage of the this secondary way of being heard through writing. It should be pointed out as well that the notice the Slones received through publication did inform them that the "written comment" avenue was available to them. (Phase I, Vol. # 1, *Staff*, p. 30 and 37).

In any event, the record clearly shows the claim of Friends that the Slones did "not receive *any notice at all* of the proposed LCO facility" (*Petitioners' Memo*, at 27; emphasis added) is simply **not true**. The Slones received four varying kinds of notice; the same kinds that the appellants in *Castaneda* received and then some. In addition, a ten hour-long opportunity to be heard, held over the course of two days, was made available to them.[3] Clearly, pursuant to the holding of *Castaneda*, sufficient notice of the Big Sky hearing had been provided to the Slones. The fact that they did not take advantage of these opportunities (for whatever reason) is beyond Jerome County's control.

Friends does claim that the reason the Slones did not participate in the Big Sky hearing was because their attorney's schedule prevented them from doing so. Absolutely fascinating about this argument is Friends' arrogance in thinking that the schedule of the Slones' attorney somehow takes precedence over the Board's. Although the record is not clear as to exactly when the Board determined that the hearing would be held on the 25th and 26th of September 2007, it does show that such decision had been made by at least August 15, 2007. (Phase I, Vol. # 1, *Staff*, p. 33). The Slones did not hire their attorney, Patrick Brown, until September 12, 2007 (Supp. Rec., Vol. II, pp. 303-05). This date of

[3] It is important to understand the significance of the amount of time allotted for this hearing. Two days were purposely scheduled and held open so that if certain members of the public could not attend one of the days, then perhaps their schedule would allow them to attend on the other scheduled day. Further along these lines, one of the hearing days was purposely held open until 10:00 p.m. so that any member of the public, who was not available during the day, might be able to make it late in the evening.

hire was almost a full month after the Board had already set the hearing date. In addition, the record makes it absolutely clear that at the time of his hire, Mr. Brown knew he had a scheduling conflict with the dates set for the Big Sky hearing and that this conflict would interfere with his ability to effectively represent the Slones. (*Id.*). Yet, instead of declining to represent the Slones based on the scheduling conflict, Mr. Brown went ahead and accepted their employment. (*Id.*). Apparently, Mr. Brown figured that the obvious solution to his dilemma was to simply accept the Slones as clients and then insist that the Board move its hearing, which had already been scheduled for some amount of time.

The Slones are not free from responsibility on this issue either. Aware of the dates scheduled for the hearing (*Id.*), and presuming Mr. Brown informed them of his conflict, the Slones could have declined to hire Mr. Brown and sought out an attorney that had no conflict and that could in fact represent them zealously at the scheduled hearing. Whatever the case, the bottom line is that Jerome County should not be held in the wrong for Mr. Brown's and the Slones' mistaken belief that the county could or would adjust its schedule around them.

As a further part of its claim regarding the Slones' notice, Friends also appears to take the position that the problem was not so much that the Slones did not receive notice, but rather that the Board failed to follow its own ordinance when providing such notice to the Slones. (*Petitioners' Memo*, at 24-28). In this argument, Friends asserts that "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*" (*Id.*, at pp. 24 and 25; emphasis added), and that "the Slones ... did not get any required notice until *after* the comment period for written testimony was already closed." (*Id.*, at 26;

emphasis in original). Friends therefore seems to frame the issue as one of whether or not Jerome County presented the Slones with notice in accordance with some kind of specified procedures. However, as noted above, neither section 67-6529 of the Idaho Code, nor chapter 13 of the JCZO, set forth any such specific notice requirements in regard to a public hearing on a LCO application. It would thus be difficult for the Board to violate notice procedures when such procedures don't exist.

The question then is how does Friends arrive at its claim? In support of its argument, Friends cites to section 13-6.01 of the Jerome County Zoning Ordinance, and it appears also that Friends finds additional support from section 13-6.02 (although it never directly cites to that section in its memorandum). It is important to note the claim Friends' makes and supports with these two sections is based on a premise that the "notice" mentioned in 13-6.01 and .02 does in fact pertain to *hearing* notice. Friends inserts this premise in the middle of the analysis and begins its argument from there (the middle). This opposed to starting at the beginning and determining the validity of the premise itself. The best way to understand how Friends arrived at its premise is to start with the premise itself and work backwards; ending then with what should have been the beginning of Friends argument.

Friends not only claims that 13-6.01 "governed the County's notice requirements" (*Petitioners' Memo*, at 25), but goes on to cite the ordinance as holding: "[t]he administrator shall...send the notice [*of hearing*] by mail to all property owners within one mile of the boundaries..." (*Id.*; emphasis added). Through the use of the brackets, Friends is obviously indicating that it is inserting the emphasized language into the cited

quote. Letting section 13-6.01 speak for itself may be the more appropriate course however, which in applicable part holds:

> 13-6.01 PUBLIC NOTIFICATION.
>
> The Planning &Zoning [*sic*] 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 **the** notice 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.

(Phase I, Vol. # 1, *Staff*, p. 31; Phase II, Vol. # 1, p. 20; emphasis added). The plain reading of 13-6.01 shows the notice requirement contained therein to apply to the receipt of LCO applications, and not to notice of LCO hearings. Therefore, Friends' statement to the court that the notice in 13-6.01 is in regards to hearings is erroneous and misleading.

However, even if this notice were assumed for the sake of argument to apply to *hearings* as opposed to *applications*, this still does not establish any procedural violation as hoped by Friends. Under such a reading, the only procedural requirement would be that notice of a LCO hearing be sent by mail to certain individuals. The record clearly shows that this was in fact done by Jerome County in regard to the Slones (Rec., Vol. I, Staff, p. 45), and Friends admit that such notice was in fact sent and received by the Slones as well. (Supp. Rec., Vol. II, pp. 303-05). Therefore, Friends' assertion that "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" (*Id.*, at pp. 24 and 25) is also erroneous and misleading. Individual notice was in fact given to the Slones and this would be al that was required of the county's ordinance (again, assuming this ordinance applies to hearings in the first place).

With this said, Friends would most likely respond that the county didn't follow its ordinance because of a time period in which the 13-6.01 notice must have been sent. This response is assumed as a result of Friends' assertion that "the Slones ... did not get any required notice until *after* the comment period for written testimony was already closed" (*Petitioners' Memo*, at 26; italicized emphasis in original, underlined emphasis added). And its later assertion that "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. (*Id.*, at 27; emphasis added). However, no "comment period" is mentioned or referred to in 13-6.01, and because Friends' does not explain where it is getting such a time period requirement. Thus, the origins of Friends' premise must be traced back even further.

The several ordinances of chapter 13 of the JCZO obviously relate to the same subject matter (*in pari material*) and thus are to be construed together to effect legislative intent. (*Grand Canyon Dories v. Tax Com'n.*, 124 Idaho 1 (Idaho 1993). Clearly, section 13-6.01 is *in pari material* with section 13-6.02, and it would appear that it is from 13-6.02 that Friends finds its time period. Although appropriate to concurrently read sections 13-6.01 with .02, Friends' interpretation of the resulting effect is in error.

Reading the two sections together, and using the clear and plain language of each, it is required of the planning & zoning administrator to publish notice *of the filing* of a LCO application, and allow and receive written comment from certain members during the fifteen days that follow such publication. Also required of the administrator is a mailing of notice of the filing of the LCO application to residents defined under 67-6529. Once again, it is plain that the notice requirements of 13-6.01 and prescribed time period

of 13-6.02 are part of application filing procedure. Friends' premise to the contrary is thus erroneous, misleading and therefore must be abandoned. If this is done, Friends entire claim falls to the wayside since it is supported entirely by the false premise Friends creates.

Even with this said, and once again assuming for the sake of argument that Friends interpretation is correct, there still would be no violation on the part of Jerome County. Essentially, under Friends' interpretation the concurrent reading of 13-6.01 and .02 produce three requirements: 1) notice of an LCO hearing must be published; 2) notice of the LCO hearing must be sent to "67-56529" members of the public; and 3) written comment from these specific members may be submitted during the fifteen days that follow publication. Looking at the record in this case, these requirements were satisfied: notice of the LCO hearing was published (Rec., Vol. I, Staff, p. 36); written comment was allowed and received by the county for fifteen days after publication from those members of the public defined by the ordinance (Rec., Vol. II and III, R-1 through R-7); and individual notice was mailed to such defined members, which included the Slones. (Rec., Vol. I, Staff, p. 45; Supp. Rec., Vol. II, pp. 303-05).

Under an actual analysis of Friends' claim regarding the Slones, it is clear that neither the Idaho Code nor the JCZO contained specified procedural requirements for notice of a scheduled LCO hearing. It is therefore impossible for a violation of such "non-existent procedures to have occurred. This remains true even if such procedural requirements existed as claimed by Friends – the county still would have complied with them.

Therefore, in regard to Friends' sufficiency of notice claim, because there are no prescribed hearing notice requirements, one must look to the notice *that was* provided by the county to determine its sufficiency. The record shows that in this case there were multiple kinds of notice provided, the nature of which were held to be sufficient in applicable case law (*Castaneda, supra*). Because of all the above, Jerome County absolutely provided the Slones with sufficient notice of the Big Sky hearing and/or complied with all notice requirements; Friends has absolutely failed to show otherwise. Therefore, the Slones' procedural due process rights were not violated as claimed by Friends.

II. (A)(2) Friends has failed to show that it was denied a meaningfully opportunity to participate in the Big Sky hearing.

Contained within its procedural due process claims, Friends also asserts that "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." (*Petitioners' Memo*, at 28). Of note is the fact that Friends speaks in terms of generalities; simply referring to all *petitioners* without identifying which specific one of them actually their rights violated in this manner.

In any event, to find standing by any one of the several petitioners that comprise Friends, it (Friends) is reduced to filling its argument with nothing more than numerous citations of various types of law (statutes and case law). In doing this, Friends is then able to slowly evolve and morph the law until it resembles something that fits its claim, yet subtle enough to go unnoticed. Point-in-fact: Friends begins its analysis by citing

Idaho Code Section 67-6534 and states "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.'" (*Petitioners' Memo*, at 28; emphasis in original). Of interest is that it is Friends that emphasizes the language "***for all affected* persons;"** this apparently being the language that Friends' deems critical in support of its claim. As important as it apparently was to emphasize this language, Friends does not mention it again as it proceeds through its recitation of law. Eventually, after discussing the hearing procedures established by the Board, Friends argues that, "These restrictions did not grant *interested persons* an opportunity to present and rebut evidence in a meaningful way." (*Petitioners' Memo*, at 29; emphasis added). Somewhere between Friends' citation of section 67-6534 and where it applies it to the facts of the case, the language of that statute, emphasized by Friends itself, morphs from *affected* persons to *interested* persons.

Friends then proceeds to argue the point further, stating next:

> 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 [by these individuals]. *For instance, Alma Hasse* ...

(*Id.*, at 30; emphasis added). This is the last step in Friends' transformation of the law; ending here with the standard simply being "individuals" as opposed to affected persons. If Friends were to impose its new standard in the language it previously cited in emphasized terms, it (section 67-6534) would now read, "*The Idaho Legislature mandates that, at a minimum, all hearing procedures established by a board of*

commissioners shall provide an opportunity for all individuals to present and rebut evidence."

Having lead the reader to this point, Friends then attempts to argue (or at least imply) that any and every *individual* that was allowed to submit only one or two pages of written comment, and who was given only four minutes to present oral comment, was not given an adequate opportunity for meaningful participation. This is a far cry from the actual language of 67-6534 that guarantees only *affected persons* the right to present and rebut evidence.

Nevertheless, Friends continues its argument, believing now that it is in a position to apply its newly created standard to certain facts of the case, all in an attempt to establish county error. Friends offers Alma Hasse as an example of an individual that participated in the Big Sky hearing and that was supposedly wronged under this claim. It is important to understand and distinguish here between the two "capacities" that Ms. Hasse holds in this case. Generally speaking, anywhere Ms. Hasse appears in the facts or record of this case (as opposed to as a petitioner of judicial review), she is in the capacity of either an individual or as ICARE on its own regard (collectively referenced, "individual capacity"). Generally speaking again, the only place Ms. Hasse appears in her "proxy" capacity – ICARE on behalf of its members – is as a petitioner in this review.

Therefore, when Ms. Hasse appeared at the Big Sky hearing and provided comment, she was doing such in her individual capacity. She was not presenting comment to the Board on behalf of any ICARE member. In this regard, Ms. Hasse, cannot seek judicial review because she is not an affected person in her individual capacity (neither she as an individual or ICARE on its own behalf has an interest in

property that might be adversely affected). Therefore, Ms. Hasse in her individual capacity has no relevance to this suit.

With this in mind, it then becomes hard to understand the reasoning behind Friends using Ms. Hasse in its example of an individual not given an appropriate chance to submit comment. Ms. Hasse, in her individual capacity is not a petitioner to this suit, so why point to her as the basis for the point being made? It doesn't even make sense for Friends to claim that it was pointing to Ms. Hasse in her "proxy" capacity because to say this, Friends would be essentially indicating that it was using Ms. Hasse in its example, who in turn was speaking as ICARE on behalf of ICARE member "X". To bring this claim, member "X" would have to be an "affected person," so the question becomes who is member "X" (it can't be Ms. Hasse as an individual, because although an ICARE member, she's not an affected person)? Member "X's" identity must be known to determine if a distict and palatable injury was actually suffered. Another reasonable question would be then, "Why doesn't Friends simply allow Petitioner ICARE (assuming it had organizational standing) to just simply bring this claim using member "X" in the above example instead of Ms. Hasse?

The point being is that it doesn't make any sense, no matter what her capacity, for Friends to point to Ms. Hasse as the example that establishes the basis of its argument, as Ms. Hasse is simply irrelevant to this claim. The only explanation that makes any sense is if Friends' is applying its newly transformed standard as outlined above. If this is done, Ms. Hasse as an individual, all of a sudden becomes relevant because the standard is no longer "affected person," but simply, "individual".

It is clear by the very way Ms. Hasse is referenced in Friends' example that she is being viewed as a mere individual. Having evolved the standard and lowered the available guarantees under 67-6534, Friends is now capable of arguing (or at least implying) that Ms. Hasse the individual has standing. This because she is in fact an individual who did in fact participate in the hearing process (never mind that she's not an affected person – it's no longer the applicable standard). However, this argument or implication is as far as Friends goes. Friends simply creates the new standard, dangles Ms. Hasse from it, and then hopes such will be enough to cause something to bite. The court obviously should pass on doing so.

In sum, although Friends claims that "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" (*Petitioners' Memo*, at 28; emphasis added), it never identifies who specifically "*them*" are. Friends asserts that the county denied *them* an opportunity to be heard, but points to (let alone establishes) no specific petitioner who was so in fact denied to the point that such petitioner became an affected person specifically in regard to this issue.

The only thing Friends correctly states is that which it emphasized at the very beginning: that only an affected person is guaranteed by section 67-6534 to be allowed an opportunity to present evidence. An affected person is one who has "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. Friends produces no specific petitioner whose 67-6534 guarantees were prejudiced and who is an affected person. The only one

offered up is Ms. Hasse. Nowhere does the record show Ms. Hasse as a person who has an interest in real property that may be adversely affected by the issuance of Big Sky's permit. Because it does not, Friends cannot claim that Petitioner ICARE is representing Ms. Hasse's claim for her.

Thus, there is absolutely no valid explanation as to why Friends would attempt to establish this claim by using Ms. Hasse as the example. The only invalid explanation (that which at least makes sense) is if Friends' fictional standard is being applied. If this is in fact the case, then Friends is attempting to commit fraud upon the court with its fictional standard and the fictional relevance that it gives Ms. Hasse. The claim made here by Friends should be denied.

II. (A)(3) Friends Has Failed To Show That Its Attorneys Failure To Participate At The Big Sky Hearing Was County Error.

Friends also sticks into its "procedural due process" claim the assertion that certain petitioners where not given a meaningful opportunity to be heard on the basis that these petitioners "were unable to have their attorneys present at the Big Sky hearing." (*Petitioners' Memo*, at 30). In its usual manner, this is all Friends offers in regard to this claim; the naked assertion that certain petitioners did not have their attorneys present. Interesting is the fact that this isn't even an assertion against Jerome County. Friends does not claim that the county somehow prevented the attorneys non-attendance, but instead, only that some petitioners were unable to have their attorneys present at the hearing. This says nothing, or at least certainly nothing against Jerome County. Instead saying anything, it only raises questions – like, "Were these petitioners unable to have their attorneys present because *they* decided *they* did not want to pay their attorneys to sit through a ten hour hearing?" Or perhaps these petitioners couldn't afford their attorneys

at all; or was it the strategy or advice of the attorneys themselves who felt their non-attendance would allow for a better chance at creating issues for judicial review? Who knows - certainly not the reader of Friends memorandum because it utterly fails to set forth any support of this claim? Therefore, the reason for the attorney's non-attendance could be anything, including a totally made-up issue. Anything that is, except valid. If this claim were valid in any possible way, one could be assured that Friends most certainly would have then been absolutely clear in its memorandum of the magnitude of the error and the county's responsibility therein.

Instead, Friends is only capable of creating the innuendo that Jerome County maliciously prevented the attendance of these attorneys, which it then sets adrift hoping that such innuendo finds some footing with the court before it sinks miserably into the abyss. This is exactly however, what the court should allow to happen to this claim – allow it to sink. If Friends is only capable of producing an issue by way of innuendo, and thinks so little of such issue that it waste no further time attempting to prop it up, then the court should not waste its time with the issue either. *See Suitts v. Nix*, 141 Idaho 706, 708 (2005) (issues on appeal that are not supported by positions of law or authority are deemed waived and will not be considered by an appellate court); and *Jorgensen v. Coppedge*, 145 Idaho 524, 528 (2008) (appellate court will not consider assignment of error not supported by argument and authority in the opening brief).

II. (B) Friends Has Failed To Show Idaho Code Section 67-6529(2) And JCZO 13-6.02 To Be Unconstitutional

Next, Friends claim that Idaho Code Section 67-6529(2) and JCZO 13-6.02 are unconstitutional because they violate Friends' substantive due process rights. (*Petitioners' Memo*, at 31-34). Friends doesn't even seem to be trying at this point. The

first sentence Friend's presents on this claim is, "I.C. § 67-6529(2) and JCZO 13-6.02 are unconstitutional because they violate *petitioners'* substantive due process rights." (*Petitioners' Memo*, at 31; emphasis added). The very last line of this argument is that 67-6529 and its embodiment in 13-6.02 "violates *petitioners'* substantive due process rights and should be found unconstitutional." (*Petitioners' Memo*, at 34; emphasis added). These two references to "petitioners" are the only ones Friends makes to anyone. No other general reference to the petitioners as a whole; no specific reference to any of the petitioners as individuals; and no specification as to how either of the two cited sections were applied (let alone applied unconstitutionally) to the non-identified petitioners. The entirety of the three pages of memorandum that occupy the space between the two above sentences consist of nothing more than recitation of case law, with a few words strung together here and there that might have some resemblance to argument. There is absolutely no application however of the litany of recited case law to the facts of this case. As a result, the court is prevented from addressing this claim. *See Venters v. Sorrento Delaware, Inc.* 141 Idaho 245 (2005) (the court will not address a due process claim where claimant simply makes a minimal, summary argument and presents no analysis justifying the challenge that a certain statute is not rational under the circumstances). This claim should also not be addressed on the basis that it is waived, since it has not been supported by propositions of law or authority in its opening brief. *Suits, supra,* 141 Idaho 708; *Jorgensen, supra,* 145 Idaho 528.

Further, with the above said, it goes without saying that Friends has not demonstrated what action of the county is being attacked; what petitioner is attacking it; why such action is thought to be in error; and what substantial right of the specific party

doing the specific attacking has been prejudiced. *Cowan, supra*, 143 Idaho at 508. *See also Poffenroth v. Culinary Workers Union Local*, 71 Idaho 412, 414 (1951) (person not adversely or injuriously affected by a statute may not challenge its constitutionality).

Finally, Friends is prevented from raising its "unconstitutional" claim as it has failed to show that such issue was raised before the Board. Idaho "case law makes it clear that constitutional issues not raised before a board of commissioners will not be considered on appeal." *Cowan, supra,* 143 Idaho at 510.

III. Friends Has Failed To Show That The JCZO Was Not Followed.

In section three of its memorandum Friends claims that "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." (*Petitioners' Memo*, at 35). There is no disagreement between Friends and Jerome County at this point; the county must comply with the requirements of the JCZO. Friends however, then cites to sections 1-3.01 and 1-6.01, supposedly for the purposes of showing those sections of the ordinance that the Board failed to comply with. (*Id.*) However, Friends never *fully* explains what elements of these two ordinances were not complied with. The term "fully" is emphasized here because Friends does eventually get to somewhat of an argument, but only after it misstates and alters1-3.01.

Friends quote section 1-3.01 as follows:[4]

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:

[4] Friends quotes this section in its entirety. Jerome County quotes only that portion felt relevant.

(*Petitioners' Memo*, at 35; emphasis added). Because of Friends tendency to "insert" language into statutes that doesn't belong[5] (because it alters the statutes meaning), the bracketed language here should be closely scrutinized.

In legal writing, the use of bracketed language is typically done to put quoted language into context, so as to prevent the need of having to quote large amounts of verbiage not otherwise needed for the point trying to be made. It is interesting then that Friends finds it necessary to insert additional language into 1-3.01, even though Friends informs the reader that the ordinance is being quoted "*in its entirety.*" Of all things capable of speaking for themselves, ordinances are at the top given that their sole function is to sufficiently inform persons (both legal and lay) of the law. So, as before, one is left trying to understand why Friends feels it necessary to insert additional language into a fully cited ordinance.

The language of section 1-3.01 seems plain and clear enough on its own, and doesn't appear to need assistance in explaining its intent. Friends either feels otherwise (the ordinance is not clear on it face) or because it is clear on its face, Friends needs to distort it so that it conforms to the point that it is attempting to make. If it were the prior, it would seem that Friends would want to at least argue that the ordinance is vague and why its interpretation is correct. If however, it is the latter that is Friends true intent, then it would make sense that Friends wants to quietly slip the added language in without much fanfare.

A statutory interpretation analysis of 1-3.01 may help shed light on the motive of inserting the additional language. Such an analysis begins with the literal words of a

[5] See discussion starting on page twenty of this response concerning Friends' quoting of section 13-6.01 and the insertion of bracketed language into that section.

statute, which are the best guide to determining legislative intent. *Doe v. Boy Scouts of America*, Idaho Supreme Court Opinion No. 152 (2009). Furthermore, the words of a statute should be given their plain meaning. (*Id.*)

As stated, the language of section 1-3.01 seems plain and clear enough on its own. The section begins with the subject matter, "*This ordinance*," and then indicates what that subject matter pertains to, "*has been made in accordance with a comprehensive plan.*" The meaning of this section could not be clearer. It is simply stating that the JCZO was derived from a comprehensive plan. The ordinance is not concerned with even identifying the exact comprehensive plan (as it does not do so), but rather only informing one that the JCZO is in conformance with Idaho law.[6] The very next sentence of 1-3.01 reads, "*It is intended, therefore to provide:*" This sentence has the pro-noun, "It" which would reference back to the noun of the prior sentence, "This ordinance". The pro-noun "it" would not reference back to the prepositional phrase, "in accordance with the comprehensive plan". Even if the rules of English grammar are ignored, the only logical way to read, "*It is intended...*" is as, "*This ordinance is intended...*"

If questions however still persist, then statutory interpretation calls for the whole act to be looked at for the purpose of ascertaining and giving effect to the questioned language. *See Corp. of Presiding Bishop v. Ada County*, 123 Idaho 410 (Idaho 1993) (in construing a statute the Court will not deal in any subtle refinements of the legislation, but will ascertain and give effect to the purpose and intent of the legislature, based on the whole act and every word therein, lending substance and meaning to the provisions).

[6]Idaho Code Section 67-6511 mandates that each "governing board shall ... establish within its jurisdiction one (1) or more zones or zoning districts where appropriate. The zoning districts shall be in accordance with the policies set forth in the adopted comprehensive plan (emphasis added). This statute then allows for the amending of a zoning ordinance "[a]fter considering the comprehensive plan." I.C. § 67-6511(b).

Being part of chapter one of the JCZO, section 1-3.01 is obviously *in pari materia* with the over-all provisions of that chapter. Law governing these circumstances has held:

> Statutes which are *in pari materia* are to be construed together to effect legislative intent . . .. [This rule] means that each legislative act is to be interpreted with other acts relating to the same matter or subject. Statutes are *in pari materia* when they relate to the same subject. Such statutes are taken together and construed as one system, and the object is to carry into effect the intention. It is to be inferred that a code of statutes relating to one subjects was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions. For the purpose of learning the intention, all statutes relating to the same subject are to be compared, and so far as still in force brought into harmony by interpretation.

Grand Canyon Dories v. Tax Com'n., 124 Idaho 1 (Idaho 1993).

If all of chapter one is reviewed as whole, it is clear that all the provisions of that chapter pertain to the county's zoning ordinance: Section 1-1.01: "*This ordinance is entitled...*"; Section 1-2.01: "*This ordinance is adopted...*"; Section 1-3.01: "*This ordinance has been...*"; Section 1-5.01: "*...the regulations and restrictions as set forth in this ordinance...*"; Section 1-6.01: "*This ordinance shall be interpreted...*"; etc. Because all of chapter one's provisions pertain to the JCZO, the only way to read the "It" in the phrase, "*It is intended, therefore to provide*," is to understand it as referencing the JCZO, and not the comprehensive plan as claimed by Friends.

All of this seems clear and elementary, so it would not appear the reason for Friends' insertion of the bracketed language was because it felt the meaning of 1-3.01 was unclear. However, even if Friends were given the benefit of the doubt that it was legitimately questioning the intent of 1-3.01, then it does not make sense for Friends not to argue as much. Instead of raising such an issue, Friends just covertly inserts the bracketed language into 1-3.01 with nothing more. Almost as if it were trying to

purposely cause the meaning of section to not be focused upon; to simply make the insertion as if it were no big deal and only common sense to read it in this manner.

Because Friends does not appear to question the "clarity" of 1-3.01, then the only other explanation for the bracketed language is that Friends is purposely trying to "bend" or conform the ordinance so that it supports the claim being made. One should therefore decline Friends' invitation to go down this rabbit hole, and rather simply choose to read 1-3.06 as it plainly was meant - as nothing more than an "explanation" that the JCZO is appropriately based upon a comprehensive plan as is required per Idaho code.[7]

What Friends is missing or not understanding when it asserts that the Board was required to consider the comprehensive plan by giving "due consideration to the enumerated factors listed in 1-3.01...[and] 1-6.01 before approving an LCO permit" (*Petitioners' Memo*, at 37), is that when the JCZO is applied, the comprehensive plan is also applied. This is because the ordinance took into consideration the comprehensive plan at the time it was written, and section 1-3.01 tells us that this is so. The "proof" that Friends offers as showing that the Board did not consider the plan, is in the fact that "[n]owhere in the memorandum...are there references to JCZO Chapter 1." (*Petitioners' Memo*, at 37). But one who understands 1-3.01 correctly, would not expect to see such references. Such a person would comprehend that because chapter thirteen was written in accordance with the plan, references to chapter thirteen are indirectly references to the plan.

Because 1-3.01 is explanatory or "assurance giving" in nature only, there are not any procedural requirements that stem from it and that must be followed. There is nothing to "comply with" as argued by Friends. This remains true even if Friends'

[7] *See footnote 4, supra.*

interpretation is pursued. Friends reads 1-3.01 as stating, "*the comprehensive plan is intended, therefore to provide: a) Support of property values by preserving... b) Protection from the menace to the public...*" and so forth all the way through "m". Even read this way, no procedural requirements pop-up or are magically created. The response to such a reading is simply, "Great. Good to know that's what the plan intends. Now what can I do under the ordinance?"

Likewise, section 1-6.01 is only guidance as to how the provisions of the JCZO are to be *interpreted* in the event a question arises. It has already been pointed out that under a statutory interpretation analysis, ordinances are to be given their clear and plain meaning. And thus, it wouldn't make sense to constantly alter the meaning of the various provision of the JCZO by always importing the 1-6.01 principles into the language of these provisions as Friends argues.[8] Instead, 1-3.01 tells us that all the provisions of the JCZO were written in accordance with the comprehensive plan, and thus already written in accordance with the 1-6.01 principles. Therefore, no such "constant" 1-6.01 interpretation is needed. However, when a legitimate question does arise as to the meaning of a particular ordinance, then such should be answered by interpreting it under the principles of 1-6.01 (e.g. If, say an ordinance simply requires all junkyards to be fenced, but does not define "fenced". If a question arises as to whether a solid fence is required or not, then 1-6.01 would control and require a solid fence so as to error on the side of protecting the property of the junkyard's neighbors.).

Therefore, Friends is not correct when it claims the Board did not consider 1-6.01, because the ordinances that the Board did consider where written in accordance with the

8 If this is what the legislator intended, they would have simply wrote all the 1-6.01 principles into all the other provisions of the JCZO.

1-6.01 principles. The Board did not have to directly consider and cite to section 1-6.01 because the provisions of chapter thirteen were clear and unambiguous and no "1-6.01 interpretation" was needed.

Friends is also in error when it claims that section 1-6.01 "*guarantees* that..."each citizen shall have the maximum use of his property without placing an undue burden upon that of his neighbor.'" (*Petitioners' Memo*, at 39; citing JCZO 1-6.01; emphasis added). Remaining consistent, Friends does not explain how it was capable of inserting the word "guarantee" into 1-6.01, but regardless, such an interpretation can be abruptly discarded because of the absurd result that it leads to. The terms "undue" and "burden" are subjective enough on their own, but placed together and the meaning of such is limited only to the number of people interpreting it. What might be an "undue burden" to one person may not be to another. If "undue" is defined as not normal or excessive (e.g. an undue response), then again what is normal or excessive to one person may not be to someone else. Under Friends' interpretation, no one could do anything with their property because it could always be argued that any use of land places an "undue burden" on neighboring property.

IV. Friends Fails To Establish That The Board Was Required To Reopen The Record After Remand.

Friends next claims that the Board's "failure to even consider the motion [to reopen the record] constitutes unlawful procedure on the Board's part, or alternatively, constitutes and [sic] arbitraty [sic] and capricious decision." (*Petitioners' Memo*, at 40). Friends spends little time on this claim, and even less (as in none) supporting it. Nor does Friends cite any legal authority, instead basing this claim entirely on the conjured premise that proper procedure required the Board to reopen the record. It is from this

false premise that Friends jumps over any argument or support, simply choosing to land directly on its conclusion – that because the Board did not reopen the record when asked, error arose proof positive.

As before, if Friends is willing to put forth so little effort into this claim, then court should not waste its time with the issue either. Both Jerome County and the court should not have to research the matter for applicable authority in attempting to determine if this is even a valid claim or not. The claim should simply be waived on the basis of not being supported by propositions of law or authority in its opening brief. *Suits, supra,* 141 Idaho 708; *Jorgensen, supra,* 145 Idaho 528.

V. Friends Has Failed To Demonstrate That The Application Was Incomplete.

Friends next attacks a finding of fact made by the Board, claiming that contrary to such finding, the Big Sky application was incomplete. (*Petitioners' Memo*, at 40). Although Friends typical "assertion without support" (which is present here) is enough on its own to deny this claim, it should be pointed out that an even higher hurdle exists here for Friends, in which it must clear to have success on this claim; such being the governing standard over reviewing courts. Such has been held in relevant part as hold:

> The Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. The Court instead defers to the Board's findings of fact unless they are clearly erroneous. In other words, the agency's [the Board's] factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record.

Urrutia v. Blaine County, 134 Idaho 353, 357 (2000). The innuendos and false premises offered by Friends in this matter fail at any level, but by definition do not establish clear error that would allow this court to substitutes its judgment for that of the Board's.

Friends claim the application was incomplete first of all, because "all agencies had not completed their review." (*Petitioners' Memo*, at 41). Specifically, Friends points to "[t]he Hillsdale Highway letter citing the need for a traffic impact study *prior to application* consideration." (*Id.*; emphasis added). It should first of all be noted that this specific issue was not raised before the Board. Idaho case law makes it clear that issues not raised before a board of commissioners will not be considered on appeal. *Cowan, supra,* 143 Idaho at 510. With that said, Friends does not cite the ordinance that requires an agency to submit *all* of its comments prior to the application being submitted, which is unfortunate because if it had, Friends would have saw that there is no such requirement.

The relevant section of the JCZO is 13-5.01(l), which states in applicable part:

> Site assessment comments are required from the appropriate Highway District, Irrigation Delivery Department, South Central Health District, Department of Agriculture, Department of Water Resources, and/or other agencies designated by the Planning & Zoning Administrator. The Applicant is required to submit these comments with his application.

Id. Clearly, this section only requires certain agency "comments" be submitted *along* with the application. As Friends points out, the Hillsdale Highway district did submit a comment letter as required by this ordinance (the letter was submitted with the application). (Phase I, Vol. I, Application Exhibit 12, p. 230). This letter does cite the need for a traffic impact study, but does not make it a requirement that the study itself be filed along with the application. Rather, the comments of the highway district that were submitted with the application simply ask the Board to not *hear* the application until *after Hillsdale had an opportunity to review* the traffic study. (*Id.*) Not that it's relevant, but districts request was allowed. Hillsdale submitted comments based on the traffic study in a three-page letter on May 15, 2007. (Phase I, Vol. I, Agency, p.6). These comments

were therefore in the hands of the Board prior to its consideration of the Big Sky application. Regardless, the fact remains that the Board found that the application contained comments from Hillsdale Highway District and that any 13-5.01(l) requirement in regard to this agency was fulfilled. Friends has not established this finding to be clearly erroneous.

The next claim Friends makes in regard to an "incomplete" application is that there was a "lack of a letter from the Valley School District until July 28, over two months after the application was file." (*Petitioners' Memo*, at 41). Per its history, this is all Friends offers. It does not mention the ordinance that shows this to be in error, nor does Friends mention the lengthy discussion the Board had in its two written decisions that were issued in this case (before and after remand). (Phase I, Vol. III, Memorandum Dec. Minutes, p.49; Phase II, Agency Record, pp.112-113). At any point, the Board found that school districts are not mentioned as one of the agencies listed under 13-5.01(1), and that the application did not therefore need to contain comments from the school districts. Friends fails to show this finding to be clearly erroneous.

Friends also claims the application to be incomplete on the bare assertion that the applicant did not show a certain water well on its map as required by the JCZO. Here again, Friends simply tries to "slip-in" its premise that such a well does in fact exist in the first place, without offering support or even argument that did. This matter as was also discussed in both of the Board's memorandums, where the Board found that there was no evidence of a "missing" water well that was not shown on the applicant's map. (Phase I, Vol. III, Memorandum Dec. Minutes, pp. 49 and 50; Phase II, Agency Record, pp.112-113). Friends states nothing that shows this finding to be clearly erroneous.

The final argument Friends offers in its incomplete application claim concerns a third party agreement (or lack thereof) to take waste from the proposed LCO. (*Petitioners' Memo*, at 41). As with the issues above, this too was addressed by the Board in its written decision after remand. (Phase II, Agency Record, pp.114-117). There, the Board found an "agreement" had been made that did satisfy any requirement that such be made prior to submission of the application.[9] (*Id.*) Friends has failed to show the Board's finding to be clearly erroneous.

These are the several areas Friends points to as why it thinks Big Sky's application was incomplete. Throughout this claim, Friends continues its shameless conduct of alluding error only, creating false premises, and never bothering to explain or support either. Friends seems to make a mockery out of the high standard that the law requires of it to be successful in its "factual findings" claim (apparently, just getting to watch the parties in opposition and court partake in its wild goose chase is enough, as nothing else explains the act of seeking judicial review with only mere innuendos and false premises of error). Needless to say, Friends entire claim of an incomplete application should be waived on the basis of not being supported by propositions of law or authority in its opening brief. *Suits, supra,* 141 Idaho 708; *Jorgensen, supra,* 145 Idaho 528.

VI. Friends Fails To Show The Board's Written Decision Not To Constitute A Reasoned Statement.

[9] The Board actually found that such a third party agreement was not even a requirement that had to be satisfied prior to a permit being issued, let alone before an LCO application is submitted. Instead, the Board found that such an agreement just had to be made sometime prior to the waste actually being removed from the LCO site. Further, the Board did make the specific finding that if for the sake of argument the agreement was found to be needed prior to the application's submission, that the applicant would have satisfied this interpretation as well. (Phase II, Agency Record, pp.114-117).

Friends next claim the Board erred by not considering Dean and Eden Dimond's written comments. This claim is obviously being brought by Petitioners Dean and Eden Dimond, which already attempted this argument in front of Judge Bevan on this matters initial judicial review. (Phase II, Agency Record, p.18). There, Judge Bevan found:

> The Dimonds contend that the Board erred by not addressing, in its written opinion, a large amount of evidence submitted by the Dimonds. This court disagrees.
>
> The language of section 67-6535(b) does not require the Board to address every argument made or every fact presented... The statute does not require a board to explain that it does not find a particular fact relevant and why. Although, as explained above, the Board erroneously relied on the Comprehensive Plan, the Board's written decision provides a sufficient "reasoned statement" explaining its conclusions."

Id., at 19. Although Judge Bevan's decision is not controlling on this point, it obviously provides guidance. Judge Bevan's interpretation that section 67-6535(b) does not require the Board to address every argument made or every fact presented is correct. To hold otherwise would lead to an absurd result. This is because most claims in opposition to any LCO permit amounts to nothing more than, "Not in my backyard, even though it's an allowed use in an allowed zone." The reasons provided in support of such a claim are typically not relevant to the criteria for issuing an LCO permit. It therefore would be absurd, let alone impossible, to find 67-6535(b) to require the Board to address everything that was mentioned or touched upon at the ten-hour hearing held in this matter.

Several times in its written decision the Board did make certain findings that it deemed relevant, and stated that nothing to the contrary to such findings had been presented. Thus, in this sense the Dimonds' comments, as well as all other comments from all other members of the public, were considered and found to offer nothing on

point and relevant to the particular issues being discussed. If, where the Board stated this, the Dimonds' information did in fact contradict the finding being made, then one would assume that Friends would be sure to point this out; that Board did not consider contradicting evidence that was presented by the Dimonds. Although it does in fact appear from the record that the Dimonds put a lot of effort into their submissions to the Board, the county should not be faulted if such effort was spent on irrelevant matters (assuming that this is why the Board failed to mention the Dimonds' submissions).

In any event, as Judge Bevan found, after citing *Cowan, supra,* the Board's decision here was in compliance with "67-6535(b) because it included the *criteria and standards it considered relevant, provided detailed facts, and explained its rationale for its decision.*" (Phase II, Agency Record, p.18; emphasis in original). Friends claim to the contrary of Judge Bevan should be denied.

VII. Friends Has Failed To Show It Is Entitled To Attorney Fees.

Friends request attorney fees in this matter pursuant to Idaho Code Section 12-117, simply "because Jerome County acted without a reasonable basis in fact and law on numerous fronts." (*Petitioners' Memo*, at 43). This is all that is offered.

Clearly, Jerome County disagrees that any of its actions were taken without a reasonable basis of fact. Even more pointedly, the county truly believes that Friends does not even raise anyone's curiosity as to whether county error even existed given the total lack of attention and support it gives the claims it raises (let alone raising its claims to the level needed to legally establish the county to have acted without a reasonable basis of fact).

Regardless, there are a few points that should be kept in mind in this request is considered. First, in regard to its actions after remand, the Board was acting within the confines of Judge Bevan's decision. Although this decision did not instruct the Board on how it should ultimately decide the matter, it did limit the areas of the JCZO that the Board could look at in making its decision. (Phase II, Agency Record, p. 31). If the Board did deviate from these areas and the matter then taken on judicial review, the Board would be hard pressed to argue under such circumstances that it did have a reasonable basis in fact for deviating from a court's findings. Instead, the Board followed the findings of the court's decision, providing an in-depth analysis as to how the specified sections were to be interpreted, and then weighed the evidence submitted as to the various criteria found in each.

Further, as pointed out above, many of the issues Friends brings now were never raised before the Board. Thus, even if considered here and agreed with by the court, it still could not find that the Board acted without a reasonable basis of fact since the Board was never asked to consider such issues.

As to all of Friends claims, the "reasonableness" of the Board's action is never even reached as a result of Friends never turning its mere assertions into valid issues by establishing some kind of basis for them. Thus, the court should not even reach the point of judging the county's actions given Friends not having met its burden of supporting its various claims.

For all these reasons, Friends request for attorney fees should be denied.

VIII. Jerome County Is Entitled To Attorney Fees.

Jerome County requests attorney's fees pursuant to Idaho Code Section 12-117, which allows such fees in certain instances and defines Jerome County as a party who is entitled to such fees upon a finding that Friends acted without a reasonable basis of fact. Such a finding is found where an appeal presents no meaningful issue on a question of law and does nothing more than invite an appellate court to second-guess the Board. *T-Craft Aero Club, Inc. v. Blough,* 102 Idaho 833 (Ct. App. 1982).

The actions of Friends falls precisely within the standard of *Blough*. The Friends brought its appeal with no reasonable basis of fact, and it was nothing more than an invitation for the court to second-guess the Board. In support of this, the court need only look to Friends memorandum to see that it – although forty-five pages in length – says nothing. Not only does it not raise legitimate issues, it does not even raise one's curiosity as to whether the innuendos that it creates are even true.

Another factor the court should consider is the amount of time taken to get to the case's merits. This large amount of time stems primarily from Friends repeated motions to augment the record. Essentially, Friends was given three chances to get its motion to augment the record right. The first being the original motion, the second found in the court's order of June 3, 2009 (stating that Friends needs to start over with the process of seeking augmentation of the record) (Phase II, Vol. I, p. 6); and then the third came at the hearing on September 29, 2009 where Friends was practically lead by the hand in its attempt to get the record augmented. This process took close to a year and was continually objected to by Jerome County and the Intervenor.

The real significance of this "preparatory time" is in the final product, Friends' memorandum. The significance is not what is in the memo, but what isn't. With the amount of

time and energy Friends spent preliminary with the record, one would expect all of Friends claims to at the very least be well supported. Further, after reading its memorandum, one would not only expect to clearly understand Friends' claims, but to also understand why all the augmented documents were requested and how all of them relate to the claims being made.

Instead, not only does Friends' claims remain entirely unsupported (this even though almost every document Friends requested to be augmented into the record was granted), but very little, if any, of the augmented documents are even mentioned or used in a meaningful way. Its almost as if the goal of the time spent trying to augment the record was not to strengthen the record so as to in turn strengthen claims, but rather for delaying purposes only.

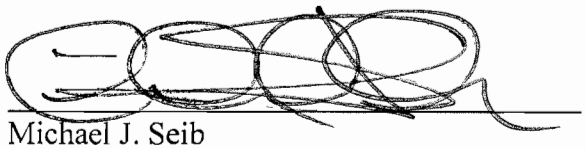
In any event, for this, and all the reasons stated above, Jerome County is due attorney fees in this matter and such should be awarded.

CONCLUSION

All claims brought by Friends should be deemed waived on the basis of not being supported by propositions of law or authority in its opening brief. *Suits, supra,* 141 Idaho 708; *Jorgensen, supra,* 145 Idaho 528. Several of Friends' don't even cite any legal authority and thus would clearly fall with in this rule. The remaining issues might contain numerous citations to various cases and/or statutes, but a close examination of these show only a mere recitation of the law, with no applicability established to whatever point is being claimed. Therefore, these claims too should be waived.

For these reasons and those stated above, Jerome County respectfully requests that Friends petition be denied; that the Board's decision of September 23, 2008 be affirmed; and the court award Jerome County applicable attorney's fees.

DATED this 18th day of February 2010.



Michael J. Seib
Jerome County Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of February 2009, I served true and correct copies of Jerome *County's Memorandum Decision* upon the following persons named below in the manner indicated:

Honorable Judge Robert J. Elgee Attn: Page 201 2nd Ave. South, Suite 106 Hailey, ID 83333	____ personal delivery __X__ U.S. Mail, postage prepaid ____ telephone facsimile
JOHN B. LOTHSPEICH Fredericksen, Williams, Meservy & Lothspeich, LLP 153 East Main Street Post Office Box 168 Jerome, Idaho 83338 jblothspeich@cableone.net	__X__ personal delivery ____ U.S. Mail, postage prepaid ____ telephone facsimile __X__ email
RICHARD A. CARLSON Attorney at Law Post Office Box 21 Filer, Idaho 8332 carlsonr@filertel.com	____ personal delivery __X__ U.S. Mail ____ telephone facsimile __X__ email
Patrick D. Brown Hutchinson & Brown, LLP PO Box 207 Twin Falls, Idaho 83301 patbrown@cableone.net	____ personal delivery __X__ U.S. Mail ____ telephone facsimile __X__ email
Charles M. Tebbutt Western Environmental Law Center 1216 Lincoln St. Eugene, Oregon 97401 charlie.tebbuttlaw@gmail.com	____ personal delivery __X__ U.S. Mail ____ telephone facsimile __X__ email

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Attorneys for Intervenor
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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 of Idaho, Inc. Petitioners,	CASE NO. CV 2008-1081 **INTERVENORS' MEMORANDUM IN OPPOSITION TO PETITION FOR JUDICIAL REVIEW**

Heading continued on next page

ORIGINAL

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

JOHN B. LOTHSPEICH Williams, Meservy & Lothspeich, LLP 153 East Main Street PO Box 168 Jerome, Idaho 83338 Attorneys for Intervenor	MICHAEL J. SEIB Jerome County Deputy Prosecutor Jerome County Judicial Annex 233 West Main Street Jerome, Idaho 83338 Attorney for Respondents
RICHARD A. CARLSON Attorney at Law PO Box 21 Filer, Idaho 83328 Attorney for Petitioners	CHARLES M. TEBBUTT Law Offices of Charles M. Tebbutt PO Box 10112 Eugene, Oregon 97440 Attorney for Petitioners
PATRICK D. BROWN Hutchinson & Brown, LLP PO Box 207 Twin Falls, Idaho 83303-0207 Attorney for Petitioners	

PREFACE REGARDING RECORD CITATION

As set forth in Petitioners' Memorandum in Support for Petition for Judicial Review, Explanation of Record Citation, Intervenor would request that the Court adopt the citation referenced in Petitioners' explanation, and incorporated in Petitioners' brief, for purposes of judicial review. Intervenors' brief has adopted same citation reference for purposes of clarity and consistency.

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IDAHO CODE:

OTHER AUTHORITY:

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, (hereinafter "Big Sky"), the Intervenor in this matter by and through its attorney, John B. Lothspeich, of the law firm Williams, Meservy & Lothspeich, LLP, and submits its Memorandum in Opposition to Petition for Judicial Review as follows:

I. STATEMENT OF THE CASE.

A. Nature of the Case

This case arises from a petition for judicial review filed by Petitioners from a Decision of the Jerome County Board of Commissioners approving Intervenors' application for a new LCO permit under Chapter 13 of the Jerome County Zoning Ordinance.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY.

On May 3, 2007, Big Sky filed an application for an LCO permit with the Jerome County Planning & Zoning Administrator. (Phase I, Volume I, Pages 4-8).

The exhibits in support of the application are vast. Within the application, Exhibit 5 indicated a description of the zoning and present use of the LCO property being located within an A-1 zone. Big Sky owned 1,204.61 acres contained within the proposed LCO site.

The application also contained the facility description and management plans. The application indicated that the new heifer raising facility would be designed to house 8,000 Jerome County animal units. The facility would be operated as a dry lot system. All the corral allies would be scraped. Storage of waste would be composted at a designated composting area. Waste utilized

and generated at the facility would be pursuant to the Idaho State Department of Agriculture's approval of a Nutrient Management Plan. Best management practices were identified for implementation in the design and operation of the facility. (Phase I, Volume I, Pages 39-44).

The plan also included an odor management component. (Phase I, Volume I, Pages 44-48).

Additionally, water utilization, traffic and facility access and a road debris maintenance plan was outlined. (Phase I, Volume I, Pages 48-50). Fly abatement, dust control and dead animal management was outlined. (Phase I, Volume I, Pages 51-54).

The Idaho Department of Transportation, in a March 7, 2007 letter to Planning & Zoning Administration Officials, indicated that the access from State Highway 25 for Big Sky Farms is approved. The Idaho Department of Transportation further indicated specific requirements and listed same. (Phase I, Volume I, Pages 57-58).

On February 27, 2007, the Idaho Department of Transportation sent a letter to Art Brown, Planning & Zoning Administrator, indicating that a traffic impact study is not required regarding the proposed Big Sky Farms development. (Phase I, Volume I, Page 59).

The application also included a soils evaluation prepared by Associated Earth Sciences, Inc. and dated March 17, 2007. Harley R. Noe, Professional Soils Scientist, concluded that there would be no significant soil related problems with construction of the heifer operation on the property. (Phase I, Volume I, Pages 78-79).

The application included a Vicinity Map, topographical maps and visual impact of the facility map. Same was prepared by Rex Harding with JUB Engineers, Inc. (Phase I, Volume I, Page 93,

Exhibit 7).

The application contained the flood zone for the relevant Eden area, prepared by the National Flood Insurance Program, Federal Emergency Management Agency. (Phase I, Volume I, Pages 105-108, Exhibit 9).

In a letter dated May 2, 2007 to Matt Thompson, Professional Engineer, Ag Tec, Marv Patton, Chief, Dairy Bureau, State of Idaho Department of Agriculture, indicated that the Department of Agriculture has reviewed and approved the Big Sky Heifer Ranch Plan at issue. In addition, the Idaho State Department of Agriculture will continually monitor the construction and operation for compliance with applicable state and federal requirements. (Phase I, Volume I, Exhibit 10-1).

Within the application, the Department of Agriculture approval of the waste system and Nutrient Management Plan was contained. Hillary Simpson, Nutrient Management Specialist, Idaho State Department of Agriculture Technical Services, by way of letter dated April 18, 2007, indicated that the Nutrient Management Plan for Big Sky written by Dustin Olsen on April 18, 2007 is approved.

The approved Nutrient Management Plan is a comprehensive document including, in part:

- facility summary;
- resource concerns;
- waste storage and handling;
- hydraulic balance;
- Nutrient Management Plan requirements;

- facility testing requirements;
- annual soil testing;
- recordkeeping;
- farm resource concerns;
- field resource concerns;
- ISDA Regulations and the Idaho Nutrient Management Standard;
- annual nutrient budget inclusive of nutrient budget summary;
- analysis of animal system inclusive of waste storage and handling;
- containment of housing facility waste and corral run-off;
- bio-nutrient export information;
- analysis of cropping system;
- analysis of soil characteristics inclusive of soil plan;
- soil drainage class;
- soil hydrologic group;
- soil permeability class;
- soil texture modifiers; and
- texture class and terms used in lieu of texture. (Phase I, Volume I, Pages 112-227).

The Nutrient Management Plan is complex and detailed, as approved by the Idaho Department of Agriculture, and will additionally require all ponds being approved by ISDA

engineers regarding construction requirements prior to allowing animals to enter the facility. (Phase I, Volume I, Pages 110-227).

The application also included a sketch showing run-off flow directions and drainage. (Phase I, Volume I, Page 229, Exhibit 11).

In its memorandum in support of petition for judicial review, Petitioners' discuss concerns regarding surface and ground water and odors at length, but wholly ignore the contents of the application and Nutrient Management Plan that specifically addresses many of their concerns. In addition to the comprehensive requirements of the Jerome County Zoning Ordinance set forth in Chapter 13, establishing the elements for a new LCO facility, the legislature addressed these concerns within the Beef Cattle Environmental Control Act, Idaho Code §22-4902, *et. seq.* regarding the global environmental issues for confined animal feeding operations. The Beef Cattle Environmental Control Act was enacted with the following purpose:

> "The legislature recognizes the importance of protecting state natural resources including, surface water and ground water. It is the intent of the legislature to protect the quality of these natural resources while maintaining an ecologically sound, economically viable, and socially responsible beef cattle industry in the state. The beef cattle industry produces manure and processed waste water, which when properly used, supplies valuable nutrients and organic matter to soils and is protective of the environment, but may, when improperly stored and managed, create adverse impacts on natural resources, including waters of the state. This chapter is intended to ensure that manure and processed waste water associated with beef cattle operations are handled in a manner which protects the natural resources of the state." (Idaho Code §22-4902(1)).

To further the purposes of the legislative declaration, the act provides that "each beef cattle animal feeding operation shall submit a Nutrient Management Plan to the director of ISDA for

approval". (Idaho Code §22-4906). [1]

Specific Department of Agriculture regulations additionally provide for addressing odors generated in excess of odors normally associated with raising beef cattle in Idaho. (IDAPA 02.04.15.030). [2]

A Nutrient Management Plan is a plan for managing the amount, source, placement, form and timing of the land application of nutrients and soil amendments. (Idaho Code §22-4904(11)).

Therefore, the ISDA's approval of the Nutrient Management Plan, aforementioned in part, above, was the assurance that the Board needed, consistent with the legislative enactment, regarding managing the LCO's waste, to ensure for protection to the environment, and in turn, protection of neighbors' properties and resources.

Site assessment comments were obtained from the Hillsdale Highway District. In a letter dated March 16, 2007, Berwyn Mussmann, Chairman of the Hillsdale Highway District, required a traffic impact study to be presented to the Board of Highway Commissioners regarding the application. (Phase I, Volume I, Page 231).

Site assessment comment from the Jerome Highway District was submitted on March 8, 2007 from Leroy Lewis, Road Supervisor for the Jerome Highway District. Mr. Lewis requested a traffic

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[1] See also Sanitary Products Act, I.C §37-401(4), ("All dairy farms shall have a Nutrient Management Plan approved by the Department [ISDA]").

[2] See also the Agriculture Odor Management Act, I.C. §25-3801, *et. seq.* Pursuant to the AOMA, ISDA promulgated the rules governing agriculture odor management, IDAPA 02.04.16.100, *et. seq.* The rule provides that management practices which are undertaken in accordance with the rules governing dairy waste; the rules governing pesticide and chemigation use and application; rules concerning disposal of cull onion and potatoes; rules governing dead animal movement and disposal; the Idaho NRCS Nutrient Management Standard 590, June 1999; Best Management Practices listed in the "Idaho Agricultural Pollution Abatement Plan", August 2001; control of "manure odors"; ASAE Standard EP379.2, §§ 5 and 6 in their entirety, November 1999; and/or "composting facility", NRCS

impact study to determine the impact on the road system. (Phase I, Volume I, Page 235).

On April 25, 2007, Mr. Lewis wrote an additional letter to Jerome County Planning & Zoning, indicating that the Jerome Highway District had received the traffic impact study for Big Sky. The letter made no specific recommendations. (Phase I, Volume I, Page 237).

Site assessment comment was submitted by First Segregation Fire District to Art Brown, Planning & Zoning Administrator, on February 16, 2007 by Donald Utt, Fire Chief. Chief Utt's letter posed no impediment for the application to proceed. (Phase I, Volume I, Page 240).

Site assessment comment was submitted by the Irrigation Delivery Department, in this matter the Northside Canal Company, by way of a March 26, 2007 letter to Art Brown, regarding the Big Sky Farms-Don McFarland CAFO application. No specific negative impacts were identified so long as the facility met specific Northside Canal Company requirements. (Phase I, Volume I, Page 242-243).

Site assessment comment was submitted by South Central District Health, by way of a letter dated March 8, 2007 from Dan King. South Central District Health interposed no objection to the LCO application proceeding. (Phase I, Volume I, Page 245).

Site assessment comment, accompanied by an application for transfer of water right, was submitted to Jerome County Planning office by James E. Stanton, Senior Water Resource Agent, State of Idaho Department of Water Resources, indicating that the transfer was processed and is proceeding. (Phase I, Volume I, Page 247-264).

Conservation Practice Standard 371, March 2001.

All setback compliance was established as set forth in the maps in Exhibits 7 and 8. (Phase I, Volume I, Page 266).

The Idaho State Department of Agriculture, Siting Team suitability determination was submitted to Art Brown, Administrator, Jerome County Planning & Zoning Commission, on November 2, 2006. The Siting Team, composed of representatives of the Department of Agriculture, Department of Environmental Quality, and the Department of Water Resources, listed the suitability determination as a "moderate risk" initially. (Phase I, Volume I, Page 268-270).

On June 5, 2007, in a letter to Art Brown, Administrator, Jerome County Planning & Zoning Commission, the Idaho State Department of Agriculture indicated that the Idaho State CAFO Siting Team had completed its review of the application. A voluminous list of technical factors contributed to the determination of the rating. In same letter, the Siting Team listed the suitability determination as "low risk". (Phase I, Volume I, Exhibit AG-1 through AG-3).

Additional letters from Highway District agencies were received and submitted with the application. (Hillsdale Highway District, (Phase I, Volume I, Exhibit AG-5 through AG-7); and Jerome Highway District, (Phase I, Volume I, Exhibit AG-10).

The public hearing on the application was held before the Board of County Commissioners on an extraordinary two day setting to allow for public comment on September 25 and 26, 2007. At the public hearing, a voluminous amount of written testimony was submitted by individuals predominantly in opposition to the application. The vast written testimony and exhibits were submitted by those in opposition, inclusive of Richard Carlson and Pat Brown, counsel for opponents

in the instant litigation. (Carlson-August 3, 2007 letter, Phase I, Volume II).

One exhibit submitted for the Board of County Commissioners was a packet from Dean Dimond's attorney comprised of almost 500 pages. (Phase I, Volume II, R-2 packet, Pages 3-489).

In a September 13, 2007 letter to the Board of Commissioners, Patrick Brown submitted information on behalf of Wayne and James Slone. Mr. Brown claims that the Slone's lacked notice but do not indicate that they own a primary residence on the land in question. From the information submitted, it is obvious that Mr. Brown had notice of the hearing, and an opportunity to be present representing his client at the public hearing. Additionally, his concerns are included in the official Agency Record. (Phase I, Volume III, Pages 854-856).

The Board held a public meeting for purposes of deliberating on the evidence on October 9, 2009. At the October 9, 2009 meeting, the Board denied the application.

On November 1, 2007, the Board issued its Memorandum Decision setting forth findings of fact and conclusions law denying the application. (Phase I, Volume III, Exhibits CC45-CC50). In its Memorandum Decision, findings and conclusions, the Board determined that the application was complete and wrote,

> "The Board finds the criteria relevant to this application, as set forth in Chapter 13 of the Ordinance, has been met and complied with by the applicant."

The Board then denied the application based upon standards considered relevant in the County's Comprehensive Plan. (Phase I, Volume III, Exhibits CC45-CC50).

Big Sky Farms Limited Partnership filed a petition for judicial review on November 13,

2007. (Phase I, Volume III, Exhibit AP1).

On June 27, 2008, and July 1, 2008, the Honorable G. Richard Bevan, District Judge, issued his Memorandum Decision and amended Memorandum Decision reversing the Board's Decision denying Big Sky's LCO application and remanded the matter back to the Board of County Commissioners for further consideration. (Phase II, Agency Record, Pages 1-43).

On August 4, 2008, Petitioner Dean Dimond appeared before the Board and attempted to file documents and be heard on his motion to submit additional evidence. Good cause was not propounded by Dimond. His request was denied. (Supplemental Record, Volume I, Page 163, Phase II; Agency Record, Page 55).

Numerous other meetings were held subsequent to the permit application on remand.

On September 4, 2008, the Board discussed the Big Sky Decision and indicated potential conditions which would be placed upon the permit inclusive of concerns addressed in the Hillsdale Highway District letter and Valley School District's request for a turn-out.

Additionally, Northside Canal Company concerns regarding leaching would be addressed. (Agency Record, Page 72).

On September 9, 2008, a Board of County Commissioners hearing was held regarding an issue of the sale of the subject property to the successors in interest, South View Dairy. This was only addressed resulting from inappropriate comments made by Commission members to the local newspaper regarding the sale of the property and its potential impact upon the permit at issue. The permit being attached to the land and going to the successor in interest was verified by the Planning

& Zoning Administrator. (Agency Record, Pages 90-91).

On September 22, 2008, the Board of County Commissioners again addressed the Big Sky discussion and concerns raised regarding specific criteria, and were informed by their counsel that findings of fact would be prepared for their review. (Agency Record, Page 93).

On September 23, 2008, the Board issued its Memorandum Decision approving Big Sky's application subject to conditions of a "school bus stop and dike or wall, being provided by Big Sky". The comprehensive and reasoned Decision addressed the issues raised as to specific criteria of the relevant ordinance. (Agency Record, Pages 111-119).

On October 21, 2008, the Petitioners filed their petition for judicial review and declaratory judgment. (Agency Record, Page 121). Petitioners requested that the court enter declaratory judgment invalidating Idaho Code §67-5629 and the Jerome County Ordinance regarding the same one mile limitation.

Intervenors filed a motion to dismiss Petitioners declaratory judgment action set forth in its original petition primarily based upon the authority set forth by the Idaho Supreme Court in *Euclid Avenue Trust v. City of Boise*, 146 Idaho 306, 193 P.3d 853 (2008). Rather than ruling upon the motion to dismiss, the Court allowed Petitioners to file their amended petition for judicial review dated March 6, 2009. However, the amended petition for judicial review does not contain a specific attack upon Idaho Code §67-5629 or the similar attack upon the Jerome County Zoning Ordinance regarding the one mile limitation. However, an argument is contained within Petitioners' memorandum in support of petition for judicial review which will be further addressed.

On June 3, 2009, the Court entered its order on motion to augment and supplement the record, correct transcript and motion to dismiss. (Supplemental Record, Volume I, Pages 1-8). The Court set forth specific parameters for the Petitioners to follow regarding the submission of documents to be considered to be augmented into the record. This was the second opportunity afforded by the Court to Petitioners to identify relevant documentation to augment the record. This was ordered subsequent to objections raised by Intervenor and Respondent regarding augmentation of the record. The subsequent submissions made by Petitioners of the documents sought to be augmented in the record did not comply with the Court's June 3, 2009 order. Irregardless, the Court allowed documents to be identified to be augmented in the record and directed counsel to attempt to stipulate to the augmentation of the record for purposes of judicial review. This was over an additional objection of Intervenor for augmentation of the record, allowing Petitioners three opportunities to augment the record. The parties eventually did stipulate to certain documents to be augmented into the record resulting in the Court's order on Petitioners renewed motion to augment the record and scheduling order dated November 24, 2009. (Supplemental Record, Volume II, Pages 234-250).

At the hearing on September 29, 2009, counsel for the Intervenor objected to the Court considering any further efforts at augmentation. The procedural history portion of the Court's order, indicating that certain documents became the subject of stipulations only resulted after counsel for the Intervenor interposed its objection to the Court's consideration, which was denied. Thereafter, the stipulation for certain documents resulted due to the Court's directive. (Supplemental Record,

Volume II, Page 235).

III. ISSUES PRESENTED FOR REVIEW.

A. The Board did not violate any procedural due process rights regarding individuals' ability to comment at the hearing or submit written evidence.

B. Idaho Code §67-6529 and Jerome County Zoning Ordinance 13-6.02, restricting written testimony from affected individuals who owned a primary residence upon real property within one (1) mile from the proposed facility is not in violation of state and federal constitutional due process rights.

C. The Board's decision to grant the LCO application was based upon lawful procedure and an appropriate application of the Board's interpretation and application of its own zoning ordinances.

D. The Board's decisions were not arbitrary, capricious or an abuse of discretion.

E. The Board appropriately denied Dean Dimond's request to reopen the record and submit additional evidence pursuant to their own procedures.

F. The decisions of the Board were consistent with the provisions of the Jerome County Ordinance relating to requirements for completeness of applications for livestock confinement operations, and the Board's Memorandum Decision addressed the application requirements in detail.

G. The Board's decision was consistent with Idaho Code §67-6535 and the Board's decision constituted a reasoned statement.

H. Intervenors are entitled to attorneys' fees on the basis that Petitioners have failed to base their claims upon a reasonable basis in fact or law.

IV. STANDARD OF REVIEW.

Idaho Code §67-6519 grants the governing boards of the county the discretion to grant or deny an application authorized or mandated by the Local Land Use Planning Act, Idaho Code §67-6501, *et. seq.* (See *McCuskey v. Canyon County*, 123 Idaho 657, 663, 851 P.2d 953, 957 (1993)).

Although interpretation of an ordinance is a question of law over which the Supreme Court exercises free review, there is a strong presumption of favoring the validity of the actions of zoning boards, which includes the application and interpretation of their own zoning ordinances. (*Southfork Coalition v. Board of Commissioners of Bonneville County*, 117 Idaho 857, 792 P.2d 882 (1990); *Howard v. Canyon County Board of Commissioners*, 128 Idaho 479, 915 P.2d 709 (1996); *Sanders Orchard v. Gem County*, 137 Idaho 695, 52 P.3d 840 (2002); *Terrazas v. Blaine County*, 147 Idaho 193, 207 P.3d 169 (2009)).

In reviewing a decision of a Local Land Use Board acting in a quasi judicial capacity, the courts will overturn a zoning decision only if it is: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or(e) arbitrary, capricious or an abuse of discretion. (Idaho Code §67-5279(3)).

In *Terrazas*, the court writes,

> "This court does not substitute its judgment for that of the agency as to the weight of the evidence on questions fact. (Idaho Code §67-5279(1)). Rather, this court defers to the agency's findings of fact unless they're clearly erroneous. (*Castenada v. Brighton Corporation*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998), citing *Southfork Coalition v. Board of Commissioners of Bonneville County*, 117 Idaho 857, 860, 792 P.2d 882, 885 (1990)).
>
> In other words, the agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record. (*Price*, 131 Idaho 429, 958 P.2d 586).
>
> Although interpretation of an ordinance is a question of law over which this

> court exercises free review, (*Lane Ranch Partnership v. City of Sun Valley*, 145 Idaho 87, 89, 175 P.3d 776, 778 (2007), there's a strong presumption of favoring the validity of the actions of zoning boards, which includes the application and interpretation of their own zoning ordinances. (*Payette River Property Association v. Board of Commissioners of Valley County*, 132 Idaho 551, 554, 976 P.2d 477, 480 (1999), citing *Howard v. Canyon County Board of Commissioners*, 128 Idaho 479, 480, 915 P.2d 709, 710 (1996))."

The party seeking to overturn the Board's decision bears the burden of proving the grounds for reversal under Idaho Code §67-5279. In addition, the party seeking to overturn a decision must show that "substantial rights...have been prejudiced". (Idaho Code §67-5279(4): *Payette River Property Association v. Board of Commissioners of Valley County*, 132 Idaho 551, 554, 976 P.2d 477, 480 (1999)).

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. (Idaho Code §67-5279(3)).

The court should not substitute its judgment for that of the agency as to the weight of the evidence presented. (Idaho Code §67-5279(1)).

V. ARGUMENT

1. NUMEROUS PETITIONERS' LACK STANDING TO CHALLENGE THE BOARD'S APPROVAL OF THE BIG SKY PERMIT.

Petitioners contend that Idaho Code §67-6521 confers standing on most any individual who claims an interest in real property which may be adversely affected by the issuance or denial of a permit authorizing the development. When the statute is combined with Idaho and federal case law, such a reading is overly broad. The legislative intent of the statute for the issuance of Board

decisions requires that:

> "It is the intent of the legislature that decisions made pursuant to this chapter should be founded upon sound reason and practical application of recognized principles of law. In reviewing such decisions, the courts of this state are directed to consider the proceedings as a whole and evaluate the adequacy of proceedings and resultant decisions in light of practical considerations with an emphasis on fundamental fairness and the essentials of reasoned decision making. Only those whose challenge to a decision demonstrates actual harm or violation of fundamental rights, not the mere possibility thereof, shall be entitled to a remedy or reversal of a decision." (Idaho Code§67-6535(c)). (Emphasis added).

It is not sound or practical to interpret Idaho Code §67-6521 to allow for any person that asserts a possible, or theoretical, harm by a Board decision to have standing at a hearing where such persons have no hope of a remedy or a reversal of a Board decision based upon Idaho Code§67-6535.

Clearly, Idaho Code §67-6521(1)(a) requires an affected person to have an interest in real property which may be adversely affected by the issuance or denial of a permit authorizing the development to claim and have standing.

As a general rule in the ordinary case,

> "A party is denied standing to assert the rights of third persons". (*Warth v. Seldin*, 422 US 490, 95 S. Ct. 2197, 45 LE 2nd 343 (1975)).

Furthermore,

> "Even when the plaintiff has alleged injury sufficient to meet the "case or controversy requirement", this court has held that the plaintiff must generally assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." (*Ibid* citing *Tileston v. Ullman*, 318 US 44 (1943), see also *US v. Raines*, 362 US 17 (1960)).

It is contended here, that many of the proposed Petitioners have tried to assert their claims on

the shoulders of the Dimond family. Pursuant to *Warth,* supra, such efforts are disallowed and no standing should be conferred upon such claimants whom do not own property affected by the permit.

Petitioners cite *Arlington Heights v. Metropolitan Housing Development Corporation,* 429 US 252 975 S. Ct. 555 (1977), to assert the courts need not consider standing as to every plaintiff and that its sufficient for one plaintiff to meet the standing requirement. In that case, matters concerning discrimination evoking the equal protection clause were addressed. While the court's ruling did state, as to standing, that it is enough that one plaintiff meet the standing requirement, the issue with respect to standing was whether the suit could be maintained at all. That differs from the instant case as the standing issue here is not whether any petitioner has standing, or whether all listed petitioners have standing.

Petitioners citing of *Arlington Heights* is misplaced, as the issues of standing can be reconciled. There, the question is whether the suit could be maintained by virtue of one petitioner in a listed agency having standing, even though others in that group did not have standing alone. In that context, the court allowed the suit to go forward because one plaintiff of the listing agency met the recognized standing requirement. Here, it is undisputed that certain petitioners have standing as affected landowners, so the suit itself is not in jeopardy of going forward. Thus, the instant case differs from *Arlington Heights.* Because this suit can be maintained by the Dimond Petitioners' who have standing, other petitioners are estopped from bringing parties to the action based upon the language in *Warth* that a party is denied to assert the right of third persons. (*Ibid*).

In support of this analysis, the court expounded in *Warth* that:

> "As an aspect of justicability, the standing question is whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf." (*Ibid*, citing *Baker v. Carr*, 269 US 186 (1962)).

Additionally, the court has held that:

> "When the asserted harm is a generalized grievance shared in substantially equal measure by all or large class of citizens, that harm alone normally does note warrant exercise of jurisdiction." (*Selsinger v. Reservists to Stop the War*, 418 US 208 (1974)).

This analysis finds support in Idaho courts as well.

The Doctrine of Standing, according to the Idaho Supreme Court,

> "Focuses on the party seeking relief and not on the issues the party wishes to have adjudicated". (*Noh v. Cenarussa*, 137 Idaho 798, 53 P.3d 1217 (2002)).

Petitioners invoking standing, are required to,

> "allege or demonstrate an injury **in fact** and a substantial likelihood that the judicial relief requested will prevent or address the claimed injury." (*Ibid*, Emphasis added).

> "Furthermore, a citizen and tax payer may not challenge a governmental enactment where the injury is one suffered alike by all citizens and tax payers of the jurisdiction. Petitioners must establish a peculiar or personal injury that is different than that suffered by any other member of the public." (*Sellkirk-Priest Basin Association v. State*, 128 Idaho 831, 919 P.2d 1032, (1996)).

In *Noh*, the petitioners argued against the passage of Proposition One, an Indian Gaming Initiative, proposing to grant certain privileges to Indians in the state to maintain and advance certain gambling rights. The court denied the petitioners in that case standing, indicating that they lacked proving up an injury in fact. Additionally, the court determined that any injury suffered is

speculative. (*Ibid*).

Like in *Noh*, many of the Petitioners in the instant case, lack standing because their alleged injuries are nothing more than speculative. They have failed to allege or demonstrate an injury in fact as required under traditional notions of standing. Many of the Petitioners, base their concerns, upon the National Monument at the Minidoka Internment Site. It is 1.25 miles away. They cannot claim an injury in fact. Many are not affected persons or property owners. Any injury claim suffered is wholly speculative.

Additionally, the challenge raised by the individual groups surrounding their concerns as to the LCO facilities speculative adverse effects and the Minidoka Internment Site, is a claimed injury suffered alike by all citizens and tax payers of the jurisdiction. They totally lack a peculiar or personal injury suffered that is different than that suffered by any other member of the public. Therefore, Petitioners Idaho Area Concerned Residents for the Environment, Inc., The Japanese American Citizens League, Inc., The National Trust for Historic Preservation, Inc., Preservation Idaho, Inc., Friends of Minidoka, and the Idaho Rural Council all lack standing. For those reasons, the Court must remove them from the petition in this matter as lacking standing to proceed.

2. JEROME COUNTY, THROUGH THE ACTIONS OF THE BOARD OF COMMISSIONERS OR PLANNING & ZONING STAFF, DID NOT VIOLATE ANY OF PETITIONERS' CONSTITUTIONAL PROCEDURAL DUE PROCESS RIGHTS.

The Fourteenth Amendment to the United States Constitution does provide, 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."

The Idaho Constitution states in pertinent part, in Article I, Section 13, that,

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

As aforementioned, many of the Petitioners lack an interest in property to be granted standing to assert a due process violation. While Petitioners maintain due process violations regarding the property rights of neighbors to the land sought to be permitted, we must not forget the focus upon the rights of the individual landowner, South View Dairy, successor in interest to Big Sky, and their property rights to develop their property.

The right to develop one's property is a "substantial right" for purposes of review under the Administrative Procedures Act. (*Terrazas v. Blaine County Board of Commissioners,* supra, citing *Lane Ranch Partnership v. City of Sun Valley*, 145 Idaho 87, 175 P.3d 776 (2007)). Here, procedural due process does require:

> "(a) Notice of proceedings;
> (b) A transcribable verbatim record of the proceeding;
> (c) Specific written findings of fact; and
> (d) An opportunity to present and rebut evidence."
> (*Chambers v. Kootenai County Board of Commissioners*, 125 Idaho 115, 867 P.2d 989 (1994)).

These requirements, however, hinge on Petitioners eligibility as persons entitled to notice in the first place. Idaho Code §67-6529(2) provides in pertinent part:

> "Only members of the public with their primary residence within a one (1) mile radius of a proposed site may provide comment at the hearing."

A. JEROME COUNTY DID NOT VIOLATE PETITIONERS' JAMES AND WAYNE SLONE'S PROCEDURAL DUE PROCESS RIGHTS.

What Petitioners' Slone ignore, is that according to the Idaho Statute, the Slone's who actually received mailed notice nearly two weeks before the subsequent hearing, would not be able to provide comment at the hearing in any event. They do not have a primary residence on their property. This is not asserted by Slone in any context. Petitioners' cite language in Jerome County Zoning Ordinance 13-6.01 as governing the notice requirement requiring notice to be given to all property owners within a one (1) mile radius of the proposed permit site. Petitioners' conveniently ignore that the same ordinance specifically references Idaho Code §67-6529, which alerts all readers of the ordinance that the content therein is derived pursuant to the standard set forth in Idaho Code §67-6529. Therefore, the primary residence within a one (1) mile radius of the proposed site is clearly incorporated from reference to the statute within the ordinance.

Under the statute, it is clear that only those that have their primary residence within one (1) mile of the proposed permit site are entitled to comment at the hearing. Since the Slone's do not own a primary residence on their property near the site, they suffer no prejudice of their substantial rights in violation of due process. (See *Cowan v. Board of Commissioners of Freemont County*, supra, 143 Idaho 501 (2006)).

Substantial rights in terms of procedural due process are defined essentially as notice and opportunity to be heard. The opportunity to be heard must occur at a meaningful time and in a meaningful manner in order to satisfy due process requirements. (*Ibid*). ("Procedural due process requires some process to ensure that the individual is not arbitrarily deprived of his rights in violation of the state or federal constitutions. This requirement is met when the defendant is provided with

notice and an opportunity to be heard. The opportunity to be heard must occur at a meaningful time and in a meaningful manner in order to satisfy a due process requirement.").

In *Cowan*, the court ruled that substantial rights in terms of procedural due process were not prejudiced where an opponent of a proposed subdivision had notice of meetings, attended meetings with counsel, and had the opportunity to speak against the subdivision application. There, the opponent, had counsel present at the initial hearing. Despite recognizing defective notice for hearings on two separate occasions, the *Cowan* court ruled that *Cowan* had "failed to demonstrate how those defects prejudiced his substantial rights since he clearly had notice of the meeting". (*Ibid*).

Even though *Cowan* spoke at the initial hearing upon the application at the time, whether or not an opponent was present at the hearing seems immaterial. Where notice is present, the burden is on the party asserting due process violations to prove that their substantial rights-notice and opportunity to be heard-was violated.

Here like *Cowan*, counsel made argument prior to the hearing upon notice, which evidences and demonstrates that the Slone's had notice of the meeting prior to the meeting. Further, the record is clear that the Slone's did receive mailed notice eleven (11) days prior to a subsequent hearing. Their allegation that they did not have a meaningful opportunity to raise objections is immaterial because, as noted, they do not have a substantial right to voice comment at hearing because they are not property owners within a primary residence within one (1) mile of a proposed permit site. (Idaho Code §67-6529, supra).

Thus, like the opponent in *Cowan*, Slone's have failed to demonstrate how the alleged notice, even if flawed, impacted substantial rights in violation of due process. Slone's had ample opportunity to obtain substitute counsel, or appear themselves, in the expanded hearing in September 2007, and voice their objections.

B. JEROME COUNTY DID NOT VIOLATE PETITIONERS' PROCEDURAL DUE PROCESS RIGHTS BY LIMITING PUBLIC COMMENTS AND WRITTEN TESTIMONY PRIOR TO AND DURING THE SEPTEMBER 25-26, 2007 HEARING.

For the same reasons noted herein above, the Petitioners procedural due process rights in the limiting public comment and written testimony prior to and during the September 25-26, 2007 hearing, fails on the basis that the persons limited in their comment did not have their primary residence within a one (1) mile radius of the proposed site. Those with their primary residence within a one (1) mile radius of the proposed site were allowed to provide written comment prior to the hearing. As such, there is no allegation that those with their primary residence within a one (1) mile radius of the proposed site lacked sufficient notice to provide written testimony prior to the hearing, inclusive of Dimond family members.

Petitioners cite language in Idaho Code §67-6534, where a board of county commissioners " shall provide and opportunity for all affected persons to present and rebut evidence" to buttress their argument to Petitioners in this case did not receive an opportunity to be heard "at a meaningful time and in a meaningful manner". (See *Cowan*, 143 Idaho 513).

Petitioners assert that "affected person" include apparently anyone who might have an objection to the proposed site, whether they are property owner or simply an ordinary citizen

concerned about a specific site or piece of property. In a further effort to have their definition of "affected persons" adopted by the court, they cite *Evans v. Teton County*, 139 Idaho 71, 73 P.3d 84, (2003), where the court ruled in part that:

> "This court will not look to a predetermined distance in deciding whether a property owner has, or does not have, standing."

And thus an opportunity to be heard:

> "To seek judicial review of a LLUPA decision."

In the same paragraph of that decision, however, the court noted that with respect to standing "proximity is a very important factor". (*Ibid*).

In *Evans*, appellants were landowners that **lived** within 300 feet of a proposed PUD. Thus, the context of the court's decision, particularly with respect to predetermined distances for conferring standing and resultant due process rights, is imperative to consider. The *Evans* court asserted the standing status-and by implication, due process rights,

> "...depends on where the person's own property that may be adversely affected by the PUDs construction, not because those persons can claim they own property with a specified distance." (*Ibid*).

There, the appellants in *Evans* were property owners that lived within 300 feet of a proposed PUD site. In *Evans*, the court determined that a PUD within 300 feet of a person's home could adversely affect that person. However, if it wasn't the 300 feet that swayed the court to grant standing to those people as revealed by its no predetermined distance standard, then what we are left with, is that the appellants had their homes near the proposed site. It should be emphasized, that having their homes near the proposed site, meant that they resided there. In further support of the

conclusion, the court noted that,

> "A property owner in Tetonia, Driggs, or even Victor may be less likely to qualify for standing to challenge the PUD because it is less likely they can show their property will be adversely affected."

In light of the foregoing, Petitioners like the Slone's, the National Trust for Historic Preservation, or ICARE, for example, have a very flimsy claim for standing to begin with, much less procedural due process rights relating to an opportunity to be heard in a meaningful manner. They don't live near the proposed site, and many of them don't even own property anywhere in the vicinity.

Petitioners would thrust upon the court an opportunity to imply that limiting public comment to defined minutes or not allowing an individual's attorney an opportunity to be present and rebut evidence violates procedural due process. What is key, is the opportunity to be present and testify. Counsel had an "opportunity" to be present, or have substitute counsel present on behalf of their client. This satisfies procedural due process requirements

Petitioners cite language in *Cowan* as well as *Neighbors for Healthy Goldfork*, 145 Idaho 121, 176 P.3d 126 (2007) to highlight these suggestions and implications. What Petitioners do not reveal from the facts of those cases, is that they reference persons who lived near a proposed permit site.

From the record, it is clear the proponents and opponents of the application for the LCO permit were afforded substantially equal time at the public hearing. Additionally, there is a vast amount of submitted written information in opposition to the permit that has been previously

referenced.

The time limitation of four (4) minutes and one written document was reasonable. Limiting public comment to a specific time period has been upheld as reasonable and appropriate in other cases. (*Bennett v. City Council of City of Las Cruces*, 126 N.M. 619, 973 P.2d 871 (1999), upholding ten minute limit on testimony; *Inganamort v. Borough of Ford Lee*, 120 N.J. Super. 286, 293 A.2nd 720 (1972), upholding a five minute limitation on speakers at public hearing; *Timbertrails Associates v. Planning and Zoning Commission of Town of Sherman*, 99 Conn. App. 916 A.2nd 99 (2007), three minute time limit imposed on speakers at commission's pubic hearing did not violate landowners right to fundamental fairness).

Pursuant to Idaho Code §67-6529(2), the board of county commissioners was not required to allow for public comment outside the one (1) mile radius but allowed to do so. Petitioners claim foul, but don't even recognize the fact that the Board had the authority and right to limit comment to those with a primary residence within a one (1) mile radius.

Individuals testified from vast distances from the proposed site in opposition. Many in opposition had no interest in real property anywhere near the site. However, they had their opportunity to voice their concerns. Petitioners maintain those in opposition should not have been given unlimited time to present testimony, but should have had the opportunity to present "substantiated" oral and written evidence. However, who decides how much? The Board has this discretion. It was reasonable here and fulfilled due process requirements.

Those with their primary residence within a one (1) mile radius submitted vast written

evidence. Those who did not own a primary residence within a one (1) mile radius were limited. However, many individuals had an opportunity to submit written evidence with no property interests in Jerome County whatsoever.

Therefore, the claimed violation of rights of property, and procedural due process must fail in all respects.

3. IDAHO CODE §67-6529 AND JEROME COUNTY ZONING ORDINANCE 13-6.02, ARE NOT UNCONSTITUTIONAL AND DO NOT VIOLATE PETITIONERS' SUBSTANTIVE DUE PROCESS RIGHTS.

As aforementioned, Petitioners' original petition included a request for declaratory judgment invalidating Idaho Code §67-6529 and Jerome County Zoning Ordinance 13-6.02. In its amended petition, the Petitioners failed to include same claim. By raising it now in their opening brief, Petitioners are requesting the Court to declare by judgment the unconstitutionality of Idaho Code §67-6529. This is the improper forum for the Court to so rule.

In *Euclid Avenue Trust v. City of Boise*, 146 Idaho 306, 193 P.3d 853 (2008), actions seeking civil damages of declaratory relief may not be combined with petitions for judicial review under the Idaho Administrative Procedures Act (IDAPA). In *Euclid*, the court writes,

> "We consider two questions on appeal. The first is whether an administrative appeal in a civil action may be combined in one proceeding. We hold that the two may not be combined and that this court will review the appeal in accordance with the standards applicable to the filing fee category designated on the initial filing in the trial court."

The court continues,

> "There seems to be an increasing tendency, particularly in land use cases, for counsel to combine civil damage claims with their administrative appeal.

> This court has yet to directly rule on the propriety of this practice, although in *Cobbly v. City of Challis*, 143 Idaho 130, 139 P.3d 732 (2006), we disapproved it was single filing in a somewhat related situation."

The court continues,

> "The Local Land Use Planning Act (LLUPA) provides that "an applicant denied a permit or aggrieved by a decision" may seek judicial review under the provisions of the Idaho Administrative Procedure Act (IDAPA), Chapter 52, Title 67, Idaho Code. (Idaho Code §67-6519(4)). Unless otherwise provided by statute, judicial review of disputed issues of fact must be confined to the agency record. (Idaho Code §67-5277). IDAPA provides the scope of review and the type of relief available in Idaho Code §67-5279- "if the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary." By failing to mention any further remedial measures, it is reasonable to conclude that combining a claim for civil damages with a petition for judicial review is not a permissible course of action. (See *Local 1494 of the International Association of Firefighters v. City of Coeur d'Alene*, 99 Idaho 630, 639, 586 P.2d 1346, 1355 (1978), where a statute specifies certain things, the designation of such things excludes all others)."

In addressing Rule 84(a) of the Idaho Rules of Civil Procedure governing judicial review, the court writes,

> "Rule 84(a) specifically allows one to combine a petition for judicial review with a request for common law or equitable writs, but says nothing about seeking declaratory or monetary relief in a judicial review proceeding. When combination of distinct types of proceedings is permitted, it is done pursuant to state or court rule."

The court goes on to write,

> "The separation of civil actions and administrative appeals is supported by good policy underpinnings. After all, one proceeding is appellate in nature and the other is an original action. They are processed differently by our courts. Discovery is rarely available in judicial review proceeding. The review is to be conducted on the record, absent specific authorization. (Idaho Code §67-5276). The standards for determining an outcome are specified by

> statute (Idaho Code §67-5279, whereas this is not the case with actions seeking declaratory or monetary relief)."
>
> "The confusion resulting from a conglomerated proceeding is apparent here. While *Euclid* primarily styled this as a proceeding seeking judicial review, the matter was determined upon three orders granting summary judgment, hardly what one would expect in a review on the record. Thus, we are constrained to hold that actions seeking civil damages or declaratory relief may not be combined with petitions for judicial review under IDAPA."

Petitioners seek the court to declare Idaho Code §67-6529(2) and its embodiment in Jerome County Zoning Ordinance 13-6.02 as unconstitutional in violation of substantive due process. (See Petitioners' brief page 32). Petitioners maintain that the one (1) mile radius is arbitrary and unreasonable having no substantial relation to the public health, safety, morals, or general welfare or other legislative purpose.

In this case, Jerome County relaxed the standard to allow non-landowners within the one (1) mile radius to testify. This is unnecessary under the statute. Under the instant facts as applied, Jerome County exceeded the requirements for procedural and substantive due process. Petitioners maintain that this was an arbitrary distinction in the legislative enactment of the statute governing the one (1) mile radius and the Jerome County equivalent. Petitioners maintain that the one (1) mile radius promotes the endangerment of the public health, safety, morals and general welfare by limiting information the Board could consider, but offer no compromise or substitute in the standard. A one (1) mile radius is significant. It is legitimate. The legislature obviously enacted it, to allow for affected persons owning a primary residence within the one (1) mile radius to have an opportunity to provide comment and state their concerns. The one (1) mile radius is similar to an

extension of set backs as set forth in the governing zoning ordinance.

In Jerome County Zoning Ordinance 13-4.04 property lines for instance, it indicates that lagoons, ponds, etc. shall be a minimum of fifty (50) feet away from the waters edge of any canal. Composting must be three hundred (300) feet from any residence not associated with the LCO. Additionally, composting shall be a minimum of fifty (50) feet from any highway district right-of-way and fifty (50) feet from the waters edge of any canal. (Supplemental Record, Volume I, Page 15).

These set backs are instituted to observe the least minimal impact to neighboring properties. Obviously they serve no benefit to the permit applicant, in that those set backs prohibit the luxury of placing the different sites within the facility at the applicant's desires. The legitimacy of set backs, and legislative determinations of same, is universally accepted. (83 Am. Jur. 2nd Zoning & Planning §127(2009)).

All of the set backs bear a rational relationship to public health, safety, morals and general welfare. It meets a legislative objective in protecting neighboring properties. It meets the goals of land use determinations. The one (1) mile radius is no different. It's not based on sole expediency as propounded by the Petitioners in this matter. [4]

Petitioners are making a claim attacking the constitutionality of the statute and ordinance regarding unaffected property owners outside the one (1) mile radius. The courts have upheld

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4 Federal statues are also consistent in allowing public involvement in land use planning process to be afforded to affected citizens being provided an opportunity to participate in rule making, decision making and planning with respect to public lands. (63C Am. Jur. 2nd Public Lands, §27, 43 USCA §1702; Secretary of the Interior through the Bureau of Land Management).

territorial restrictions for the placement of structures within zoning ordinances affecting the property owner seeking a set back variance.

In *Whorle v. Kootenai County*, 147 Idaho 267, 207 P.2d 998 (2009), the court upheld the twenty-five (25) foot set back requirement from a structure on lake front property determining that upon denial of the variance request, owners were still able to use their property as permitted and therefore, the set backs did not prejudice owners' substantial rights.

Therefore, the request to declare unconstitutional the statute and ordinance regarding the one (1) mile radius allowing affected property owners to publicly comment at the public hearing at issue is constitutional, and does not affect their substantial rights. In addition, it is improperly pled before the court.

Finally, it almost seems absurd to be making this claim on the basis that the Board of County Commissioners in the instant action relaxed the one (1) mile radius for public testimony and afforded a vast opportunity for non-affected non-property owners to testify in opposition at this public hearing. Therefore, absolutely no substantial rights of any individual were prejudiced in the instant matter.

4. THE BOARD APPLIED THE RELEVANT ORDINANCE, STANDARDS AND CRITERIA.

The Board applied the ordinances deemed appropriate to the instant application and appropriately followed the Jerome County Zoning Ordinance in the instant facts. Petitioners contend that the Board failed to follow the Jerome County Zoning Ordinance through the Big Sky process, making its approval of the Big Sky permit tainted by unlawful procedure.

Petitioners contend that the Board should have considered additional ordinances in evaluating the Big Sky application and failing to reopen the record. Petitioners concede that the Jerome County Zoning Ordinance, Chapter 13 provides the "nuts & bolts of permitting LCO's in Jerome County". (Petitioners' Opening Brief, Page 35). As set forth in Jerome County Zoning Ordinance 13-3.01 it states:

> "New LCO's shall be allowed only in agricultural A-1 zone, and only after compliance with the provisions of this chapter and the Jerome County Zoning Ordinance." (Supplemental Record, Volume I, Page 14).

Petitioners contend that Jerome County Zoning Ordinance, Chapter 1-3.01 should have been evaluated by the Board of County Commissioners and discussed in reaching its ultimate conclusion in granting the application and allowing the permit. As Jerome County Zoning Ordinance, Chapter 1-3.01 indicates, it was drafted in accordance with the Comprehensive Plan. It sets forth broad policy statements consistent with the Jerome County Comprehensive Plan.

Petitioners also cite Jerome County Zoning Ordinance 1-6.01 entitled Preservation of Private Property Rights. It indicates that the Ordinance should be interpreted to protect each citizen from undue encroachment on their private property and allowing the citizenry the maximum use of their property without placing undue burden upon that of his neighbor.

The entire purpose of Jerome County Zoning Ordinance, Chapter 13, is to ensure, by the exhaustive requirements, that when permitting LCO's, and providing for the maximum use of a persons property, the setbacks and other requirements are designed to avoid placing undue burden upon neighbors' properties and in turn protecting the neighbors' resources and environment.

Idaho Code §67-6519(4) states,

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

Therefore, obviously, the Board has the discretion to determine the relevant ordinance to be applied and the standards used in evaluating an application.

Idaho Code §67-6535, Approval or Denial of Any Application to Be Based Upon Standards and to Be in Writing, states,

> "(a) The approval or denial of any application provided for in this chapter shall be based upon standards and criteria which shall be set forth in the comprehensive plan, zoning ordinance or other appropriate ordinance or regulation of the city or county."
>
> "(b) The approval or denial of any application provided for in this chapter shall be in writing and accompanied by a reasoned statement that explains the criteria and standards **"considered relevant"**, states the relevant contested facts relied upon and explains the rationale for the decision based upon the applicable provisions of the comprehensive plan, relevant ordinance and statutory provisions, pertinent constitutional principles and factual information contained in the record." (Emphasis added).

Where the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and there is no occasion for the court to consider rules of statutory construction. (*Payette River Property Association v. Board of Commissioners of Valley County*, 132 Idaho 551, 976 P.2d 477 (1999)). Further, if the statutory language is clear and unambiguous, the court need merely apply the statute without engaging in any statutory construction. (*State v.*

Burnight, 132 Idaho 654, 978 P.2d 214 (1999)).

Where a statute or constitutional provision is plain, clear, and unambiguous, it speaks for itself and must be given interpretation language clearly implies. (*Moon v. Investment Board*, 97 Idaho 595, 548 P.2d 861 (1976)). When the language of a statute is clear and unambiguous, statutory construction is unnecessary, and the Supreme Court need only determine the application of the words to the facts of the case at hand. (*Jen-Rath Company, Inc. v. Kitt Manufacturing Company*, 137 Idaho 330, 48 P.3d 659 (2002)).

Here, the Board had the duty to submit a reasoned statement evaluating the criteria and standards **considered relevant** to the instant facts consistent with Idaho Code §67-6535(b). The Board, not Petitioners', exercise this discretion.

In this case, the standards and criteria set forth in relevant zoning ordinance are contained within Chapter 13 of the Jerome County Zoning Ordinance governing LCO's.

Idaho Code §67-6535(c) states,

> "It is the intent of the legislature that decisions made pursuant to this chapter shall be founded upon sound reason and practical application of recognized principles of law. In reviewing such decisions, the courts of the state are directed to consider the proceedings as a whole and to evaluate the adequacy of procedures and resultant decisions in light of practical considerations with an emphasis on fundamental fairness and the essentials of reasoned decision making."

A recognized principle of law is relevancy. (IRE 401). When reviewing Jerome County Zoning Ordinance, Chapter 1-3.01, which sets forth policy statements consistent with the Comprehensive Plan, it is not relevant to specifically be applied to the permitting of LCO's in that,

most of the provisions are irrelevant, and many of the statements could be interpreted in both favor of granting the application or denial of same. For instance, subsection (a) support of property values by preserving existing uses and guiding future development, would indicate and be easily applied to justify the development of an irrigated farmland to a heifer raising facility, which would support the property value by guiding its future development.

In addition, subsection (e) supporting the economy of the county, by allowing a heifer raising facility, and developing the property towards that end, is entirely consistent with that policy statement.

Subsection (f) protection for prime agricultural lands for production of food and fiber, would be interpreted as allowing for prime agricultural lands to be developed to produce food, i.e. milk, by allowing for a heifer raising facility for dairy replacement heifers.

Subsection (g) support for agriculture and other industry together with related uses, is entirely consistent with the heifer raising facility on farmland, which would require agriculture commodities to feed same animals, and supporting the related dairy industry, an intrical party of agriculture in our state. However, none of the above are standards and criteria governing permitting LCO's.

Jerome County Zoning Ordinance 1-6.01, Preservation of Private Property Rights, allows for the maximum use of property, i.e. developing the property for heifer raising facility, without placing undue burden upon that of his neighbor, by carefully following the aforementioned Nutrient Management Plan and other designed components and required state, federal and local regulations to ensure that the waste produced is properly handled so as to avoid undue burden upon neighbors.

Additionally, the Jerome County Zoning Ordinance 1-6.01, Preservation of Private Property Rights, in allowing for the maximum use of the property, is consistent with maintaining the individual integrity of the specific property owner who is subject to land use regulations. It must be remembered, and the courts have espoused the general rule that, zoning laws are in derogation of common law rights of free ownership and use of property, where more than one reasonable interpretation is possible, the interpretation that places the least restriction on use of property is favored.

In addition, when choosing between alternative constructions of a statute, or ordinance, unnecessarily harsh consequences are to be avoided. Therefore, the Board under the instant application, was required to review the relevant ordinance specific to the relevant land use request and applying the County governing zoning ordinances that were the least restrictive on the property. (See also *Best Hill Coalition v. Halko, LLC*, 144 Idaho 813, 172 P.3d 1088 (2007); *Smith v. U.S.R.V. Properties, LC*, 141 Idaho 795, 118 P.3d 127 (2005); and *D & M Country Estates Homeowners Association v. Romriell*, 138 Idaho 160, 59 P.3d 965 (2002). Further espousing the view that the court will not extend by implication any restriction upon real property not clearly expressed in restrictive covenants affecting real property because the same are in derogation of the common law right to use land for all lawful purposes).

Jerome County Zoning Ordinance, Chapter 1-3.01, setting for the policy statements consistent with the Comprehensive Plan, is an extension of the policy determination in guiding principles of the Comprehensive Plan. As the court wrote in *Cooper v. Board of County*

Commissioners of Ada County, 101 Idaho 407, 614 P.2d 947 (1980),

> "The plan embodies the policy determination and guiding principles; the zoning ordinances provide the detailed means of giving effect to those principles."

To that end, the Board here, in a careful analysis of the standards and criteria relevant to permitting new LCO facilities, focused upon Chapter 13 of the Jerome County Zoning Ordinance. Petitioners would assert that Jerome County Zoning Ordinance, Chapter 1-3.01, would allow for the Board to deny the LCO permit on the basis of generalized policy statements consistent with the Jerome County Comprehensive Plan. Without reconciling that Chapter with Chapter 13 governing the permitting of LCO's, it would allow for a Board to never allow for a permit to issue for an LCO if the focus was solely upon Chapter 1-3.01. That certainly is unreasonable and violates the property rights of the permit seeker and his attendant development rights. The Board has the discretion to use the criteria considered relevant under their interpretation of their own governing zoning law.

Therefore, without even referencing the above-referenced ordinances by Petitioners, the Board of Commissioners in this case in granting the permit application by the primary focus on Chapter 13, as the relevant Ordinance, in no way violated the rights of any individual and in fact was entirely consistent with the plainly stated intent of the legislature in both Idaho Code §67-6519 and Idaho Code §67-6535.

5. THE BOARD DID NOT FAIL TO FOLLOW ITS OWN PROCEDURES IN REFUSING TO ALLOW DEAN DIMOND TO REOPEN THE RECORD SUBSEQUENT TO THE COURT'S INITIAL REMAND UPON JUDICIAL REVIEW OF THE APPLICATION.

Petitioners contend that the Board erred in failing to allow the record to be reopened with the

submission of additional evidence upon the motion made by Dean and Eden Dimond.

On August 4, 2008, Dean Dimond requested to submit additional evidence before the Board and reopen the record. In the Notice of Procedures for LCO Hearings before the Jerome County Board of Commissioners, reopening the record, it indicates that the Board **may, for good cause demonstrated**, reopen the record for purposes for receiving additional evidence. The procedure for reopening the record states:

> "The board shall decide a motion to reopen the record within a timely manner by way of oral or written decision."

The procedure further indicates that:

> "The Board may, within time allowed herein, reopen the record for good cause on its own motion." (Supplemental Record, Volume II, pages 328-329).

In the minutes, the Board did consider Dimond's motion to reopen the record and submit additional evidence. The minutes do not reflect that Dimond established good cause for reopening the record. In fact, the discussion indicated that the Board had made its decision and was awaiting a written decision. The Board then voted to deny the motion to reopen the record by a vote of 2 to 1. (Phase II, Agency Record, Page 56).

Petitioners contend that the Board did not even "consider the motion". That is not the case. The Board considered the motion, and denied it because Dimond did not establish good cause to reopen the record. Dimond bore that burden. Petitioners do not cite any specific authority other than the Jerome County procedure to reopen the record in support of their contention. The Board did not act arbitrarily or capriciously in denying the motion to reopen the record. The Board followed its

own procedures, and in finding that good cause was not demonstrated, correctly denied the motion made by Dimond.

6. THE BIG SKY APPLICATION WAS COMPLETE.

Petitioners contend that the Big Sky LCO permit was incomplete. Three reasons are propounded in this regard, (1) all agencies had not completed their review and submitted letters; (2) application didn't include on its required map a well on Fred Stewart's property; and (3) lack of evidence in the application of a binding contractual agreement to export waste.

In its Memorandum Decision, the Board indicated that Jerome County Zoning Ordinance section 13-5.02(1), holds in relevant part that:

> "The board of county commissioners may place conditions on the livestock confinement operation as requested by the agencies."

The Board determined that the applicant had submitted letters from all designated agencies listed in this section. (Phase II, Agency Record, Page 117). The Board then went on to list the specific comments of the Valley School District, the Northside Canal Company, two highway districts, Jerome and Hillsdale, and the Idaho Transportation Department which indicated it would approve the application submitted to it upon Big Sky meeting several conditions outlined by the Idaho Transportation Department. The Board concluded that the applicant has complied with these requirements. (Phase II, Agency Record, Page 119).

The Board addressed the claim that the application did not include on its required map a well on Fred Stewart's property. In addressing this issue the Board wrote,

> "In disagreement to this "consistent conclusion" analysis is the Board's

dissenting voice, which is adamant that existing wells and sink holes are not shown on the site map as required by sections (e) and (f), respectively. However, despite the adamancy, no support of such assertions, to a degree that would allow the majority to feel validly persuaded, is offered. The dissent's assertions are based solely on the testimony of Mr. Fred Stewart and Mr. James Stewart. In our original decision, the Board did consider the testimony of the Stewart's. But that testimony was not only weighed by the Board against the evidence that contradicted it, but the Board also weighed the basis of the Stewart's knowledge as to the facts they were testifying to. At the conclusion of this process, and for the reasons stated in our original decision, the Board made findings of fact that all existing wells were shown on the parcel/vicinity map, and that the site map showed no sink holes because none existed." (Agency Record, Page 113).

The Board went on to state:

> "The Board's reliance on section 13-5.02 in its original decision, along with its analysis of the facts pertinent to that section, was undisturbed by the District Court. Therefore, the discussion the Board had on the 13-5.02 requirements, as wells the Board's findings and conclusions on those requirements stated in our original decision, is adopted and incorporated into this decision, as if asserted herein. Based on these findings and conclusions, the Board once again finds Big Sky's application to be complete and in compliance with Jerome County Zoning Ordinance, section 13-5.02." (Agency Record, Page 114).

In the Board's original Decision, in addressing the Stewart's well, wrote,

> "Mr. Stewart also argued that the application was not complete on the bases that a domestic well was not shown on the vicinity map as required by 13-5.02(e)(1). Mr. Stewart only stated that a domestic well did exist and that it was within a mile radius of the proposed facility. However, he did not identify this well or point to where it was located. He simply stated, "But you can ask my father. He's got a domestic well that's within that mile range that is not on that map, so that part is incomplete." Mr. Stewart presented no other evidence in regard to this issue. His father, Mr. Fred Stewart, did testify that map being used for reference purposes of the hearing did not show his culinary well (Hearing Tr. Page 46), although he did not state such well was in fact less than a mile from the proposed facility."

The Board went on to write,

> "However, Mr. James Stewart claims that a domestic well exists within the mile radius that is not shown on the map. This claim however, is all Mr. James Stewart offers. He does not point to where on map this "missing" well is located, or give any other type of evidence that would support its existence."

The Board continues in writing,

> "Somewhat contrary to this testimony is that of Mr. Matt Thompson's, Big Sky's consultant, who testified,
>
> > "We've gone through a tremendous amount of effort to give you an application that is as detailed as possible. I would dare say this is probably the most detailed CAFO application that Jerome County's received." (Hearing Tr. Page 114).
>
> "In consideration of all of the above, the Board finds and concludes that the vicinity map submitted by the applicant does identify several domestic wells in the area of that property identified as Mr. Fred Stewart's. These wells are within a mile radius of the proposed facility and thus are correctly identified on the map. The evidence does not support that there is an additional domestic well that is not one of those already identified on the vicinity map. Therefore, the Board finds the application complete as to this issue." (Phase I, Volume III, Page CC-48, Page 4, Memorandum Decision).

By the lengthy reasoning in both Memorandum Decisions, the Board weighed the claims made by the Stewart's, and additional evidence, and concluded, by exhaustive reasoning, that the application was complete as to the wells being included on the map.

In the instant Memorandum Decision, the Board went into great detail regarding the claim that the application lacked an agreement to export waste. Petitioners cite Jerome County Zoning Ordinance 13-2.01(a) which indicates in part,

> "Animal waste products, including sprinkled waste, shall not leave the property of the operator, unless the operator has agreed with another party to

disburse animal waste products on that persons' property."

Petitioners contend that this requires a binding contractual agreement.

In its Memorandum Decision, the Board specifically cited Jerome County Ordinance, Chapter 13, section 13-2.01. The Board writes,

> "This section requires a waste distribution plan for all waste produced from Big Sky's operation, and which prevents any of the waste generated from that operation from leaving its facility unless there's a third party agreement for such waste to be sprinkled on the third party's property." (Phase II, Agency Record, Page 114).

The Board, in interpreting its own zoning ordinance, continues in writing,

> "Upon examination, it does not appear that the agreement referred to has to be made prior to the permit being issued. That is to say, this section only requires an agreement be made before any waste leaves the LCO's property. It does not require that if there is going to be an agreement, such agreement be made prior to the issuance of the permit." (Phase II, Agency Record, Page 115).

However, even with that interpretation, the Board found that there was an agreement submitted and writes,

> "As indicated, it does not appear that such an agreement needs to exist before the application can be approved. In this regard, the agreement is not an element of the application process that needs to be satisfied at this time. Nevertheless, any disagreement to this conclusion would be satisfied by the fact that the record does show 'an agreement" that would satisfy 13-2.01. A waste distribution was placed into evidence. That plan does indicate that an agreement had been made between Big Sky and an individual named Mr. Gott, who agreed to accept 8,000 lbs of waste from Big Sky LCO. Big Sky's engineering consultant, Matt Thompson, further testified to this agreement at the hearing." (September 25 Hearing Tr. Pages 97-130).
>
> "The record is void [sic] as to any details that would qualify this agreement, but regardless, an agreement nonetheless, was made, is in evidence, and has

not been disputed in any significant manner by the record. Therefore, the ordinance, and specifically the provisions of 13-2.01, cannot be just substituted in our previous decision and used as a basis of support for that decision." (Phase II, Agency Record, Pages 116-117).

This court must give deference to the Board of County Commissioners reasoning and application of their relevant zoning ordinance in reaching the decision for permit issuance in this case. There is a strong presumption in favor of the validity of actions of zoning boards, and such presumption can only be overcome by showing that the ordinance, as applied, is arbitrary, unreasonable, capricious and confiscatory. (*Ready to Pour, Inc. v. McCoy*, 95 Idaho 510, 511 P.2d 792 (1973)). This presumption extends to validity being favored of actions of zoning authorities when applying and interpreting their own zoning ordinances. (*Howard v. Canyon County Board of Commissioners*, 128 Idaho 479, 915 P.2d 709 (1996); *Sanders Orchard v. Gem County*, 137 Idaho 695, 52 P.3d 840 (2002); *Terrazas v. Blaine County*, 147 Idaho 193, 207 P.3d 169 (2009)).

Through its quasi-judicial capacity, in weighing the evidence and credibility of same, the Board appropriately interpreted its ordinance and weighed the evidence in the record in finding that the parameters of a waste agreement had existed to satisfy that criteria. Therefore, the Board's conclusions that the application was complete, was made after a careful analysis of the record and contested facts.

7. THE SEPTEMBER 23, 2008 MEMORANDUM DECISION DOES CONSTITUTE A REASONED STATEMENT.

Petitioners contend that the Board's September 23, 2008 Memorandum Decision is deficient as a reasoned statement. The ten page Decision of the Board cogently addressed the mandate of the

District Court on remand. Pursuant to the court's directive, the factors the Board may consider in granting or denying an LCO permit application were stated as:

(1) Whether the application is complete;

(2) Whether the proposed site is located in the agricultural A-1 zone; and

(3) A vague and generalized requirement that the application comply with the provisions of Chapter 13 and the Jerome County Zoning Ordinance. (Agency Record, Page 112).

These were the substantive factors the Board applied under their own interpretation of their own relevant zoning ordinance and in compliance with the court's order.

From a review of the Board's Decision, the Board review relevant contested evidence and applied same to the ordinance criteria requirements. The Board reasoned that if all thirteen requirements, subsection (a) through (m), of section 13-5.02, have been complied with, the LCO application is complete. The Board reiterated, from its previous Decision, that the evidence supported their finding that all subsections were satisfied. The contested issues, subsections (e), (f) and (l) were discussed in lucid detail based upon the evidence. (Agency Record, Pages 112-114).

The Board concluded, in weighing conflicting evidence that all existing wells were shown on the parcel/vicinity map. The Board engaged in a specific discussion weighing the evidence regarding the wells shown and contested and, once again, concluded that the criteria has been met and complied with. (Agency Record, Pages 113-114).

The Board additionally addressed the waste distribution plan and appropriate criteria within its ordinance governing same. In its interpretation of its ordinance and the specific evidence regarding export agreements, the Board wrote a lengthy analysis of the relevant criteria and specific

evidence regarding application contents regarding a waste export agreement and concluded the criteria had been met. (Agency Record, Pages 114-116).

The Board carefully enumerated specific agency concerns and ordered approval of the application subject to several conditions. (Agency Record, Page 119). The Petitioners argue that the Board failed to give adequate weight to the vast documentary evidence submitted by Dean Dimond, National Park Service, and other opponents. [5]

In the instant case, the Board articulated a lengthy analysis weighing the standards and criteria of their relevant, zoning law and relevant contested facts. Here, the Memorandum Decision is supported by substantial, competent evidence. A court shall defer to findings of fact of County Board of Commissioners that are supported by substantial, competent, although conflicting evidence. (*Davisco Foods, Inc. v. Gooding County*, 141 Idaho 784, 118 P.3d 116 (2005); *Cowan v. Board of Commissioners v. Freemont County*, 143 Idaho 501, 148 P.3d 1247 (2006)).

The court is constrained to examine the Board's findings to determine if they are supported by substantial, competent evidence. The court will not substitute its judgment for that of the Board on questions of fact. (*Galli v. Idaho County*, 146 Idaho 155, 191 P.3d 233 (2008); *Wohrle v. Kootenai County*, 147 Idaho 267, 207 P.3d 998 (2009)).

So long as the findings, conclusions and decision of the Board of County Commissioners are sufficiently detailed to demonstrate that it considered applicable standards and reached a reasoned decision, the court will find that the Decision was not arbitrary and capricious and was based upon

5 Neil King, Superintendent for the National Park Service, testified at the hearing in opposition in addition to submitting written documentary evidence. (Phase I, Tr. Pages 26-29).

substantial evidence in the record. (*Terrazas v. Blaine County*, 147 Idaho 193, 207 P.3d 169 (2009)).

Courts have further ruled that substantial and competent evidence is more than a scintilla of proof, but less than a preponderance; it is relevant evidence which a reasonable mind might accept to support a conclusion. (*Mancilla v. Greg*, 131 Idaho 685, 963 P.2d 368 (1998); *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 38 P.3d 617 (2001); *Lane Ranch Partnership v. City of Sun Valley*, 144 Idaho 584, 166 P.3d 374 (2007)).

Petitioners maintain that the evidence referred to in the Board's Decision was a mere fraction of the contested facts in the record. However, the Board, as any tribunal rendering a decision based upon a large body of evidence, applied the relevant facts to the appropriate standards and criteria and rendered a reasoned decision. In any contested case, the opposing sides may articulate, after the fact, relevant points to further advocate opposing views.

Certainly, in this case, ample fodder exists for either side to further propound argument to the Board. Here, the Board far surpassed the threshold required for articulating a reasoned statement and, through a lengthy analysis, referenced substantial and competent, albeit conflicting, evidence to support its Memorandum Decision. It should therefore be upheld in all respects.

8. ATTORNEYS' FEES SHOULD BE AWARDED TO INTERVENORS.

Pursuant to Idaho Code §12-117, the Court shall award the prevailing party reasonable attorneys' fees...if the Court finds that the party against whom the judgment is rendered acted without a reasonable basis in fact or law.

The courts have further noted that they will award attorneys' fees on appeal under Idaho Code

§ 12-117 if it is found that the losing parting acted without a reasonable basis in law or in fact. (*Marcia T. Turner, LLC v. City of Twin Falls,* 144 Idaho 203, 159 P.3d 840 (2007); *Giltner Dairy, LLC v. Jerome County*, 145 Idaho 630, 181 P.3d 1238 (2008)).

The Intervenors ability to move forward on permit issuance has been egregiously delayed by the Petitioners in this matter. Petitioners have proceeded without a reasonable basis in fact or law.

For these reasons, fees should be awarded to Intervenors in this matter.

RESPECTFULLY SUBMITTED this 18 day of February, 2010.

Williams, Meservy & Lothspeich, LLP

JOHN B. LOTHSPEICH
Attorney for Intervenors

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused a copy of the *Intervenors' Memorandum in Opposition to Petition for Judicial Review* to be served postage prepaid to the following:

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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
	PETITIONERS' REPLY 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.)

As an overall matter, Petitioners, Friends of Minidoka, et al., continue to be greatly concerned with the way the County Respondents cavalierly disregard the seriousness of the due process violations set forth by Friends of Minidoka. Such disregard is first evidenced in the brief by the County's vague response to Friends of Minidoka's statement of facts. The remainder of the County's brief rhetorically disregards the cases and propositions articulated by Friends of Minidoka, but fails to cite cases to the contrary or analyze in any meaningful way the authorities cited by Friends.

South View, on the other hand, takes an expectedly narrow view of the relevant ordinances, state law, and general due process requirements applicable to this case, in an apparent attempt to draw the Court away from the numerous constitutional and procedural irregularities present in this proceeding.

I. POINTS ADDRESSING RESPONDENTS' AND INTERVENORS' STATEMENT OF FACTS.

The Court should note at the outset that neither the County nor South View dispute the facts presented in Friends of Minidoka's opening brief. Idaho Code of Appellate Procedure Rule 35 states:

(3) Statement of the Case.

A statement of the case to the extent that the respondent disagrees with the statement of the case set forth in appellant's brief.

The County merely references the facts from Judge Bevan's original decision remanding the matter to the Board, even though most of the facts pertinent to this phase of the litigation were not even relevant in the judicial review request filed by Big Sky because the County originally denied Big Sky's permit application. Such a casual reference does not amount to a disagreement. Consequently, as the facts are not disputed, this Court may take Friends of Minidoka's facts as admitted.

With respect to South View, Friends of Minidoka takes issue with many of South View's purported recitations of fact as they are provided without support in the record or constitute misplaced attorney argument. For example, South View recites the Beef Cattle Environmental Control Act (BCECA) in the fact section (Intervenors' Brief, p.5) when it should be argument. Nonetheless, the BCECA has been recently been found by the Idaho Supreme Court, nowhere mentioned by South View, not to preempt county ordinances. *See Idaho Dairymen's Federation v. Gooding County*, 2010 Supreme Court of Idaho Op. No. 12 at *6 & *13, 2010 LEXIS 25 at *6 & *13 (feb. 1, 2010)(state did not mean to preempt local authority to regulate the siting and conditions of placement for CAFOs, including water quality). Similarly, South View incorrectly argues in the fact section (Intervenors' Brief, p. 6) that the ISDA's approval of the Nutrient Management Plan somehow absolves Jerome County of its duty to protect its citizens from large animal feeding operation pollution. This statement is both factually and legally incorrect. Even the suspect Idaho statutory language concerning large confined animal feeding operations states that "A board of

county commissioners may reject a site regardless of the approval or rejection of the site by a state agency." IC 67-6529(2).

South View then grossly misleads the Court when it states "vast written testimony and exhibits...inclusive of [that submitted by] Pat Brown," yet does not cite to any record of documents submitted by Pat Brown. Intervenors' Brief, pp.8-9. In fact, there are no such documents because Pat Brown was never able to submit documents on behalf of his clients. *See, e.g.*, Supp. Rec., Vol. II, pp. 303-05.

In yet another instance when South View does cite to the record (Intervenors' Brief, p. 10), it does so incorrectly. South View implies that Dean Dimond's motion to reopen the record was fully heard and rejected. In fact, Mr. Dimond's attempt to reopen the record was summarily denied without even reading it because the Board's counsel, based upon objection by South View's counsel, Supp. Rec., Vol. II, p. 324 (BOC refused to hear the motion "which they stated they had not read although they had read Mr. Lothspeich's objection"), gave the commissioners the incorrect advice that the Board could only consider "whether the application was complete because the county ordinance does not give the board any authority to reject or approve an application except on the basis of whether it is complete." Phase II, AR, p. 55. As set forth in Friends of Minidoka's Opening Brief (pp. 35-38), and as further discussed *infra* (pp. 11-13), this position is incorrect as a matter of Jerome County's own zoning ordinances. Judge Bevan's decision did not *require* that Jerome County approve the LCO application on remand, only that it determine if there were "some other *valid* basis upon which to deny the Big Sky's LCO permit application," Phase II, AR, p. 38 (emphasis in original), besides relying "*solely* on factors set forth in the Comprehensive Plan." *Id.* at 35 (emphasis added). The Court went to state in a subheading of its decision that "*The Matter is 'Remanded for Further Proceedings as Necessary,' but the Board is not Specifically Directed to Issue the Permit.*" *Id.* at 36 (emphasis in original). Jerome County clearly missed this direction.

South View then goes on to say that "inappropriate comments [were] made by Commission members to the local newspaper regarding the sale of the property...", again without any record citation to support its statement. Intervenors' Brief, p. 10.

The above inaccuracies and failures to rely upon the record, along with South View's "statement of facts," belie its efforts to convince this Court of its position.

II. PETITIONERS' STANDING.

Friends of Minidoka provided the extensive standing information to this Court to protect the record going forward. Now Friends of Minidoka feels constrained to spend far more time than desired to respond to the scattershot and unsupported, challenges to standing. The County appears to oppose everyone's standing, while Intervenors appear to at least concede the Dimond family's standing . Intervenors' Brief, pp. 16-17 ("...Petitioners have tried to assert their claims on the shoulders of the Dimond family"). Certainly, the Dimond's have standing because they live and own property adjacent to the proposed facility.[1] Going to the petitioner organizations, first Idaho Rural Council has identified Dean, Eden, Harold and Carolyn Dimond as members. Carlson Aff., p. 1. While Dean and Eden Dimond were allowed to submit documents as part of the application process, Harold and Carolyn were not allowed to submit more than one page, and only then at the hearing, even though they own and operate a farm that borders nearly one mile of the proposed LCO. Supp. Rec., Vol. I, pp. 191-92. Harold and Carolyn Dimond's testimony at the hearing was replete with claims of injury-in-fact, such as waste draining onto their farm (Phase I, Trans., p.222), yet they were prevented from entering evidence of such injury because of the unconstitutional restrictions on residency and testimony. Furthermore, Respondents and Intervenors apparently failed to even read Friends of Minidoka's brief, which sets forth some of the specific injuries to

[1] *See* 4 Am. Law. Zoning 42:8 (1, 6) (5th ed.) (affected landowners have standing as do organizations in representative capacity).

specific members. *See, e.g.*, Petitioners' Opening Brief at 8-9 (IRC members Carolyn and Harold Dimond). 10 (ICARE Director Hasse mentioned members living in proximity to proposed LCO site; Hasse Aff., paras. 13-14 (Jim Stewart and Dick Helsley identified as ICARE members)). The record itself sets forth many more of the specific injuries which would be suffered by the operation of the proposed LCO. For instance, both Jim Stewart and Dick Helsley testified about the how their lives and property would be impacted by the proposed facility. *See* Phase I, Trans., pp. 308-318 (Stewart), 240-242 (Helsley-worried, among other things, about property devaluation from proximity to proposed facility).

With respect to ICARE, Respondents ignore the record and state that Alma Hasse was at the hearing as an individual. Respondents' Brief, p. 18 ("when Ms. Hasse appeared at the Big Sky hearing and provided comment, she was doing such in her individual capacity."). This misrepresentation directly flies in the face of Ms. Hasse's testimony where she stated at various points: "I'm the executive director of ICARE," Phase I, Trans., p. 259; "Our [ICARE's] mission is pretty straightforward," *id.* at 261; and even more directly: "And I believe that gives me standing and the right to speak here at this meeting *on behalf of ICARE and our affected members*." *Id.* at 262 (emphasis added). If this isn't enough to prove representational capacity, virtually every e-mail sent to the County by Ms. Hasse identifies her as "Alma Hasse, Executive Director of ICARE." *See, e.g.*, Supp. Rec., Vol. II, pp. 289-299.

The other organizations also have standing to pursue their interests to protect the Minidoka National Historic Site from odors, flies, impacts on aesthetic qualities, etc., and to ensure that they receive their procedural due process rights to attempt to protect the site, as set forth below, *infra* at section III.A (immediately below).

III. PROCEDURAL DUE PROCESS.

A. Petitioners have properly raised issues about the constitutionality of the process followed by the county.

On page 11 of its brief, South View argues that Friends of Minidoka amended its petition pursuant to the ruling in *Euclid Avenue Trust v. City of Boise*, 146 Idaho 306, 193 P.3d 853 (2008) in order to abandon the declaratory judgment counts. This proposition is true in the sense that the amended petition no longer seeks a declaration of rights as a separate cause of action from the judicial review proceeding. But by amending the petition, Friends of Minidoka has not abandoned its contention that the County acted unconstitutionally by depriving the Slones and petitioner organizations and their members of meaningful notice and opportunity to participate. Simply put, the petitioners are entitled to due process, notwithstanding the County's attempt to persuade the Court that some combination of IC 67-6529 and the Jerome County Zoning Ordinance provide otherwise.

The petitioners are entitled to challenge the constitutionality via judicial review pursuant to IC 67-5279. Paragraph (3) of that statute empowers the courts to determine whether the County acted "(a) *in violation of constitutional or statutory provisions*; (b) in excess of statutory authority; (c) upon lawful procedure; (d) without being supported by substantial evidence on the record as a whole; or (e) arbitrarily, capriciously or by abusing discretion." IC 67-5279(3)(emphasis added). If the court determines, on judicial review, that the County has violated *any* of those five criteria and substantial rights have been prejudiced, it must set aside the County's granting of the permit. *Id.*

Accordingly, the Court should decline to accept any proposition that it lacks power in the judicial review process to "declare" that the petitioners have been unconstitutionally denied due process.

Respondents also argue that Friends of Minidoka never raised constitutional issues at the hearings and thus did not exhaust its remedies. Respondents' Brief at 24. Once again, Respondents failed to read Friends of Minidoka's brief and its own record. While it is not necessary to raise constitutional claims before an agency, Friends of Minidoka specifically pointed out numerous instances, *e.g.*, Petitioners' Opening Brief, pp. 6, 8-10, where due process concerns, including those specific "due process" words, were raised by Petitioner members. *See also, e.g.*, Phase I, Trans., p. 90, lines 10-11 (Lee Halper- ICARE member (Hasse Aff., para. 15)- "due process rights have been violated"); Phase I, Trans., p. 217, lines 7-12 (Carolyn Dimond- IRC member (Carlson Aff., p. 1)- same); Phase I, Trans., p. 309, lines 13-22 (Jim Stewart- ICARE member (Hasse Aff., para. 13)- same).

In addition, Friends of Minidoka, Japanese American Citizens League, National Trust for Historic Preservation and Preservation Idaho, all attested that they had members in Jerome County or documented their special interests in the Minidoka site and the effects that a 13,000 head heifer operation would have on their members and the site. *See, e.g.*, Momohara Aff., paras. 5-9; Yoshitomi Aff., paras. 5-8, 11; Hartig Aff., paras. 5, 8-11; Everhart Aff., 4, 7-9. The "Catch-22" presented by both Respondents' and Intervenors' standing arguments is that they say that the petitioners failed to present evidence of harm from the proposed LCO. But as representatives of the petitioner organizations testified, both at the hearing and in their affidavits submitted for standing, they were prevented from submitting just the kind of documentation about "affects from large CAFOs [concentrated animal feeding operations]" (a synonym for Jerome County's LCO nomenclature) that would have further established their injury. *See id.*; *see also*, *e.g.*, Phase I, Trans., pp. 88, 90, 217, 221, 263 (all indicating that limitations on presentation of evidence to the Board made it impossible to fully document their concerns and particularized injuries). While Dean Dimond did present substantive information about the adverse health effects from large CAFOs,

see, e.g., Phase I, Vol. II, pp. 106-118, others were prevented from doing so. In any case, the Board arbitrarily and capriciously ignored documentation about off-site CAFO impacts in its decision on remand.

B. All of the petitioners are entitled to due process protections.

South View and the County argue that the Slones and other petitioners are not entitled to or "eligible" to receive due process.[2] The problem with these arguments is that they are based on nothing more than the misguided idea that eligibility for constitutional due process is somehow limited to those who reside within one mile of the proposed facility. It is, however, the state and federal constitutions that make the Slones eligible for due process because they have an undisputed property interest by virtue of their ownership of land adjacent to the CAFO site. No attempt to invoke some "residency" requirement from a combination of IC 67-6529 and the Jerome County Zoning Ordinance will defeat the constitutional protection afforded to those who have a "property interest" like the petitioners who own real estate next to the proposed site. Thus, for instance, the United States Supreme Court stated that it had "made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571-72 (1972); *see also River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 166 (7th Cir. 1994) (land owner had protectable interest in land that it owned in fee simple).

In this case, the Slones' ownership of the property is enough to require individual notice, whether or not they reside on it. The County ordinance in effect as of May, 2007, unequivocally

[2] South View also errantly attempts to find a purpose in IC 67-6529's restriction on public participation, but in doing so conflates the principles of protections to the public in the form of setbacks, a worthy requirement, with the outright limitations on public participation present in this case. The point missed by South View in its attempt to build a large CAFO to the detriment of others around the facility, is that the public participation requirements are intended to bring about *better* public protections, whereas the one mile residency restriction for providing testimony and documentary evidence can only result in *lesser* public protections.

required individual notice. Supp. Rec., Vol. 1, p. 20 ("The Administrator *shall* also send *notice 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.")(emphases added).

Furthermore, the JCZO provided, in pertinent part, that property interests were to be protected by way of application of Chapter 1-6.01 which stated that "every citizen of Jerome County shall at all times have the right to appear in person *or through his attorney*...before the... Board...to *freely petition for the relief of an alleged burden* created by this ordinance...." Supp. Rec., Vol. II, p. 360 (emphases added). These procedural rights, affirmed by ordinance, were ignored by the Board in this case to the prejudice of the petitioners. Multiple petitioners were denied the opportunity to be represented by counsel, while all were denied a meaningful opportunity to seek relief from the burdens that a large CAFO would cause.

This Court should also know that in August, 2007, just over one month before the hearing in this matter (and reaffirmed in additional September 2008 amendments), the County liberalized its limitation on submission of documentary evidence. Supp. Rec., Vol. I, pp. 105 (13-7.01), 130 (13-6.02), 134-35 (23-5.02(F)). The new limitation, attempting to correct the earlier due process violations, removed entirely the primary residency requirement, excluded any reference to Idaho Code 67-6529, and allowed "all members of the public desiring to present oral or written comment, or *documentary evidence*, ... [to do so] as set forth in Chapter 23...." *Id.* Chapter 23, in turn, provided for submission of potentially unlimited documentary evidence as long as it was provided no later than seven days prior to hearing. *Id.* at 108 (23-6.02 (F)). This amendment still restricted submission of documents at the hearing to one side of an 8½ x 11 inch piece of paper. *Id.* These amendments evidence the County's recognition that the one mile residency restriction at issue in this case was indeed an unconstitutional restriction on fundamental due process rights of members of the affected public. If this same hearing were held today, all of the petitioners in this case would

have been able to submit the kind of documentary evidence that they either tried to or desired to submit, but were prevented from doing so.

The process due is not mere general notice of the application, as the County rationalizes, or of some availability of proceedings, as South View urges. Their positions cannot be squared with the notice requirements of the state and federal constitutions, Jerome County ordinance, and recent Idaho case law that drew into question the restrictions set forth in IC 67-6529. As a matter of law, procedural due process requires that notice be given so that the opportunity to be heard occurs at a meaningful time and in a meaningful manner. *Neighbors for a Healthy Gold Fork v. Valley County*, 145 Idaho 121, 176 P.3d 126, 132 (2007) (citations omitted). Procedural due process may be satisfied by following reasonable statutory and ordinance requirements, but those requirements must also satisfy the meaningfulness requirements. As further explained below, the County applied its view of those requirements not to confer meaningful opportunity to be heard to the petitioners, but rather to deprive them of that opportunity.

C. The only notice that the Slones received provided no meaningful opportunity to be heard.

Under the ordinances, actual notice is required to be achieved by providing written notice to *property owners*. Supp. Rec., Vol. I, p. 20. Curiously though, that notice requirement then indicates that only those with their primary residence within a one mile radius of the proposed site may provide written comments for the hearing. Furthermore, the requirement states that written comment must be submitted to the Administrator within 15 days after publication of the notice in a newspaper, and also presumably from the date individual notice was required to be sent to certain property owners. In this case, the required notice document was not mailed to the Slones until September 14, 2007, even though the public notice for the September 25-26 hearing was published in a newspaper on August 23, 2007.

In short, no one can dispute that the County first mailed notice to the Slones on September 14, some seven days after the written comment period had closed on September 7. *See* Phase I, Vol. I, pp. 46-47 (County admits Slones "not notified with original thirty-seven (37) property owners"). No one can honestly say that the Slones had reasonable notice of an opportunity to submit written comments.

Thus, the only notice that the Slones had was that they could present oral testimony (and a one-page written comment) on September 25 or 26. The Slones' counsel not only immediately notified the County of the due process problems and of his unavailability on those dates (Supp. Rec., Vol. II, p. 304), but also that counsel needed copies of other materials from the County immediately in order to prepare for and make a presentation at any hearing. *Id.* at pp. 304-05: *see also* Supp. Rec., Vol. II, p. 360 (JCZO 1-6.01- providing right to be represented by counsel).

The County responded in two ways. First, it scheduled and held a hearing on September 24 about whether to vacate the September 25 proceedings due to notice problems and counsel's unavailability. Phase I, Vol. III, Documentation marked as exhibits CC45-CC94, p. 58. But it did not inform the Slones or their counsel of that hearing, nor make a verbatim record of that hearing where it apparently decided not to give the Slones or their counsel an opportunity to present evidence or oral argument, except on the 25th or 26th of September. *See id.*

The second way the County responded is even more telling. The County informed Mr. Brown that the records requested in his letter of September 13 would not be available for him to pick up until Monday, September 24, 2007. Supp. Rec., Vol. II, p. 309 (September 21, 2007 letter from Art Brown to Patrick Brown). And the County's billing shows the application file and related materials were so voluminous it took them 13 hours of staff time to produce and copy them. *Id.*

In short, South View and the County would have the Court believe that the County may take from September 13 until September 24 to copy the pertinent files, produce that volume of material

the day before the hearing, and still argue with a straight face that it provided the Slones and their counsel a meaningful opportunity to prepare and present evidence the following day.

D. The cases the County and South View rely on are not analogous to the Slones' circumstances.

In *Cowan v. Board of Commissioners of Fremont County*, 143 Ida. 501, 148 P.3d 1247 (2006), the party complaining of a due process violation was not substantially prejudiced by a due process violation because the attorney for the party had spoken at length at a hearing and presented evidence both at the hearing on the preliminary plat and a hearing before the Board involved. Similarly, in *Neighbors for a Healthy Gold Fork v. Valley County*, 145 Ida. 121, 176 P.3d 126, the party complaining was not substantially prejudiced by due process violations because that party's attorney availed himself of the opportunity to submit a binder of exhibits and written objections. The party had also availed itself of the opportunity at a hearing to offer oral testimony and written exhibits.

In stark contrast, the Slones were not allowed verbal or written submissions at any point in time. In short, they were denied any reasonable opportunity to meaningfully participate.

IV. FAILURE TO ISSUE A REASONED DECISION.

In addition to the points raised in its opening brief, Friends of Minidoka further emphasizes the example of the disconnect between the first decision denying the permit application and the decision after remand that granted it. In the first decision, the Board based much of its denial on concerns over phosphorus contamination of soil at the site and its consequences for the overall well-being of the county. Phase I, Vol. III, Documentation marked as exhibits CC45-CC94, pp.51-52. Yet the Board dropped this issue altogether in issuing its grant of the permit application, without any change in factual circumstances, by relying on incorrect advice of counsel that it could only base its decision on whether the application was complete. *See* Phase II, AR, pp.3-4. What

the County failed to do was simply apply the ordinance that incorporated the Comprehensive Plan, namely JCZO 1-3.01 and the standards set forth therein which were meant to provide, among other things, "[a]ssurance that the important environmental features of the county are protected and enhanced." Supp. Rec., Vol. II, p.359 (1-3.01(h)). Such environmental features include assuring "that phosphate and other waste products will be disposed of properly [in a way that] will guarantee that Jerome County soils remain vibrant for future generations to come, and do not die from an ever-increasing accumulation of such waste." Phase I, Vol. III, Documentation marked as exhibits CC45-CC94, p. 52. The County decision to protect its agricultural soils was even based on underestimated phosphorus loads from manure. Alma Hasse attempted to submit evidence, denied by the County based on the one mile residency rule, that shows that the phosphorus numbers were perhaps as low as one-half of the true amounts of phosphorus present in the manure. Supp. Rec., Vol. II, pp. 273-75. If the County applied all of its required ordinances, as Friends of Minidoka asks this Court to direct the County to do,[3] it could still protect the soils of Jerome County by applying JCZO 1-3.01 to its decision *along with* the Comprehensive Plan.

As Judge Bevan said in his order on remand, "there is a possibility that the Board may find some other *valid* basis upon which to deny Big Sky's LCO permit application."[4] Phase II, AR, p. 38 (emphasis in original). Both 1-3.01 and 1-6.01 of the JCZO provide that valid basis. These sections of the ordinance constitute requirements for the County to follow to weigh substantive evidence, much of which was unconstitutionally precluded in this case, to comply with the purposes of its Comprehensive Plan and to protect the property rights of nearby residents. Part of the

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[3] *See Urrutia vs. Blaine County,* 134 Idaho 353, 2 P.3d 738 (2000), citing *Price v. Payette County Bd. Of County Comm'rs,* 131 Idaho 426, 431, 958 P.2d 583, 588 ("where an appellate court reverses or vacates a judgment upon an issue properly raised, and remands for further proceedings, it may give guidance for other issues on remand.").

[4] Judge Bevan was fully apprised of Southview's argument to the effect that the Board must approve the application if it is complete, but was not persuaded by it. *See id.*

purpose of issuing a written decision is for the reviewing court to know what standards a county applied and whether it followed its own laws. The Board's decision cannot be considered "reasoned" when it fails to substantially comply with its own ordinances as required by law. I.C. 67-6535(b); *see also, e.g., Taylor v. Bd. Of County Comm'rs*, 124 Idaho 393, 401, 860 P.2d 8, 17 (Ct. App. 1993) (county must comply with its own ordinances).

V. INCOMPLETE APPLICATION.

While Friends of Minidoka recognizes the high hurdle it must jump for this Court to overturn a finding of fact, there is no more compelling opportunity to overturn a finding of fact than the matter of whether Big Sky identified all wells within one mile of the proposed facility. The Board relied upon a paid consultant for the applicant instead a man who lived on his own property and the used the well at issue for much of his 90 years. Fred Stewart owns several farms directly east of the proposed LCO. Phase I, Trans., pp. 46-50. At page 46, lines 24-25, he tells the Board (referring to the applicants' maps that are supposed to delineate all wells) "the plat there doesn't show my culinary well, but it's there." At page 49, line 2-3, responding to a request by Chairman Howell to do so, Mr. Stewart pointed out on the applicant's map where his farms were and *specifically where his domestic well is located*- the one that was not delineated on applicant's map. Furthermore, Fred's son, Jim Stewart, referred to the undelineated well that his father owns in his closing statement to the Board: " Is—there is a domestic well missing on their map. It's on- if you like- well, I'd just as soon not point it out. I'm kind of tired of doing Matt's homework for him [referring to Matt Thompson, applicant's engineer who was responsible for preparing the inaccurate map of domestic wells]. But you can ask my father. He's got a domestic well that's within that mile range that is not on that map, so that part is incomplete." Phase I, Trans., pp. 314 (lines 22-25) and. 315 (lines 1-3).

With respect to both Fred Stewart's well and another well on Harold Dimond's property, Dean Dimond tried to address the hearing discrepancies in his motion to reopen the record on August 4, 2008 (post remand), but was denied an opportunity to do so. *See* Supp. Rec., Vol. II, p. 324. The failure to reopen the record constitutes a procedural irregularity while the failure to take the word of a life-long resident about his own property over that of a paid consultant who had no access to Mr. Stewart's land constitutes reversible error.

VI. FRIENDS OF MINIDOKA IS ENTITLED TO ATTORNEYS FEES.

Based on the multiple errors by the County, Friends of Minidoka is entitled to attorneys fees and costs. Neither the County nor South View has a colorable claim for fees against Friends of Minidoka as it is the County who violated the petitioners' rights to due process and a fair and reasoned decision. Furthermore, attorney fees are not to be awarded against petitioners where the losing party brought the appeal in good faith and where a genuine issue of law was presented, as it has been in this case. *Minich v. Gem State Developers*, 99 Idaho 911, 918, 591 P.2d 1078, 1085 (1979) (addressing IC §12-121).

CONCLUSION

Friends of Minidoka respectfully requests that this Court find that the County has violated the procedural due process rights of the petitioners and other procedural irregularities as set forth in the briefs and established throughout the record. Specifically, the violations by the County include lack of notice and opportunity to be heard as it regards the Slones, lack of opportunity for all petitioners to be allowed to meaningfully participate in the application review process because of the refusal by the County to allow submission of substantial documentation of affected parties' claims, failure of the County to follow its own ordinances, failure to allow reopening of the record pursuant to its own procedures, failure to issue a reasoned statement, and incorrectly finding the application complete. Each one of these violations by itself is enough to vacate the County's permit

grant of September 23, 2008. Friends of Minidoka further respectfully requests that this Court remand the matter to the Board with specific instructions to require a new public hearing without restriction as to predetermined distances and for the Board to apply its entire set of ordinances to the application, which include by reference the Comprehensive Plan. In addition, the Court should award Friends of Mindoka its fees and costs.

Dated: March 5, 2010.

Respectfully submitted,

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On the brief:
Daniel C. Snyder

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of March, 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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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,	Case No.: CV-2008-1081 DECISION ON JUDICIAL 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,	

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

On May 3, 2007, Big Sky Farms' application for a Livestock Confinement Operation (LCO) permit was filed with the Jerome County Planning & Zoning Administrator. A public hearing on the application was held before the Jerome County Board of Commissioners (the "Board") on September 25-26, 2007. The Board held a public meeting for purposes of deliberating on the evidence on October 9, 2007. At the 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.

Big Sky Farms filed a petition for judicial review on November 13, 2007. On June 27, 2008, Judge Bevan issued a Memorandum Decision reversing the Board's decision and remanding 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, but the Board declined to hear or consider the motion. On August 11, September 2, September 4, September 9, and September 22, 2008, the Board held several meetings to reconsider the LCO application and voted 2-1 to approve it on September 22, 2008. On September 23, 2008, the Board's written order approving Big Sky Farms' LCO permit was issued.

Petitioners filed Petition for Judicial Review and Declaratory Judgment on October 21, 2008 and a supporting memorandum on January 20, 2010. Respondents' filed Memorandum in Response on February 18, 2010. Intevernors' Memorandum in Opposition to Petition for Judicial Review was filed February 18, 2010. Petitioners' Reply Memorandum in Support of Petition for Review was filed March 08, 2010.

Petitioners' Petition for Judicial Review and Declaratory Judgment came before the court on April 23, 2010. 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. The Court took the matter under advisement on April 23, 2010.

FACTS

The site of the proposed LCO facility is approximately 1.25 miles upwind from the Minidoka National Historic Site ("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. The site,

visited annually by thousands, was designated a National Monument in 2001 under the auspices of the National Park Service. 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. Big Sky's application immediately gained interest from these property owners. In addition, due to the proximity of the proposed LCO to the Minidoka Site, a large number of individuals and historic preservation and conservation organizations became interested with the LCO permitting process also. The Board received volumes of letters and emails following the submission of the LCO application.

The Board initially scheduled a public hearing on the proposed Big Sky LCO to be held on August 14-15, 2007. In accordance with the Jerome County Zoning Ordinance ("JCZO"), on July 17, 2007, the Board sent written notice of the public hearing to individuals owning property within one mile of the proposed LCO site. The Board also published an announcement of the hearing dates in the *Jerome North Side News* on July 19, 2007. 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 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. Written comments from this group were required to be received within 15 days after publication of the announcement in order to be considered by the Board. 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 limited:

written testimony was limited to one 8.5" by 11" sheet of paper, single-sided; oral testimony was limited to two minutes per person. Public comments began arriving at the county soon after publication in the paper.

Planning and Zoning Director Art Brown refused to accept comments from several individuals. 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. 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. Art Brown refused to accept the documents and returned them on August 3, 2007. Mr. Brown explained that the deadline for receiving information from all primary residents within one mile of the proposed LCO was 5 p.m. on August 2, 2007. Mr. Brown returned Mr. Miller's comments because Mr. Miller was not a resident within one mile of the proposed LCO. 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. Planning and Zoning staff informed the Dimonds that they were not allowed to submit written comments because they were not residents of that particular property.

On August 6, 2007, the Board cancelled the August 14-15 public hearing and rescheduled it for September 25-26, 2007. The Board recognized that Mr. Brown had improperly interpreted JCZO 13-6.02's 15-day public comment period to include the date of publication in the newspaper. The Board stated cancellation was necessary because of the refusal to accept the submission of the written comments provided by Dean Dimond.

On August 15, 2007, property owners living within one mile of the proposed LCO received a mailed notice of the rescheduling. On August 23, 2007, public notice of the hearing

was published for one day. The public announcement made clear that the 15-day comment period closed on September 7, 15 days after the August 23 publication date. The hearing procedures listed in the public announcement and the notices mailed to property owners listed in the public announcement and the notices mailed to property owners contained identical limitations on public comments as the original August 14-15 procedures.

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. 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. 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. The Board voted 2-1 against another delay. The inability of various counsel for opponents to attend the public hearing was a recurring discussion at Board meetings, all resulting in a decision to not change the hearing dates. The new procedural limitations for the September 25-26 public hearing were mailed out to citizens owning property within one mile of the proposed LCO site on September 11, 2007 and published in the newspaper on September 13.

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. The Slones own property located approximately 300 yards southeast of the proposed LCO site. Under JCZO Chapter 13-6.01, the Slones were entitled to timely individual notice of both the August 14-15 and September 25-26 hearings. The Slones, however, received no such notice from Jerome

County. In his letter, Patrick Brown requested that the hearing be delayed because his client required proper notice and because he (Patrick Brown) was unavailable on those dates and his client had the right to be represented by counsel and to prepare for the hearing. The Planning and Zoning department delivered notice to the Slones by mail on September 14, 2007. By the time Mr. Slone received notice, the comment period for written testimony had already closed. 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. Art Brown interpreted JCZO 13-6.01 as requiring that notice be sent only to property owners who resided on their property. As a result of the improper notice, the Board considered delaying the hearing in its September 24 meeting. County Prosecutor Seib informed the Board that he did not see any deficiency in notifying Slone of the hearing and that nothing required them to delay the hearing any further. The Board decided not to delay the hearing.

The LCO hearing commenced on September 25, 2007. John Lothspeich, attorney for Big Sky Farms, opened the hearing by asking the commissioners to focus solely on whether the Big Sky application had met the requirements of JCZO Chapter 13. 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. Opponents of the proposal then expressed their chief concerns regarding the LCO. Concerns relayed at the hearing included, but were not limited to, environmental and aesthetic problems, protection of private property, undue burden on the local water table, proximity of the proposed LCO to the Minidoka Site, negative impacts on the integrity of the Minidoka site, negative effects on a nearby wildlife preserve, exacerbation of asthma and allergies, increased traffic, that Chapter 13 of the JCZO only set the minimum standards that the Big Sky application

was required to meet, and that the applicant's well map did not include a culinary well located on his property.

On September 26, 2007, 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. Harold Dimond expressed concern about the evidentiary limitations of the hearing and the lack of opportunity to have an attorney present. Harold Dimond testified 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.

Commissioner Howell questioned Harold Dimond about whether the Board ever told Dimond that he could not bring an attorney. Harold Dimond explained that his attorney, Richard Carlson, had another prior commitment to attend, and when he and his attorney requested the hearing be moved, the Board said that lack of representation during the public hearing was not a factor to be considered and was irrelevant. Commissioner Howell then pointed to documents in the record that the Board had received from Richard Carlson, believing these letters demonstrated that Harold Dimond had been allowed to submit evidence. Harold Dimond disagreed, pointing out that the letters received by the Board were from Richard Carlson acting on behalf of Dean Dimond, not him. Harold Dimond also described how Art Brown had returned the evidence he tried to submit prior to the hearing date. Commissioner Howell asked County Prosecutor Seib to address the discussion of who was not allowed to bring an attorney. Mr. Seib noted that Mr. Carlson could not be present, but that Harold Dimond was not restricted to just that attorney. Mr. Seib also stated there was not necessarily a right to have an attorney.

Then, Alma Hasse asked the Board to clarify some procedural questions. Commissioner Howell deferred to Mr. Seib, who indicated that Hasse had four minutes, regardless of the substance of her testimony. Ms. Hasse protested, pointing out that the County's notice said the public would have four minutes of substantive testimony. She requested that her procedural questions not be subject to the same time limit. The Board limited Ms. Hasse to a total of four minutes. Ms. Hasse objected to the limitations imposed by the Board on the public testimony, noting the tremendous amount of information needed to adequately evaluate the Big Sky application. 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. The Board denied the submission of any of these exhibits. Ms. Hasse noted that the procedures established by the Board pertained only to written testimony, not to electronic media. The Board dismissed this notion. Commissioner Obenauer, however, wanted to have the information available if she needed to look at some other documents that had been withheld because of the Board's indecision concerning the 15 days and other issues. Art Brown interjected, telling the Board if they look at the audio CD's and other exhibits, then it becomes evidence. Commissioner Howell ended the discussion because he felt it conflicted with the advice obtained from Mr. Seib.

Ms. Hasse then requested that she be allowed to question Big Sky's experts. Commissioner Howell interrupted her in the midst of this request, informing her that time had expired. Commissioner Obenauer then asked Ms. Hasse a set of questions relating to the Big Sky Nutrient Management Plan. 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.

Next, Mr. Nelson, a member of the Jerome County Planning and Zoning Commission, requested that the Board listen to a tape recording of a Planning and Zoning hearing relating to the Minidoka Site. 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. The Board initially believed they had to disallow the tapes due to the procedures they established for accepting testimony. Mr. Lothspeich, however, informed the Board that they could take official notice of the Planning and Zoning tapes pursuant to Title 67 of IDAPA. Mr. Seib believed the Board could also introduce the tapes into evidence based upon the Board's own procedures it established for the Big Sky public hearing. Ms. Hasse objected. The Board then considered holding the record open so that Ms. Hasse's exhibits and Mr. Nelson's tapes could be considered. The Board believed they could extend the public hearing for one hour the following Monday, but ultimately decided not to.

Jim Stewart concluded the public testimony. Stewart was unable to have his attorney present at the public hearing, and 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. Stewart also 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. Stewart pointed out numerous ways in which the application was incomplete.

At the conclusion of the September 26 hearing, Mr. Lothspeich pointed out that the application was complete in all aspects. He urged the Board that they must approve the application if it met the requirements in Chapter 13 of the JCZO. He also told the Board that its sole inquiry was whether the applicant satisfied the criteria in Chapter 13, and if so, the Board was mandated to issue a permit in this case. Following Mr. Lothspeich's remarks, Mr. Seib

reminded the Board that it had to determine whether or not it would accept the exhibits Ms. Hasse wished to provide. Commissioner Howell said he would let them be submitted in an envelope, given to Art Brown. In terms of examining the exhibits, Commissioner Howell stated they would not open the envelope and would not present it to the Board at that time.

The Board concluded the hearing by announcing that it would reach a final decision at its October 9, 2007 meeting. 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. 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. 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. 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.

Commissioner Obenauer expressed concern about well contamination, the health of the residents near the cow confinement facility, local wildlife, and the effect of the LCO on the Minidoka Site. 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. Davidson then made a motion to deny the application, which was seconded by Commissioner Obenauer. The Big Sky LCO application was denied 2-1.

The Board approved a memorandum decision discussing its rationale for denying the Big Sky LCO application on November 1, 2007. 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 fact and conclusions of law. Obenauer believed

more time was required to adequately complete the county's written decision on the Big Sky application. Commissioner Obenauer later noted that she had been excluded from the process of approving the Board's factual findings.

The bulk of the Board's memorandum decision discussed the completeness of the application with regards to JCZO Chapter 13. 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. Specifically, the decision noted that the LCO did not adequately address concerns about phosphate pollution and its impacts on the local soil. The application was therefore denied.

Don McFarland and Big Sky Farms appealed the Board's decision to the Jerome County District Court. Specifically, Big Sky argued that the Board's sole reliance upon the County comprehensive plan in denying its application was an improper application of the County's ordinances. Big Sky argued that the ordinances merely required an applicant to meet the exact criteria listed in Chapter 13, and nothing more. 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. 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 the LCO permit application. The court reversed the Board's decision and remanded the case back to Jerome County for further proceedings.

The Board first addressed the District Court's remand on July 28, 2008. Without making specific references 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 Big Sky application was complete.

On August 4, 2008, Dean Dimond requested that the Board consider reopening the record for the Big Sky Permit. Dimond insisted that he had additional evidence for the Board to consider before it rewrote its decision on the application. Mr. Seib opined that the JCZO did not allow the Board to approve or deny an application except on the basis of whether it was complete. Commissioners Howell and Davidson then voted against reopening the Big Sky record, with Commissioner Obenauer voting for reopening.

On August 11, 2008, the Board again discussed the Big Sky remand. Mr. Seib opined that the Board could only consider whether the application was complete, and nothing more. Commissioner Obenauer wished to discuss a memorandum she had prepared on the Big Sky application. 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. Commissioner Obenauer disagreed with Mr. Seib's opinion. Richard Carlson, attorney for the Dimond families, asked that he, as well as Mr. Lothspeich, be granted 15 minute to present argument to the Board concerning the meaning of the Court's decision. Mr. Lothspeich responded, arguing that the Court said this LCO permit should have been granted and that the application was egregiously overdue. There were no more arguments on the matter by counsel.

After discussion about placing conditions on approval of the application 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. Commissioners Davidson and Howell both insisted that the application was complete, and there was concern if they did not approve the application a court would again reverse the Board's decision. It was agreed that Mr. Seib would write a decision reflecting the majority view to approve the permit.

On September 2, 2008, Richard Carlson, the Dimonds' attorney, requested that he be allowed to comment on the Big Sky discussion. Mr. Lothspeich objected to any commentary, stating it would impermissibly reopen the record. 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 them. The Board, however, agreed to allow Carlson to speak, but did not record it. Mr. Carlson began by noting that the Board had previously stated it was searching for a reason to deny the application. He suggested that he could prepare a memorandum that would support a denial. 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. The Board tentatively stated that it had decided to approve the Big Sky application, but it was going to apply conditions to the approval. Those conclusions would be discussed at a later hearing.

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. 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. 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. 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. Mr. Lothspeich was able to complete his remarks.

The final Big Sky hearing after remand took place on September 22, 2008. 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. Eden Dimond objected to this statement, believing that Mr. Lothspeich had been granted an opportunity to present additional evidence into the record where others had not. She was refused the opportunity to speak. 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. After a brief recess, the Board reconvened to hear a statement by Alma Hasse. Commissioner Obenauer believed the record required reopening, but the rest of the Board disagreed. The Board then voted 2-1 to approve the Big Sky application.

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 provision of Chapter 13 and the JCZO. 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.

ISSUES PRESENTED

1) Do petitioner organizations have standing?

2) 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?

3) 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?

4) Were the decisions of the Board consistent with the provisions of Jerome County ordinances relating to the requirements for completeness of applications for livestock confinement operations?

5) Was the Board's decision to grant the LCO application based upon unlawful procedure because the Board failed to apply its own ordinances? Were the decisions of the Board arbitrary, capricious, or an abuse of discretion? 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?

6) Did the Board's decision violate Idaho Code § 67-6535 to the extent that it failed to provide a "reasoned statement" for its decision?

7) Are petitioners entitled to attorney's fees incurred in bringing this petition pursuant to Idaho Code § 12-117; or, is Jerome County entitled to attorney's fees, pursuant to I.C. § 12-117, incurred in having to respond to Friends' petition?

STANDARD OF REVIEW

Idaho's Local Land Use Planning Act (LLUPA), Idaho Code § 67-6501, *et seq.*, allows an affected person to seek judicial review of local government decisions concerning land use permits issued or denied pursuant to LLUPA. The district court conducts judicial review of the action of local government agencies. I.R.C.P. 84(a)(1). For purposes of judicial review of LLUPA decisions, a local agency making a land use decision, such as the Board of Commissioners, is treated as a government agency under the Idaho Administrative Procedure Act (IDAPA). *Evans v. Teton County*, 139 Idaho 71, 74, 73 P.3d 84, 87 (2003); *Urrutia v. Blaine County*, 134 Idaho 353, 357, 2 P.3d 738, 742 (2000). The district court bases its judicial review on the record created before the local government agency. I.R.C.P. 84(e)(1).

Idaho Code § 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,* 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 v. Gem County, ex. rel. Bd. Of County Comm'rs*, 137 Idaho 695, 698, 52 P.2d 840, 843 (2002) (citing *Urrutia v. 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 appealing the Board of Commissioners' decision must first show the Board of Commissioners erred in a manner specified under I.C. § 67-5279(3), and second, that a substantial right has been prejudiced. I.C. § 67-5279(4); *Evans v. Teton County*, 139 Idaho at 75, 73 P.3d at 88; *Price v. Payette County Bd. of Comm'rs*, 131 Idaho 426, 429, 958 P.2d 583, 586 (1998). Whether the Board of Commissioners violated a statutory provision is a matter of law over which this court exercises free review. *Evans v. Teton County*, 139 Idaho at 75, 73 P.3d at 88; *Friends of Farm to Market v. Valley County*, 137 Idaho 192, 196, 46 P.3d 9, 13 (2002); *Polk v. Larrabee*, 135 Idaho 303, 308, 17 P.3d 247, 252 (2000). This court defers to the Board of Commissioners' findings of fact unless the findings of fact are clearly erroneous. *Evans v. Teton County*, 139 Idaho at 75, 73 P.3d at 88; *Evans v. Bd. of Comm'rs of Cassia County*, 137 Idaho at 431, 50 P.3d at 446; *Friends of Farm to Market*, 137 Idaho at 196, 46 P.3d at 13. The Board of Commissioners' factual

findings are not clearly erroneous so long as they are supported by substantial, competent, although conflicting, evidence. *Evans v. Teton County*, 139 Idaho at 75, 73 P.3d at 88; *Friends of Farm to Market*, 137 Idaho at 196, 46 P.3d at 13.

A party is entitled to a 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).

LEGAL ANALYSIS

1) Standing

Respondent Jerome County raises a challenge to the organizational standing of Friends of Minidoka, Japanese American Citizens League, and the National Trust for Historic Preservation.

Intervenor South View Dairy concedes that *some* of the Petitioners (Dimonds) have standing, and acknowledges that the case will go forward no matter what decision the court makes with regard to standing of the other petitioners. Intervenors contend, however, that some of the other petitioners do not have standing, notably the Idaho Concerned Area Residents for the Environment (ICARE), the Japanese American Citizens League, the National Trust for Historic Preservation, Preservation Idaho, Friends of Minidoka, and the Idaho Rural Council.

The requirements for standing (being allowed to participate in the court/judicial review process) are different from the requirements for remedy from the court. To have *standing*, one must demonstrate that they may be adversely affected by the issuance or denial of a permit authorizing the development. Standing status depends on whether one owns property that may be adversely affected by the development, not because one owns property within a specified

distance. Proximity is a very important factor, but the court will not look to a predetermined distance in deciding whether a property owner has standing. *Evans v. Teton County,* 139 Idaho 71, 75, 73 P.3d 84, 88 (2003). While the existence of real or potential harm is sufficient to challenge a land use decision (to have standing), in order to be entitled to a *remedy*, Idaho Code § 67-6535(c) requires a demonstration of actual harm or violation of a fundamental right. *Id.* at 76, 73 P.3d at 89. These requirements are completely distinct from a determination of who may have a right to comment or present evidence at a public hearing.

To have standing as an organization, different standards apply. An organization may have standing solely as the representative of its members. The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. *Selkirk-Priest Basin Assn., Inc. v. State,* 127 Idaho 239, 899 P.2d 949 (1995). The injury must be distinct and palpable and not one suffered alike by all citizens in the jurisdiction. *Selkirk-Priest Basin Assn., Inc. v. State,* 128 Idaho 831, 919 P.2d 1032 (1996).

Petitioners allege that ICARE and the Idaho Rural Council have members who live within one mile of the proposed site. Pet'rs' Mem. 23 n.11. The Idaho Rural Council alleges they have several members who own and farm real property adjacent to the proposed site and several who live on that property. Whether those members have their primary residence on that property, or even whether they actually live on it, as opposed to merely owning land near the proposed site, is irrelevant for purposes of standing. Those people may be adversely affected, and face potential harm, if the proposed site is developed. ICARE and the Idaho Rural Council have standing.

The only other allegation from Petitioners regarding standing is that the other organizations have members that visit the Minidoka National Historic Site, and will continue to visit, regularly. *Id.*; Pet'rs' Reply Mem. 8. These allegations reference the affidavits of Momohara, Yoshitomi, Hartig, and Everhart. These four affidavits, therefore, are offered to support Petitioners' claims to standing for the Japanese American Citizens League, the National Trust for Historic Preservation, Preservation Idaho, and Friends of Minidoka.

The court has examined those affidavits carefully. Though each provides a compelling recitation of the importance of the Minidoka National Historic Site to their various organizations, none of them allege a distinct and palpable injury not suffered alike by all citizens in the jurisdiction. At least one of the affidavits notes the Historic Site is just over a mile away from the proposed LCO site. None of them purport to speak for, or on behalf of, the Minidoka National Historic Site itself. That is, none of them purport or claim to be on the board of directors of the Historic Site or to represent it. Rather, they all pay tribute to the importance of the site to their various organizations. Though several of the affidavits refer to the fact they have members who live in Jerome or Twin Falls or Minidoka counties, there is no specific allegation that any identified member of any of these organizations live in proximity to the proposed LCO site, or would be harmed by its presence. At best, these four affidavits voice concerns on behalf of unidentified members of their organizations, none of whom individually would have standing to participate in this appeal.

The court concludes that Friends of Minidoka, the Japanese American Citizens League, the National Trust for Historic Preservation, and Preservation Idaho, all lack standing and all will be dismissed from further participation in this appeal. Counsel for Intervenors is requested to prepare an appropriate form of order for the court's signature reflecting this determination.

2) Whether Idaho Code § 67-6529 is constitutional

Petitioners contend that I.C. § 67-6529 is unconstitutional. Idaho Code § 67-6529 provides that: "At a minimum, a county's ordinance or resolution shall provide that the board of commissioners shall hold at least one public hearing affording the public an opportunity to comment... Only members of the public with their primary residence within a one (1) mile radius of a proposed site may provide comment at the hearing. However, this distance may be increased by the board."

Petitioners argue that both I.C. § 67-6529 and JCZO 13-6.02 violate substantive due process because the distinction made between those with their primary residence on either side of the one mile boundary is arbitrary and unreasonable. [1] Admittedly, the statute does not provide the right to comment at hearing to those who own land within the one mile limit but do not reside there. Here, however, in accordance with the statute, the Board expanded the right to comment to include those people (see below). JZCO 13-6.02 conforms to I.C. § 67-6529 by allowing any primary resident, as defined in the statute, to submit written comments or objections to the Board within 15 days after publication of the application in the paper and by allowing those comments or objections to become part of the record.

Jerome County argues in its brief that the court should not consider this argument, in that Petitioners failed to raise this issue before the Board of Commissioners. In their Reply Brief, at page 8, Petitioners assert it is not necessary to raise constitutional issues before an agency, but then they go on to point to references in the record where due process issues were raised. The court mentions this only to clarify the law on this point. Ordinarily, review on appeal is limited

[1] Petitioners' brief also suggests the statute is unconstitutional in that it distinguishes between those "owning and living" on property within a one mile radius, and those who reside outside the boundary, "or may not own land." The statute does not, on its face, distinguish between those who own their residence and those that do not.

to those issues raised before the administrative tribunal. *Johnson v. Blaine County,* 146 Idaho 916, 204 P.3d 1127 (2009). This rule would not apply to an issue the administrative tribunal lacked the authority to decide, such as the facial constitutionality of a statute. *Id.* at 920, 204 P.3d at 1131.[2]

Petitioners' challenge appears to be a facial attack upon the statute. As noted below, however, the commissioners relaxed the standards *as applied.* The Idaho Supreme Court has given some guidance in this area. In analyzing a state statute, they have announced the following rules: legislative acts are generally presumed constitutional and any doubt concerning interpretation of a statute is to be resolved in favor of that which renders the statute constitutional; and the burden of overcoming the presumption of the statute's validity rests with the one raising the challenge. *Robison v. Bateman-Hall,* 139 Idaho 207, 76 P.3d 951 (2003); *McLean v. Maverik Country Stores, Inc.,* 142 Idaho 810, 135 P.3d 756 (2006). It is a general rule that a legislative act should be held to be constitutional until it is shown beyond a reasonable doubt that it is not so, and that a law should not be held to be void for repugnancy to the Constitution in a doubtful case. *State v. Bennett,* 142 Idaho 166, 125 P.3d 522 (2005). With respect to JZCO 13-6.02, there is a strong presumption that the actions of the Board of Commissioners, where it has interpreted and applied its own zoning ordinances, are valid. *Evans v. Bd. of Comm'rs of Cassia County,* 137 Idaho 428, 431, 50 P.3d 443, 446 (2002).

This court has no substantial basis upon which to rule that I.C. § 67-6529 or JCZO 13-6.02 are unconstitutional. No persuasive authority has been cited in support of Petitioners' argument. Arguments can certainly be made that the one mile limit is arbitrarily drawn, and that

[2] Petitioner's disagreement with the statute may be more of an equal protection argument than a substantive due process argument, in that it raises a challenge to the classification or status of those within the one mile radius, and those outside it. The court will leave that argument to others. It has not been raised.

there are people further than a mile away from a LCO that might unquestionably be affected by such an operation. Arguments could also be made that the legislature has arbitrarily excluded from the right to comment at hearing those that farm land within a mile, or rent a residence within a mile, or have their primary residence elsewhere, though they rent out a residence on their land within a mile, or those that have not yet built upon property within a mile. However, those are judgments for the legislature to make, not this court. The court will not and cannot substitute its judgment for that of the legislature on this point.

3) Procedural due process at the public hearing: the right to be heard and/or present documentary evidence.

Chapter 23 of JCZO entitled Procedural Requirements for Meetings and Hearings is in the record at pages 22-24 of the Supplemental Record, Volume I. According to the Certification of the Clerk of the Jerome County Board of Commissioners, at page 11 of the same volume, the versions of Chapter 13 and 23 that were in effect as of May 3, 2007 are attached in the record at pages12 through 25. Chapter 23 of the May 2007 version of the JCZO provides for hearing procedures before the Planning and Zoning Commission. Paragraph 23-7.01 provides that all documents (there is no limitation on size or amount of the submittal) must be submitted seven days prior to the hearing. Persons who attended a hearing could submit a one page document. Pursuant to paragraph 23-7.02 witness testimony was limited to 2 minutes each, except that the "principal opposer" got 5 minutes. Those were Jerome County's rules governing hearings as the public hearing approached. As noted, the hearing originally set in August was postponed to September.

Later, on September 10, 2007, a little over two weeks before the rescheduled September 25-26 public hearings, the Board amended several chapters of the Jerome County Zoning Ordinance text by adopting Jerome County Ordinance 2007-6. These amendments are in the record commencing at page 101 of Volume I of the Supplemental Record, and ending at page 110. They were published September 20, 2007, just days before the county held its first and only public hearing in this matter. Supplemental R., Vol. I 137-138.S.

According to Petitioners' opening brief at page 29, the Board of Commissioners established the following guidelines for the presentation and rebuttal of evidence at the September 25-26 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 8 ½" x 11" that is sufficiently legible, handwritten or typed in any standard font...An individual may submit two page(s) document(s) no larger than 8 ½"x 11" that is sufficiently legible, handwritten or typed in any standard font...if they don't give any oral testimony the night of the hearing.

Petitioners also admit that,

> ...in August, 2007, just over one month before the hearing in this matter (and reaffirmed in additional September 2008 amendments), the County liberalized its limitation on submission of documentary evidence. Supp. Rec., Vol. I, pp.105 (13-7.01), 130 (13-6.02), 134-135 (23-5.02F). The new limitation, attempting to correct the earlier due process violations, removed entirely the primary residence requirement, excluded any reference to Idaho Code § 67-6529, and allowed 'all members of the public desiring to present oral or written comment, *or documentary evidence,...*[to do so] as set forth in Chapter 23...' *Id.* Chapter 23, in turn, provided for potentially unlimited documentary evidence as long as it was provided no later than seven days prior to hearing. *Id.* at 108 (23-6.02F). This amendment still restricted submission of documents at the hearing to one side of an 8 x ll inch piece of paper. *Id.*

Pet'rs' Reply Mem. 10.

Thus, the county allowed for *unlimited* written comment and documentation *from anyone* so long as it was presented at least seven days prior to hearing, restricted the length of

time and the documents the county would accept at hearing, but heard oral testimony from anyone who wanted to give it, regardless of where they lived, provided they kept their comments limited to four minutes.

Petitioners argument on this point is that 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 authority, Petitioners point to the comment of the Idaho Supreme Court in *Cowan v. Board of Commissioners of Fremont County,* 143 Idaho 501, 148 P.3d 1247 (2006). In *Cowan,* the Supreme Court observed that although Cowan's rights were not violated, limiting public comment to two minutes is not consistent with affording an individual a meaningful opportunity to be heard. *Id.* at 512, 1258. Whether four minutes of oral testimony passes constitutional muster is unknown.[3]

Idaho Code § 67-6529 is critical here, at least with respect to who gets to comment at the public hearing. The Legislature has determined and defined due process with regard to LCOs. Idaho Code § 67-6529 provides that: **"At a minimum, a county's ordinance or resolution shall provide that the board of commissioners shall hold at least one public hearing affording the public an opportunity to comment... Only members of the public with their primary residence within a one (1) mile radius of a proposed site may provide comment at the hearing. However, this distance may be increased by the board."**

[3] Whether due process has been allowed petitioners in this case does not necessarily come down to a "two minute" vs. "four minute" analysis. Idaho Code § 67-6535(c) directs the courts of this state to "consider the proceedings as a whole and to evaluate the adequacy of procedures and resultant decisions in light of practical considerations with an emphasis on fundamental fairness and the essentials of reasoned decision-making."

As noted above, this court can find no substantial basis to determine this statute is unconstitutional. Therefore, it sets the boundaries of who is entitled to comment at public hearing.

Those that have their primary residence outside the one (1) mile radius cannot, as a matter of law, be denied due process because their time to present testimony was too short, or because their opportunity to submit documentation at the hearing was limited. This occurs because those outside the one mile limit do not have to be afforded the opportunity to present *any* testimony or documents at the hearing. Although the county did not have to, they granted people who lived outside the one mile radius an opportunity to provide comment at hearing. However, people that are given an opportunity to comment that do not have *a right* to comment cannot bootstrap that into a claim they have been denied procedural due process. Consequently, those that have not affirmatively demonstrated that their primary residence is within the one mile radius cannot be denied due process, as a matter of law, for a failure to be heard or for denial of the ability to submit documents at hearing. A further logical consequence of the one mile rule is that those petitioners with their primary residence outside the one mile limit are unable to demonstrate, as a matter of law, that "a substantial right" of theirs has been prejudiced for any failure to be heard at hearing, or for their inability to submit documents (or lengthier documents) at the public hearing on September 25 and 26. Still another logical consequence of this rule is that each and every organization that had joined in this action in order to complain about an inability (or limited ability) to present their views at public hearing must have had at least one member that has a primary residence within one mile of the proposed site. If it did not, that organization could not possibly have met the requirement of I.C. § 67-5279(4) that a substantial

right of theirs has been prejudiced by a limitation on their right to be heard or present documents at the public hearing—they had no such right.[4]

The net result of this one mile rule is that any claims of petitioners that do not have their primary residence, or that of at least one member, within one mile of the proposed site, that are based solely on an allegation they were denied due process at the public hearing, are barred. In short, the only petitioners that have any claim at all that their right to be heard was not "meaningful" are those that had their primary residence within the one mile radius, or represent an organization with a member who has a primary residence within the one mile radius.

Petitioners have claimed *in general* that their due process rights have been violated. Jerome County maintains that is insufficient, directing the court's attention back to *Cowan v. Board of Commissioners of Fremont County, supra.* Jerome County maintains that each Petitioner must identify their own individual claims, point to the specific action of the County that each is attacking, and then illustrate that the Board erred in a specified manner, and then show that a substantial right of that particular petitioner has been prejudiced. Resp'ts' Mem. 30. The language of *Cowan,* at page 508, is very close to that. It does not recite that "each particular petitioner" must make the showing that a substantial right of that particular petitioner has been prejudiced, but that is the clear directive of Idaho Code § 67-5279(4), referred to above. It states: "...agency action shall be affirmed unless substantial rights *of the appellant* have been prejudiced." Accordingly, somewhere, somehow, Petitioners such as ICARE and the Dimonds and the IRC must each show agency action that prejudiced a substantial right of each of them.

[4] Idaho Code § 67-5279(4) provides that "...agency action shall be affirmed unless substantial rights of the appellant have been prejudiced." Although the court noted in the "Standing" section of this decision that there is a difference between "potential harm", which allows one to participate in the court process, and having a substantial right prejudiced, failure to show prejudice to a substantial right at this point is fatal to one appealing an agency action.

At a minimum, there are Petitioners, ICARE, Dean and Eden Dimond, and IRC, that are able to demonstrate that they had a clear right to present comment at the hearing because they resided or had members that resided within one mile of the proposed site. *See,* Dean Dimond Aff., Supplemental R., Vol. II, 323; Alma Hasse Affidavit, Supplemental R., Vol. II, 271; Alma Hasse Aff., Pet'rs' Brief, Dec. 23, 2009. As "primary residents," or organizations with primary residents as members, these Petitioners have an unqualified right to complain that the Board's actions in limiting public comment at hearing to four (4) minutes prejudiced a substantial right, or that the Board's actions in limiting written comment at hearing prejudiced a substantial right. However, given the fact that Jerome County relaxed the rules for public comment in this case to allow for the submission of unlimited written materials prior to hearing, and one or two written pages at hearing, and to allow for four minutes of comment from any member of the public, the court cannot conclude that a due process right of any particular petitioner has been violated.

a) Procedural Due Process Rights of James and Wayne Slone

James and Wayne Slone raise their own claims that they have been denied procedural due process. They own property within approximately 300 yards of the proposed site. Petitioners' brief, at p. 25, alleges that Slones received defective notice pursuant to the ordinance in effect at the time of the filing of the application, JCZO 13-6.01. This ordinance is set forth in the record. Supp.Rec., Vol I, p.20. It provides that: "The Administrator shall also send notice by mail to all property owners within one mile of the boundaries of the contiguous property owned by the applicant..." Although Petitioners suggest in their brief this ordinance refers to mailing of the *notice of hearing* regarding the application, a reading of the ordinance suggests it could be read one of two ways. The first sentence of the ordinance requires the Planning and Zoning Administrator to cause a "Notice of the filing *of an application* for a LCO permit" to be

published in the newspaper. This sentence is followed by the one above, requiring notice by mail to all property owners. The third sentence of the ordinance sets forth that "The property owner shall be responsible to forward Notice of Hearing to all primary residents on the property."

Thus, it is unclear whether the mailed notice "to all property owners within one mile" refers to the notice of *filing of an application* as referenced in the first sentence, or whether it refers to a *notice of the public hearing* as mentioned in the third sentence. Both Idaho Code § 67-6529 and JCZO 13-6.01 are silent as to any particular notice that must be provided. The statute requires only that the board of commissioners hold at least one public hearing affording the public an opportunity to comment. In *Castaneda v. Brighton Corp.,* 130 Idaho 923, 950 P.2d 1262 (1998), the Idaho Supreme Court stated that the due process requirement of an opportunity to be heard is fulfilled if the opportunity occurs at a meaningful time and in a meaningful manner. In *Castenada,* the Supreme Court found notice acceptable when the city posted a notice at the city hall 24 hours prior to the meeting approving the preliminary plat, it published notice in the newspaper concerning the public hearing on the annexation and rezone applications, and it mailed notices to property owners within 300 feet of the affected property.

Here, the Board published an announcement of the hearing dates in the *Jerome North Side News* on July 19, 2007. The Board also sent written notice of the hearing to some of the property owners within one mile of the proposed site. Both of these notices established the procedures that would govern public participation before and during the August 14-15 public hearings. On August 6, 2007, the Board cancelled the August 14-15 public hearing and rescheduled it for September 25-26, 2007. As noted, this hearing was rescheduled when the Board determined that notice of the August hearing was inadequate, and because some property owners (e.g.-Dean Dimond) had been refused the opportunity to submit written comments. On

August 23, 2007, public notice of the September 25-26 hearing was published for one day. The public announcement made clear that the 15-day comment period closed on September 7, 15 days after the August 23 publication date.

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. The Slones own property located approximately 300 yards southeast of the proposed LCO site. The Slones, therefore, had actual knowledge of the hearing set for September 25-26 by at least September 13 because Patrick Brown's letter requested a continuation of that hearing so that he could be present. After receipt of this letter the Jerome Planning and Zoning Dept. delivered notice to the Slones by mail on September 14, 2007. By the time Mr. Slone received notice the comment period for unlimited written testimony had already closed. However, under the procedures Jerome County had adopted, the opportunity to attend the hearing, with or without an attorney, and the opportunity to submit limited written comments, was always available to Slones. Moreover, the County would have accepted their written comments prior to hearing if they would have offered, and the published notice advised them of the opportunity to comment and provide limited written comments at hearing. Phase I, Vol. I, Staff, 30, 37.

Finally, regardless of the notice they received, or the limited opportunity they had to make comment at hearing or be represented by counsel, Slones do not fall within that class of persons eligible to make comment at the public hearing. As set forth above, because they have not established that they had their primary residence within one mile of the proposed site, they had no demonstrated right to be present or comment at hearing. The court concludes Slones have failed to show that a substantial right of theirs has been prejudiced.

b) Right to counsel.

Petitioners characterize the Board's actions prior to the September 25-26, 2007 hearings as a denial of the opportunity to be represented by counsel. Jerome County submits the county did nothing to prevent an appearance by counsel at any hearing, except decline to postpone a scheduled public hearing. The court agrees that Petitioners have failed to show that the county impeded the ability of any party to be represented by counsel. Rather, it appears that several petitioners sought to be represented by counsel, but counsel were unable to attend the scheduled hearing for reasons personal to them or unidentified in the record. The Board did not "deny" anyone the opportunity to be represented, they simply declined to continue the scheduled hearing in order to accommodate counsel's schedules. There is no authority cited for the proposition that this works as any sort of "denial" by the county. Invariably, with a large public hearing, someone's attorney could not be present. Even if the hearing was scheduled far into the future, someone would wait until the last minute to try to hire an attorney. It should not be expected that a large public hearing could accommodate scheduling for multiple attorneys representing multiple parties. Attorneys have to make an effort to attend a scheduled public hearing or suggest alternate counsel. Any other procedure would make it impossible to schedule a large public hearing or result in interminable delays.

There is no adequate showing that the inability of counsel to attend the public hearing in September 2007 affected a substantial right of any party.

4) Completeness of the application.

Petitioners contend the Board erred in finding that the application was complete for three reasons. First, all agencies had not completed their review and submitted letters before the

application was filed. Specifically, Petitioners point to letters from Hillsdale Highway District and the Valley School District as being inadequate. Second, the application did not include on its required map a well on Fred Stewart's property. Third, the application was approved without any record of a binding contractual agreement to export waste, as required by JCZO 13-2.01.

As to the first issue, it is not clear where this issue was ever raised before the Board. Nevertheless, Section 5.02 of JCZO requires site assessment "comments" from certain agencies, and that they must be submitted along with the application. There is no requirement that these comments be complete at the time of the application. The fact is that the Hillsdale Highway District submitted a comment letter, which was included with the application. The letter suggests the need for a traffic study before the application should be approved. This was done, and Jerome County found that the requirements of the ordinance had been met. No error has been demonstrated.

As to the Valley School District, school districts are not one of the agencies enumerated in the ordinance requiring "comments." That is, JCZO 5.02 does not require site assessment comments from a school district at any point, either before or after the application is made. At any rate, it appears the Board obtained and reviewed comments from the school district. The court can find no error in this regard.

There was conflicting evidence on the issue of the "missing well" on Fred Stewart's property, or at least some uncertainty as to the exact location of the well, or whether it had already been identified on the vicinity map. The Board weighed the evidence and arrived at a decision after deliberation that concluded the application was complete, and the well was not missing. The court is not at liberty to overturn this finding unless it is arbitrary or capricious, or not supported by substantial evidence. I.C.§ 67-5279(3)(d) and (e). Factual determinations are

binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record. *Urrutia v. Blaine County,* 134 Idaho 353, 357 (2000). Moreover, even if this well existed, agency action shall be affirmed unless substantial rights of the Petitioners have been prejudiced. I.C. § 67-5279(4). Petitioners bear this burden. No showing has been made how the inclusion of this well in the application, or a failure to include it, and the resulting decision of the agency bears on any substantial right of Petitioners that has been prejudiced.

The third allegation is that the application was approved without any evidence in the record of a binding contractual agreement to export waste. Petitioners assert that this is required by JCZO 13-2.01(a). The court agrees with both Jerome County and Intervenor that the applicable zoning ordinance does not prohibit approval of the application pending an agreement with another party to disperse animal waste products on that person's property. Instead, the ordinance requires that "animal waste products shall not leave the property of the operator" unless such an agreement has been reached. In addition, Jerome County found that even if such an agreement was needed, there was such an agreement in evidence, even though the record was void of any details. Apparently they accepted the testimony of Big Sky's consultant Mike Thompson in that regard. Petitioners have failed to show the Board's finding to be clearly erroneous.

5) Whether the Board failed to follow its own ordinances.

Petitioners allege the Board failed to follow its own ordinances, and therefore the approval process was tainted by unlawful procedure. Idaho Code § 67-5279(3)(c) requires the court to affirm the agency action unless the court finds the agency's decision was made (among

other things) upon unlawful procedure, or was arbitrary, capricious, or an abuse of discretion. I.C. §67-5279(3)(e). Petitioners contend this occurred when Jerome County failed to allow reopening of the record following remand from Judge Bevan and followed wrong advice from its attorney, thereby improperly limiting its review to the sole question of whether the application was complete. They further contend the Board failed to comply with or give adequate consideration to JCZO 1-6.01, which requires the Board to protect each citizen from undue encroachment of his private property.

Judge Bevan's previous decision did not require that the Board reopen the original record and/or accept new or additional testimony. Petitioners are unable to cite to any authority indicating the Board should have reopened the record, or that a failure to do so constitutes an abuse of discretion or an unlawful procedure. Quite simply, it appears that whether to reopen the record was a discretionary decision of the Board. Supplemental R., Vol. II, 328-329. The Board exercised their discretion in favor of a denial. Although good arguments exist on both sides of this issue, there is no evidence the Board made a decision in this regard upon unlawful procedure, and Petitioners have failed to meet their burden to show an abuse of discretion.

In Judge Bevan's Amended Memorandum Decision on Appeal to the District Court, filed July 3, 2008, he noted the substantive factors the Board was required to consider in granting or denying an LCO permit application. These included whether the application was complete, whether the proposed site was located within the Agricultural A-1 zone, and a vague and generalized requirement that the application comply with the provisions of Chapter 13 and the JCZO. Supplemental R., Vol. II. 31. On remand, Judge Bevan also addressed the argument as to whether the application had to be approved "if complete." *See,* Supplemental R., Vol. II. 37-38. The judge made clear in his decision that the Board upon remand could find some other valid

basis upon which to deny the permit application. *Id.* at 38. Thus, regardless of the advice the Board received, they knew from the judge's decision they were free to review their own ordinances and find a valid basis to deny the application. They apparently chose not to. Of significance is Judge Bevan's further observation that the Board might construe their own ordinance to require approval of a complete application "because the Board drafted the ordinance that way." *Id.* at 38. Rather than constitute an abuse of discretion, it could be argued the Board found itself with limited ways to construe its own LCO ordinances and chose a reasonable course of construction that required it to issue the permit upon a finding the application was complete. There is a strong presumption of validity of the actions of zoning boards when applying and interpreting their own zoning ordinances. *Howard v. Canyon County Board of Comm'rs,* 128 Idaho 479, 915 Pl2d 709 (1996), *Terrazas v. Blaine County,* 147 Idaho 193, 207 P.3d 169 (2009). The court is unable to conclude that Jerome Count misinterpreted its own ordinance.

Petitioners have failed to carry their required burden to demonstrate Jerome County utilized an unlawful procedure or abused their discretion.

6) Whether the Board failed to provide a "reasoned statement" for its decision.

Petitioners main contention here is that the Board's written decision failed to give reasonable weight to the documentary evidence presented by Dean and Eden Dimond, the National Park Service, the National Trust for Historic Preservation, the Idaho State Historical Society, and the James and Janiel Stewart Family. As a result, they argue that the Board's written decision fell short of the requirements of Idaho Code § 67-6535 to the extent it did not include a discussion of what amounted to more than an entire volume and one-half of relevant evidence in the record.

The court sees this issue as similar to the claim that the Board only looked at whether the application was complete or not. As pointed out by Judge Bevan, part of this may be due to the way the Board has written its ordinances. Do they require the Board to consider and weigh health effects, water quality standards, the effect of odor, the attraction of insects, noise, environmental standards, traffic, impact on neighbors, etc.? Or do they leave those decisions and standards to other (state and federal) agencies? And/or do Jerome County's ordinances give the Board discretion to consider the type of evidence presented by the neighbors and others that may be affected by an LCO? This court arrives at the same conclusions Judge Bevan did. Jerome County ordinance13-1.03, a part of Jerome County's Livestock Confinement Ordinance, states: "The provisions of this chapter are minimum standards..." even though it also provides that any more restrictive standards contained in other laws must be complied with. Judge Bevan also noted: "If the Board enacted the JCZO to indeed mandate that an LCO application must be approved upon a finding that it is complete, it would not be legitimate for the Board to later turn around and deny a complete application based on other discretionary factors." Agency R. 38. It is an entirely legitimate argument that the Board has left itself without much room to move. If that is the case, the solution is political and not judicial. The Board could change the ordinance, or the voting public could change the Board. The court cannot mandate what the ordinance does not. "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." *Southfork Coalition v. Board of Commissioners of Bonneville County,* 117 Idaho 857, 860-861, 792 P.2d 882, 885-86 (1990).

Idaho Code § 67-6535 requires the Board to base their approval or denial of any application upon standards and criteria set forth in the comprehensive plan, zoning ordinances, or other appropriate ordinance or regulation of the city or county. It further requires the approval or

denial to 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. Thus, although Idaho law requires a statement explaining the criteria and standards considered relevant, it does not, conversely, require a statement explaining criteria or evidence the Board disregarded or considered irrelevant. The court is mindful of the amount and degree of evidence submitted in opposition to this application. However, it is up to the Board, not the court, to weigh and consider the evidence presented and determine what evidence it relied upon and what evidence it considered irrelevant. "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." Idaho Code § 67-5279.

Here, although the Board did not set forth and evaluate evidence it did not rely upon, it did give a reasoned explaining what criteria and standards it considered relevant, stated the relevant facts relied upon when faced with contested issues of fact, and explained the rationale for its decision. The law requires no more.

The court is unable to conclude the Board erred by failing to provide a reasoned statement for its decision.

7) Attorney Fees

All parties claim attorney fees in their opening briefs pursuant to I.C. §12-117. That section requires the court to award attorney fees to a prevailing party in any civil or administrative proceeding if the court finds the party against whom judgment is rendered acted without a reasonable basis in fact or law. Petitioners are not the prevailing party and are not entitled to fees or costs.

Intervenors are not entitled to claim attorney fees against Petitioners pursuant to I.C. § 12-117 either. "The statute has never been amended, however, to provide for an award to a person who is not adverse to the governmental entity. We decline to infer that the Legislature intended that one person might recover from another person under I.C. §12-117 solely because of the presence of a governmental entity in the litigation." *Neighbors for Responsible Growth v. Kootenai County,* 147 Idaho 173, 207 P.3d 149 (2009). Nor may attorney fees be awarded pursuant to I.C. § 12-121 in connection with a petition for judicial review. *Id.* at 177.

It is an open question in Idaho whether four minutes of public comment satisfies due process. It is an open question whether, overall, Jerome County or the Idaho Code provide due process when public comment is limited to a one mile radius. There are many other issues addressed by this appeal. The court is unable to conclude that Petitioners acted without a reasonable basis in fact or law in bringing this petition for judicial review. Neither Jerome County nor Petitioners are entitled to attorney fees on this appeal.

Two other very recent decisions of the Idaho Supreme Court bear on this issue as well: *Lake CDA Investments, LLC v. Idaho Department of Land,* 2010 Opinion No. 63, June 2, 2010, and *KGF Development, LLC v. City of Ketchum,* 2010 Opinion No. 92, July 28, 2010. *Lake CDA Investments* observed on page 16, footnote 6, that the Legislature amended Idaho Code § 12-117, effective March 4, 2010, retroactive to May 31, 2009. It further noted that because the Supreme Court has already defined the term "civil judicial proceeding" to mean civil lawsuits and to *exclude appeals of administrative proceedings to a court,* Idaho Code § 12-117 as now amended may not now apply to such appeals. The Supreme Court also accepted without citation of authority in *Lake CDA Investments* the proposition that the version of the statute that governs is the one in effect at the time the district court awards costs and fees. *Id.* at 14.

Both of these principles were reaffirmed in *KGF Development, LLC. v. City of Ketchum.* The Supreme Court stated there that even if the City had acted without a basis in fact or law, the current version of Idaho Code § 12-117 may not allow for an award of fees. *KGF Development, LLC v. City of Ketchum*, p. 9 n.9.

CONCLUSION

The Petition for Judicial Review is DENIED. The agency action of Jerome County is hereby AFFIRMED. Each party shall bear their own costs and attorney fees on appeal.

IT IS SO ORDERED.

Dated this 3 day of ~~July~~ August, 2010

Robert J. Elgee
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of July, 2010, 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:

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cc: Brian Dickson

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Z:\Valerie\CLIENTS\Big Sky(South View)\Order dismiss petitioners.doc

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, Dean & Eden Dimond, Harold & Carolyn Dimond, Wayne Slone, guardian of James Slone, the Idaho Rural Council, Inc., and Idaho Concerned Area Residents for the Environment, Inc., Petitioners,	CASE NO. CV 2008-1081 ORDER DISMISSING FRIENDS OF MINIDOKA, THE JAPANESE AMERICAN CITIZENS LEAGUE, INC., THE NATIONAL TRUST FOR HISTORIC PRESERVATION, INC., and PRESERVATION IDAHO, INC. FOR LACK OF STANDING

Heading continued on next page

ORIGINAL

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

The Court, hereby dismisses Friends of Minidoka, the Japanese American Citizens League, Inc., the National Trust for Historic Preservation, Inc., and Preservation Idaho, Inc., for lack of standing and are denied further participation in this appeal pursuant to the Court's Decision on Judicial Review dated August 3, 2010, page 20.

SO ORDERED this 18 day of August, 2010.

HONORABLE ROBERT J. ELGEE
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of August, 2010, I served a true and correct copy of the foregoing document on the persons whose names and addresses appear below by the method indicated:

John B. Lothspeich Williams, Meservy & Lothspeich, LLP PO Box 168 Jerome, Idaho 83383	☐ ☐ ☑	U.S. Mail, postage prepaid Via facsimile Hand delivery
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John L. Horgan Jerome County Prosecutor 233 W Main St Jerome, Idaho 83338	☐ ☐ ☑	U.S. Mail, postage prepaid Via facsimile Hand delivery
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Pro Hac Vice Attorney for Petitioners listed above

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 Idaho, Inc. Petitioners,	CASE NO. CV 2008-1081 **NOTICE OF APPEAL** Fee: $101.00

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,)
)

TO: RESPONDENTS JEROME COUNTY, JOSEPH DAVIDSON, CHARLES HOWELL, AND DIANA OBENAUER, AND INTERVENORS SOUTH VIEW DAIRY, TONY VISSER, WILLIAM DeJONG AND RYAN VISSER, AND THE PARTIES' ATTORNEYS, AND THE CLERK OF THE DISTRICT COURT OF THE 5TH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR JEROME COUNTY.

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Appellants 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, and Preservation Idaho appeal against the above named Respondents to the Idaho Supreme Court from the final judgment denying Appellants' Petition for Judicial Review, entered in the above entitled action on the 6th day of August, 2010, Honorable Judge Robert J. Elgee presiding.

2. Appellants have a right to appeal to the Idaho Supreme Court, and the judgment described in ¶1 above is appealable under and pursuant to Rule 11(a)(1) I.A.R.

3. Appellants assert that the District Court made several errors in its legal analysis in the final judgment, including but not limited to:

A. the denial of standing for the Japanese American Citizens League, the National Trust for Historic Preservation, Preservation Idaho, and Friends of Minidoka applied an inappropriately narrow standard;

B. the conclusion that Respondents' limitation on who could provide written and oral testimony and the manner in which such testimony is submitted did not violate constitutional procedural or substantive due process requirements;

C. the rejection of the claim that Respondents violated one of the Appellants (Wayne Sloan, guardian of James Sloan) procedural due process rights by failing to cure defective notice of the hearing; and

D. the rejection of Appellants' claim that Respondents followed an unlawful procedure by failing to follow its own ordinances and construing its own ordinances in a way that limited its ability to consider other potentially conflicting ordinance requirements.

4. There has not been an order sealing the record in this case.

5. Appellants do not request a reporter's transcript.

6. Appellants do not request any additional documents be included in the clerk's record, other than those automatically included.

7. Appellants do not request that any exhibits be copied and sent to the Supreme Court, except those automatically included as part of the Record.

8. I certify that:

A. Appellants have contacted the Clerk of the Court for Fifth Judicial District for the State of Idaho, have requested an estimate of the fee for preparation of the clerk's record, and intend to pay that fee once the clerk has determined the cost of preparation.

B. That the appellate filing fee has been paid.

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

RESPECTUFLLY SUBMITTED THIS 13th day of September, 2010.

HUTCHINSON & BROWN, LLP

By: _____
Patrick D. Brown
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., Preservation Idaho, Inc., Dean & Eden Dimond, Harold & Carolyn Dimond, and the Idaho Rural Council, Inc.

LAW OFFICES OF CHARLES M. TEBBUTT

By: _____
Patrick D. Brown for Chas. Tebbutt

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 13th day of September, 2010, (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:

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

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

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

Connie Bell

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/Appellant/Cross-Respondent,

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/Cross-Appellant.

Heading continued on next page

Case No.: CV 2008-1081

NOTICE OF CROSS-APPEAL

Fee:
Exempt per I.C. § 67-2301

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

Intervenor.

TO: THE ABOVE NAMED CROSS-RESPONDENTS, 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., AND THE CLERK OF THE ABOVE-ENTITLED COURT:

NOTICE IS HEREBY GIVEN THAT:

1. The above named Cross-Appellant, Jerome County, cross-appeals against the above named Cross-Respondents Friends of Minidoka, Dean & Eden Dimond, Harold & Carolyn Dimond, Wayne Slone, guardian of James Slone, the Idaho Rural Council, Inc. ("IRC"), Idaho Concerned Area Residents for the Environment, Inc. ("ICARE"), the Japanese American Citizens League, Inc., the National Trust for Historic Preservation, Inc., and Preservation Idaho, Inc to the Idaho Supreme Court from the final judgment denying Cross-Respondents' Petition for Judicial Review, entered in the above entitled action on the 5th day of August 2010, the Honorable Judge Robert J. Elgee presiding.

2. That cross-appellant has a right to cross-appeal to the Idaho Supreme Court, and that the judgment described in paragraph one above is an appealable order under and pursuant to Rule 11(a)(2) and/or (7) I.A.R.

3. Cross-appellant asserts that the district court made certain errors in its legal analysis that lead to erroneous conclusions in the final judgment, including but not limited to:

(a) Finding that cross-respondents ICARE and IRC had standing.

(b) Denying attorney fees to cross-appellant Jerome County.

4. The cross-appellant does not request preparation of any portion of the reporter's transcript.

5. The cross-appellant does not request any additional documents be included in the Clerk's record, other than those automatically included under Rule 28(b)(2), I.A.R.

6. The cross-appellant does not request any exhibits be copied and sent to the Supreme Court.

7. I certify:

(a) That the clerk of the district court has not been paid the estimated fee for preparation of the reporter transcript on the basis that such transcript is not being requested and on the basis that cross-appellant is a governmental entity that is exempt from paying such fees.

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

Dated this 4th day of October 2010.

Michael J. Seib
Jerome County Deputy Prosecutor

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 4 day of October 2010, he served a true and correct copy of the within and foregoing document, NOTICE OF CROSS-APPEAL, upon the following persons in the manner indicated:

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

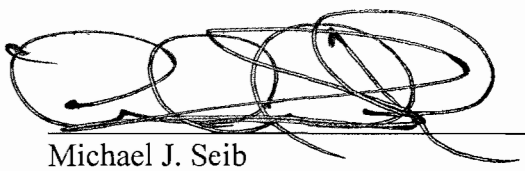
X personal delivery (Inter-Office Box)
_____ U.S. Mail, postage prepaid
_____ telephone facsimile

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

_____ personal delivery
X U.S. Mail
_____ telephone facsimile

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

_____ personal delivery
X U.S. Mail
_____ telephone facsimile



Michael J. Seib
Jerome County Deputy Prosecutor

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 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 OBENAUER, SOUTHVIEW DIARY, WILLIAM 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,

Case No. CV2008-1081
Supreme Court No. 38113

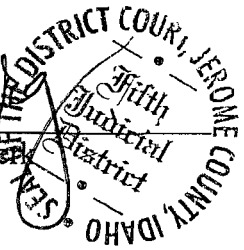
CLERK'S CERTIFICATE OF APPEAL

APPEAL FROM:	FIFTH JUDICIAL DISTRICT, HONORABLE ROBERT J ELGEE, PRESIDING
Case Number from Court or Agency:	CV2008-1081
Order on Judgment appealed from:	Decision on Judicial Review Filed stamped August 5, 2010.
Attorney for Appellant:	Patrick Brown, P.O. Box 207 Twin Falls, ID 83303-0207 Charles M Tebbutt, P.O. Box 10112 Eugene, OR 97440
Attorney for Respondent:	Mike Seib, 233 W Main Jerome, ID 83338
Attorney for Intervenor:	John Lothspeich, P.O. Box 168 Jerome, ID 83338
Appealed by:	Friends of Minidoka, etal, Petitioner/Appellant/ Cross-Respondent.
Appealed against:	Jerome County, etal, Respondent/Cross-Appellant
Notice of Appeal filed:	September 13, 2010
Notice of Cross-appeal:	Yes. Filed October 4, 2010
Appellate fee paid:	Yes
Request for additional Reporter's transcript:	No
Request for additional Clerk's record:	No
Was reporter's transcript requested:	No
Court Reporters:	N/A
Additional Information:	None

DATED This 8th day of December, 2010.

MICHELLE EMERSON
Clerk of the District Court

By _____
Traci Brandebourg, Deputy Clerk



Mailed: 12-08-10

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. CV2008-1081 Supreme Court No. 38113 AMENDED CLERK'S CERTIFICATE OF APPEAL
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 OBENAUER, SOUTHVIEW DIARY, WILLIAM 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,	

APPEAL FROM:	FIFTH JUDICIAL DISTRICT, HONORABLE ROBERT J ELGEE, PRESIDING
Case Number from Court or Agency:	CV2008-1081
Order on Judgment appealed from:	Decision on Judicial Review Filed stamped August 5, 2010.
Attorney for Appellant:	Patrick Brown, P.O. Box 207 Twin Falls, ID 83303-0207 Charles M Tebbutt, P.O. Box 10112 Eugene, OR 97440
Attorney for Respondent:	Mike Seib, 233 W Main Jerome, ID 83338
Attorney for Intervenor:	John Lothspeich, P.O. Box 168 Jerome, ID 83338
Appealed by:	Friends of Minidoka, etal, Petitioner/Appellant/ Cross-Respondent.
Appealed against:	Jerome County, etal, Respondent/Cross-Appellant
Notice of Appeal filed:	September 13, 2010
Notice of Cross-appeal:	Yes. Filed October 4, 2010
Appellate fee paid:	Yes
Request for additional Reporter's transcript:	No
Request for additional Clerk's record:	No
Was reporter's transcript requested:	No
Court Reporters:	N/A
Additional Information:	William Visser should have been Tony Visser

DATED This 22nd day of December 2010.

MICHELLE EMERSON
Clerk of the District Court

By _____
Traci Brandebourg, Deputy Clerk

Mailed: 12-22-10

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	Case No. CV2008-1081 Supreme Court No. 38113
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 OBENAUER, SOUTHVIEW DIARY, WILLIAM 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,	CERTIFICATE OF EXHIBITS

STATE OF IDAHO)
)
County of Jerome)

I, MICHELLE EMERSON, Clerk of the District Court of the Fifth Judicial District of the state of Idaho in and for the County of Jerome, do hereby certify:

That the attached list of exhibits is a true and accurate copy of the exhibits being forwarded to the Supreme Court on Appeal.

1. AGENCY RECORD
2. SUPPLEMENTAL RECORD VOLUME I
3. SUPPLEMENTAL RECORD VOLUME II

DATED This 13 day of Jan, 2011 ~~2010~~.

MICHELLE EMERSON
Clerk of the District Court

By _____
Traci Brandebourg, Deputy Clerk

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

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	Case No. CV2008-1081 Supreme Court No. 38113
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 OBENAUER, SOUTHVIEW DIARY, WILLIAM 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,	CERTIFICATE OF SERVICE

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

Patrick D Brown
104 Lincoln St/PO Box 207
Twin Falls, ID 83303-0207

Attorney for Appellant

Michael J Seib
233 West Main
Jerome, ID 83338

Attorney for Respondents

WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 13 day of Jan, 2011.

MICHELLE EMERSON
Clerk of the District Court

By _____
Traci Brandebourg, Deputy Clerk

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

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	Case No. CV2008-1081 Supreme Court No. 38113
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 OBENAUER, SOUTHVIEW DIARY, WILLIAM 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,	CLERK'S CERTIFICATE

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

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

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Jerome, Idaho, this 13 day of Jan., ~~2010~~ 2011.

MICHELLE EMERSON
Clerk of the District Court

By _____
Traci Brandebourg, Deputy Clerk