9-2-2011

Friends of Minidoka v. Jerome County Appellant's Reply Brief Dckt. 38113

IN THE SUPREME COURT OF THE STATE OF IDAHO

FRIENDS OF MINIDOKA, 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-Appellants,

38113

v.

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-Cross Appellants,

and

SOUTH VIEW DAIRY, AN IDAHO GENERAL PARTNERSHIP, TONY VISSER, WILLIAM DEJONG AND RYAN VISSER, GENERAL PARTNERS,

Respondents-Intervenors.

APPELLANTS' REPLY BRIEF

Appeal from the District Court of the Fifth Judicial District for Jerome County

Honorable Robert J. Elgee, District Judge presiding.

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I. INTRODUCTION

Respondents Jerome County and South View Dairy take a variety of approaches in attempting to rebut the arguments put forth by Friends of Minidoka (hereinafter collectively referred to as "Friends") in its opening brief. These approaches include rhetorical questioning, shallow reasoning, and an abundant use of block quoting. But not once do the Respondents actually address the legal authorities cited by appellants. Nor do they deal with the facts of this case, instead opting to employ willful blindness throughout their briefs. When confronted with binding law and the compelling record of this case, it becomes readily apparent that appellants are entitled to a reversal of the District Court's decision, including vacating the decision of the Jerome County Board of Commissioners (hereinafter the "Board") to approve the Big Sky LCO permit.

II. THE APPELLANT-ORGANIZATIONS HAVE STANDING.

South View's and Jerome County's arguments about standing distort the substantive allegations contained in Friends' standing affidavits and conflate multiple legal standards. Rather than rebut the authority cited by Friends, the respondents rhetorically question the standing of ICARE, IRC, and Friends of Minidoka. This strategy proves futile, however, in the face of binding law and compelling facts.

A. The Appellant-Organizations have Statutory Standing.

Friends have made a sufficient showing to be conferred statutory standing under the Local Land Use Planning Act ("LLUPA"), I.C. § 67-6501 *et seq.* Pursuant to I.C. § 67-6521, only "affected persons" have standing to seek judicial review of local land use decisions. An "affected person" is one "having a bona fide interest in real property which *may* be adversely affected" by a challenged land use decision. I.C. § 67-6521(1)(a) (emphasis added). This Court

has held that the mere allegation that offensive odors could potentially travel 3.4 miles and onto a party's land was sufficient for that party to be considered "adversely affected." *Davisco Foods Intern., Inc. v. Gooding County*, 141 Idaho 784, 787 (2005). Thus, the threshold to obtain statutory standing under LLUPA is much lower than that proffered by the respondents.

The affidavits provided by Friends easily meet this standard by describing how individual members of the organizations owned, lived, and worked on real property in close proximity to the Big Sky site. *See* Appellants' Opening Brief, pp. 25-26 (hereinafter "Appellants' Brief") (detailing member interests in real property located adjacent to and nearby Big Sky). These affidavits went on to detail the specific types of harms threatened by Big Sky. *See id.* (harms include, *inter alia*, nuisance odors, fly infestations, and groundwater and surface water pollution).

Respondents' attenuated arguments ignore the plain language and inescapable import of the affidavits. Friends have expressly stated (1) that their members maintain interests in real property located adjacent to and nearby the Big Sky property, and (2) that these members will suffer harm from issuance of the permit. This is all that I.C. § 67-6521 requires.

B. The Appellant-Organizations have Constitutional Standing.

Jerome County and South View concede all elements of representational standing, except for the requirement that the appellant-organizations' individual members suffer a distinct and palpable "injury-in-fact" as a result of the Board's decision. *See* South View's Brief, pp. 12, 14; Jerome County's Brief, pp. 7-10.[1] The case law cited by Friends in their opening brief, however, demonstrates that issuance of the Big Sky permit *does* threaten distinct injury that is not shared

[1] South View purports that ICARE and IRC are "seeking to assert rights of third persons and should be estopped as named parties[.]" South View's Brief, p. 14. This argument showcases a deep misunderstanding of representational (or associational) standing and third-party standing. Both doctrines are exceptions to the general rule that a party must assert his own legal rights and interests. *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Thus, even if ICARE and IRC were asserting third-party standing, which they are not, that would not be grounds for dismissal.

alike by all citizens in the jurisdiction. Appellants' Brief, pp. 23-25. South View and Jerome County make no attempt to rebut this law, instead opting to distort the allegations contained in Friends' affidavits.

It goes without question that standing may be predicated upon a "threatened harm." *Schneider v. Howe*, 142 Idaho 767, 772 (2006). In this instance, issuance of the Big Sky permit threatens to negatively impact Friends' interests in the aesthetic and recreational integrity of the Minidoka Site, the use and enjoyment of members' private real property, and the members' physical well-being. *See* Appellants' Brief, pp. 26-27; Aff. of Momohara, ¶ 9; Aff. of Carlson, pp. 1-2; Aff. of Hasse, ¶ 7. Threatened injuries such as these are universally held as constitutionally sound. *See, e.g., Hall v. Norton*, 266 F.3d 969, 976 (9th Cir. 2001) (citing cases).

Furthermore, the injury threatened by Big Sky is not shared alike by all citizens in the jurisdiction. Even if it were, if all people were significantly impacted, that would provide constitutional standing to all. *U.S. v. S.C.R.A.P.*, 412 U.S. 669, 688 (1973) ("To deny standing to persons who are in fact injured simply because many others are also injured, would mean ... government actions could be questioned by nobody."). The difference lies between generalized, perhaps hard to define, grievances versus the specific types of injuries that are clearly defined in this case. Rather than being generalized grievances, the harm threatened by Big Sky affects most directly those individuals living in proximity to the proposed CAFO and those citizens who visit and value the Minidoka Site for its recreational, historical, and aesthetic qualities. This Court has upheld standing on broader grounds when it found that term limit pledges placed on *every* state election ballot caused a distinct injury only to those citizens opposing term limits, even though the ballots reached every citizen in the jurisdiction. *See Van Valkenburgh v. Citizens for*

Term Limits, 135 Idaho 121, 125 (2000). Here, the injury threatened by Big Sky befalls a smaller, more distinct, and more identifiable subsection of the citizenry than in *Van Valkenburgh*. Thus, Friends have adequately alleged that their members' interests are threatened by approval of the Big Sky permit. This is all that constitutional standing requires.

C. Whether Friends' Substantial Rights are Prejudiced Goes to Remedies.

Pursuant to I.C. § 67-6535, only those challenges which demonstrate "actual harm or violation of fundamental rights" are entitled to a judicial remedy under LLUPA. In its brief, South View conflates this standard with the requirements for standing. South View's Brief, p. 11. Judge Elgee explicitly rejected this argument, finding that the right to a remedy is a distinct legal issue from standing. Elgee Dec., p. 19. Additionally, Friends have demonstrated that the County's actions throughout the Big Sky saga did harm their fundamental rights. Appellants' Brief, pp. 32 n. 14, 37-38, 42 n. 20. No dispute has been raised as to this issue.

Moreover, this Court recently enunciated that, in examining whether neighbors' substantial rights will be prejudiced by a county's land use decision, it is proper to look at issues such as whether the challenged decision would decrease property values or interfere with the use or ownership of land. *Hawkins v. Bonneville County Bd. of Comm'rs,* 151 Idaho 228, ___, 254 P.3d 1224, 1229 (2011). These issues are independent of due process violations, which also prejudices substantial rights for the purposes of I.C. § 67-5279. *Eddins v. City of Lewiston,* 150 Idaho 30, 36 (2010) (due process rights are substantial rights). Here, Friends' substantial rights were prejudiced by (1) the unconstitutional limitations imposed by the County on their due process rights, and (2) the deleterious impacts the Big Sky CAFO would have on their private property rights and the Minidoka site. *See, e.g.,* Phase I, Trans., pp. 46-50, 58-61, 63-65, 73-76, 81-84, 90-93, 217-219, 220-223, 240-242, 299-301, 303-305 (detailing how Big Sky CAFO

would decrease property values, cause fly infestations, impact air and water quality, and cause significant health problems). Clearly, Friends' rights are "in jeopardy of suffering substantial harmif the project goes forward." *Hawkins,* 254 P.3d at 1229.

III. FRIENDS' PROCEDURAL DUE PROCESS RIGHTS WERE VIOLATED.

South View and Jerome County paint the Big Sky hearing as "extraordinary," allowing "any person" to participate "wholesale" with "unrestricted input" before the Board. Jerome County's Brief, p. 12; South View's Brief, pp. 19, 23. In making these arguments, the respondents casually ignore the core tenet of procedural due process: that the opportunity to present and rebut evidence must occur at a meaningful time *and in a meaningful manner. Cowan v. Board of Comm'rs of Freemont County*, 143 Idaho 501, 512 (2006). The focus of this standard is not on the number of individuals allowed to participate in a public hearing, but rather on the *manner* and *quality* of the participation afforded. Here, the public's opportunity to present and rebut evidence during the Big Sky hearing was severely limited. Many of the people who wished to comment on the 500+ page application were limited to one single-sided sheet of paper and four minutes of oral testimony or, if that person elected not to testify, two single-sided sheets of paper. These limitations do not comport with due process.

Jerome County argues that, under *Cowan*, these procedures were constitutionally sound because this Court "ultimately found" the two-minute limitation in *Cowan* constitutionally acceptable. Jerome County's Brief, p. 11. Rather than finding a two-minute limitation acceptable, however, this Court unequivocally wrote that "limiting public comment to two minutes is not consistent with affording an individual a meaningful opportunity to be heard." *Cowan*, 143 Idaho at 512. Here, Friends are challenging the opportunity to meaningfully participate in the Big Sky hearing as a whole. The Board's limitations at the hearing left Friends

without any meaningful opportunity to present evidence concerning the negative impacts of CAFOs and the problems posed by the proposed 13,000 head operation. Only certain landowners who resided within one mile of the site were allowed the ability to submit substantial written testimony, and even then only if they did so within 15 days of official notice.

The County also contends that no constitutional violation occurred because Friends have not identified any specific member who was denied a meaningful opportunity to present or rebut evidence. Jerome County's Brief, p. 13. This argument is clearly contradicted by the record. For instance, ICARE members Brenda Herrmann (Phase I, Trans., p. 209), Lee Halper (*id.* at 89), Dick Helsley (*id.* at 241), ICARE Director Alma Hasse (*id.* at 193-95; 259-64; 270-71), and IRC members Harold Dimond (*id.* at 221) and Eden Dimond (*id.* at 228) were all denied a meaningful opportunity to present and rebut evidence in violation of their due process rights during the hearing.[2]

South View makes a variety of scattershot arguments in asserting that no procedural due process violations occurred.[3] First, it echoes Judge Elgee's erroneous conclusion that the Board liberalized its ordinances to allow for unlimited written testimony prior to the hearing. South View's Brief, p. 22. Judge Elgee's finding on this matter was a clear error of law. Appellants' Brief, pp. 31-32 (amendments to JCZO allowed unlimited testimony to be submitted up to seven

[2] Jerome County accuses Friends of making the "outrageous" claim that the Dimonds were not allowed to present written testimony prior to the hearing. Jerome County's Brief, p. 13. The County fails to comprehend that multiple Dimond families are involved in this dispute. While Dean Dimond was allowed to submit written testimony prior to the hearing, *his parents*, Harold and Carolyn Dimond *were not*. Appellants' Brief, p. 29; Phase I, Trans., pp. 220-21. Even though they owned, but did not reside on, land adjacent to the Big Sky site, the County refused to accept their written comments.

[3] In response to Friends' procedural due process arguments, South View cites and applies the numerous standards governing judicial review of local land use decisions. South View's Brief, pp. 20-22. How this line of argument is relevant to the County's violation of procedural due process, however, is left unexplained by South View.

days prior to hearing, but effective date of ordinance rendered it inapplicable to Big Sky hearing). Thus, South View's belief that anyone could submit unlimited written testimony prior to the hearing is simply wrong.

Second, South View incorrectly states that Friends had a "spokesman" at the hearing. South View's Brief, p. 23. The record does not support this contention. First, the alleged "spokesman" present at Big Sky hearings was not an official representative or agent of any plaintiff in this proceeding, and therefore could not afford appellants' their due process rights. Second, the "spokesman" did not get "substantially equal time" as the opponent. Big Sky representatives were given significantly more time and leniency than any of the opposition. *See, e.g.,* Phase I, Trans., pp. 94-98, 244-5 (Don McFarland); pp. 98-142, 245-48 (Matt Thompson, engineer for Big Sky); pp. 3-13, 26, 71-2, 97, 110-11, 128, 140-41, 146-47, 167-178, 188-196, 204-09, 251, 257-260, 265-67, 277, 286-88, 297-98, 318-326, 333 (John Lothspeich).

In total, the opposing parties' arguments are nothing more than specious attempts to direct the Court's attention away from the pertinent facts of this case. Friends could not reasonably and meaningfully participate in the Big Sky public hearing in the time and space allotted by the Board. As such, the limitations did not comport with due process.

IV. THE SLONES' PROCEDURAL DUE PROCESS RIGHTS WERE VIOLATED.

Jerome County violated the Slones' procedural due process rights in three ways: (1) failing to serve them with timely actual notice of the September 25-26 Big Sky hearing; (2) failing to provide them with actual notice of a hearing where the sufficiency of the corrected notice they received and the adequacy of their opportunity to present and rebut evidence were at issue; and (3) failing to make a transcribable, verbatim transcript of that later hearing. The respondents take issue with only the first of these issues, and therefore concede that the County

violated the Slones' procedural due process rights in the other two instances.

As to the Slones' entitlement and receipt of actual notice, the arguments put forth by Jerome County and South View are unavailing. Both parties attempt to show that the Slones received four different types of notice concerning the hearing. Jerome County's Brief, pp. 15-17; South View's Brief, pp. 26-27. But while there may have been constructive notice of the hearing through indirect means, that alone does not cure the County's failure to provide the Slones with *actual* and *timely* mailed notice, *as required by the County's ordinance and the Constitution.* Indeed, neither party rebuts the case law cited by Friends, which holds that constructive notice is *never constitutional* except in those rare instances where the affected party is not "reasonably identifiable." Appellants' Brief, p. 36.

Jerome County also advances two implausible arguments to suggest that (1) the LCO ordinance did not require notice of a hearing to be sent to the Slones, and (2) even if it did, the pertinent provisions of the JCZO do not contain timing requirements for notice. Jerome County's Brief, pp. 18-22. The notice ordinance in question, JCZO 13-6.01, reads:

> The Planning & Zoning Administrator shall cause a 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.* The property owner shall be responsible to forward Notice of Hearing to all primary residents on the property. The applicant for the LCO Permit, in addition to the application fee, shall pay all costs of publication and notice. (Emphasis added).

The County interprets this ordinance as requiring notice of the "filing of an application" to be sent to property owners within one mile of the proposed CAFO location. Jerome County's Brief, p. 19. This interpretation is untenable. The second sentence of the ordinance specifically references I.C. § 67-6529, which governs local public hearings procedures for CAFO permitting. By inserting this language, the drafters of the ordinance plainly required "all property owners

within one mile" of the proposed site, such as the Slones, to receive an individual notice containing the statutory requirements for LCO public hearings. Moreover, the County's interpretation renders the third sentence of the ordinance meaningless. That sentence instructs the property owner to forward the "Notice of Hearing" to all "primary residents" on the property. The term "primary residents" again references I.C. § 67-6529, which restricts participation at LCO public hearings to those with a "primary residence" within one-mile of the proposed site. Thus, the "notice" that eligible landowners receive must be a "Notice of Hearing," because the landowner is directed by the ordinance to forward the notice to the exclusive group of individuals ("primary residents") who are authorized under the statute to participate in LCO public hearings.[4]

The County also attempts to construe the ordinance such that it contains no timing requirement. Jerome County's Brief, p. 19. Such a construction is indefensible. The first sentence of JCZO 13-6.01 clearly sets up the timeline of events. First, an LCO application is filed with the County. Second, the Planning & Zoning Administrator publishes notice of the filing of the application in a newspaper of general circulation. Finally, the Administrator "*shall also*" mail notice of the hearing to property owners within one-mile of the proposed site. The proximity of the term "shall also" to the sentence instructing the Administrator to publish notice of the filing of the application clearly indicates that these requirements are concurrent. In fact, this timeline of events is close to the actual procedure followed by the Planning & Zoning Administrator in this case. *See* Phase I, AR, p. 46 (Exhibit marked S44, Electronic Rec., p. 991).

Even assuming, *arguendo*, that the ordinance itself contains no specific timing requirement, then timeliness must necessarily depend on the date that notice was *actually sent* to

[4] In fact, the County *never* mailed or published a "Notice of the filing of application." *See* Phase I, AR, p. 46 (Exhibit marked S44, Electronic Rec., p. 991). Rather, the County published a "Notice of Hearing" in the local newspaper and mailed the same to landowners within one-mile of the proposed Big Sky site, excluding the Slones.

entitled landowners. In this case, the County actually mailed notice of the hearing to some landowners on July 17, 2007, and amended notice on August 17, 2007. In each instance, the County failed to provide notice to the Slones. It was only on September 14, 2007, 11 days before the start of the public hearing and after the time period for written comments had closed, that the Slones received the same notice that all other landowners had received months prior. This cannot be considered timely under any circumstance.

South View contends that the Slones waived their right to complain of due process violations by failing to appear at the hearing. South View's Brief, p. 27. South View fails to cite legal support for its waiver argument, likely because the premise of its contention represents a quintessential Catch-22. Under the Court's holding in *Cowan*, the Slones may have been precluded from complaining of their inadequate notice had they participated at the hearing. *Cowan*, 143 Idaho at 513. But according to South View, the Slones are similarly foreclosed because they *did not appear* at the hearing. The Court should not countenance this type of circular logic.

The Slones were entitled to the protections afforded by procedural due process. The County violated these protections in three distinct ways, only one of which is contested. As to the one issue the opposing parties do contest, the record is clear that the County's failure to provide the Slones with timely, actual notice meant that they could not meaningfully participate in the Big Sky hearing under any application of the facts. These violations provide sufficient grounds for the Court to overturn the lower court and reverse the approval of the Big Sky CAFO permit.

V. I.C. § 67-6529 AND JCZO 13-6.02 ARE UNCONSTITUTIONAL RESTRICTIONS ON SUBSTANTIVE DUE PROCESS.

The procedures adopted by the County pursuant to the limitations contained in I.C. § 67-6529, and its embodiment in JCZO 13-6.02, were unconstitutional violations of substantive due process. Friends acknowledge that the Board "relaxed" the limitations of the one-mile rule for the two day hearing itself. In practice, however, the rule was inextricably intertwined with the earlier procedures promulgated by the Board. Under the auspices of I.C. § 67-6529 and JCZO 13-6.02, the County prohibited all written comments prior to the hearing from *any* individual or group residing outside of the one-mile exclusionary zone.

Both Jerome County and South View implicitly acknowledge that Friends' substantive due process claim is colorable, but insist that no individual appellant had their substantive due process rights prejudiced because the one-mile rule was relaxed at the hearing. Jerome County's Brief, pp. 22-25; South View's Brief, pp. 30-31. Once again, the facts directly contradict the respondents' contentions.[5] By way of example, a number of appellants were unconstitutionally prejudiced by operation of the one-mile rule. Harold and Carolyn Dimond, who own farmland contiguous with nearly one-mile of the Big Sky site, had their written comments turned away by Jerome County Planning and Zoning staff because they were not "primary residents" under the one-mile rule.[6] Supp. Rec., Vol. I, pp. 191-93. Alma Hasse, executive director of ICARE, also

[5] In fact, South View effectively concedes that the one-mule rule *was applied* during the proceedings below. *See* South View's Brief, p. 25 (Slones' argument that they had right to meaningful participation "immaterial," because they were not property owners with a primary residence within one-mile of the proposed Big Sky site); p. 17 (admitting that one-mile rule was used to limit and define "affected persons").

[6] Jerome County suggests that Harold Dimond has no standing to pursue a substantive due process claim because the Board asked him a few questions after his abbreviated testimony. Jerome County's Brief, p. 23. Both Harold and Carolyn Dimond, however, were denied the opportunity to present meaningful *written* testimony prior to the hearing pursuant to the limitations imposed under the one-mile rule, despite the fact that they own property contiguous with over one-mile of the Big Sky site. Phase I, Trans., pp. 220-21.

tried to submit a number of items to the County both prior to, and during, the hearing, but was similarly denied because she too was not a "primary resident" within one mile of the proposed Big Sky site. Aff. of Hasse, ¶ 9. A number of the petitioners below were likewise precluded from submitting written comments pursuant to the one-mile rule, including the National Trust for Historic Preservation. *See, e.g.,* Phase I, Vol. II, Exhibit marked as AG8-9, pp. 9-10 (Electronic Rec., pp. 918-19). Thus, contrary to the claims made by opposing parties, appellants' individual substantive due process rights were unconstitutionally violated by operation of I.C. § 67-6529.[7]

The County and South View also assert that Friends improperly blend a petition for judicial review with an action for declaratory relief. Jerome County's Brief, p. 25; South View's Brief, pp. 32-33. Such argument misunderstands Friends' claim. Friends are seeking a ruling that the Board acted unconstitutionally by promulgating procedures which imposed a one-mile limitation on public commentary prior to the Big Sky hearing. Pursuant to I.C. § 67-5279(2)(a), affected persons are entitled to relief where a county has, among other things, acted in violation of constitutional provisions. Here, the Board violated the state and federal constitutions by enacting limitations which had no substantial relationship to the public health, safety, morals, or general welfare. *Village of Euclid, Ohio v. Amber Realty Co.*, 272 U.S. 365, 395 (1926). While the one-mile rule may be the genesis of those limitations, its imposition through the County's procedures is the unconstitutional act that deprived Friends of their substantive due process rights and concurrently prejudiced appellants' substantial rights under I.C. § 67-5279(4). *See Eddins,* 150 Idaho at 36 (due process rights are substantial rights). As such, Friends are entitled to their requested relief.

[7] By extension, this issue is not moot. South View's Brief, p. 33. Jerome County did not eliminate the statute's restrictions on public presentation of evidence, but instead used the rule as justification to refuse written comments from those who were not "primary residents" within one-mile of the proposed CAFO site. Thus, a justiciable controversy still exists.

VI. THE BOARD FAILED TO FOLLOW ITS ZONING ORDINANCE.

The County's CAFO zoning ordinance, JCZO Chapter 13, authorizes the permitting of new CAFOs only where (1) the site is zoned Agricultural A-1, (2) the application is compliance with the provisions of Chapter 13, and (3) the application is in compliance with the JCZO as a whole. JCZO 13-3.01. The arguments advanced by Jerome County and South View would read the third element out of the ordinance entirely and require mandatory permit issuance where an applicant has adhered only to the technical application requirements of Chapter 13. Jerome County's Brief, p. 28; South View's Brief, pp. 36, 38. Such construction is incorrect for two reasons.

First, the interpretation would improperly render a major portion of the ordinance superfluous. Chapter 13 unambiguously requires the Board to authorize a CAFO permit *only* where the application is in "compliance" with the JCZO. To be in "compliance" with the JCZO requires the Board to affirmatively consider and determine whether issuance of the CAFO permit would conform with the rules, goals, and standards governing the entire zoning process, including JCZO Chapter 1 and the comprehensive plan.[8] The interpretation proffered by Jerome County and South View would negate this affirmative duty and render that portion of the ordinance meaningless.[9]

[8] JCZO Chapter 1 incorporates the goals of the comprehensive plan and, among other things, necessitates that permitting decisions not place an undue burden on neighboring landowner's private property rights.

[9] Jerome County accuses Friends of "morphing" the standards of the ordinance. Jerome County's Brief, p. 28. The language used by Friends, however, comes directly from the decisions of Judge Bevan and Judge Elgee, who both found that Chapter 13-3.01 listed the substantive factors the Board must "consider in granting or denying an LCO permit." *See* Phase II, AR, p. 31; Elgee Dec., p. 34. Even the County adopted this reasoning in its Decision Upon Remand. Phase II, AR, p. 112. In fact, the County's argument strengthens Friends' contention that the Board was required to do something – whether that be "consider," "comply," "discuss," or any other verb –

Second, this construction ignores the Board's actual actions in initially denying the Big Sky application. In its 2007 Memorandum Decision, the Board affirmatively determined that permit issuance would cause environmental problems due to the amount of manure and phosphate generated by the Big Sky CAFO once operational. *See* Phase I, AR, Exhibits Marked as CC49-CC50 (Electronic Rec., pp. 1944-45). Thus, the Board recognized that there were other factors outside of Chapter 13 that must be considered before granting a CAFO permit. Jerome County made this same argument before Judge Bevan, when it contended that:

> Certainly, the law [JCZO Chapter 13] was not envisioning the monkey or the rubber stamp, but was instead visualizing delineated and articulated community standards being considered and applied by the human element. One of the documents that delineates and articulates those community standards is the comprehensive plan.... Although Big Sky is correct in that it should be allowed to lawfully use or develop its property, it cannot do so at the risk of the health, safety and general welfare of others.

Jerome County's Response Brief, pp. 6, 16, *McFarland v. Jerome County*, 2007-cv-1242 (Idaho 5th Judicial District, J. Bevan). Jerome County once understood that the ordinance, as written, required the Board to consider whether the application was in "compliance" with the entire zoning ordinance, not just Chapter 13. The County should be estopped from making a contrary argument before this Court.

The County also contends that the Board *did* consider whether the Big Sky application was in "compliance" with the JCZO in its 2008 Decision Upon Remand. *See* Jerome County's Brief, pp. 29-31. The County fails to cite any language that actually supports this assertion. Instead, it references a paragraph contained in the "DISCUSSION" section of the remand decision. *Id.* at 31. That paragraph does not indicate whether the Board ever made an affirmative determination that the Big Sky application complied with the whole of the JCZO. To the contrary, the paragraph unequivocally allows "the Board to reconsider all issues that it

to affirmatively determine whether the application was in "compliance" with the JCZO.

previously had, or other issues overlooked." Phase II, AR, p. 112.

Furthermore, there is no statement *anywhere* in the 2008 decision evidencing that the Board considered, let alone affirmatively determined, that the application was in compliance with the entire JCZO. *See id.* at 111-119. A close examination of the Decision Upon Remand reveals that the Board approved the Big Sky permit based *solely* on the technical application requirements of Chapter 13. *See* Phase II, AR, p. 113, 117 (application complies with thirteen technical requirements of 13-5.02); p. 114 (Big Sky CAFO situated in Agricultural A-1 zone); pp. 115-117 (application meets provisions contained in 13-2.01). This contravenes the unambiguous requirements of the County's own ordinances.

VII. APPELLANTS ARE ENTITLED TO ATTORNEY FEES.

The County tries to argue that it is entitled to attorney fees, but the facts do not support such a claim.[10] This Court recently determined that the 2010 amendments to I.C. § 12-117 do not allow for the award of attorney fees in an appeal from an administrative action. *Smith v. Washington County Idaho*, 150 Idaho 388, ____, 247 P.3d 615, 618 (2010). The Court's holding in *Smith* is inapplicable here, however, because amendments to mandatory fee-shifting statutes may not be applied retroactively. *Myers v. Vermaas*, 114 Idaho 85, 87 (Ct. App. 1988) (amendments to I.C. § 12-120, which mandates award of attorney fees in commercial transactions, could not be applied retroactively). I.C. § 12-117 is one example of a mandatory fee-shifting statute. *Rincover v. State Dept. of Finance*, 129 Idaho 442, 444 (1996). Thus, the 2010 amendments to I.C. § 12-117 and the Court's holding in *Smith* cannot be applied to this case. Moreover, the effective date of the amendments to I.C. § 12-117 is June 1, 2009. This

[10] Friends acknowledge that they incorrectly cited *Clements Farms, Inc. v. Ben Fish & Son*, 120 Idaho 185, 208 (1991) to support their proposition that amendments to a fee-shifting statute are not retroactive. As expressed *infra*, there is ample case law approving the same principle.

action was commenced on October 21, 2008, and the older version of the statute must necessarily apply. *Walker v. Nationwide Financial Corp. of Idaho*, 102 Idaho 266, 268 (1981) (courts to interpret legislative action in a manner that will not nullify language or make words superfluous).

Under the prior version of I.C. § 12-117, an award of attorney fees against the County is warranted because it acted without a reasonable basis in law or fact in defending this case. *See Fischer v. City of Ketchum*, 141 Idaho 349, 356 (2005). In *Fischer*, fees were awarded against the City of Ketchum when the City, among other things, ignored the plain language of its ordinance. *Id.* Here, the County ignored the plain language of JCZO 13-3.01, which required the Board to determine whether the Big Sky application was "in compliance" with the whole JCZO. Furthermore, the County acted unconstitutionally by restricting public participation at the Big Sky hearing and violating the Slones' procedural due process rights. *See Reardon v. Magic Valley Sand and Gravel, Inc.*, 140 Idaho 115, 120 (2004) (awarding fees against county where county's actions were unconstitutional). The County has also wasted precious judicial resources by making numerous unsupported attacks on Friends' statutory and constitutional standing. When viewed as a whole, Jerome County's actions in this matter fully support an award of attorney fees in Friends' favor.

Judge Elgee recognized below that Friends acted with a reasonable basis in law and fact. Elgee Dec., p. 38. Judge Elgee specifically noted that "it is an open question in Idaho whether four minutes of public comment satisfies due process." *Id.* Under any circumstances, an award of attorney fees against Friends is entirely unjustified.

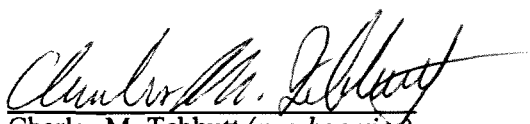
VIII. CONCLUSION.

For the reasons stated above, Friends respectfully requests that the Court reverse the District Court's denial of the petition for judicial review, vacate Jerome County's approval of the

Big Sky LCO, and remand for a new hearing that allows for meaningful public participation consistent with the Idaho and United States constitutions.

Dated: August 30th, 2011.

Respectfully submitted,



Charles M. Tebbutt (*pro hac vice*)
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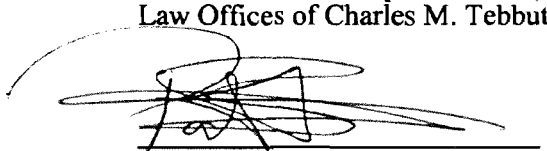

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31st day of August, 2011, I served two true and correct copies 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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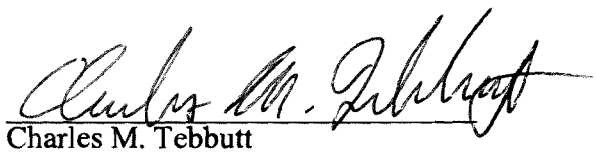

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