

7-12-2013

917 Lusk, LLC v. City of Boise Clerk's Record Dckt. 41214

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IN THE SUPREME COURT OF THE STATE OF IDAHO

917 LUSK, LLC, an Idaho limited liability
company,

Supreme Court Case No. 41214

Peitioner-Appellant,

vs.

CITY OF BOISE, a political subdivision in
the State of Idaho,

Respondent,

and

ROYAL BOULEVARD ASSOCIATES,
LP, an Idaho limited partnership,

Intervenor-Respondent.

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Fourth Judicial District, in and for the County of Ada.

HONORABLE KATHRYN A. STICKLEN

RICHARD H. ANDRUS

MARY ELIZABETH WATSON

ATTORNEY FOR APPELLANT

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

BOISE, IDAHO

GARY G. ALLEN

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

917 Lusk LLC vs. City of Boise

Date	Code	User		Judge
5/17/2012	NCOC	TCORTEJN	New Case Filed - Other Claims	Kathryn A. Sticklen
	PETN	TCORTEJN	Petition for Judicial Review	Kathryn A. Sticklen
5/23/2012	OGAP	DCLYKEMA	Order Governing Judicial Review	Kathryn A. Sticklen
5/25/2012	MOTN	CCSWEECE	Motion to Intervene By Royal Boulevard Associates LP (Gary Allen for Royal Boulevard Assoc LP)	Kathryn A. Sticklen
	MEMO	CCSWEECE	Memorandum In Support of Motion to Intervene By Royal Boulevard Associates LP	Kathryn A. Sticklen
	AFSM	CCSWEECE	Affidavit of Joseph Coyle In Support Of Motion to Intervene By Royal Boulevard Associates LP	Kathryn A. Sticklen
5/31/2012	NOTC	CCSWEECE	Notice of Lodging of Transcripts and Record In A Judicial Review Pursuant to Idaho Rules of Civil Procedure 84(j) with Boise City Clerk	Kathryn A. Sticklen
6/14/2012	ORDR	DCLYKEMA	Order on Motion to Intervene	Kathryn A. Sticklen
6/28/2012	NOTC	CCWRIGRM	Notice of Filing of Transcripts & Record of a Judicial Review With the District Court	Kathryn A. Sticklen
	NOTC	CCWRIGRM	Notice of Settling of Transcripts & Record of a Judicial Review	Kathryn A. Sticklen
8/2/2012	PETN	CCWEEKKG	Petitioner's Brief	Kathryn A. Sticklen
8/30/2012	BREF	CCMEYEAR	Respondent City of Boise's Brief Opposing Petition for Judicial Review	Kathryn A. Sticklen
	MISC	CCBOYIDR	Intervenor Royal Boulevard Associates LP's Response Brief	Kathryn A. Sticklen
	RSPS	CCHOLMEE	Intervenor Royal Boulevard Associates LP's Response Brief [duplicate entry]	Kathryn A. Sticklen
9/20/2012	RPLY	CCBOYIDR	Reply Brief	Kathryn A. Sticklen
9/27/2012	NOTH	CCMEYEAR	Notice Of Hearing (01/17/2013 @ 1:30 pm)	Kathryn A. Sticklen
	HRSC	CCMEYEAR	Hearing Scheduled (Petition 01/17/2013 01:30 PM) Petition for Judicial Review	Kathryn A. Sticklen
10/4/2012	NOTH	CCMEYEAR	Notice Of Hearing (11/29/2012 @ 1:30pm)	Kathryn A. Sticklen
	HRSC	CCMEYEAR	Hearing Scheduled (Hearing Scheduled 11/29/2012 01:30 PM)	Kathryn A. Sticklen
11/29/2012	HRHD	TCLYCAAM	Hearing result for Hearing Scheduled scheduled on 11/29/2012 01:30 PM: Hearing Held, Reporter: Madsen, less than 100 pages	Kathryn A. Sticklen
1/17/2013	HRVC	TCLYCAAM	Hearing result for Petition scheduled on 01/17/2013 01:30 PM: Hearing Vacated Petition for Judicial Review	Kathryn A. Sticklen
5/31/2013	MEMO	TCWEATJB	Memorandum Decision and Order	Kathryn A. Sticklen
7/12/2013	NOTA	TCWEGEKE	NOTICE OF APPEAL	Kathryn A. Sticklen
	APSC	TCWEGEKE	Appealed To The Supreme Court	Kathryn A. Sticklen

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NO. 951 FILED _____
 A.M. _____ P.M. _____

MAY 17 2012

CHRISTOPHER D. RICH, Clerk
 By JOANNA ORTEGA
 DEPUTY

KATHRYN A. STICKLEN

Attorneys for Petitioner

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

917 LUSK, LLC, an Idaho limited liability)
 company)
)
 Petitioner,)
)
 vs.)
)
 CITY OF BOISE CITY, a political)
 subdivision in the State of Idaho,)
)
 Respondent.)

Case No. **CV 00 1208871**

PETITION FOR JUDICIAL REVIEW

Fee Category: L3
 Filing Fee: \$88.00

Petitioner 917 Lusk, LLC (“**Petitioner**”), by and through its undersigned counsel of record, hereby files the following Petition for Judicial Review related to actions of the City of Boise City, as follows:

I.

NAME OF THE AGENCY AND APPLICATION FOR WHICH JUCICIAL REVIEW IS SOUGHT

1. The name of the agency from which judicial review is sought is the City of Boise City

(the “City”), a political subdivision of the State of Idaho having jurisdiction over land use and zoning decisions within the City, by and through its City Council (the “Council”).

2. The application that resulted in the decision that Petitioner requests this Court to review is CUP 11-00090, and the associated applications CFH11-00035, CFH11-00036, and DRH12-00013 (collectively, the “Application”).

II.

JURISDICTION

3. Petitioner is an “affected person” seeking judicial review of a decision of the City (described below), as allowed by Idaho Code Title 67, Chapter 52 (Idaho Administrative Procedure Act), Idaho Code Title 67, Chapter 65 (Local Land Use Planning Act), Rule 84 of the Idaho Rules of Civil Procedure, and/or the ordinances of the City.

4. The actions of the City described herein are subject to judicial review under Idaho Code Sections 67-6512, 6519, 6521, and 6535.

III.

HISTORY RELEVANT TO PETITION FOR JUDICIAL REVIEW

5. Petitioner owns certain real property located in the City commonly known as 917 Lusk Street.

6. On or about November 28, 2011, The Michaels Organization (the “Applicant”) submitted the Application to the City for an exception to the zoned height to construct a student housing project at 1004 W. Royal Boulevard.

7. The change in height requested is nearly thirty feet above than the thirty-five foot height allowed in the R-OD (Residential – Office with Design Review) zone where the proposed project would be located.

8. The property where the proposed project would be located is directly adjacent to the Petitioner's property.

9. The Boise City Planning & Zoning Commission (the "**Commission**") was to originally hear the Application on February 6, 2012.

10. Although several citizens in attendance had signed into to testify on the matter, the Commission approved the Application as part of the "Consent Agenda" without hearing any testimony on the matter.

11. On February 13, 2012, the Commission agreed to reconsider the application and received public testimony.

12. At a March 5, 2012 hearing, the Commission approved the Applicant's requested height increase.

13. Petitioner appealed the decision to the Council.

14. The Council considered the appeal of the Application on April 17, 2012.

15. On April 25, 2012, the Council issued its Decision Letter denying the appeal and upholding the Commission's decision to approve the increased height.

16. The Council's decision prejudices Petitioner's substantial rights.

V.

STATEMENT OF ISSUES FOR JUDICIAL REVIEW

17. The City's decision to approve the Application and deny the appeal was in excess of constitutional or statutory protections, in excess of the City's statutory authority, made upon unlawful procedure, not supported by substantial evidence on the record as a whole, or arbitrary, capricious, or an abuse of discretion.

18. Petitioner reserves the right to amend and/or supplement this Statement of Issues to include other issues later discovered, in accordance with Idaho Rule of Civil Procedure 84(d)(5).

VI.

DESIGNATION REGARDING TRANSCRIPTS

19. The testimony and proceedings should have been recorded, and the City should have possession of those recordings at its offices. Petitioner requests preparation of transcripts of the Council, Commission, Design Review Committee, and Parks and Recreation Committee proceedings. Petitioner agrees to pay estimated and final fees for preparation of certified transcripts of the proceedings as required by Idaho Rule of Civil Procedure 84 and the Idaho Administrative Procedure Act.

VII.

ATTORNEY CERTIFICATION

20. Attorneys for Petitioner hereby certify that:

- A. This Petition has been served upon the City, which is the local government rendering the decision.
- B. Petitioner requests transcripts for the proceedings of the Council, Commission, Design Review Committee, and Parks and Recreation Committee. Petitioner agrees to timely pay the resulting estimate and fees as required by Idaho Rule of Civil Procedure 84.
- C. Petitioner requests an estimated fee for preparation of the record. Petitioner agrees to pay the estimated fee calculated by the City Clerk in accordance with Rule 84(f)(4).

WHEREFORE, Petitioner prays for the following:

1. That the action of the Council upholding the Board's approval of the Application be set aside, in whole or in part, that the Board's approval of the Application be set aside, in whole or in part, and the Application be remanded to the Board for further proceedings in compliance with the applicable statutes and ordinances;
2. An award of attorneys' fees and costs pursuant to Idaho Code Section 12-117 or other applicable statute or rule; and
3. For such other and further relief as the Court deems just and proper.

DATED this 17th day of May 2012.

SPINK BUTLER, LLP

By: Richard H. Andrus
Richard H. Andrus
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of May 2012, I caused a true and correct copy of the above PETITION FOR JUDICIAL REVIEW to be served upon the following individuals in the manner indicated below:

Boise City Clerk
150 N. Capitol Blvd., 1st Flr., Bldg. 1
Boise, ID 83702
P.O. Box 500
Boise, ID 83701
Facsimile: 208/384-3711

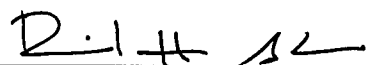
U.S. Mail
 Hand-Delivery
 Federal Express
 Via Facsimile

Boise City Council
c/o Mayor's Office
150 N. Capitol Blvd., 3rd Flr., Bldg. 1
Boise, ID 83702
P.O. Box 500
Boise, ID 83701
Facsimile: 208/384-4420

U.S. Mail
 Hand-Delivery
 Federal Express
 Via Facsimile

Boise City Attorney's Office
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P.O. Box 500
Boise, ID 83701
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U.S. Mail
 Hand-Delivery
 Federal Express
 Via Facsimile



Richard H. Andrus

Sticker
make appeals
8/3/12
W

NO. _____ FILED 3:50
A.M. _____ P.M.

AUG 02 2012

CHRISTOPHER D. RICH, Clerk
By **STEPHANIE VIDAK**
DEPUTY

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Attorneys for Petitioner

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

917 LUSK, LLC, an Idaho limited liability)
company,)

Case No. CV-OC-2012-08871

Petitioner,)

PETITIONER'S BRIEF

vs.)

CITY OF BOISE CITY, a political)
subdivision in the State of Idaho,)

Respondent,)

and)

ROYAL BOULEVARD ASSOCIATES,)
LP, an Idaho limited partnership,)

Intervenor.)

PETITIONER'S BRIEF - 1

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I.
STATEMENT OF THE PETITION

This is an appeal from the decision of the Boise City (“City” or “Boise”) City Council (the “Council”) upholding the City’s Planning & Zoning Commission’s (the “P&Z Commission”) approval of a conditional use request for a height exception from the limitations of the Boise City Zoning Ordinance (“Zoning Ordinance” or “City Code”). The purpose of the height exception will permit Royal Boulevard Associates LP (“Intervenor”) to construct an apartment building (the “Project”) to a height exceeding the thirty-five height foot limit applicable to buildings in the City’s Residential Office District (with Design Review Overlay) zone (“R-O zone” or “R-OD zone”).

Petitioner, being an adversely affected neighboring property owner, contends that the City’s approval of the conditional use permit adversely affects Petitioner and the public at large and is improper because: (i) the P&Z Commission erred in failing to follow the procedure established by the City Code and consider testimony required to analyze whether permission for a conditional use request was appropriate; (ii) the Council erred in failing to overturn the decision of the P&Z Commission in clear violation of City Code Section 11-03-07.05.G; (iii) the Council’s decision to uphold the P&Z Commission’s grant of the conditional use permit was not supported by substantial evidence in the record; (iv) the Council’s decision to uphold the P&Z Commission’s grant of the conditional use permit was made upon unlawful procedure; and (v) the Council’s decision to uphold the P&Z Commission’s grant of the conditional use permit was arbitrary, capricious or an abuse of discretion.

II. STANDARD OF REVIEW

The Local Land Use Planning Act, Idaho Code Sections 67-6501 to 67-6538, (“LLUPA”) allows an affected person to seek judicial review of the approval or denial of a land use application, as provided for in the Idaho Administrative Procedures Act, Idaho Code Sections 67-5201 to 67-5292 (“IAPA”). *Evans v. Teton County*, 139 Idaho 71, 73 P.3d 84 (2003). An affected person is one having an interest in real property which may be adversely affected by the issuance or denial of a permit authorizing the development. Idaho Code § 67-6521(1) (a). A conditional use permit is an appealable permit under LLUPA. *Wohrle v. Kootenai County*, 147 Idaho 267, 207 P.3d 998 (2009); *Eacret v. Bonner County*, 139 Idaho 780, 86 P.3d 494 (2004).

The decision of a zoning authority will be overturned if the Court finds that the zoning authority’s findings, inferences, conclusions, or decisions are (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence in the record; or (e) are arbitrary, capricious or an abuse of discretion. Idaho Code § 67-5279(3). The requirements of procedural due process apply to land use matters, including proceedings on conditional use applications. *Hawkins v. Bonneville County Bd. of Com’rs*, 151 Idaho 228, 254 P.3d 1224 (2011); *Cowan v. Board of Com’rs of Fremont County*, 143 Idaho 501, 148 P.3d 1247 (2006).

The role of the reviewing court is to evaluate the process by which the zoning decision was reached, consider whether substantial evidence supported the factual findings, and evaluate the soundness of the legal reasoning advanced in support of the decision. *Jasso v. Camas County*, 151 Idaho 790, 795, 264 P.3d 897, 902 (2011). The approval or denial of a zoning application must be vacated when it is not accompanied by a reasoned statement plainly stating

the resolution of factual disputes, identifying the evidence supporting that factual determination, and explaining the basis for legal conclusions, including identification of the pertinent laws and/or regulations upon which the legal conclusions rest must be vacated. *Id.*

III. ISSUES ON APPEAL

1. Whether the decision to grant the conditional use request, and the Council's refusal to overturn the P&Z Commission decision, was in excess of the City Code's authority of the P&Z Commission and the Council.
2. Whether the P&Z Commission's decision to grant the conditional use request, and the Council's refusal to overturn the P&Z Commission decision, was made upon unlawful procedure.
3. Whether the P&Z Commission's decision to grant the conditional use request, and the Council's refusal to overturn the P&Z Commission decision, was not supported by substantial evidence in the record.
4. Whether the P&Z Commission's decision to grant the conditional use request, and the Council's refusal to overturn the P&Z Commission decision, was arbitrary, capricious or an abuse of discretion.
5. Whether the "Reason for the Decision" Issued by the P&Z Commission and approved as modified by the Council were inadequate under LLUPA and City Code, and thereby violated Petitioner's due process rights.

IV. ADMINISTRATIVE PROCEEDINGS

On or about November 28, 2011, the Intervenor's predecessor in interest, the Michaels Organization ("Applicant"), filed an application with the City requesting approval of a

conditional use for a height exception to build a student housing project at 1004 West Royal Boulevard in Boise, Idaho. BC-181 to 193.¹

The P&Z Commission is empowered to grant conditional use requests after imposing any conditions needed to mitigate any damages, hazards, nuisances, or other detriments to persons or property in the vicinity due to the proposed conditional use. *Boise City Code* (“BCC”) §§ 11-06-04.01 and 11-06-04.04. The P&Z Commission originally heard the application on February 6, 2012. BC-70, 195. Although two members of the public had signed up to testify at the hearing, in error the P&Z Commission approved the Project as part of its “Consent Agenda” without hearing that testimony. BC-70. To rectify the error, the P&Z Commission reconsidered its decision and held another hearing. BC-70, 223. On February 13, 2012, the P&Z Commission heard from City staff (“Staff”), Applicant’s representatives, and Petitioner’s representative. BC-223 to 226. The P&Z Commission then continued the hearing to March 5, 2012. BC-226 to 227.

At its March 5 hearing, the P&Z Commission refused to consider testimony on adverse impacts associated with the conditional use request and refused to appropriately condition the request for a height exception as required under LLUPA and City Code. Idaho Code § 67-6512; *BCC* §§ 11-06-04.01, 11-06-04.13, 11-06-04.14, and 11-06-06.12. Staff wrongly instructed the P&Z Commission that: “The application tonight only concerns the additional height requested by the applicant”, and that potentially negative impacts, such as parking, were not an “issue before the Commission.” BC-112.

¹ Idaho Appellate Rule 35 requires references to the record to follow certain conventions. To avoid confusion, this *Petitioner’s Brief* uses the bates page numbering convention used by the City.

The P&Z Commission then approved the conditional use application for a height exception at its March 5, 2012 hearing. BC-106 to 111. On March 15, 2012, Petitioner timely appealed the P&Z Commission's decision to the Council. BC-80. The Council held a hearing on the appeal on April 17, 2012. BC-32 to 55. The Council denied the appeal and upheld the approval of the conditional use for the height exception. BC-284 to 287. Petitioner thereafter timely filed its Petition for Judicial Review.

V.
STATEMENT OF FACTS

In fall 2011, Applicant applied to the City of Boise for permission to build a student housing project at 1004 West Royal Boulevard in Boise, Idaho. BC-184 to 193. The proposed Project consists of a housing structure for Boise State University students approximately 352,000 square feet in size and with a footprint that would occupy the majority of approximately 3.4 acres directly adjacent to the Boise River Greenbelt (the "Greenbelt"), Ann Morrison Park, and Petitioner's property. BC-181, 195. The proposed Project would be located in the City's R-OD zone. BC-195.

The City's Zoning Ordinance prohibits buildings over thirty-five feet in the R-OD zone. *BCC* § 11-04-05.05; Table 2. Applicant could only construct the Project at its proposed height of between fifty-nine and sixty-three feet – nearly double the thirty-five-foot height allowed in the R-OD zone—if the City permitted the additional height after analyzing this now conditional use under the City Code process. BC-70; *BCC* §§ 11-04-05.05, 11-06-04.01, 11-06-04.13, 11-06-04.14, and 11-06-06.12.

The 1997 Boise City Comprehensive Plan (the "Comprehensive Plan") was in effect at the time Applicant's application was filed. The Comprehensive Plan incorporates by reference

the Downtown Boise Plan (the “Downtown Plan”). *Comprehensive Plan* p. 8-33.² The Downtown Plan provided guidance for a strong “Implementation Program,” *Downtown Plan* p. xv *et seq.*, including zoning amendments necessary to implement the Downtown Plan. *Id.* The Downtown Plan stated that the “City should create and adopt a new Residential-Office (R-O) zoning district...intended to serve as a transitional buffer between the CBD and adjacent neighborhoods.” *Downtown Plan* p. xvi. The City did create the new R-O zone. *See, BCC* § 11-04-05. The implementation of the Downtown Plan involved the rezone of large portions of the City’s downtown in order to ensure downtown zoning would: “comply with and conform to the...goals and policies under the...Downtown Policy Plan [; and] maintain and preserve compatibility of surrounding zoning and development.” *Boise City Ordinance No. 5475*. In other words, the City’s implementation program was undertaken to ensure the zoning of the properties in downtown was in accordance with the Comprehensive Plan.

As part of the Downtown Plan’s implementation program, the subject property was one of many properties deliberately rezoned from a zone that would have allowed—by right—building heights above thirty-five feet to the R-OD where building heights above thirty-five feet are only allowed through the conditional use process. *Boise City Council Meeting Transcript 04-17-12_2* (“*Transcript 4-17-12*”) pp. 3-4.³ This was a striking change by the City. The City consciously implemented the Downtown Plan by downzoning what had been the allowed the height on many properties such as the subject property—immediately adjacent to the Greenbelt

² The Comprehensive Plan was revised during the course of proceeding at the City. The Downtown Plan was, again, adopted and incorporated by reference into the revised Comprehensive Plan. The 1997 Boise City Comprehensive Plan and Downtown Plan have been provided to the Court for ease of reference.

³ Idaho Appellate Rule 35 requires references to transcripts to follow certain convention. To avoid confusion, the *Petitioner’s Brief* uses the page numbering convention used by the City.

and Ann Morrison Park. *See, BCC § 11-04-05.05; Table 2.2A; Transcript 4-17-12 pp. 3-4.*

This implementing R-O zone does allow for some flexibility in height, but only with strict compliance with the City's conditional use process.

As part of the Downtown Plan's implementation program, at the same time that the subject property was rezoned to be consistent with the Downtown Plan, Petitioner's property, which is located immediately east and south of the proposed Project and away from Ann Morrison Park, was rezoned BC-81. Similarly, other properties in the vicinity not located adjacent to Ann Morrison Park were also rezoned. *Boise City Ordinance No. 5475.* However, Petitioner's property and these other properties were rezoned to a zone (General Commercial with Design Review or C-2D) that maintained the same forty-five foot height that existed prior to the rezone. *Id.; see also BCC § 11-04-05.05.* The City drew a line: properties along Ann Morrison Park were only allowed a maximum height of thirty-five feet; properties further east of Ann Morrison Park, were allowed a maximum height of forty-five feet. *Transcript 4-17-12 pp 3-7.* Again, it is not that the R-O zone properties, like the subject property, cannot be developed above thirty-five feet. However, the developers of those properties, and the City, must first conduct the conditional use procedure found in City Code.

Petitioner's building serves the employees of Keynetics and is a three-story Class A office building located in the C2-D zone with a base maximum height of forty-five feet. BC-228. Petitioner requested and received a conditional use permit for a height exception, which varies the roofline for design purposes and to accommodate stair towers. BC-83. That additional height, considered on its own merits as a conditional use, is not habitable space, but rather serves design and aesthetic considerations. BC-83. On the other hand, the height exception requested by Applicant would add two stories of residential units to the Project, which

is double the number of residential stories the Project would include if it complied with the thirty-five foot height limit in the R-OD zone. *Transcript 4-17-12* p. 4; BC-141, 229 to 231, and 247.

At its March 5, 2012 hearing, on instruction from Staff, the P&Z Commission did not consider adverse impacts of the Project due to parking. BC- 112. The overwhelming evidence presented at the hearing and in written materials submitted to the P&Z Commission demonstrated that the Project was severely under-parked and the parking would adversely impact surrounding property owners. BC-123 to 124, 229 to 231, and 247. The additional height attributable to the conditional height exception would add two full stories of residences to the Project above what is permitted as an allowed use under the City Code. BC-141, 229 to 231, and 247. The Project would contain 622 bedrooms and house at least 622 student tenants, but only provide 280 parking spaces. BC-229 to 231, and 247.

Parking around the Project is already strained. Ann Morrison Park hosts a variety of high traffic events throughout the year. BC-229 to 231, and 247. During the summer river floating season, soccer season, and other sports seasons, parking in Ann Morrison Park and along Royal Boulevard becomes heavily congested. BC-229 to 231, and 247. The inadequate parking will make the proposed Project an undesirable place to live, adversely affect the businesses in the area, and harm the public's ability to enjoy Ann Morrison Park and the Boise River Greenbelt. BC-229 to 231, and 247. Students that cannot find parking within the housing Project will park at adjacent properties, including Petitioner's property. BC-84 to 88. As a result, Petitioner and other property owners will be forced to expend considerable time and resources policing the parking on their properties. BC-229 to 231. Congested parking will drive customers away from businesses in the area. BC-229 to 231.

On March 5, 2012 the P&Z Commission approved Applicant's conditional use request for a legal exception. BC-106-111.

On March 15, 2012, the Petitioner timely appealed the P&Z Commission decision to the City Council. BC-80 to 95.

On April 17, 2012, the Council upheld the P&Z Commission decision. BC-284 to 287.

VI. STANDING OF PETITIONER

“An affected person aggrieved by a final decision concerning matters identified in Section 67-6521(1)(a), Idaho Code, may within twenty-eight (28) days after all remedies have been exhausted under local ordinances seek judicial review as provided by Chapter 52, Title 67, Idaho Code.” Idaho Code § 67-6521(1) (d). An “affected person” means “one having a bona fide interest in real property which may be adversely affected by: (i) the approval, denial or failure to act upon an application for a subdivision, variance, special use permit and such other similar applications required or authorized pursuant to this chapter . . .” Idaho Code § 67-6521(1)(a)(i). The action of the Council, upholding the P&Z Commission's approval of Applicant's request for a height increase under the conditional use permit criteria, is a final decision subject to judicial review. *Canal/Norcrest/Columbus Action Committee v. City of Boise*, 136 Idaho 666, 39 P.3d 606 (2001).

Petitioner is an affected person having an interest in real property immediately adjacent to the proposed Project and adversely affected by the approval of a conditional use request for an increase in height. *Johnson v. Blaine County*, 146 Idaho 916, 920, 204 P.3d 1127, 1131 (2009) (adjoining property owner affected by increased housing density is viewed as an affected person); *Taylor v. Canyon County Bd. Of Com'rs*, 147 Idaho 424, 210 P.3d 532 (2009) (standing

satisfied by neighboring landowner); *Cowan v. Board of Com'rs of Fremont County*, 143 Idaho 501, 148 P.3d 1247 (2006) (standing satisfied by landowners affected by adjacent subdivision development); *Davisco Foods International, Inc. v. Gooding County*, 141 Idaho 784, 118 P.3d 116 (2005) (standing satisfied because petitioners might smell proposed wastewater treatment plant over three miles distant); *Evans v. Teton County*, 139 Idaho 71, 73 P.3d 84 (2003) (standing satisfied by rural home owners affected by resort development).

The most immediate, real, significant, and anticipated adverse consequence to Petitioner and other property owners in the neighborhood (including the public who travel to and use Ann Morrison Park) is the parking crisis created by the City's approval of an additional two stories of habitable apartments over and above the allowed height of thirty-five feet in the R-OD zone – all without appropriate conditions being placed on the conditional use request to ensure that adverse impacts are mitigated. In fact, there was no discussion, no analysis, and no deliberation by the City to review the potential adverse parking impacts caused by this additional habitable apartments that are not allowed by right under the Zoning Ordinance.

The lack of deliberation by the City, and the failure of the City to attach appropriate conditions to this conditional use approval (assuming, solely for arguments sake, that the conditional use could even be appropriately conditioned so as to mitigate adverse impacts), will devalue Petitioner's property, require time and expense for Petitioner to police parking on its own property, inconvenience employees and visitors to Petitioner's building, cause similar deleterious consequences to the neighborhood around the Project, potentially drive business from the neighborhood, and cause adverse consequences for patrons of Ann Morrison Park.

VII. **ARGUMENT**

A. General Rules Regarding Conditional Use Permit Requests.

Conditional uses are land uses that a governing body previously determined includes characteristics that might render the use unsuitable as requested by an applicant. Such characteristics may include increases in height that increase habitable space and all the attendant issues from the increase in the number of people residing on and parking their cars on or near a particular piece of property.

Permission to develop a conditional use, cannot, legally, be granted without compliance with LLUPA's enabling legislation and the City Code. Under LLUPA:

As part of a zoning ordinance, each governing board may provide by ordinance . . . for the processing of applications for . . . special or conditional use permits. A special use permit may be granted to an applicant if the proposed use is conditionally permitted by the terms of the ordinance, subject to conditions pursuant to specific provisions of the ordinance, subject to the ability of political subdivisions, including school districts, to provide services for the proposed use, and when it is not in conflict with the plan.

Idaho Code § 67-6512(a). The City adopted conditional use permit review procedures for height exceptions. *See BCC* §§11-06-04, 11-06-06.12, 11-06-06.13, and 11-06-06.14.

The stated "general intent" of the Zoning Ordinance is to require conformity within zoning districts, *BCC* § 11-04-02.01, and buildings in any district are to be used only in accordance with the regulations established for that district. *Id.* In the R-O zone, the City has set a maximum height of thirty-five feet. *BCC* § 11-04-05.05. Roof line features in the R-O zone are allowed to vary slightly above this maximum building height and within strict parameters. *BCC* § 11-04-05.06.A. Any other extension of height above the thirty-five foot maximum is possible only if an applicant obtains conditional use approval from the P&Z Commission. That

P&Z Commission approval, if granted, “shall be based upon the criteria set forth in [BCC] Section 11-06-04.13.” *BCC* § 11-06-06.12 (emphasis added); *see also* *BCC* § 11-04-05.06.D.

A multifamily building in the R-O zone is an allowed use when it is built to a height of thirty-five feet. A multifamily building in the R-O zone built above thirty-five feet is a conditional use, and, by the City’s own legislative determination, “[c]onditional uses by definition possess characteristics such as to require review and appraisal by the [P&Z] Commission to determine whether or not the use would cause any damage, hazard, nuisance or other detriment to persons or property in the vicinity.” *BCC* § 11-06-04.01.

Review and appraisal by the P&Z Commission occurs at a public hearing, and “[f]ollowing the hearing, the [P&Z] Commission shall approve, deny or modify the application for a conditional use permit, imposing any conditions needed to establish the findings of [BCC] Section 11-06-04.11. [sic: 11-06-04.13]” *BCC* § 11-06-04.04 (emphasis added). Further, the City requires the P&Z Commission, “in acting upon the application, shall provide that approval of a conditional use permit shall be contingent upon compliance with specified conditions.”⁴ *BCC* § 11-06-04.14 (emphasis added). Once a land use – such as the proposed Project – has been classified by the City as a conditional use, the duty arises for the P&Z Commission to protect the public’s welfare through rigorous compliance with the adopted procedures.

Conditional use permits by definition are not granted as a mere matter of course. The City’s Zoning Ordinance contemplates that a full hearing on a conditional use application will occur. A hearing in which neighbors who know their neighborhood well, such as Petitioner, can provide testimony to the P&Z Commission on potential negative impacts that the requested

⁴ The Zoning Ordinance (*BCC* § 11-06-04.14) actually specifies a list of conditions that, “without limitation” the P&Z Commission is to use to condition any particular conditional use application to mitigate potential “damage, hazard, nuisance or other detriment to persons or property in the vicinity.” *See* *BCC* § 11-06-04.01.

conditional use may impose on the neighborhood. A hearing in which the P&Z Commission would take all that testimony and would review and appraise the application in light of that testimony. A hearing in which the P&Z Commission would deliberate toward a decision using that testimony and, if the conditional use request was approved, that approval would be contingent on conditions of approval that would mitigate the adverse impacts of the conditional use.

B. The P&Z Commission Erred By Not Following The City's Conditional Use Procedure.

The procedure contemplated by the Zoning Ordinance was not followed in this instance. Idaho Code Section 67-6512(a) enables local governments to establish, by ordinance, a process for reviewing and appraising conditional use requests. The City established by ordinance that procedure, but did not follow its procedure. Petitioner understands the judiciary will in general defer to a local government's factual findings. In this case, the City refused to gather and deliberate on many of the facts, all of which facts form the basis for conclusions of law set out in the City's conditional use criteria. *BCC* § 11-06-04.13.

The conditions of approval attached to an approved conditional use request must include those conditions the P&Z Commission determines will allow the P&Z Commission to reach the following conclusions of law:

- A. That the location of the proposed use is compatible to other uses in the general neighborhood; and
- B. That the proposed use will not place an undue burden on transportation and other public facilities in the vicinity; and
- C. That the site is large enough to accommodate the proposed use and all yards, open spaces, pathways, walls and fences, parking, loading, landscaping and such other features as are required by this title; and

- D. That the proposed use, if it complies with all conditions imposed, will not adversely affect other property of the vicinity; and
- E. That the proposed use is in compliance with and supports the goals and objectives of the Comprehensive Plan.
- F. Multiple family building (any building containing more than 2 residential units) must be designed to include features which add to the visual and aesthetic appearance of the structure and help prevent a sterile, box-like appearance....

BCC § 11-06-04.13.

In acting on a conditional use permit application, the P&Z Commission “shall provide that approval of a conditional use permit shall be contingent upon compliance with specified conditions.” *BCC § 11-06-04.14; see also Idaho Code § 67-6512(d).* Among those conditions that **shall** apply are “requirements for off-street parking.” *BCC § 11-06-04.14.C.* Thus, merely meeting the Zoning Ordinance’s off-street parking requirements for an allowed use (as compared to a conditional use) does not necessarily satisfy the off-street parking requirements that may be needed after analyzing a particular conditional use request. The City must go through the legislatively-demanded procedure to analyze whether parking must be conditioned. The language of City Code Section 11-06-04.14.C requires an examination of the off-street parking for any conditional use permit application. The P&Z Commission must consider all of the particulars of the proposed Project, including parking, and, as necessary, attach conditions of approval regarding off-street parking.

However, in this case, the P&Z Commission treated this conditional use request as though the building, at the height requested, only needed to meet the parking standards automatically applicable to allowed uses. The P&Z Commission concluded that:

The height exception will not adversely affect surrounding property owners as the building’s additional height does not allow for more units than the site’s available parking. . . . The

height exception allows for the applicant to maximize the number of units, while providing for adequate parking.

BC-108. The purpose of the conditional use procedure is to take a rigorous look at the potential adverse effects a particular conditional use request may have on its surroundings and condition the request accordingly. In this case, the P&Z Commission did not go through that exercise but made the conclusory statement that there was adequate parking in order for Applicant to get the most units out of the site as possible.

On several occasions during the conditional use process and appeal, Staff asked the P&Z Commission and Council to compare the Project to other buildings “in the area” of the Project that are similar height to the proposed Project. BC-199, 213. In its efforts to conjure an image of compatibility, Staff failed to explain that the buildings Staff specifically referred to are not located in the same zone as the Project and are not located “in the area.” BC-70, 82 to 83, and 199. In fact, one of the buildings referenced by Staff is across the river and two of the buildings—the Morrison Center at sixty-three feet high and the Barnes Towers at seventy-four feet high – are located nearly one-third mile from the proposed Project, across two major roadways (9th Street and Capitol Boulevard) on the Boise State University Campus, and most importantly, in the “University” or “U” land use zone that allows, by right, a height of seventy-five feet. BC-83.

Staff also used the height of Petitioner’s building and Petitioner’s height exception to claim compatibility between the proposed Project and the surrounding area. Yet Staff failed to explain to the P&Z Commission that Petitioner’s building is located in the C2-D zone away from the public’s park and on the other side of the zoning boundary that the City deliberately drew when the City implemented the Downtown Plan. BC-83, 199; *Boise City Ordinance No. 5475*.

Staff further failed to point out that Petitioner's height exception was judged on its own merits under the City's conditional use procedure, which is what should be expected in this instance.

The Project, at the height requested, arguably may be compatible with other buildings in the area. The issue is whether, at the height requested, the Project is adequately parked or must be conditioned so that the Project "will not adversely affect other property in the vicinity." *BCC* §§ 11-06-04.13.D and 11-06-04.14.C.

At its March 5, 2012 hearing, on instruction from Staff, the P&Z Commission refused to consider adverse impacts of the Project due to parking. Staff instructed the P&Z Commission that "[t]he application tonight only concerns the additional height requested by the applicant", and that potentially negative impacts required to be considered for conditional use requests, such as the need for additional on-site parking exacerbated by the additional two stories of habitable space the height exception would permit, was not an "issue before the Commission." BC-112. After the public testimony portion of the hearing was closed and the P&Z Commission began deliberating toward a decision, Commissioner Stevens, the P&Z Commission chair, stated:

I want to remind the Commissioners that the parking issue tonight is not actually before us. This Commission is not in position to make findings that require our applicant to be held to standards above that which is in our code. That would be arbitrary and would make the City be in some serious hot water, so I want to make sure that when we have our discussion tonight, that we keep the parking out of it. It is not before us.

BC-126 (emphasis added). Commissioner Story affirmed Commissioner Stevens' position and stated that "parking is off the table." BC-126. The Commissioners were wrong to conclude that discussion of parking would be "arbitrary." What was arbitrary was that the P&Z Commission did not consider the potential negative effects and the possible need to condition the Project to

provide additional parking. What was arbitrary was that the Project was treated by the P&Z Commission as though it was an allowed use and not the conditional use that it is.

Despite that the P&Z Commission was instructed to not consider the parking problems, and despite that the P&Z Commission expressly stated that it would not consider the parking problems, the “Reason for the Decision” prepared by Staff and approved by the Council stated “the public record from the Planning and Zoning Commission meeting revealed a robust discussion regarding parking.” BC-285, 263, and 272-273. The statement contains no support in the record and contradicts what the P&Z Commission said and did. There was no such deliberation by the P&Z Commission.

The P&Z Commission acted upon unlawful procedure based on the requirements of City Code Sections 11-06-06.12, 11-06-04.01, 11-06-04.04, 11-06-04.13, and 11-06-04.14. Because the P&Z did not even consider the evidence in the record related to parking, the conditional use decision cannot be supported by substantial evidence in the record. Finally, the P&Z Commission’s express disregard for the parking problems when the City Code specifically requires the P&Z Commission to consider parking effects on the surrounding neighborhood demonstrates its actions were clearly arbitrary, capricious, and an abuse of discretion.

C. The Council Erred When It Upheld the P&Z Commission’s Decision to Approve the Conditional Use Permit.

City Code sets forth the procedure and standards for appeals from P&Z Commission decisions: When “there is not substantial evidence to support the findings upon which the original decision is based, the decision shall be reversed. The City Council shall substitute its own findings when the findings from the [P&Z Commission] are not supported by substantial

evidence.” *BCC* § 11-03-07.05.G.4. Further, the Council may “remand the matter for further proceedings if a “substantial procedural error has taken place.” *BCC* § 11-03-07.05.G.6.

The Council upheld the P&Z Commission’s approval of the conditional use permit based on a completely incorrect statement of what occurred before the P&Z Commission. When the Council deliberated on the appeal, the Council Member’s statements show that the Council Members were completely unaware that the P&Z Commission was instructed by Staff not to consider parking issues and that the P&Z Commission expressly refused to consider and address parking issues. *Compare BC-285 with Transcript 7-14-12 pp. 35-37.*

The statements from Council Members when they heard Petitioner’s appeal on the P&Z Commissioner’s lack of thorough conditional use review and deliberation indicate that the Council either missed the error of the P&Z Commission or that the Council found it incredulous to think the P&Z Commission would not have deliberated appropriately. Council Member Jordan stated: “there was no indication in the record of uh concern on the part of the Commissions [sic] that they perhaps were not receiving complete information to deliberate properly.” *Transcript 4-17-12 p. 35.* Council Member McLean stated: “I saw on the record a lot of conversation about parking....” *Transcript 4-17-12 p. 36.* Council Member Clegg opined that “I find it hard to believe that in this many hearings um if there were issues to be brought up that they weren’t brought up...I’m convinced given the record at hand that the Planning and Zoning Commission did fully uh consider those.” *Transcript 4-17-12 p. 37.*

But, in fact, the P&Z Commission did not “consider those.” No matter how much evidence regarding parking was brought before the P&Z Commission, the P&Z Commission was expressly instructed by Staff to not consider any of it and the P&Z Commission did not consider the testimony. The Council was in error.

The Council's approved "Reason for the Decision" states "the public record from the Planning and Zoning P&Z Commission meeting revealed a robust discussion regarding parking." BC-285. The statement is manufactured out of thin air. The statement is certainly not based on the record which underscores the fact that no such "robust" discussion occurred. BC-112 and BC-126. Hence, the Council's decision to uphold the P&Z Commission's approval violated the standard of review set forth in City Code Section 11-03-07.05. BCC § 11-03-07.05. The P&Z Commission's approval and the Council's decision to uphold that decision were made upon unlawful procedure, not supported by substantial evidence in the record, and arbitrary, capricious, and an abuse of discretion.

D. The P&Z Commission's "Reason for the Decision," Which the Council Approved as Modified, Fails to Meet the Requirements of Idaho Code Section 67-6535 and Violates Petitioner's Due Process Rights.

The "Reason for the Decision" issued by the P&Z Commission and approved as modified by the Council simply fails to meet the basic requirements of a reasoned written statement required by LLUPA. See BC-106-111, 263 and 284. Idaho Code Section 67-6535(2) provides:

The approval or denial of any application required or authorized pursuant to this chapter shall be in writing and accompanied by a reasoned statement that explains the criteria and standards considered relevant, states the relevant contested facts relied upon, and explains the rationale for the decision based on the applicable provisions of the comprehensive plan, relevant ordinance and statutory provisions, pertinent constitutional principles and factual information contained in the record.

Idaho Code § 67-6535(2). The reasoned statement "must plainly state the resolution of factual disputes, identify the evidence supporting that factual determination, and explain the basis for legal conclusions, including identification of the pertinent laws and/or regulations upon which the legal conclusions rest." *Jasso v. Camas County*, 151 Idaho 790, 794, 264 P.3d 897, 901 (2011). Due process requires that parties be afforded a meaningful opportunity for judicial

review, and the “reasoned statement” requirement means that decision-makers must articulate the basis for their decision to permit meaningful judicial review. *Id.* at 797, 264 P:3d at 904.

In the present case, the P&Z Commission expressly refused to resolve factual disputes in the conditional use procedure. For the P&Z Commission, using parking as the example, granting Applicant’s height exception request “allows for the applicant to maximize the number of units”, BC -108, and justifies this through the conclusory statement that Applicant is “providing adequate parking.” *Id.* Because the P&Z Commission committed that foundational error, the written findings do not reflect the standard set forth in Idaho Code Section 67-6535 as further explained in *Jasso*.

The Council, in issuing its own “Reason for the Decision” that adopted the P&Z Commission statements, compounded the error. BC-284 to 287. The Council not only ignored the correct procedure for reviewing a conditional use as well as the factual evidence presented to the P&Z Commission regarding the parking problems, but it also completely ignored what the record clearly showed—that the P&Z Commission had refused to consider parking and the adverse effects created by the Project. Merely stating that a “robust” discussion occurred at the P&Z Commission level does not make it so. Such conclusory and false statements do not satisfy the Idaho Code Section 67-6535 due process requirements to provide a meaningful judicial review.

VIII.

THE SUBSTANTIAL RIGHTS OF PETITIONER HAVE BEEN PREJUDICED BY THE CITY GRANTING THE CONDITIONAL USE PERMIT WITHOUT FOLLOWING PROPER PROCEDURE.

The errors made in the City’s decision to grant a conditional use permit to Applicant for a height exception that will almost double the height of an adjacent apartment building have

prejudiced Petitioner's substantial rights. As described above, Petitioner is an affected person having an interest in real property that will be adversely affected by the approval of the conditional use permit. Affected persons, such as Petitioner, hold a substantial right to procedural regularity and due process.

“[E]veryone with a statutory interest in the outcome of a decision is entitled to a meaningful notice and a fair hearing before an impartial decision maker.” *Hawkins v. Bonneville County Bd. of Com'rs*, 151 Idaho 228, 233, 254 P.3d 1224, 1229 (2011) (citing *Eacret v. Bonner Cnty.*, 139 Idaho 780, 787, 86 P.3d 494, 501 (2004); *Eddins v. City of Lewiston*, 150 Idaho 30, 36, 244 P.3d 174, 180 (2010)). Additionally, “all the parties involved in a land-use decision have a substantial right to a reasonably fair decision-making process. Governing boards owe procedural fairness not just to applicants but also their interested opponents. Both should expect proceedings that are free from procedural defects that might reasonably have affected the final outcome.” *Hawkins*, 151 Idaho at 232, 254 P.3d at 1228 (citing *Noble v. Kootenai Cnty.*, 148 Idaho 937, 942-43, 231 P.3d 1034, 1039-40 (2010)). Thus, due process and a procedurally fair decision are substantial rights of a non-applicant petitioner. *See Hawkins*, 151 Idaho at 233, 254 P.3d at 1228 (2011); *Jasso*, 151 Idaho at 794, 264 P.3d at 901 (“due process rights are substantial rights”) (*quoting Eddins*, 150 Idaho at 36, 244 P.3d at 180).

Throughout the administrative process at the City, the City sent Petitioner the message that its participation in the process was nothing more than a nuisance—a bump in the road toward approval of Applicant's request. Petitioner has a substantial interest in the outcome of the application and was substantially prevented from meaningfully participating in the review process. Most importantly, the City expressly refused to consider information required under the

procedure established in the City's own Zoning Ordinance for review and conditioning of a conditional use permit. *BCC* §§ 11-06-04.01, 11-06-04.13, 11-06-04.14.C, and 11-06-06.12.

The City violated Petitioner's due process rights by failing to adopt adequate findings of fact to show support for the conclusions of law the City is required to reach under City Code. *BCC* § 11-06-04.13; *see also BCC* § 11-06-04.14. The City specifically did not address the conditional use criteria established in City Code. The failure to adopt such findings and conclusions, alone, is sufficient to prejudice a substantial right of Petitioners. *Jasso v. Camas City, supra*.

Finally, the City was required to attach any necessary conditions of approval to mitigate any damages, hazards, nuisances, or other deterrents. *BCC* § 11-06-04.14. When the P&Z Commission and then the Council just plain refused to consider parking, refused to recognize and deliberate on the potential adverse impacts, even though such is required by City Code, the substantial rights of Petitioner, specifically, and the public, generally, were violated.

IX.
PETITIONER IS ENTITLED TO AN AWARD OF ATTORNEYS' FEES

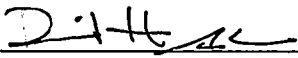
Idaho Code Section 12-117 provides that a petitioner in a petition for judicial review shall be awarded reasonable attorneys' fees, witness fees, and other expenses when the zoning authority acted without a reasonable basis in fact or law. Idaho Code § 12-117(1) and (5). The City acted without a reasonable basis in fact or law when the City failed to follow City Code procedures for consideration of Applicant's conditional use request or provide written findings that satisfy Idaho Code Section 67-6535. Under Idaho Code Section 12-117, Petitioner, as the prevailing party, is entitled to an award of reasonable attorneys' fees. Idaho Code § 12-117.

X.
CONCLUSION

The City committed procedural and due process errors that require the Court to vacate the Council's decision and the P&Z Commission's approval of the conditional use permit application. Petitioner respectfully requests that the Court vacate the Council's decision and the P&Z Commission's approval and remand the matter back to the P&Z Commission instructing the P&Z Commission to consider all of the of the matters required by City Code Sections 11-06-04.13 and 11-06-04.14. Petitioners also respectfully request an award of attorneys' fees as the prevailing party.

DATED this 2nd day of August 2012.

SPINK BUTLER, LLP

By: 
Richard H. Andrus
Attorneys for Petitioner

CERTIFICATE OF SERVICE

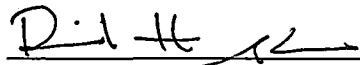
I HEREBY CERTIFY that on this 2nd day of August 2012, I caused a true and correct copy of the above PETITIONER'S BRIEF to be served upon the following individuals in the manner indicated below:

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ORIGINAL

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

917 LUSK, LLC, an Idaho limited liability
company,

Petitioner,

v.

CITY OF BOISE CITY, a political
subdivision of the State of Idaho,

Respondent,

and

ROYAL BOULEVARD ASSOCIATES LP,

Intervenor.

Case No. CV OC 2012 08871

**RESPONDENT CITY OF BOISE'S
BRIEF OPPOSING PETITION FOR
JUDICIAL REVIEW**

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I. STATEMENT OF THE CASE

This case is an appeal from the determination by the Boise City Council (“City Council”) upholding a decision by the Boise City Planning and Zoning Commission (“P&Z”) which approved a conditional use permit (“CUP”) for a height exception for Royal Boulevard Associates, LP (“Intervenor”) to build a multi-family apartment complex called the River Edge Apartments (“River Edge”).¹

On March 5, 2012, the P&Z unanimously approved the River Edge CUP for a height exception and adopted reasons for the decision and conditions of approval.² 917 Lusk, LLC (“Petitioner”) filed a timely appeal of the P&Z’s decision to the City Council, asserting that the P&Z decision failed to meet the requirements for a CUP.³ On April 17, 2012, the City Council denied the appeal and upheld the P&Z’s approval of the height exception.⁴

The subject site is 1004 West Royal Boulevard, to the east of Boise’s Ann Morrison Park and to the west of the property owned by Petitioner.⁵ Multi-family dwellings are an allowed use for this location⁶ as the property is currently zoned as Residential Office with a Design Review Overlay (“R-OD”).⁷ The Local Land Use Planning Act (“LLUPA”)⁸ and the Boise City Zoning

¹ R. pp. BC 284-287.

² R. pp. BC 106-111.

³ R. pp. BC 82-89.

⁴ R. pp. BC 284-287.

⁵ R. p. BC-162.

⁶ Boise City Code § 11-04-05.04, Table 2.1.

⁷ R. p. BC-161.

⁸ Idaho Code §§ 67-6501 *et seq.*

Ordinance (“Zoning Ordinance”) allow this use to exceed the base zoning’s standard height limit of 35 feet with the issuance of a CUP.⁹

II. ADDITIONAL ISSUES PRESENTED ON APPEAL

1. Does Petitioner have standing under Idaho Code § 67-6521 to seek judicial review of the City Council’s approval of the River Edge CUP?
2. Did Petitioner challenge the City Council’s approval of the River Edge CUP without a reasonable basis in fact or law thereby entitling Respondent to attorney’s fees pursuant to Idaho Code § 12-117?

III. ARGUMENT

A. Standard of Review.

LLUPA allows judicial review of a final decision of a land use application for an affected person, as provided in the Idaho Administrative Procedure Act (IAPA).¹⁰ The issuance of special or conditional use permits is allowed by Idaho Code § 67-6512(a), and includes exceptions or waivers of standards for building height as addressed by Idaho Code § 67-6516.¹¹ Therefore, a party aggrieved by a decision of the City Council approving a conditional use permit for a height exception may seek judicial review under the provisions of IAPA.

⁹ Idaho Code § 67-6512(f); Boise City Code § 11-06-06.09.

¹⁰ Idaho Code § 67-6521(1)(d); *In re Jerome County Bd. of Com’rs*, 281 P.3d 1076, ___ (2012).

¹¹ Idaho Code § 67-6512(f).

In its review, “The district court cannot substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.”¹² “[T]he 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 on the record.”¹³

Regarding the Court’s scope of review, Idaho Code § 67-5279(3) requires:

When the agency was required by the provisions of this chapter or by other provisions of law to issue an order, the court shall affirm the agency action unless the court finds that the agency’s findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of 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.

If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary.

“There is a strong presumption favoring the validity of a governing board’s zoning decisions, including its application and interpretation of its own zoning ordinance.”¹⁴

B. Petitioner has not established it has standing to seek judicial review of the City Council’s approval of the River Edge CUP, as required by Idaho Code § 67-6521.

A “fundamental tenet of American jurisprudence” is “that a person wishing to invoke a court’s jurisdiction must have standing.”¹⁵ In land use cases, LLUPA allows judicial review

¹² *Cowan v. Bd. Of Com’rs of Fremont Cnty.*, 143 Idaho 501, 508, 148 P.3d 1247, 1254 (2006) (paraphrasing Idaho Code § 67-5279(1)); *See also, Marcia T. Turner, L.L.C. v. City of Twin Falls*, 144 Idaho 203, 209, 159 P.3d 840, 845 (2007).

¹³ *Fischer v. City of Ketchum*, 141 Idaho 349, 352, 109 P.3d 1091, 1094 (2005) (quoting *Price v. Payette County Bd. of County Com’rs*, 131 Idaho 426, 429, 958 P.2d 583, 586 (1998)).

¹⁴ *Marcia T. Turner, L.L.C. v. City of Twin Falls*, 144 Idaho 203, 209, 159 P.3d 840, 845 (2007).

¹⁵ *In re Jerome County Bd. of Com’rs*, 281 P.3d 1076, ___ (2012) (quoting *Van Valkenburgh v. Citizens for Term*

pursuant to IAPA for “affected person[s] aggrieved by a final decision” granting or denying a development permit after exhausting all available remedies under local ordinances.¹⁶ An “affected person” is “one having a bona fide interest in real property which may be adversely affected by: (i) [t]he approval, denial or failure to act upon an application for a subdivision, variance, special use permit and such other similar applications required or authorized pursuant to this chapter.”¹⁷ Standing in this matter depends on whether Petitioner can show real or potential harm to Petitioner’s property due to City Council’s approval of the River Edge CUP.¹⁸ Despite all the cases Petitioner cites,¹⁹ Petitioner has not met this burden and cannot be considered an affected party for purposes of judicial review by this Court.

Petitioner cites numerous cases in an effort to establish standing: *Johnson v. Blaine County*,²⁰ where the harm was a higher density than the underlying zone allowed; *Taylor v. Canyon County Bd. of Com’rs*,²¹ where the harm was in living adjacent to a property being rezoned to a higher density; *Cowan v. Board of Com’rs of Fremont County*,²² where the harm was in living adjacent to a property being subdivided and developed; *Davisco Foods Int’l, Inc. v. Gooding County*,²³ where the harm could be the smell from development of a proposed

Limits, 135 Idaho 121, 124, 15 P.3d 1129, 1132 (2000)).

¹⁶ Idaho Code § 67-6521(1)(d); *see also*, *Hawkins v. Bonneville County Bd. of Com’rs*, 151 Idaho 228, 231, 254 P.3d 1224, 1227 (2011).

¹⁷ Idaho Code § 67-6521(1)(a).

¹⁸ *Cowan v. Board of Com’rs of Fremont County*, 143 Idaho 501, 509, 148 P.3d 1247, 1255 (2006).

¹⁹ Petitioner’s Brief at 13-14.

²⁰ 146 Idaho 916, 920, 204 P.3d 1127, 1131 (2009).

²¹ 147 Idaho 424, 210 P.3d 532 (2009).

²² 143 Idaho 501, 509, 148 P.3d 1247, 1255 (2006).

²³ 141 Idaho 784, 787, 118 P.3d 116, 119 (2005).

wastewater treatment plant; and *Evans v. Teton County*,²⁴ where the harm was in living adjacent to a property being rezoned to accommodate a resort development. To claim “affected person” status, Petitioner’s only similarity with these cases is found with adjacency to the proposed development. But adjacency wasn’t the key detail of the cases above. “Proximity is a very important factor,” but standing status depends on being adversely affected – not being within a specified distance.²⁵

In the case at hand, Petitioner is a landowner adjacent²⁶ to a 3.42 acre parcel zoned R-OD²⁷ which allows the multi-family project the Intervenor seeks to build as an allowed use.²⁸ The Zoning Ordinance sets out the acceptable density for the subject parcel’s R-OD zone²⁹ – a density which Intervenor is not asking to exceed.³⁰ The Zoning Ordinance also establishes standards which control how much on-site parking is required for that specific density in that zone – again, standards which are met by Intervenor.³¹ As such, it cannot be reasonably argued that density and parking standards are the source of harm to establish Petitioner’s standing because, *but for the height exception*, Intervenor has a legal right to build River Edge without any statutory review by Respondent nor any input from Petitioner. Therefore, if real or potential harm to real estate interests are to be shown, as the case law requires,³² then harm to Petitioner

²⁴ 139 Idaho 71, 75, 73 P.3d 84, 88 (2003).

²⁵ *Id.*

²⁶ R. pp. BC 239-241.

²⁷ R. p. BC 195.

²⁸ Boise City Code § 11-04-05.04, Table 2.1.

²⁹ Boise City Code § 11-04-05.05, Table 2.2A.

³⁰ R. pp. BC 176-180.

³¹ R. p. BC 196.

³² *Cowan v. Board of Com’rs of Fremont County*, 143 Idaho 501, 509, 148 P.3d 1247, 1255 (2006); *Evans v. Teton County*, 139 Idaho 71, 76, 73 P.3d 84, 89 (2003).

must surely originate from Intervenor's height exception – as it is the only part of the application that is not already outright allowed by the Zoning Ordinance.

Petitioner's assertion of harm stemming from a height exception is imagined. For one, Petitioner does not assert a legal claim to a view easement which Intervenor's building will disrupt. Furthermore, despite so many pages of Petitioner's brief devoted to the topic, it does not follow that the heights of 59 and 61 feet requested from the Intervenor translate into the parking crisis Petitioner claims. There is no nexus or causal connection between the two elements and no parking problem proximately caused by wanting a taller building. For example, the extra height requested above the 35' which the R-OD zone allows by right could be merely aesthetic preference. Alternatively, the Intervenor could wish to have dwelling units with very tall ceilings or have extra sound-proofing between floors or have a decorative spire that serves no dwelling purpose whatsoever. Or, as is actually the case, the Intervenor could wish to build the project over a first floor devoted to parking such that there are no actual first floor dwelling units.³³

It is neither sensible nor logical to believe Petitioner's real property could be adversely affected by the River Edge height exception; height alone does not translate into a parking emergency, despite Petitioner's insistence to the contrary. By contrast, Landowner applicants "have a substantial right to develop their own property."³⁴ LLUPA gives the City Council the authority to make decisions about CUPs for height exceptions.³⁵ Petitioner's desire for a

³³ R. p. BC 164.

³⁴ *Hawkins v. Bonneville County Bd. of Com'rs*, 151 Idaho 228, 233, 254 P.3d 1224, 1229 (2011).

³⁵ Idaho Code § 67-6512.

different outcome in the matter does not equate to the adverse effect necessary for standing. For these reasons, Petitioner's standing to challenge the River Edge CUP decision is lacking and its appeal to this Court must be dismissed.

C. Petitioner has not established that any substantial rights have been prejudiced.

Even if this Court determines that Petitioner has standing to set this case in motion, Idaho Code § 67-6535(3) directs that, "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."³⁶ The City Council's approval of the River Edge CUP must be affirmed unless "substantial rights of the appellant have been prejudiced."³⁷ Mere conclusory allegations that property rights have been prejudiced are not sufficient to prove prejudice to substantial rights.³⁸

While the Petitioner must show both an error under the standard of review set forth in Idaho Code § 67-5279(3) and prejudice to substantial rights under Idaho Code § 67-5279(4), "nothing in the IAPA requires the courts to address these two requirements in any particular order."³⁹ This Court can affirm the City Council's decision solely on the grounds that Petitioner has not shown prejudice to substantial rights.⁴⁰ And it may completely "forego analyzing

³⁶ Idaho Code § 67-6535(3) (emphasis added).

³⁷ Idaho Code § 67-5279(4).

³⁸ *Krempasky v. Nez Perce County Planning and Zoning*, 150 Idaho 231, 235, 245 P.3d 983, 987 (2010).

³⁹ *Hawkins*, 151 Idaho at 232 (2011).

⁴⁰ *Id.*

whether the governing board erred in a manner specified by Idaho Code. § 67-5279(3) if petitioner cannot show that his or her substantial rights were violated.”⁴¹

Petitioner asserts that its substantial rights were prejudiced because of procedural defects.⁴² Since Petitioner’s brief fails to identify any procedural flaw in the City Council’s approval of the River Edge CUP and makes no assertion of procedural error in the P&Z approval, it seems Petitioner’s argument rests on a claim that the City Council violated its due process rights “by failing to adopt adequate findings of fact to show support for the conclusions of law the City is required to reach under City Code.”⁴³ In this assertion, Petitioner relies on *Hawkins v. Bonneville County Bd. of Com’rs*⁴⁴ and *Jasso v. Camas County*⁴⁵ to elevate displeasure in the outcome of the River Edge CUP into prejudice of a substantial right. But neither of these cases transforms non-applicant Petitioner’s basic rights of due process and procedural fairness into substantial rights.

Contrary to Petitioner’s claims, *Hawkins* makes a clear distinction between the permit applicant and the non-applicant opponent on the subject of substantial rights, pointing out that the non-applicant opponent cannot claim harm to a substantial right merely in the substantive misapplication of an ordinance:

[W]hen a petitioner *opposes* a governing board's decision to grant a permit authorizing development, as *Hawkins* has, the petitioner must still show, not merely allege, real or potential prejudice to his or her substantial rights. Since a party *opposing* a landowner's request for a development permit has no substantial

⁴¹ *Id.*

⁴² Petitioner’s Brief at 24-26.

⁴³ Petitioner’s Brief at 26.

⁴⁴ 151 Idaho 228, 254 P.3d 1224 (2011).

⁴⁵ 151 Idaho 790, 264 P.3d 897 (2011).

right in seeing someone else's application adjudicated correctly, he or she must therefore show something more. The petitioner opposing a permit must be in jeopardy of suffering substantial harm if the project goes forward, such as a reduction in the opponent's land value or interference with his or her use or ownership of the land. It would be instructive to look to law relating to property rights, nuisance, and trespass when determining if a substantial right is at stake in a case such as this.

Thus, (...) it is not enough that Hawkins may be able to show that the County substantively misapplied its own ordinance. The Board does not prejudice Hawkins' substantial rights merely by incorrectly adjudicating someone else's application for a variance.⁴⁶

Petitioner, as the non-applicant opponent in the case at hand, cannot claim harm to a substantial right by asserting that the City failed to condition the River Edge CUP on Boise City Code § 11-06-04.14. *Hawkins* is clear Petitioner has no such right to seeing Intervenor's CUP application adjudicated correctly.⁴⁷

Petitioner's reliance on *Jasso v. Camas County*⁴⁸ is equally flawed. In *Jasso*, the Court found there was "utter failure" on the part of the Camas County Board of Commissioners to provide a decision that could facilitate judicial review.⁴⁹ "Due to the inadequacy of the Board's findings and conclusions, neither the district court nor [the Idaho Supreme] Court possesses the information necessary to meaningfully review the Board's approval of the preliminary plat

⁴⁶ *Hawkins*, 151 Idaho at 233 (internal citations omitted).

⁴⁷ Respondent asserts the P&Z was never required, by the plain language of the ordinance, to condition the River Edge CUP on Boise City Code § 11-06-04.14. This is especially true in light of the parking standards set forth in Boise City Code § 11-10-01.01, Table 1, which were applicable to and met by Intervenor. If the language of an ordinance is unambiguous (where reasonable minds do not differ nor are uncertain as to its meaning), an ordinance is given its plain meaning. *See, Jasso v. Camas County*, 151 Idaho 790, 798, 264 P.3d 897, 905 (2011).

Had the P&Z been required to condition the CUP on Boise City Code § 11-06-04.14, following Petitioner's logic, the CUP would have been required to have conditions related to, for example, noise and vibration (*see*, § 11-06-04.14(D)) and hours of operation (*see*, § 11-06-04.14(E)).

⁴⁸ 151 Idaho 790, 264 P3d 879 (2011).

⁴⁹ 151 Idaho at 797.

application.”⁵⁰ The Court held in *Jasso* that, “the Board’s failure to provide a reasoned statement for its decision prejudiced [the parties’] substantial right to due process.”⁵¹

It cannot be rationally argued that the City Council, after its review of the record and consideration of extensive testimony about parking standards and parking concerns,⁵² failed to return adequate findings and conclusions or failed to provide a reasoned statement for its decision of April 17, 2012.⁵³ At a minimum, the City Council could have simply adopted the P&Z findings and conclusions⁵⁴ because Idaho Code § 67-6535 requires only that findings and conclusions be made.⁵⁵ However on April 24, 2012, the City Council did formally adopt its Reason for Decision and Conditions of Approval clearly setting forth the elements considered, the facts measured as important, the Zoning Ordinance standards used and interpreted, and the site-specific conditions that were deemed necessary and appropriate for the River Edge CUP.⁵⁶ Therefore, Petitioner’s reliance on *Jasso* to claim prejudice to its substantial rights is erroneous.

Petitioner has provided nothing more than conclusory allegations of prejudice to imagined substantial rights. As such, Petitioner has failed to meet its burden under Idaho Code § 67-5279(4) and, regardless of any other facts argued, this Court can affirm the City Council’s decision and dismiss the Petitioner’s appeal instantly.⁵⁷

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² R. pp. BC 121-122, 114-115, 125; Tr. Boise City Council Meeting (April 17, 2012) pp. 6-11, 17-19, 21-23, 25, 27, 29-34.

⁵³ See, City Council’s Reason for Decision and Conditions of Approval, formally adopted April 24, 2012 at R. pp. BC 284-287.

⁵⁴ R. pp. BC 108-111.

⁵⁵ *Cowan v. Board of Com’rs of Fremont County*, 143 Idaho 501, 511, 148 P. 3d 1247, 1257 (2006).

⁵⁶ R. pp. BC 284-287.

⁵⁷ See, *Hawkins*, 151 Idaho at 232.

D. The City Council did not err in a manner specified in Idaho Code § 67-5279(3) when it approved the River Edge CUP for a height exception.

Because of Respondent and Intervenor's indistinguishable interests in this case, and in the interests of brevity and ease of this Court's review, Respondent hereby concurs with and adopts the arguments proffered by the Intervenor concerning the standards of Idaho Code § 67-5279(3) and Petitioner's failure to demonstrate error by the City Council. These arguments are set out in Intervenor's Brief on pages 10-19, and Respondent adopts them in whole and with minor additions, as follows.

In this appeal, except for the significant financial interests Intervenor alone has in the matter, the Respondent and Intervenor possess identical interests in seeing the City Council's decision of April 17, 2012, upheld. Petitioner's failure to address the applicable standards of Idaho Code § 67-5279(3), coupled with Petitioner's assertion of irrelevant⁵⁸ or simply unaddressed⁵⁹ issues on appeal, left the Respondent and Intervenor wondering how best to relate Petitioner's arguments to Idaho Code § 67-5279(3) so that the Court is not also equally confused. Additionally, Petitioner's failure to address the applicable Zoning Ordinance sections of § 11-06-04.13(C) and § 11-10-01.01, Table 1,⁶⁰ was mystifying to both Respondent and Intervenor.

⁵⁸ Petitioner's arguments regarding the 1997 Boise City Comprehensive Plan and its incorporation of the Downtown Plan (Petitioner's Brief at 9-11) is perplexing since this legislative history is irrelevant to the City Council's interpretation of its ordinances. Furthermore, Petitioner's second Issue on Appeal (Petitioner's Brief at 7) asserts that the P&Z decision, and the City Council's refusal to overturn it, was made upon unlawful procedure. However, Petitioner never alleges procedural error by the City Council, only disagreement with the City's interpretation of its Zoning Ordinance. The P&Z decision is not subject to judicial review as it is not a final decision, pursuant to Idaho Code § 67-6521(d).

⁵⁹ See, Petitioner's first Issue on Appeal (Petitioner's Brief at 7) regarding the P&Z decision and City Council's refusal to overturn that decision as being in excess of the City Code's authority.

⁶⁰ Boise City Code § 11-06-04.13(C) is the one of seven CUP standards which addresses parking: "That the site is large enough to accommodate the proposed use and all yards, open spaces, pathways, walls and fences, parking,

In summary, the record before this Court is replete with substantial evidence of the City Council's coming to a reasoned decision⁶¹ that this Court cannot now second guess. Upon review, "[t]he district court cannot substitute its judgment for that of the agency as to the weight of the evidence on questions of fact."⁶²

The City Council's performance of its duty as a quasi-judicial agency – by considering how specific facts align with the standards of the Zoning Ordinance – is now “binding on the reviewing court,” even if there was conflicting evidence before the agency⁶³ so long as the determinations are supported by substantial and competent evidence.⁶⁴ Substantial and competent evidence is “relevant evidence which a reasonable mind might accept to support a conclusion.”⁶⁵

In addition to the burden of establishing both standing and prejudice to substantial rights, Petitioner has the burden of proving that the City Council erred in at least one of the standards of review set out in Idaho Code § 67-5279(3). As noted above, “There is a strong presumption favoring the validity of a governing board's zoning decisions, including its application and interpretation of its own zoning ordinance.”⁶⁶ The P&Z was not required to adopt the specific

loading, landscaping and such other features as are required by this title.” (emphasis added). Boise City Code § 11-10-01.01, Table 1, sets forth the amount of parking “required by this title”: 1.5 spaces per dwelling unit plus 1 guest space per 10 units.

⁶¹ Tr. Boise City Council Meeting (April 17, 2012) pp. 34-40.

⁶² *Cowan v. Bd. Of Com'rs of Fremont Cnty.*, 143 Idaho 501, 508, 148 P.3d 1247, 1254 (2006) (paraphrasing Idaho Code § 67-5279(1)); *See also, Marcia T. Turner, L.L.C. v. City of Twin Falls*, 144 Idaho 203, 209, 159 P.3d 840, 845 (2007).

⁶³ *See, Fischer v. City of Ketchum*, 141 Idaho 349, 352, 109 P.3d 1091, 1094 (2005).

⁶⁴ *Wohrle v. Kootenai County*, 147 Idaho 267, 274, 207 P.3d 998, 1005 (2009).

⁶⁵ *Wohrle*, 147 Idaho at 274 (quoting *Lamar Corp. v. City of Twin Falls*, 133 Idaho 36, 43, 981 P.2d 1146, 1153 (1999)).

⁶⁶ *Marcia T. Turner, L.L.C. v. City of Twin Falls*, 144 Idaho 203, 209, 159 P.3d 840, 845 (2007).

findings and conclusions addressing the Zoning Ordinance CUP standards.⁶⁷ The City could rely on the parking standards set out in its own Zoning Ordinance to decide the River Edge CUP for a height exception was appropriate and well-supported by the evidence. For these reasons, Petitioner's claims must fail.

E. Petitioner is not entitled to attorney's fees.

Petitioner's request for attorney's fees was not properly pled in its Issues on Appeal⁶⁸ and, therefore, should be denied. Idaho Appellate Rule 41(a) requires that, "Any party seeking attorney fees on appeal must assert such a claim *as an issue presented on appeal* in the first appellate brief filed by such party as provided by Idaho Appellate Rule 35(a)(5) and 35(b)(5)."⁶⁹ Appellant (Petitioner) is obligated to "*indicate in the division of issues on appeal that appellant is claiming attorney fees and state the basis for the claim.*"⁷⁰ Idaho Appellate Rule 35(b)(5) requires the same formality of pleadings by the Respondent and, as such, has been set forth as an Addition Issue Presented on Appeal, above.

Even if this Court determines the pleadings were adequate, Petitioner's demand for fees is not warranted. Attorney's fees can only be awarded under Idaho Code § 12-117 if: 1.) the Court finds in favor of a party, and 2.) the other party acted without a reasonable basis in fact or law.⁷¹ According to the Idaho Supreme Court, it is necessary "to determine whether there was

⁶⁷ Petitioner asserts numerous times that the P&Z and City Council were required to address each of the conditions set forth in Boise City Code § 11-06-04.14. This assertion is not supported by law and is contrary to the plain language of the ordinance. See Footnote 47.

⁶⁸ Petitioner's Brief at 7.

⁶⁹ IAR 41(a)(emphasis added).

⁷⁰ IAR 35(a)(5)(emphasis added).

⁷¹ *Burns Holdings, LLC v. Madison County Bd. of County Com'rs*, 147 Idaho 660, 664, 214 P.3d 646, 650 (2009).

no authority at all for the agency's actions."⁷² If an agency has no authority to take a particular action, it is said to act without a reasonable basis in fact or law.⁷³ For the reasons argued herein, the City Council was not acting outside the scope of its authority when it denied the Petitioner's appeal and affirmed the P&Z approval of the River Edge CUP. LLUPA empowers the City Council to take the action it took. Therefore, Petitioner should not be awarded attorney's fees in this matter.

F. Respondent is entitled to attorney's fees pursuant to Idaho Code § 12-117 because Petitioner challenged the City Council's approval of River Edge CUP without any reasonable basis in fact or law.

The arguments presented herein and within the Intervenor's Brief establish that Respondent is entitled to attorney's fees awarded by this Court. There is no basis in law for Petitioner's continued insistence⁷⁴ that the P&Z was *required* to make its River Edge CUP approval contingent upon the specified conditions set out in Boise City Code § 11-06-04.14. And the absurdity of that insistence is borne out in the way that some of the conditions of Boise City Code § 11-06-04.14 are outright inapplicable to the River Edge CUP. Following Petitioner's logic, the P&Z would have been required to add conditions related to, for example, noise and vibration⁷⁵ and hours of operation.⁷⁶

⁷² *Wohrle v. Kootenai County*, 147 Idaho 267, 276, 207 P.3d 998, 1007 (2009) (quoting *Ralph Naylor Farms, LLC v. Latah County*, 114 Idaho 806, 809, 172 P.3d 1081, 1084 (2007)).

⁷³ *Fischer v. City of Ketchum*, 141 Idaho 349, 356, 109 P.3d 1091, 1098 (2005).

⁷⁴ Petitioner's Brief at 5, 8, 16, 18-21, 24.

⁷⁵ Boise City Code § 11-06-04.14(D).

⁷⁶ Boise City Code § 11-06-04.14(E).

Petitioner has failed to provide any reasonable argument for this Court to overturn the City Council's decision under the applicable standards of review in Idaho Code § 67-5279(3). The City Council has properly decided that the River Edge CUP approval was appropriate based on the Zoning Ordinance and extensive testimony in the record and that the P&Z decision was in no way erroneous. This Court, in turn, should do the same because of Petitioner's failures as outlined and the Court's deference to the City Council's interpretation of its laws.⁷⁷

"The purpose of Idaho Code § 12-117 is to serve as a deterrent to groundless or arbitrary action and to provide a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies should never have made."⁷⁸ Accordingly, Respondent is entitled to be reimbursed for its reasonable attorney's fees incurred in this appeal pursuant to Idaho Code § 12-117.

IV. CONCLUSION

The Petitioner's appeal should be denied, and the decision by the Boise City Council to uphold the decision of the Planning and Zoning Commission should be upheld. The Petitioner has failed to prove requisite standing and has failed to prove that any of its substantial rights have been prejudiced in accordance with Idaho Code § 67-5279(4). In accordance with Idaho Code § 67-5279(3), the Petitioner has not established that the City's action: violated constitutional or statutory provisions; exceeded its statutory authority; was made upon unlawful

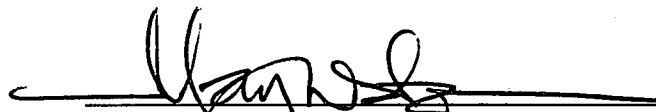
⁷⁷ See, *Marcia T. Turner, LLC v. City of Twin Falls*, 144 Idaho 203, 209, 159 P.3d 840, 845 (2007).

⁷⁸ *Neighbors for a Healthy Gold Fork v. Valley County*, 145 Idaho 121, 143, 176 P.3d 126, 138 (2007).

procedure; was not supported by substantial evidence; or was arbitrary, capricious or an abuse of discretion. As such, the Respondent respectfully requests this Court affirm City Council's decision and deny the Petitioner's appeal.

In addition, the Respondent requests an order granting it reasonable attorney fees against Petitioner pursuant to Idaho Code § 12-117 as there was no reasonable basis in fact or law to support the Petitioner's appeal.

DATED this 30th day of August, 2012.



MARY ELIZABETH WATSON
Assistant City Attorney

CERTIFICATE OF SERVICE

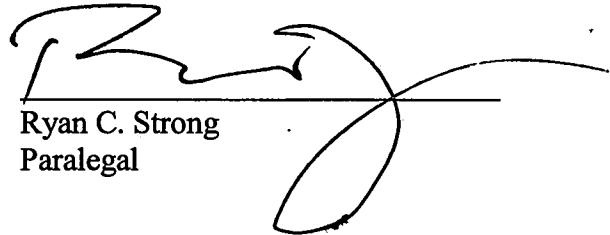
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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

917 LUSK, LLC, an Idaho limited liability
company,

Petitioner,

vs.

CITY OF BOISE CITY, a political subdivision
of the State of Idaho,

Respondent,

and

ROYAL BOULEVARD ASSOCIATES, LP,

Intervenor.

Case No. CV OC 1208871

**INTERVENOR ROYAL
BOULEVARD ASSOCIATES LP'S
RESPONSE BRIEF**

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I. STATEMENT OF THE CASE

Intervenor Royal Boulevard Associates, LP (“Intervenor”) plans to build a multi-family apartment complex called the River Edge Apartments (“River Edge”) along the Boise River near Boise State University (“BSU”) and downtown Boise.¹ Multi-family housing is a permitted use for this location under the Boise City Zoning Ordinance (“BCZO”).² The requested height for River Edge is allowed upon Boise City’s approval of a conditional use permit (“CUP”) pursuant to BCZO § 11-06-04 (“CUP Ordinance”), BCZO § 11-06-06.09 (allowing height exceptions by CUP), and its enabling legislation, Idaho Code § 67-6512 within the Local Land Use Planning Act, Idaho Code §§ 67-6501 *et seq.* (“LLUPA”).

The Boise City Planning and Zoning Commission (“P&Z”) approved a CUP for a height exception for River Edge on March 5, 2012. An adjacent property owner, 917 Lusk, LLC (“Petitioner”), appealed the P&Z’s decision to the Boise City Council (“City Council”), complaining that River Edge would obscure the view of Ann Morrison Park from Petitioner’s office building³ and arguing that the P&Z’s decision did not satisfy certain CUP criteria.⁴ On April 17, 2012, the City Council upheld the P&Z decision based on the BCZO and the record of the P&Z proceedings.⁵ On May 17, 2012, Petitioner filed this judicial review action challenging the City Council’s decision.

¹ P&Z Action Letter (3-6-12) (“Decision Letter”), pp. 1-6, BC pp. 106-111.

² BCZO §§ 11-04-05.03 and 11-04-05.04.

³ Petitioner’s Appeal Letter, p. 3, BC p. 83.

⁴ Petitioner’s Appeal Letter, pp. 2-9, BC pp. 82 to 89.

⁵ City Council Decision Statement, BC pp. 284-287.

II. ADDITIONAL ISSUE PRESENTED ON APPEAL

1. **Did Petitioner challenge the City Council's approval of Intervenor's CUP for River Edge without any reasonable basis in fact or law thus entitling Intervenor to attorneys' fees pursuant to Idaho Code § 12-117?**

III. STATEMENT OF FACTS

Intervenor is part of a family of companies known as the Michaels Organization ("Michaels"), which is one of the nation's largest affordable housing developers.⁶ River Edge is intended primarily as housing for BSU students.⁷ The project is ideally located for this purpose in easy walking or biking distance of the BSU campus, next to the Boise River.⁸

Michaels applied to the City for a CUP for a height exception on November 28, 2011. After an initial delay, the matter was set for hearing on February 6, 2012, where the CUP was approved.⁹ However, two persons associated with Petitioner had left the hearing room and failed to return to testify.¹⁰ To ensure the City received their testimony, at a hearing on February 13, 2012, the City rescinded the approval and continued the hearing until March 5, 2012.¹¹

At the March 5th hearing, City staff informed the P&Z and the audience of the City staff's and City attorney's interpretation of the City's ordinances.¹² In so many words, the staff stated that the multi-family use meets the City's parking ordinance in Title 11, Chapter 10 of the City Code (the "Parking Ordinance"), and that the additional parking issues are not before the P&Z as

⁶ Affidavit of Joseph Coyle in Support of Motion to Intervene, p. 2, par. 3.

⁷ Decision Letter, p. 3, BC p. 108; City Council Decision Statement, BC p. 284; Staff Report (2-6-12), p. 5, in Staff Packet (3-5-12), p. 65, BC p. 198; Applicant Letter (11-28-11), p. 1, BC p. 181; Applicant Letter (2-27-12), p. 1, BC p. 176.

⁸ Decision Letter, p. 3, BC p. 108; City Council Decision Statement, BC p. 284; Staff Report (2-6-12), p. 5, in Staff Packet (3-5-12), p. 65, BC p. 198.

⁹ Boise City Planning and Development Services Memorandum (3-5-12), p. 1, BC 134.

¹⁰ Boise City Planning and Development Services Memorandum (3-5-12), p. 1, BC 134.

¹¹ Boise City Planning and Development Services Memorandum (3-5-12), p. 1, BC 134; P&Z Hearing Minutes (2-13-12), p. 4, BC p. 226.

¹² Staff testimony, P&Z Hearing Minutes (3-5-12) p. 1, BC p. 112

part of the height CUP.¹³ The P&Z followed the advice of staff and based its determination of parking requirements on the standards in the Parking Ordinance.¹⁴ Nonetheless, Petitioner and other parties submitted extensive testimony about parking at the P&Z hearing.¹⁵

Petitioner then appealed to the City Council, which held a hearing on April 17, 2012.¹⁶ Once again, Petitioner and persons supporting Petitioner spoke at length about their parking concerns.¹⁷ City Council members discussed the concerns raised by Petitioner in some detail, ultimately rejecting them.¹⁸ The City Council's decision affirms the P&Z's decision based in part on the City Council's interpretation that the standards in the Parking Ordinance control the parking requirements for a height exception CUP.¹⁹

IV. ARGUMENT

A. Introduction.

Petitioner has the burden to establish (i) that when the City Council affirmed the P&Z's approval of the CUP the City Council erred in at least one of the standards of review specified in Idaho Code § 67-5279(3),²⁰ and (ii) that Petitioner's substantial rights have been prejudiced in accordance with Idaho Code § 67-5279(4).²¹ Petitioner has not met either burden.

¹³ P&Z Hearing Minutes (3-5-12) pp. 1, 15, BC pp. 112, 126; Boise City Planning and Development Services Memorandum (3-5-12), p. 2, BC 135.

¹⁴ P&Z Hearing Minutes (3-5-12), pp. 15, BC pp. 126.

¹⁵ Petitioner testimony, P&Z Hearing Minutes (3-5-12), pp. 9-11, BC pp. 120-122; Public testimony, P&Z Hearing Minutes (3-5-12), p. 13, BC p. 124.

¹⁶ Application for Appeal, BC p. 80; Petitioner's Appeal Letter (3-29-12), pp. 1-15, BC pp. 81-95; City Council Meeting Minutes (4-17-12), p. 20, BC 51; City Council Hearing Minutes (4-17-12) p. 1-40; City Council Decision Statement, BC p. 284.

¹⁷ City Council Meeting Minutes (4-17-12), pp. 6, 9-10, 27, 29-31, 33-34.

¹⁸ City Council Meeting Minutes (4-17-12), pp. 34-40.

¹⁹ City Council Meeting Minutes (4-17-12), pp. 35-38; City Council Decision Statement, BC p. 284.

²⁰ Idaho Code § 67-5279(3) provides:

When the agency was required by the provisions of this chapter or by other provisions of law to issue an order, the court shall affirm the agency action unless the court finds that the agency's findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;

Petitioner’s Brief fails to focus on the pertinent law, which has made it difficult to write a responding brief. Petitioner’s arguments boil down to questioning whether the City may interpret its ordinances to limit parking-related conditions that may be attached to a height exception CUP to those standards set forth in the Parking Ordinance. Yet, Petitioner fails to wrestle with the two provisions in the BCZO that control how much parking is required for a height exception CUP: (1) BCZO § 11-06-04.13(C) in the CUP Ordinance and (2) BCZO § 11-10-01.01 (Table 1) in the Parking Ordinance. BCZO § 11-06-04.13 provides that the P&Z “may approve a conditional use permit when the evidence presented at the hearing is such to establish...[seven standards].”²² Only one of these seven standards addresses parking: BCZO § 11-06-04.13(C), which provides:

That the site is large enough to accommodate the proposed use and all yards, open spaces, pathways, walls and fences, parking, loading, landscaping and such other features as are required by this title.

(emphasis added.) The parking “required by this title” for the proposed use is set forth in BCZO § 11-10-01.01 (Table 1), which requires 1.5 spaces per dwelling unit plus 1 guest space per 10 units. The undisputed evidence in the record shows that River Edge meets this parking standard by providing 280 on-site parking spaces for 175 units.²³ With no basis in law, Petitioner tries to

-
- (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.

If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary.

²¹ *Friends of Farm to Market v. Valley County*, 137 Idaho 192, 196, 46 P.3d 9, 13 (2002).

²² BCZO § 11-06-04.13 (emphasis added).

²³ Staff Report (2-6-12), pp. 3-5, in Staff Packet (3-5-12), pp. 63-65, BC pp. 196-198; Applicant Letter (2-27-12), p. 1, BC 176; Applicant Letter (11-28-11), p. 1, BC p. 181; Applicant testimony, P&Z Hearing Minutes (3-5-

sidestep these controlling ordinance provisions and recast the parking discussion largely as a matter of procedural error or lack of substantial evidence.

Petitioner's Brief also fails to address the applicable bases for overturning a City Council decision under Idaho Code § 67-5279(3), leaving the parties and the Court to try to relate Petitioner's arguments to the applicable standards (which the following sections of this brief attempt to do). For example, Petitioner states in its first "Issue on Appeal" that the P&Z's decision and City's Council's refusal to overturn that decision was in excess of the City's authority. Petitioner's Brief at 7. However, no portion of the Argument in Petitioner's Brief appears to address this issue. Further, the P&Z's action was not a "decision" on which "all remedies have been exhausted under local ordinances" that is subject to judicial review.²⁴ Only the City Council's decision meets this definition.

Similarly, Petitioner states in its second "Issue on Appeal" that the P&Z's decision and City's Council's refusal to overturn that decision was made upon unlawful procedure.²⁵ However, Petitioner never alleges any procedural error by the City Council. Petitioner argues at page 17 of its Brief that the P&Z did not follow the BCZO's "conditional use procedure" by declining to deliberate on testimony about parking and instead relying only on the Parking Ordinance. However, this is not a procedural error at all, but simply Petitioner's disagreement with how the City interpreted its ordinances. Even if this were a legitimate procedural error,

12), p. 3, BC p. 114. Further, Petitioner's Brief does not allege any deficiency with meeting this CUP standard and Petitioner did not allege any deficiencies with meeting this CUP standard in its appeal to City Council.

²⁴ Idaho Code § 67-6521(d).

²⁵ Petitioner's Brief at 7.

which it is not,²⁶ the P&Z's decision is not subject to judicial review and the City Council considered the testimony in the record appropriately.

Throughout its Brief, Petitioner appears to assume without authority that the City was required to consider the imposition of parking standards beyond the Parking Ordinance as part of considering the CUP standards of compatibility or no adverse impact on other properties. Yet Petitioner fails to provide any argument why the plain language of the CUP Ordinance and the Parking Ordinance allow such an interpretation, and Petitioner fails to address why the City's interpretation was "capricious, arbitrary, or unreasonable,"²⁷ thus overcoming the "strong presumption of validity" of the City's interpretation.²⁸

Petitioner clearly wishes the City had interpreted its ordinances differently. However, Petitioner's desire for a different outcome does not give rise to a legal error or create prejudice to Petitioner's substantial rights. Nor does Petitioner's desire for a different outcome entitle Petitioner to file a Petition for Judicial Review without a reasonable basis in law or fact. Petitioner fails to cite controlling legal authority (particularly the standards that govern interpretation of the Parking and CUP Ordinances) and to provide sufficient argument to support its claim that this Court must overturn the City's Council's decision. Petitioner has caused unnecessary delay to the project and unnecessary expense to the City and Intervenor to respond to the Petition. For the reasons described herein, Intervenor asks the Court to uphold the City Council's decision and to order Petitioner to pay Intervenor's attorneys' fees.

²⁶ As explained below, the P&Z followed all notice and hearing procedures for a CUP. Petitioner's disagreement with the P&Z's interpretation of its ordinances as to applicable parking standards does not amount to a procedural error, and, moreover, the P&Z properly applied the parking standards in the CUP Ordinance.

²⁷ *Lane Ranch Partnership v. City of Sun Valley* ("Lane Ranch"), 145 Idaho 87, 91, 175 P.3d 776, 780 (2007) (citing *Enterprise, Inc. v. Nampa City*, 96 Idaho 734, 739, 536 P.2d 729, 734 (1975)).

²⁸ *In re Jerome County Bd. Of Comm'rs*, 281 P.3d 1076 (Idaho 2012); *Krempasky v. Nez Perce County Planning and Zoning*, 150 Idaho 231, 235, 245 P.3d 983, 987 (2010); *See also, Noble v. Kootenai County ex rel. Kootenai County Bd. of Comm'rs*, 148 Idaho 937, 940, 231 P.3d 1034, 1037 (2010).

B. The City Council did not err in a manner specified in Idaho Code § 67-5279(3).

Petitioner's prayer for relief must fail because it has not demonstrated the City Council erred in a manner specified in Idaho Code § 67-5279(3), which provides the following standard of review applicable to this action:

When the agency was required by the provisions of this chapter or by other provisions of law to issue an order, the court shall affirm the agency action unless the court finds that the agency's findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) not supported by substantial evidence on the record as a whole; or
- (e) arbitrary, capricious, or an abuse of discretion.

If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary.

(Emphasis added). Because Petitioner has not established that the City Council has violated any of the enumerated bases of error, the Court must uphold the City Council's approval of the CUP.²⁹

1. The City Council's approval of the CUP was not in violation of constitutional or statutory provisions (Idaho Code § 67-5279(3)(a)).

Petitioner does not raise in its Issues on Appeal that the City Council's decision violated constitutional or statutory provisions.³⁰ Thus, Petitioner cannot demonstrate any violation on this basis and is now precluded from raising this issue in this appeal. The Idaho Supreme Court refuses to consider "arguments raised for the first time in the appellant's reply brief."³¹ Instead, "[a] reviewing court looks only to the initial brief on appeal for the issues presented because

²⁹ See, e.g., *Spencer v. Kootenai County*, 145 Idaho 448, 452, 180 P.3d 487, 491 (2008); *Fischer v. City of Ketchum*, 141 Idaho 349, 352, 109 P.3d 1091, 1094 (2005); *Chisholm v. Twin Falls County*, 139 Idaho 131, 134, 75 P.3d 185, 188 (2003).

³⁰ See Issues on Appeal, Petitioner's Brief at 7.

³¹ *Marcia T. Turner, L.L.C. v. City of Twin Falls*, 144 Idaho 203, 211, 159 P.3d 840 (2007).

those are the arguments and authority to which the respondent has an opportunity to respond in the respondent's brief."³²

Without reference to either Idaho Code § 67-5279(3)(a), the Idaho Constitution, or other controlling legal authority, Petitioner generally asserts that the P&Z's "Reason for the Decision" violated Petitioner's due process rights because the P&Z "refused to resolve factual disputes in the conditional use procedure"³³ and because the P&Z failed to adopt findings of fact addressing the standards in the CUP Ordinance.³⁴ Even if this issue had been properly presented to this Court, Petitioner's broad assertions regarding the P&Z's actions do not provide a basis under Idaho Code § 67-5279(3)(a) for this Court to find that the City Council's approval of the CUP was made in violation of constitutional or statutory provisions. Moreover, Petitioner's general assertions are incorrect.

When considering a CUP request, the P&Z is not required to resolve every factual dispute or even to consider every fact presented in testimony, especially when it deems that testimony irrelevant in light of specific, applicable standards set forth in the BCZO. Rather, the P&Z is required to issue its decision in writing, along with a reasoned statement that explains the relevant facts and law.³⁵ And, the "court shall not substitute its judgment for that of the agency as to the weight of evidence on questions of fact."³⁶ As affirmed by the City Council on appeal, the P&Z properly relied on the standards in the BCZO to approve the CUP.

³² *Id.*

³³ Petitioner's Brief at 24.

³⁴ Petitioner's Brief at 26 (Petitioner argues: "The City violated Petitioner's due process rights by failing to adopt adequate findings of fact to show support for the conclusions of law the City is required to reach under City Code. *BCC* § 11-06-04.13; *see also BCC* § 11-06-04-14. The City specifically did not address the conditional use criteria established in City Code. The failure to adopt such findings and conclusions, alone, is sufficient to prejudice a substantial right of Petitioners.")

³⁵ Idaho Code § 67-6535(2).

³⁶ Idaho Code § 67-5279(1).

Additionally, contrary to Petitioner's assertion, the P&Z is not required to adopt specific findings and conclusions addressing each standard in the CUP Ordinance. The Idaho Code has not required a P&Z decision document to be in the form of findings of fact and conclusions of law since the Legislature amended LLUPA in 1999 to remove this requirement. Instead, as noted, LLUPA requires a decision to "be in writing and accompanied by a reasoned statement" that explains the rationale for the decision based on the relevant law and facts.³⁷ Both the City Council and the P&Z adopted such a reasoned statement.³⁸ Thus, Petitioner's vague claims of due process violations are unfounded.

Petitioner argues at pages 23 through 24 of its Brief that the P&Z's Reason for the Decision fails to meet Idaho Code § 67-6535(2), which provides:

The approval or denial of any application required or authorized pursuant to this chapter shall be in writing and accompanied by a reasoned statement that explains the criteria and standards considered relevant, states the relevant contested facts relied upon, and explains the rationale for the decision based on the applicable provisions of the comprehensive plan, relevant ordinance and statutory provisions, pertinent constitutional principles and factual information contained in the record.

(Emphasis added.) The P&Z adopted a reasoned statement that meets this standard.³⁹ It sets forth the rationale for the decision based on what it believes to be the relevant law and facts, as required by Idaho Code § 67-6535. The Idaho Supreme Court will uphold such a statement when the decisionmaking body includes "the criteria and standards it considered relevant..."⁴⁰ Specifically, as to parking, the decision statement concludes that the requested additional height

³⁷ Idaho Code § 67-6535(b); *Evans v. Teton County*, 139 Idaho 71, 80-81 (2003).

³⁸ Decision Letter, pp. 1-6, BC pp. 106-111; City Council Decision Statement, BC pp. 284-287.

³⁹ Decision Letter, pp. 1-6. 3, BC p. 108-111.

⁴⁰ *Cowan v. Board of Comm'rs of Fremont County*, 143 Idaho 501, 512, 148 P.3d 1274, 1258 (2006). Further, the Idaho Supreme Court has explained, "what is needed for adequate judicial review is a clear statement of what, specifically, the decisionmaking body believes, after hearing and considering all of the evidence, to be the relevant and important facts upon which its decision is based." *Id.* at 511, 1257. (emphasis added).

will not cause the building to exceed applicable parking standards and thus will not adversely affect surrounding properties.⁴¹ Likewise, the City Council appropriately approved this decision statement, as modified to require additional bike parking.

Petitioner has not established, or even properly asserted, that the City Council's approval of the CUP violates any constitutional or statutory provisions.⁴²

2. The City Council's approval of the CUP was not in excess of its statutory authority (Idaho Code § 67-5279(3)(b)).

Petitioner fails to demonstrate or even address how the City Council's decision is in excess of its statutory authority. On page 16 of its Brief, Petitioner cites to general standards applicable to the P&Z's treatment of CUP requests, including:

- The requirement for a public hearing;
- The requirement for the P&Z to determine whether or not the use would cause any damage, hazard, nuisance, or other detriment to persons or property in the vicinity; and
- The requirement for the P&Z to approve, deny or modify the application and to impose any necessary conditions.

However, Petitioner's Brief does not demonstrate, or even allege, that these general requirements were not met. Likewise, Petitioner did not raise this argument in its appeal to City Council.

In fact, the P&Z held a public hearing at which Petitioner, its counsel and its supporters testified in person and/or in writing. The P&Z considered adverse impacts on surrounding properties, and made a decision on the application with conditions the City deemed necessary to allow the requested height exception.⁴³ The City Council considered Petitioner's appeal in

⁴¹ Decision Letter, p. 3, BC p. 108.

⁴² Petitioner states on page 15 of its Brief that a CUP may not be granted without compliance with Idaho Code § 67-6512(a). This is not accurate, as this section of LLUPA is an enabling statute that is only relevant to the validity of the City's ordinance. LLUPA sets forth the terms that must be included in the City's ordinance and then the City's ordinance controls. Petitioner is not challenging the validity of the City's ordinance and has not raised any specific arguments that the City's decision did not comply with Section 67-6512(a).

⁴³ P&Z Hearing Minutes (3-5-12), pp. 1-17, BC pp. 112-128; Decision Letter, pp. 1-6, BC pp. 106-111.

accordance with the hearing procedures and standards set forth in the BCZO⁴⁴ and found no error with the P&Z's decision.⁴⁵ Thus, the P&Z and City Council acted within their statutory authority.

3. The City Council's approval of the CUP was not made upon unlawful procedure (Idaho Code § 67-5279(3)(c)).

Petitioner's Brief does not cite a single procedural violation by the City. In fact, the P&Z provided proper notice, held a public hearing (and even provided an additional public hearing to accommodate Petitioner, who left the hearing room and missed the opportunity to testify at the first hearing), recorded the hearing, and issued a written decision in the required format.⁴⁶ Petitioner also did not allege specific procedural violations in its City Council appeal, and, regardless, the City Council found no procedural error in the P&Z's approval. Petitioner, its counsel and supporter participated extensively throughout both the P&Z and City Council proceedings.

Throughout its brief, Petitioner attempts to recast the fact that the City interpreted its ordinances not to allow the imposition of parking conditions beyond those in the Parking Ordinance as "procedural errors" for failing to consider Petitioner's testimony or failing to follow CUP procedures.⁴⁷ These arguments are without merit. Petitioner's disagreements with the City's interpretation of its ordinances and with the City's substantive decision do not constitute procedural errors.

⁴⁴ BCZO § 11-03-07.05.

⁴⁵ City Council Meeting Minutes (4-17-12), pp. 34-40; City Council Decision Statement, BC pp. 284-287.

⁴⁶ Decision Letter, pp. 1-6, BC pp. 106-111.

⁴⁷ Petitioner claims the P&Z did not take a "rigorous look" at the potential adverse impacts of the requested CUP on surrounding properties but instead "made the conclusory statement that there was adequate parking." Petitioner's Brief at 19. There is no legal standard requiring a "rigorous" look, but nonetheless, the P&Z decision demonstrates that the P&Z did consider the potential adverse impacts of the requested P&Z on surrounding properties. Decision Letter, p. 3, BC p. 108. Further, as to parking, the P&Z appropriately applied the standard set forth in the Parking Ordinance and concluded, based on the undisputed evidence in the record, that the standard was met.

Petitioner has not established that the City Council's approval of the CUP was made upon unlawful procedure.

4. The City Council's approval of the CUP is supported by substantial evidence in the record as a whole (Idaho Code § 67-5279(3)(d)).

Petitioner fails to demonstrate how the P&Z's decision, upheld by the City Council, was not supported by substantial evidence in the record. For the CUP approval as a whole, and for each CUP standard, the record is ample.

The following summary of record support relates to those CUP standards challenged by Petitioner in its City Council appeal⁴⁸ and in Petitioner's Brief.⁴⁹

a. Compatibility to other uses in the general neighborhood.

- There are numerous buildings of similar height in the immediate vicinity, including Petitioner's own building next door that also received a height exception.⁵⁰
- River Edge provides ample separation from shorter structures.⁵¹
- The additional height does not increase the density to the point it exceeds the parking standards in the BCZO.⁵²
- The additional height will not create privacy concerns given that adjacent uses consist of offices and park land.⁵³
- The additional height allows podium parking which creates a desirable aesthetic for the neighborhood; it minimizes surface parking, creates a better streetscape, and creates a more pedestrian friendly environment.⁵⁴

⁴⁸ “[I]ssues not raised below but raised for the first time on appeal will not be considered or reviewed.” *Whitted v. Canyon County Board of Comm'rs*, 137 Idaho 118, 122, 44 P.3d 1173, 1177 (2002).

⁴⁹ “A reviewing court looks only to the initial brief on appeal for the issues presented because those are the arguments and authority to which the respondent has an opportunity to respond in the respondent's brief.” *Marcia T. Turner, L.L.C. v. City of Twin Falls*, 144 Idaho 203, 211, 159 P.3d 840 (2007).

⁵⁰ Decision Letter, p. 3, BC p. 108; Staff Report (3-5-12), pp. 2-3, in Staff Packet (3-5-12), pp. 2-3, BC pp. 135-136; Staff Report (2-6-12), pp. 6-8, in Staff Packet (3-5-12), pp. 66-68, BC pp. 199-201; Applicant testimony, P&Z Hearing Minutes (3-5-12), p. 5, BC p. 116; Staff testimony, P&Z Hearing Minutes (3-5-12), p. 1, BC p. 112.

⁵¹ Decision Letter, p. 3, BC p. 108; Staff Report (2-6-12), p. 6, in Staff Packet (3-5-12), p. 66, BC p. 199.

⁵² Decision Letter, p. 3, BC p. 108; Staff Report (2-6-12), p. 8, in Staff Packet (3-5-12), p. 68, BC p. 201.

⁵³ Decision Letter, p. 3, BC 108.

⁵⁴ Decision Letter, p. 3, BC 108; Applicant testimony, P&Z Hearing Minutes (3-5-12), p. 7, BC 118.

b. No adverse affect on other property in the vicinity.

- River Edge will provide 280 parking spaces for 175 units to satisfy the Boise Zoning Ordinance parking requirement of 1.5 spaces per dwelling unit and 1 guest space per 10 units.⁵⁵
- The additional height does not increase the density to the point it exceeds parking standards. This should prevent overflow parking from spilling into the neighborhood.⁵⁶
- River Edge parking is consistent with parking ratios provided by Boise State University housing developments.⁵⁷
- River Edge will promote the use of zip-cars and provide 5-6 stalls within the parking garage for zip-car use, which may be rented by the hour or by the day.⁵⁸
- River Edge will promote bicycle use, U-bikes and rental bikes and will provide secured bicycle parking on site.⁵⁹
- The proposed building height does not obstruct pedestrian views of the river any more than a 35-foot building would, and the pedestrian pathway mitigates this impact.⁶⁰
- The operating characteristics of the multi-family development do not conflict with the surrounding uses. The area is comprised of other multi-family developments, office and industrial uses that are of similar or greater intensity to River Edge.⁶¹
- The increase in traffic generated by the development is offset by the potential for existing businesses to capitalize on the increase in customers to the surrounding neighborhood as well as by access to bus stops and the greenbelt.⁶²
- The traffic generated by this development is mitigated by its intended use as student housing and the fact that the site is served by many modes of transportation. Boise

⁵⁵ Staff Report (2-6-12), p. 3, in Staff Packet (3-5-12), p. 63, BC p. 196.

⁵⁶ Decision Letter, p. 3, BC p. 108; Staff Report (2-6-12), p. 8, in Staff Packet (3-5-12), p. 68, BC p. 201.

⁵⁷ Staff testimony, P&Z Hearing Minutes (3-5-12), p. 1, BC p. 112; Boise State University Parking Ratios for Select On-Campus Housing Properties (3-2-12) (describing parking to bedroom ration range of .34-.54), BC p. 261; Applicant letter (2-27-12), in Staff Packet (3-5-12), p. 43, BC p. 176 (describing 622 bedrooms and 280 parking spaces for a parking to bedroom ratio of .45).

⁵⁸ Applicant testimony, P&Z Hearing Minutes (3-5-12), p. 4, BC p. 115.

⁵⁹ Applicant testimony, P&Z Hearing Minutes (3-5-12), p. 4, BC p. 115.

⁶⁰ Decision Letter, p. 3, BC p. 108; Staff Report (2-6-12), pp. 6, 8, in Staff Packet (3-5-12), pp. 66, 68, BC pp. 199, 201.

⁶¹ Staff Report (2-6-12), p. 8, in Staff Packet (3-5-12), p. 68, BC p. 201.

⁶² Staff Report (2-6-12), p. 8, in Staff Packet (3-5-12), p. 68, BC p. 201.

State University provides bus service only one block away, which runs every 20 minutes on weekdays. The project is next to the greenbelt, which allows a direct walking/biking path to Boise State University, which is only ¼ mile away.⁶³

Petitioner's criticisms of some of this evidence (e.g., Petitioner's allegation on page 19 of its Brief that some buildings used as a point of comparison for height compatibility have different base zoning) do not provide a basis for this Court to overturn the City Council's decision. "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 evidence in the record."⁶⁴ Further, Petitioner dismisses its own argument, stating on page 20 of its Brief: "The Project, at the height requested, arguably may be compatible with other buildings in the area."

Petitioner has not established that the City Council's approval of the CUP was unsupported by substantial evidence in the record.

5. The City Council's approval of the CUP was not arbitrary, capricious or an abuse of discretion (Idaho Code § 67-5279(3)(e)).

Petitioner argues that the City Council's decision was arbitrary, capricious or an abuse of discretion because the P&Z did not consider parking effects on the surrounding neighborhood.⁶⁵ This argument has no merit.

As described above, the core authorities in this case are BCZO § 11-06-04.13(C) (in the CUP Ordinance) and BCZO § 11-10-01.01 (Table 1) (in the Parking Ordinance). BCZO § 11-06-04.13 provides that the P&Z "may approve a conditional use permit when the evidence presented at the hearing is such to establish...[seven standards]." BCZO § 11-06-04.13

⁶³ Decision Letter, p. 3, BC p. 108; Staff Report (2-6-12), p. 7, in Staff Packet (3-5-12), p. 67, BC p. 200.

⁶⁴ *Whitted v. Canyon County Board of Comm'rs*, 137 Idaho 118, 121, 44 P.3d 1173, 1176 (2002); *See also, Friends of Farm to Market v. Valley County*, 137 Idaho 192, 196, 46 P.3d 9, 13 (2002).

⁶⁵ Petitioner's Brief at 21, 23.

(emphasis added). Only one of these seven standards addresses parking: BCZO § 11-06-04.13(C), which provides:

That the site is large enough to accommodate the proposed use and all yards, open spaces, pathways, walls and fences, parking, loading, landscaping and such other features as are required by this title.

(emphasis added.) The parking “required by this title” for the proposed use is set forth in BCZO § 11-10-01.01 (Table 1), which requires 1.5 spaces per dwelling unit plus 1 guest space per 10 units. The undisputed evidence in the record shows that River Edge meets this parking standard by providing 280 on-site parking spaces for 175 units.⁶⁶

The first step in interpreting an ordinance is to look at the plain language of the enactment. If the language is unambiguous, the analysis ends there.⁶⁷ If the ordinance is ambiguous, the City’s interpretation is entitled to a “strong presumption of validity.”⁶⁸ The City’s interpretation may be overturned only if it is “capricious, arbitrary or unreasonable.”⁶⁹

The plain language of BCZO § 11-06-04.13(C) and BCZO § 11-10-01.01 (Table 1) supports the City’s decision that the standards in the Parking Ordinance control. The only CUP standard addressing parking defers to the Parking Ordinance, which includes uniform standards for all uses, a requirement of LLUPA.⁷⁰ Nothing in the plain language of the compatibility or

⁶⁶ Staff Report (2-6-12), pp. 3-5, in Staff Packet (3-5-12), pp. 63-65, BC pp. 196-198; Applicant Letter (2-27-12), p. 1, BC 176; Applicant Letter (11-28-11), p. 1, BC p. 181; Applicant testimony, P&Z Hearing Minutes (3-5-12), p. 3, BC p. 114. Further, Petitioner’s Brief does not allege any deficiency with meeting this CUP standard and Petitioner did not allege any deficiencies with meeting this CUP standard in its appeal to City Council.

⁶⁷ *Payette River Property Owners Ass’n v. Bd. of Comm’rs of Valley County*, 132 Idaho 551, 557, 976 P.2d 477, 483 (1999).

⁶⁸ *In re Jerome County Bd. Of Comm’rs*, 281 P.3d 1076 (Idaho 2012); *Krempasky v. Nez Perce County Planning and Zoning*, 150 Idaho 231, 235, 245 P.3d 983, 987 (2010); *See also, Noble v. Kootenai County ex rel. Kootenai County Bd. of Comm’rs*, 148 Idaho 937, 940, 231 P.3d 1034, 1037 (2010).

⁶⁹ *Lane Ranch*, 145 Idaho at 91, 175 P.3d at 780.

⁷⁰ Idaho Code § 67-6511.

adverse impact standards requires the City to consider a different parking standard for a height CUP.⁷¹

Petitioner argues at page 18 of its Brief that the express parking requirement in BCZO § 11-06-04.13(C) – which falls within the City’s conditional use permit standards – only applies to allowed uses and not conditional uses. This argument is contradicted by the plain language of the CUP Ordinance. As noted above, the P&Z “may approve a conditional use permit when the evidence presented at the hearing is such to establish...That the site is large enough to accommodate the proposed use and all yards, open spaces, pathways, walls and fences, parking, loading, landscaping and such other features as are required by this title.” BCZO § 11-06-04.14C (emphases added). Petitioner’s provision of 280 on-site parking spaces for 175 units meets this standard; therefore the P&Z “may approve” the CUP on that basis.

Even if the Court deems the CUP and Parking Ordinances to be ambiguous, the City’s interpretation is not “capricious, arbitrary or unreasonable.”⁷² At the outset, it is reasonable for the City to rely simply on the express reference in BCZO § 11-06-04.13(C) tying compliance to the Parking Ordinance. The City has adopted detailed parking standards in the Parking Ordinance, which Petitioner has not challenged. The City quite reasonably is not obliged to revisit those standards in reviewing every CUP and could reasonably conclude that a use meeting the requirements of the Parking Ordinance will be compatible with its neighbors and will not cause an adverse impact because the Parking Ordinance adequately ensures there will be enough parking on-site not to adversely impact surrounding properties.

Further, the City could reasonably focus on BCZO § 11-06-04.13(C) and discount the importance of the compatibility and adverse impact criteria in this case because a height

⁷¹ BCZO § 11-06-04.13(A) and (D).

⁷² See *Lane Ranch*, 145 Idaho at 91, 175 P.3d at 780.

exception CUP is an unusual form of CUP. The issue in this kind of CUP is not the use; the multi-family use is an approved use in the R-O zone. Rather, the issue is only to assess the impact of the height on surrounding properties. BCZO § 11-06-04.13(C) is directly relevant to this consideration in that it focuses on the size of the site and places a natural limit on the height because the developer can only include the number of units for which the required number of parking spaces to serve those units will fit within the site.

The compatibility and adverse impact criteria that Petitioner alleges the City failed to address do not have the same natural connection to a height CUP. These criteria make sense when the permit is about use: e.g. is a warehouse, with the attendant noise, truck traffic and hours of operation, compatible with residential neighbors? Does it have adverse impacts on neighbors that can be mitigated through conditions in a CUP? When compatibility and adverse impact are about height, the application of these criteria is more narrow: i.e. what impact does the building height have on neighbors? The City addressed this issue sensibly by looking at whether River Edge is a similar height to nearby buildings, which it is. Meanwhile, Petitioner faults the City for not assessing a much more indirect connection, that more height means more units means more parking means more impact means less compatibility. Yet, nowhere does Petitioner demonstrate that it was “arbitrary, capricious or unreasonable” for the City to conclude that the adequacy of the parking is decided by the CUP and Parking Ordinance provisions that specifically address this issue, as compared to provisions that relate only indirectly to parking, if at all.

In short, no provision of LLUPA or the BCZO requires specific consideration of parking for a CUP except as to whether the parking spaces required by the BCZO fit within the site—a fact that is both true and unchallenged.

Further, notwithstanding the clarity of the ordinances, the testimony and other evidence in the record reflects a substantial discussion showing the reasonableness of applying the Parking Ordinance requirements to River Edge. As summarized above, River Edge will provide student housing that will require parking in a ratio comparable to similar BSU housing developments.⁷³ River Edge promotes zip cars and bicycle use and is located adjacent to the greenbelt, downtown, and Boise State University, with bus shuttle service to the campus.⁷⁴ And, the additional height requested by the CUP does not increase the number of units to the point it exceeds the BCZO's parking standards, which should prevent overflow parking from spilling into the neighborhood.⁷⁵

The City Council reasonably interpreted all BCZO requirements for the CUP. Petitioner has not established that the City Council's approval of the CUP was arbitrary, capricious or an abuse of discretion.

C. No substantial right of Petitioner has been prejudiced, as required by Idaho Code § 67-5279(4).

Regardless of any alleged error specified in Idaho Code § 67-5279(3), the City Council's approval of the CUP must be affirmed unless "substantial rights of the appellant have been prejudiced."⁷⁶ Mere conclusory allegations that property rights have been prejudiced are not sufficient to prove prejudice to substantial rights.⁷⁷ Petitioner has not met this burden and, therefore, its prayer for relief must fail.

⁷³ Staff testimony, P&Z Hearing Minutes (3-5-12), p. 1, BC p. 112; Boise State University Parking Ratios for Select On-Campus Housing Properties (3-2-12), BC p. 261; Applicant letter (2-27-12), in Staff Packet (3-5-12), p. 43, BC p. 176.

⁷⁴ Applicant testimony, P&Z Hearing Minutes (3-5-12), p. 4, BC p. 115.

⁷⁵ Decision Letter, p. 3, BC p. 108; Staff Report (2-6-12), p. 8, in Staff Packet (3-5-12), p. 68, BC p. 201.

⁷⁶ Idaho Code § 67-5279(4).

⁷⁷ *Krempasky v. Nez Perce County Planning and Zoning*, 150 Idaho 231, 235, 245 P.3d 983, 987 (2010).

Petitioner alleges its substantial rights were prejudiced because the P&Z granted the CUP “without following the proper procedure.”⁷⁸ However, as discussed above, Petitioner has not identified any procedural flaw in the approval and in fact all procedural requirements for the CUP application and associated hearings were met. Petitioner’s disagreement with the City Council’s interpretation of its own ordinances or with the City Council’s substantive conclusions does not create an unlawful procedure.

Petitioner also argues: “The City specifically did not address the conditional use criteria established in City Code. The failure to adopt such findings and conclusions, alone, is sufficient to prejudice a substantial right of Petitioners.”⁷⁹ As discussed above, the City is not required to adopt specific findings and conclusions addressing each standard but rather must simply adopt a reasoned statement that explains the rationale for the decision based on the relevant law and facts, which it did.

Even though the P&Z was not required to consider (or even allow) testimony on topics such as parking concerns given that the applicable parking standards were met, the P&Z did not prohibit Petitioner from presenting such testimony, and both Petitioner and Intervenor submitted a great deal of testimony and evidence regarding parking into the record.⁸⁰

Petitioner has not established how the City Council’s decision to grant River Edge a height exception, made in accordance with the BCZO, prejudices Petitioner’s substantial rights. Petitioner is not entitled to any particular view from its office building, and Petitioner has no

⁷⁸ Petitioner’s Brief at 24.

⁷⁹ Petitioner’s Brief at 26.

⁸⁰ Petitioner testimony, P&Z Hearing Minutes (3-5-12), pp. 10-11, BC pp. 121-122; Applicant testimony P&Z Hearing Minutes (3-5-12), pp. 3, 4, 14, BC pp. 114-115, 125; Petitioner testimony, City Council Hearing Minutes (4-17-12), pp. 6-11, 27, 29-31, 33-34; Applicant testimony, City Council Hearing Minutes (4-17-12), pp. 17-19, 21-23, 25, 31-33.

right to more process or stricter standards for a neighbor's CUP than are set forth in the BCZO. River Edge meets all applicable setbacks and improvement standards, including parking.

D. Petitioner is not entitled to attorneys' fees.

Petitioner argues it is entitled to attorneys' fees under Idaho Code § 12-117 because the City "failed to follow City Code procedures" and to "provide written findings" in accordance with the Idaho Code.⁸¹ Petitioner's Brief does not indicate whether it seeks attorneys' fees from the City alone or from both Intervenor and the City. We will allow the City to speak for itself, but to the extent Petitioner seeks attorneys' fees from Intervenor, its request must be denied.

First, Petitioner's request for attorneys' fees was not properly pled in accordance with applicable rules for a Petition for Judicial Review. Idaho Appellate Rule 41(a) requires that the attorneys' fees request be made "in the first appellate brief . . . as provided by Rules 35(a)(5) and 35(b)(5)."⁸² Idaho Appellate Rule 35(a)(5) requires the appellant to identify its attorneys' fee claim "in the division of issues on appeal." Petitioner did not include a demand for attorneys' fees in its Issues on Appeal,⁸³ and therefore this Court should disregard this issue.

Second, even if this Court finds Petitioner's demand sufficient, an award of attorneys' fees is not warranted under Idaho Code § 12-117. "To award attorney fees under I.C. § 12-117, the Court must not only find that the Board acted without a reasonable basis in fact or law, but it must also find in favor of the party requesting fees."⁸⁴ In assessing an award of fees under this statute, the Idaho Supreme Court looks to "determine whether there was no authority at all for

⁸¹ Petitioner's Brief at 26.

⁸² A judicial review petition to this Court subject to Idaho Rule of Civil Procedure 84(r), which directs that the Idaho Appellate Rules apply to any procedure not specified in Rule 84. Because I.R.C.P. 84 does not prescribe a method for requesting attorney fees, I.A.R. 41(a) is applicable.

⁸³ Petitioner's Brief at 7.

⁸⁴ *Neighbors for a Healthy Gold Fork v. Valley County*, 145 Idaho 121, 138, 176 P.3d 126, 143 (2007).

the agency's actions."⁸⁵ As set forth herein, the City Council had clear authority to affirm the P&Z's issuance of the CUP, and Petitioner's claim that the City failed to follow City Code procedures and to provide written findings have no merit.

Further, Intervenor's involvement in this action has been justified and premised on an objectively reasonable belief that the relevant facts and law support the validity of the CUP. As such, Petitioner's demand for attorneys' fees must be denied.

E. Intervenor is entitled to attorneys' fees.

Intervenor intervened in this case to protect the substantial investment it has made in River Edge and to avoid the cost of further construction delays. The analysis presented herein demonstrates that Petitioner lacked a reasonable factual or legal basis to challenge the CUP. In particular, Petitioner's argument that the P&Z was required to consider testimony about parking, beyond the standards plainly stated in the CUP and Parking Ordinances, has absolutely no basis in law. Further, the City Council properly determined that the P&Z decision was not erroneous based on BCZO standards and testimony in the record. Petitioner has not provided any reasonable argument for this Court to overturn that decision under applicable standards for review.

Accordingly, Intervenor is entitled to be reimbursed for its reasonable attorneys' fees incurred in this appeal under Idaho Code § 12-117(1), which provides:

Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

⁸⁵ *Wohrle v. Kootenai County*, 147 Idaho 267, 276, 207 P.3d 998, 1007 (2009) (citing *Ralph Naylor Farms, L.L.C. v. Latah County*, 144 Idaho 806, 809, 172 P.3d 1081, 1084 (2007)).

The Court is authorized to award fees under Idaho Code § 12-117 to a prevailing applicant/intervenor, which is a party for all purposes under applicable authority.⁸⁶

V. CONCLUSION

Petitioner's argument that the City Council unlawfully affirmed the P&Z's determination with regard to parking, or any other aspect of the CUP, has no reasonable basis in law or fact. The City Council properly decided based on an interpretation its own ordinances and the record of the case to uphold the P&Z's decision.

Petitioner has not met its burden to establish (i) that when the City Council affirmed the P&Z's approval of the CUP, it erred in at least one of the standards of review specified in Idaho Code § 67-5279(3), and (ii) that Petitioner's substantial rights have been prejudiced in accordance with Idaho Code § 67-5279(4). Therefore, this Court must affirm the City Council's decision.

Intervenor respectfully requests this Court to affirm the City Council's approval of the CUP and to order Petitioner to pay Intervenor's attorneys' fees incurred in this appeal.

GIVENS PURSLEY LLP

By: 

Gary G. Allen

By: 

Deborah E. Nelson

*Attorneys for Intervenor Royal Boulevard
Associates LP*

⁸⁶ *Draper v. Board of Comm'rs of Ada County*, Case No. CV OC 0209940D, (4th Dist. December 4, 2003) (awarding attorneys' fees to intervenor) (attached hereto as Exhibit A); *See also Rural Kootenai Org., Inc. v. Bd. of Comm'rs*, 133 Idaho 833, 846 (2000) (awarding attorneys fees against intervenor under Section 12-117); *Gold Hunter Mining & Smelting Co. v. Holleman*, 2 Idaho 839, 27 P. 413, 414 (1891) (holding that intervenor's rights are as comprehensive as the rights of the original parties to the suit).

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of August 2012, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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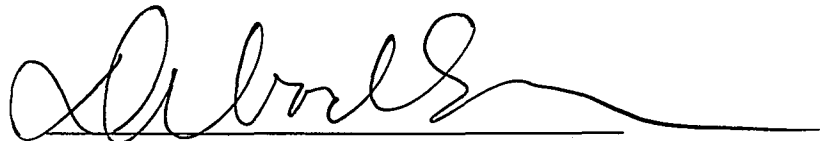
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Deborah E. Nelson

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A.M. _____ P.M. 2:26

DEC 04 2003

J. DAVID NAVARRO, Clerk
By *Martha Lopez*
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

EDWARD A. DRAPER, and DEA J.
DRAPER, husband and wife,

Petitioners,

vs.

BOARD OF COMMISSIONERS of ADA
COUNTY, a political subdivision of the
State of Idaho,

Respondent,

and

BRIGHTON CORPORATION,

Respondents in Intervention.

Case No. CV OC 0209940D

**DECISION AND ORDER
ON APPEAL**

BACKGROUND

This matter is before the Court pursuant to a petition for judicial review filed by Petitioners Edward and Dea Draper (the Drapers). The Drapers are appealing a decision by the Ada County Board of Commissioner (the Board) approving a master site plan submitted by the Brighton Corporation (Brighton).

The Drapers are residents who live near property, owned by Brighton, which is zoned M1, limited industrial. Brighton applied to the Board for

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permission to build and operate warehouse buildings. The application went through all the proper procedures and was approved by the Board in November of 2002. The Drapers then filed this judicial review on December 18, 2002.

DISCUSSION

The Drapers first argue that the Board abused its discretion by not considering compatible development issues. The Drapers concede that Brighton's proposed project meets the minimum zoning requirements and fits within the allowed uses for an M1 zone, but continue on to argue that the Board failed to fully evaluate the compatible development issues.

The five specific objections alleging abuse of discretion presented by the Drapers are light and lighting, noise, traffic, hours of operation, and whether the actual use planned for the property will allow trucking activity that will have the same impact on surrounding properties as would a terminal trucking activity, which is prohibited in M1 zones. Regarding the first four objections, the record has sufficient evidence to support the Board's approval of the project. The Ada County Code established standards for lighting, as well as noise. The Ada County Highway District found that the existing transportation system could handle the additional traffic and the Brighton's plan provides for most of the loading to take place indoors. The Board's decision will not be disturbed merely because there is conflicting evidence in the record.

The Board properly reviewed substantial evidence, made sure the standards in the statute were met, and did not abuse its discretion in approving

the master site plan. Additional compatibility does not arise as an issue when the proposal fits within the statute, as Brighton's warehouse proposal fits within the statute.

Any further arguments regarding the specific standards allowed in an M1 zone and the comprehensive plan are issues of zoning and are untimely. The land at issue in this proceeding was rezoned in March of 2000 and no appeal of that decision was taken.

The Drapers second main argument is that the Board abused its discretion in refusing to consider whether truck delivery uses included in Brighton's proposed master site plan would have the same impact on surrounding existing residential, agricultural, and commercial uses as truck terminal operations that are prohibited in M1 zones. Brighton submitted a proposal to use the land at issue for a warehouse. Evidence in the record, including the design of the buildings, as well as testimony by an architect and a real estate professional, supports Brighton's statement that the area will be used as a warehouse. The proposed warehouse use is within the allowed uses for an M1 zone. The Board was well within its discretion to approve the proposed warehouse project and properly did not expand its perception of the proposed project as that of a truck terminal.

Argument that the Drapers may have a future claim against Brighton regarding the actual use of the property is just that, a future claim. Potential problems are not yet ripe for judicial action. This Court will not consider speculation as to the problems that may or may not arise.

ATTORNEY FEES

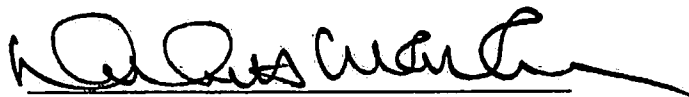
This Court further finds that Brighton is entitled to reasonable attorney fees. I.C. § 12-117. The petition, as brought by the Drapers, was without a reasonable basis in fact or law. The approved proposal was admittedly within the approved confines of an M1 zone and the argument that the warehouse proposal is a truck terminal in disguise is fundamentally flawed. Brighton is therefore awarded reasonable attorney fees to be paid by the Drapers.

CONCLUSION

The Board exercised appropriate discretion in approving Brighton's application. Accordingly the Ada County Board of Commissioner's decision to approve the master site plan submitted by the Brighton Corporation is AFFIRMED.

IT IS SO ORDERED.

Dated this 3^d day of December, 2003.



D. DUFF MCKEE
Senior District Judge

CERTIFICATE OF MAILING

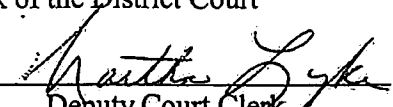
I hereby certify that on this 4th day of December 2003, I mailed a true and correct copy of
the within instrument to:

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Clerk of the District Court

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

917 LUSK, LLC, an Idaho limited liability)
company,)

Petitioner,)

vs.)

CITY OF BOISE CITY, a political)
subdivision in the State of Idaho,)

Respondent,)

and)

ROYAL BOULEVARD ASSOCIATES,)
LP, an Idaho limited partnership,)

Intervenor.)

Case No. CV-OC-2012-08871

REPLY BRIEF

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I.
SUMMARY

The issue before the Court is not confusing or complex, as the Respondent and Intervenor would like the Court to believe. In the straight-forward terms of the Boise City Zoning Ordinance (“Zoning Ordinance” or “City Code”), City Code requires the Boise City (“City” or “Boise”) Planning & Zoning Commission (the “P&Z Commission”) to review, as a conditional use, any request to exceed any height limit set forth in City Code, and that review and decision must be based on the conditional use criteria set forth in City Code.

Conditional uses, by City Code definition (*BCC* § 11-06-04.01) “possess characteristics that require review and appraisal by the Commission to determine whether or not the conditional use would cause any damage, hazard, nuisance or other detriment to persons or property in the vicinity” of the conditional use. The P&Z Commission is to appraise items set forth in City Code—such as parking—and impose any conditions necessary to establish the findings for approval set forth in City Code – such as appropriate conditions of approval related to parking.

The P&Z Commission violated the procedure set forth in City Code when it explicitly refused to appraise and consider parking during its deliberations. No amount of public testimony at the P&Z Commission hearings regarding parking can sanitize the P&Z Commission’s refusal to consider that testimony in its deliberations. The City Council (“Council”) compounded the error when it deliberately ignored the record and upheld the P&Z Commission conditional use approval to exceed the City-established height limit.

The appropriate course of action is for the Court to remand the application back to the City, so the City can follow the procedure set forth in City Code. Petitioner’s only request to Council at its hearing in April 2012 was that the Council remand this matter to the P&Z

Commission for the P&Z Commission to go through the portion of the City’s process that the P&Z Commission missed. Petitioner did not then, and does not now, ask for additional process—just the process set out in City Code. Even today, the City could recognize this request is still all that Petitioner asks and bring this matter back to the City for further proceedings on its own determination. *See* Idaho Code § 67-6510 (allowing the City to require mediation “at any point during the decision-making process or after a final decision has been made”).

II.
REPLY

A. The Council Erred in Upholding the P&Z Commission’s Decision Because the Commission Refused to Follow the Conditional Use Procedure Required Under City Code for any Request to Exceed a Height Limit Established in City Code.

The Respondent and Intervenor base their entire response on the following erroneous conclusion—City Code Section 11-10-01.01 (Table 1) is the sole authority in City Code concerning parking for a conditional use. This position is unsupported by the plain language of City Code. *BCC* §§ 11-04-05.04 (Table 2.1) and (Table 2.2A); 11-04-05.06.D; 11-06-04.14; and 11-06-06.09; *see also* 11-10-01.01 (Table 1) (providing parking standards for allowed uses not conditional uses). City Code requires a review of parking and the impacts on property in the vicinity of a proposed conditional use. The City failed to follow this procedure.

1. City Code Provides a Clear Procedure for Reviewing a Request for Height Exceptions.

The language of City Code is clear and unambiguous regarding the procedure for reviewing a request for a height exception. *BCC* § 11-06-06.09. A request for a height exception must be based on all of the criteria set forth in Section 11-06-04.13. *BCC* §§ 11-04-

05.04 (Table 2.1) and (Table 2.2A);¹ 11-04-05.06.D;² and 11-06-06.09.³ Section 11-06-04.13

provides in pertinent part:

The Commission, following the procedures outlined below, may approve a conditional use permit when the evidence presented at the hearing is such as to establish:

- A. That the location of the proposed use is compatible to other uses in the general neighborhood; and
- B. That the proposed use will not place an undue burden on transportation and other public facilities in the vicinity; and
- C. That the site is large enough to accommodate the proposed use and all yards, open spaces, pathways, walls and fences, parking, loading, landscaping and such other features as are required by this title; and
- D. That the proposed use, if it complies with all conditions imposed, will not adversely affect other property of the vicinity; and
- E. That the proposed use is in compliance with and supports the goals and objectives of the Comprehensive Plan.
- F. Multiple family building (any building containing more than 2 residential units) must be designed to include features which add to the visual and aesthetic appearance of the structure and help prevent a sterile, box-like appearance. Such features may include the use of brick or stone, roof or facade modulation, planter boxes, bay windows, balconies, porches, etc. The Commission or committee must make a finding that specific design features have been added to enhance the physical appearance of such multiple-family residential structures.

BCC §11-06-04.13 (emphasis added). In addition to the review of the criteria set forth in Section 11-06-04.13, the P&Z Commission “shall provide that approval of a conditional use permit shall

¹ Respondent and Intervenor conveniently omit Table 2.2A in their discussion about what constitutes an allowed use and what is treated as a conditional use. *Respondent’s Brief* p. 45; *Intervenor’s Brief* p. 1. A multi-family dwelling taller than thirty-five feet is not an allowed use. It is a conditional use in the R-OD zone.

² Section 11-04-05.06.D provides “Height exceptions, except for roof line features meeting the standards of this section, shall require a commission-level conditional use permit in accordance with the provisions of Section 11-06-06.13 [sic] of the Boise City Code.” *BCC* § 11-04-05.06.D.

³ Section 11-06-06.09 provides “Conditional use approval from the Planning and Zoning Commission is required to exceed the height limits set forth in this ordinance.” Therefore a conditional use permit that includes a height exception must meet the requirements for conditional use permits and the Commission’s decision on a height exception “shall be based upon the criteria set forth in Section 11-06-04.13 (emphasis added). This does not mean a few of the criteria in Section 11-06-04.13, but rather each and every criterion listed in the Section.

be contingent upon compliance with specified conditions.” BCC § 11-06-04.14 (emphasis added); see also Idaho Code § 67-6512(d). Among those conditions that apply are “requirements for off-street parking.” BCC § 11-06-04.14.C.

This does not mean that additional parking conditions must always be imposed for conditional uses or that such conditions must always exceed the off-street parking requirements for allowed uses found in the standard off-street parking requirements of City Code. It does mean, however, that parking must be considered as part of the analysis of a height exception request and, where appropriate, conditions related to parking imposed.

It is not sufficient for the P&Z Commission to consider only a few or even a majority of the criteria in Section 11-06-04.13. In the present case, the P&Z Commission was required to determine the proposed conditional use would not adversely affect other property in the vicinity. That analysis includes whether parking would be sufficient. The P&Z Commission must at the very least consider the criteria. The review necessary for a conditional use involves more than a mere conclusion that City Code Section 11-10-01.01 (Table 1) provides the appropriate level of parking without considering the surrounding circumstances and any of the evidence and testimony presented.

2. Table 1 of Section 11-10-01.01 Does Not Automatically Satisfy the Parking Review Requirements for a Conditional Use.

Respondent and Intervenor claim the phrase “as required by this title” in Section 11-06-04.13.C limits the parking requirements for a conditional use to only those standards found in City Code Section 11-10-01.01 (Table 1). *Intervenor’s Brief* p. 15; *Respondent’s Brief* p. 14. This would be just plain silly if it were not an attempt by Respondent and Intervenor to read conditional uses out of City Code. Section 11-06-04.13.C reads: “That the site is large enough to

accommodate the proposed use and all yards, open spaces, pathways, walls and fences, parking, loading, landscaping and such other features as are required by this title.” The phrase “as required by title” refers to the laundry list of land use components listed in Section 11-06-04.13, not the standards applicable to those land use components.

Respondent and Intervenor’s argument ignore a basic rule of statutory interpretation that requires all provisions of an ordinance to be read to give each effect. *Poison Creek Pub. Inc. v. Central Idaho Pub., Inc.*, 134 Idaho 426, 431, 3 P.3d 1254, 1259 (Ct. App. 2000). If, as Respondent and Intervenor argue, a conditional use needs only to meet the off-street parking requirements of Section 11-10-01.01 (Table 1) for allowed uses without any further review, the language of Section 11-06-04.14.C related to off-street parking conditions would be read out of City Code, violating this basic rule of statutory construction.

Further, Section 11-10-01.01 (Table 1) is not the only provision of “this” zoning title that applies to parking. The parties have cited at least two sections of “this title” that are applicable to off-street parking. The first is City Code Section 11-10-01.01 (Table 1), which Respondent and Intervenor cite, that sets forth the standard off-street parking requirements for allowed uses.⁴ The second is City Code Section 11-06-04.14.C that allows the P&Z Commission to include a condition of approval for off-street parking for conditional uses. The two sections do not

⁴ Respondent and Intervenor attempt to separate the height from the multi-family residential nature of the proposed conditional use. *Respondent’s Brief* pp. 4-5; *Intervenor’s Brief* p. 1. The two cannot be separated. The proposed conditional use is for a height exception for a multi-family dwelling. A multi-family dwelling thirty-five feet or shorter is an allowed use. BCC §§ 11-04-05.04 (Table 2.1) and (Table 2.2A); 11-04-05.06.D. A multi-family dwelling taller than thirty-five feet constitutes a conditional use. BCC §§ 11-04-05.04 (Table 2.1) and (Table 2.2A); 11-04-05.06.D.

contradict each other. They work side by side, with the former controlling the requirements for allowed uses and the latter requiring a case-by-case analysis for conditional uses.

The P&Z Commission cannot merely plug a use into Table 1 of Section 11-10-01.01 and call it appropriate parking for a conditional use without further deliberation. If that were the case, there would be no need for Section 11-06-04.14.C allowing a condition of approval for parking requirements. This makes further sense in light of Section 11-06-04.13.C, which requires the P&Z Commission to consider parking, and Section 11-06-04.13.D, which requires the P&Z Commission to determine that, if the conditional use complies with all conditions imposed, the conditional use will not adversely affect other property in the vicinity of the conditional use. The P&Z Commission would not need to consider parking and would not need to attach a separate condition of approval tied to parking for the conditional use if all that is required is a mathematical calculation under Section 11-10-01.01 (Table 1).

3. *The P&Z Commission Did Not Consider Any Evidence Regarding Parking and the Council Ignored the Record Demonstrating This Error.*

Respondent and Intervenor want the Court to believe that holding a hearing and allowing citizens to testify is all that is required regardless of whether the P&Z Commission actually followed the procedure and deliberately consider the testimony and evidence. This is an unsupportable position.

The P&Z Commission absolutely refused to consider any evidence related to parking, including the abundant evidence and testimony submitted by Petitioner that the Project did not provide adequate parking for a structure of its height and would, as a result, adversely affect other property in vicinity. BC-123 to 124, 229 to 231, and 247. This refusal was based on the same erroneous reading of City Code that Respondent and Intervenor continue to promote: that

City Code Section 11-10-01.01 (Table 1) contains the sole authority for evaluating parking for a conditional use.

The record is replete with evidence showing the P&Z Commission refused to consider parking impacts. City planning staff instructed the P&Z Commissioners that parking was not an “issue before the Commission tonight.” BC-112. The P&Z Commission Chair, Commissioner Stevens, further stated at the beginning of deliberations:

I want to remind the Commissioners that the parking issue tonight is not actually before us. This Commission is not in position to make findings that require our applicant to be held to standards above that which is in our code. That would be arbitrary and would make the City be in some serious hot water, so I want to make sure that when we have our discussion tonight, that we keep the parking out of it. It is not before us.

BC-126 (emphasis added).

Contrary to the statement above, what was arbitrary was not considering parking impacts on the surrounding neighbors. If the P&Z Commission actually considered parking, it might have determined that parking was not an issue under Section 11-06-04.13 and, assuming there was evidence to support its conclusion, declined to attach additional off-street parking conditions as provided by Section 11-06-04.14. By refusing to even deliberate on parking, the P&Z Commission acted upon unlawful procedure and, as a result, did not consider the evidence in the record. The P&Z Commission’s acts were clearly arbitrary, capricious, and an abuse of discretion.

The Council propagated this error by failing to remand the application to the P&Z Commission for consideration of the parking. More troubling is the fact that the record directly contradicts Council’s approved “Reason for the Decision,” which states “the public record from the Planning and Zoning Commission meeting revealed a robust discussion regarding parking.”

BC-285. No robust discussion occurred. BC-112 and BC-126. Merely allowing Petitioner to submit information and testimony regarding parking does not satisfy the procedural requirement that the P&Z Commission actually consider parking and the possible adverse effect on property in the vicinity and deliberate toward an appropriate decision.

The Council did not remand the application to the P&Z Commission and did not make any effort on its own to examine the evidence related to parking. In fact, the Council completely ignored the error that occurred by the P&Z Commission and the record that showed this to be the case. Council Member Jordan stated: “there was no indication in the record of uh concern on the part of the Commissions [sic] that they perhaps were not receiving complete information to deliberate properly.” *Transcript 4-17-12* p. 35. Council Member McLean stated: “I saw on the record a lot of conversation about parking...” *Transcript 4-17-12* p. 36. Council Member Clegg opined that “I find it hard to believe that in this many hearings um if there were issues to be brought up that they weren’t brought up...I’m convinced given the record at hand that the Planning and Zoning Commission did fully uh consider those.” *Transcript 4-17-12* p. 37.

The record directly contradicts the conclusions of the Council. The P&Z Commission refused to consider any evidence about parking. By upholding the P&Z Commission’s approval, the Council failed to correct the violation and comply with the standard of review set forth in City Code Section 11-03-07.05.⁵ The P&Z Commission’s approval and therefore the Council’s

⁵ Section 11-03-07.05.G provides:

- “1. If the findings of fact upon which the original decision was based are supported by substantial evidence, the City Council shall accept those findings.
2. If the City Council finds error on a factual finding, the City Council shall modify one or more of the findings as warranted by the evidence or substitute its own findings, citing the evidence found that supports the substitute findings.
3. If the decision is supported by the findings, but the City Council is not satisfied with the results in the particular case, the City Council may direct appropriate amendments to the underlying policy or

decision to uphold that decision were, accordingly, made upon unlawful procedure, not supported by substantial evidence in the record, and arbitrary, capricious, and an abuse of discretion.

B. Respondent Describes an Incorrect Standard for Standing.

Respondent repeatedly states the wrong standard for standing. *Respondent City of Boise's Brief Opposing Petition for Judicial Review ("Respondent's Brief")* pp. 6-10. Petitioner does not need to prove damages to establish standing as alleged by Respondent. Rather, "[t]o have standing in a land-use case, the petitioner needs to allege, not prove, only that the development could potentially harm his or her real estate interests." *Hawkins v. Bonneville*

regulatory documents to apply to future applications, but may not modify, remand or reverse a decision based on such future amendments.

4. If there is not substantial evidence to support the findings upon which the original decision is based, the decision shall be reversed. The City Council shall substitute its own findings when the findings from the review body are not supported by substantial evidence.

5. If the original decision is not fully supported by the findings, the City Council may:

(a) examine the evidence to determine whether additional findings could be supported, make those additional findings and then review the original decision;

(b) make such decision as is supported by the findings; or

(c) uphold the review body, putting additional conditions on the application as warranted by the facts.

6. If a substantial procedural error has taken place, the City Council may remand the matter for further proceedings.

7. Because the decision-makers below are experts having recognized expertise in their substantive areas, the City Council shall give due consideration to a reasonable interpretation of a City ordinance adopted by the review body.

8. The City Council may find error on the following grounds:

(a) The decision below is in violation of constitutional, State or City law. An example would be that the review body's decision would be a taking or failed to comply with mandatory notice required under the Local Land Use

Planning Act.

(b) The review body's decision exceeds its statutory authority. An example would be when there is no authority for the decision in federal or Idaho law, or local ordinance.

(c) The decision below is made upon unlawful procedure. An example would be if notice of the hearing was inadequate.

(d) The decision below is arbitrary, capricious or an abuse of discretion. For the review body's actions to be deemed 'arbitrary or capricious,' it must be shown that its actions were without rational basis; or in disregard of the facts and

circumstances presented. Where there is room for two opinions, action is not arbitrary and capricious when exercised honestly and upon due consideration.

(e) The decision below is not supported by substantial evidence."

County Bd. of Com'rs, 151 Idaho 228, 231, 254 P.3d 1224, 1227 (2011) (emphasis added) (citing *Evans v. Teton Cnty.*, 139 Idaho 71, 76, 73 P.3d 84, 89 (2003)). Petitioner clearly met this pleading standard.

The foundation of Respondent's argument about why Petitioner does not have standing rests solely on the same incorrect reading of the conditional use sections of City Code that lead Respondent to claim the Project only needs to satisfy the off-street parking requirements for allowed uses – which this is not – found in Section 11-10-01.01 (Table 1). Respondent essentially argues that because the Project meets the numerical requirements for off-street parking of an allowed use under Section 11-10-01.01 (Table 1), there can be no potential harm to Petitioner. *See Respondent's Brief* pp. 8-9. This conclusion flies in the face of the fact that the City has legislatively-determined that an extension of set building height can trigger certain externalities (such as those related to parking) on surroundings – including Petitioner's property – that are unacceptable unless appropriately conditioned. The City, through its City Code, sets forth factors, such as parking, that must be considered and, if necessary, need to be appropriately conditioned – that is, to go beyond the numerics of off-street parking required for a building that is not seeking an extension of height – to prevent harm to the surroundings. Here the P&Z Commission refused to consider a factor that the City decreed that it must.

The most immediate, real, and adverse consequence to Petitioner and other property owners in the neighborhood (and the public who travel to and seek to park on public streets in order to use Ann Morrison Park) involves the parking crisis created by the City's approval of an additional two stories of apartments – with parking tenants – above the allowed height of thirty-five feet in the R-OD zone without even considering whether appropriate parking conditions should be imposed to mitigate adverse impacts. Respondent would have the Court believe that

the design of the building with first floor parking and four stories of habitable apartments would not exceed the height limit if the first floor of parking were removed. *Respondent's Brief* p. 9. This is not correct. BC-140 to 141. Further, Respondent would have the Court believe that the taller building could just be a matter of the Intervenor's design preference with no attendant parking problem due to that additional height. *Respondent's Brief* p. 9. How would the Court know? Certainly not from the City, who has not provided the Court with deliberation of the potential adverse parking impacts caused by this additional habitable space that is not automatically allowed in this zone under City Code.

The lack of deliberation by the City, and the failure of the City to attach appropriate conditions to the conditional use approval, will devalue Petitioner's property, require time and expense for Petitioner to police parking on its own property, inconvenience employees and visitors to Petitioner's building, cause similar deleterious consequences to the neighborhood around the Project, potentially drive business from the neighborhood, and cause adverse consequences for patrons of Ann Morrison Park. BC-229 to 231, and 247. Petitioner has clearly alleged that the Project could potentially harm its real estate interests. Standing is satisfied.

C. The Substantial Rights of the Petitioner Were Violated When the P&Z Commission and the Council Refused to Follow the Procedure Established in City Code for Approving a Conditional Use.

Respondent and Intervenor correctly note that the Idaho Supreme Court has stated a non-applicant petitioner must do something more than "show that the [decision maker] substantively misapplied its own ordinance" to demonstrate prejudice to a substantial right. *Hawkins v. Bonneville County Bd. of Com'rs*, 151 Idaho 228, 333, 254 P.3d 1224, 1229 (2011); *Respondent's Brief* pp. 11-12; *Intervenor Royal Boulevard Associates LP's Response Brief* ("*Intervenor's Brief*") p. 19. However, Respondent and Intervenor ignore the rest of the

Hawkins decision in which the Idaho Supreme Court held that a non-applicant affected party, such as the Petitioner, holds a substantial right to due process and procedural regularity.

“[E]veryone with a statutory interest in the outcome of a decision is entitled to a meaningful notice and a fair hearing before an impartial decision maker.” *Hawkins*, 151 Idaho at 233, 254 P.3d at 1229 (citing *Eacret v. Bonner Cnty.*, 139 Idaho 780, 787, 86 P.3d 494, 501 (2004); *Eddins v. City of Lewiston*, 150 Idaho 30, 36, 244 P.3d 174, 180 (2010)). Procedural regularity means more than notice and a chance to speak at a hearing. *See Jasso v. Camas County*, 151 Idaho 790, 796, 264 P.3d 897, 903 (2011) (holding that notice and an opportunity to be heard are not the only requirements of due process). “[A]ll the parties involved in a land-use decision have a substantial right to a reasonably fair decision-making process. Governing boards owe procedural fairness not just to applicants but also their interested opponents. Both should expect proceedings that are free from procedural defects that might reasonably have affected the final outcome.” *Hawkins*, 151 Idaho at 232, 254 P.3d at 1228 (emphasis added) (citing *Noble v. Kootenai Cnty.*, 148 Idaho 937, 942-43, 231 P.3d 1034, 1039-40 (2010)). Thus, due process and a procedurally fair decision are substantial rights of even a non-applicant petitioner. *Id.* at 233, 254 P.3d at 1228.

In the present case, the P&Z Commission refused to follow the procedure required under City Code to review and approve a request for a height exception. The Council then ignored the record that showed that refusal. This is not a situation where Petitioner merely disagrees with the way the City interpreted a particular parking standard under a City ordinance. Rather, this is a situation where the City refused point blank to consider criteria required as part of the procedure for reviewing a height exception application. In this case, the P&Z Commission explicit refusal to consider parking at all violates the procedure set forth in City Code.

The City's failure to follow City Code provisions at issue constitutes a procedural defect. City Code Section 11-06-04.01 requires the P&Z Commission to review and determine whether the proposed use, including parking, would cause any damage, hazard, nuisance, or other detriment to persons or property in the vicinity of the Project. *BCC* §§ 11-06-04.01. The P&Z Commission was then required to make specific findings related to the Project, including whether the parking planned for the Project would adversely affect other property in the vicinity. *BCC* §§ 11-04-05.04 (Table 2.1) and (Table 2.2A); 11-06-04.13; and 11-06-06.09. Finally, the P&Z Commission was required to attach any necessary conditions of approval, including off-street parking requirements, to mitigate any damages, hazards, nuisances, or other detriments. *BCC* § 11-06-04.01. The P&Z Commission did none of this.

The P&Z Commission not only failed to deliberate about the parking, but it explicitly refused even to consider parking issues. When the P&Z Commission refused to consider parking, which is required procedure under City Code, it violated the substantial rights of the Petitioner and other affected parties.

The Council's decision to uphold the P&Z Commission's approval merely rubber stamped what was already a defective process. The Council's decision also completely ignored the plain record before the Council. Not only did the Council's decision run counter to the substantial evidence in the record, but it wholly contradicted the only evidence in the record involving the P&Z Commission's lack of deliberations about parking. For the Council to state that the P&Z Commission reached its decision after a "robust discussion" ignores the record of what actually occurred before the P&Z Commission.

The Council was in error. Hence, the Council's decision to uphold the P&Z Commission's approval violated the standard of review set forth in City Code. *BCC* § 11-03-

07.05. Therefore, the P&Z Commission's approval and the Council's decision to uphold that decision were made upon unlawful procedure, not supported by substantial evidence in the record, and arbitrary, capricious, and an abuse of discretion.

D. Because the P&Z Commission and the Council Refused to Follow the Procedure Established in City Code for Approving a Conditional Use, They Could Not Provide Findings that Complied with Idaho Code Section 67-6535.

The plain language of City Code requires the P&Z Commission to address all of the criteria set forth in City Code Section 11-06-04.13. *BCC* §§ 11-04-05.04 (Table 2.1) and (Table 2.2A); 11-04-05.06.D; 11-06-04.13; and 11-06-06.09. When the P&Z Commission explicitly refused to consider parking, the P&Z Commission deliberately chose not to consider a matter that the City had legislatively-determined was relevant to be considered when appraising a height exception request.

Intervenor claims the Council could ignore parking because parking was not relevant. *Intervenor's Brief* p. 9. However, Respondent and Intervenor do not dispute that City Code Section 11-06-04.13 is relevant. Because that Section, especially when read in conjunction with other Sections of City Code (11-04-05.04 (Table 2.1) and (Table 2.2A); 11-04-05.06.D; 11-06-04.13; and 11-06-06.09), mandate parking to be considered, the P&Z Commission had to consider parking in order to make the necessary findings required pursuant to Idaho Code Section 67-6535. When the P&Z Commission refused to consider parking at all, as is required by City Code, it could not provide a "reasoned statement that explains the criteria and standards considered relevant, states the relevant contested facts relied upon, and explains the rationale for the decision based on the applicable provisions of the comprehensive plan, relevant ordinance and statutory provision, pertinent constitutional principles and factual information contained in the record." Idaho Code § 67-6535(2). The Council then perpetuated the error by failing or

refusing to acknowledge what the record showed – that the P&Z Commission refused to follow the procedure established by City Code.

E. Petitioner Is Entitled to an Award of Attorneys' fees.

Generally, the failure to include an issue in the statement of issues limits the ability of the Court to consider that issue on appeal. *State v. Prestwich*, 116 Idaho 959, 961, 783 P.2d 298, 300 (1989), *overruled on other grounds*, *State v. Guzman*, 122 Idaho 981, 842 P.2d 660 (1992); *Crown v. State, Dept. of Agric.*, 127 Idaho 188, 190, 898 P.2d 1099, 1101 (Ct. App. 1994) *aff'd in part, rev'd in part*, 127 Idaho 175, 898 P.2d 1086 (1995). However, this rule is relaxed where the issue or issues were addressed by authorities cited or arguments contained in the briefs. *Prestwich*, 116 Idaho at 961, 783 P.2d at 300; *Crown*, 127 Idaho at 190, 898 P.2d at 1101. Petitioner's initial brief not only includes a clear heading stating that Petitioner requests an award of attorneys' fees, but it also contains substantive argument and authority regarding why an award is justified. The request for attorneys' fees is clearly before the Court, and the Respondent and Intervenor cannot claim surprise or lack of notice. In fact, Respondent and Intervenor responded substantively to Petitioner's request for attorneys' fees in their own briefs. *Respondent's Brief* pp. 16-17; *Intervenor's Brief* pp. 20-21. No legitimate reason exists for the Court to not consider an award of attorneys' fees to Petitioner due to Idaho Appellate Rule 35(a).

Petitioner is entitled to an award of attorneys' fees because the actions of the City lacked a reasonable basis in fact and law. Idaho Code § 12-117(1) and (5). The City acted without a reasonable basis in fact or law when: (1) the P&Z Commission failed to follow procedures in City Code for considering the height exception request and (2) the Council ignored the facts of what occurred before the P&Z Commission. City Code clearly requires the P&Z Commission to make a decision on a height exception request based on the conditional use criteria, which the

P&Z Commission failed to do. The Council then ignored the record and failed to remand back to the P&Z Commission for it do its job. Because the P&Z Commission and the Council clearly acted without a reasonable basis in fact or law, Petitioner is entitled to an award of attorneys' fees.

F. Respondent and Intervenor Are Not Entitled to an Award of Attorneys' fees.

As set forth above, the P&Z Commission and the Council erred and acted without a reasonable basis in fact or law. Therefore, the Respondent and Intervenor are not the prevailing parties and are not permitted an award of attorneys' fees under Idaho Code Section 12-117.

VI.
CONCLUSION

Petitioner merely asks the Court to require the City to follow the procedure established in its own ordinances. Petitioner respectfully requests that the Court vacate the Council's decision and the P&Z Commission's approval and remand the matter back to the City for further procedure.

DATED this 20th day of September 2012.

SPINK BUTLER, LLP

By: Richard H. Andrus
Richard H. Andrus
Attorneys for Petitioner

CERTIFICATE OF SERVICE

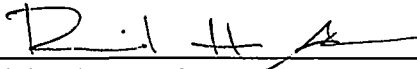
I HEREBY CERTIFY that on this 20th day of September 2012, I caused a true and correct copy of the above REPLY BRIEF to be served upon the following individuals in the manner indicated below:

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Richard H. Andrus

MAY 31 2013

CHRISTOPHER D. RICH, Clerk
By JOHN WEATHERBY DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

917 LUSK, LLC, an Idaho limited liability company,
Petitioner,
vs.
CITY OF BOISE CITY, a political subdivision in the State of Idaho,
Respondent,
and
ROYAL BOULEVARD ASSOCIATES, LP, an Idaho limited partnership,
Intervenor.

CASE NO. CV-OC-2012-08871
MEMORANDUM DECISION
AND ORDER

This is a petition, filed by 917 Lusk, LLC, an Idaho corporation, (Lusk) seeking judicial review of a final decision of the City of Boise¹ granting a conditional use permit for an apartment complex to be built by Royal Boulevard Associates, LP (Royal), which has intervened in this case.² For the reasons set forth hereinafter, the City's decision will be affirmed.

¹The Boise City Council approved the conditional use permit during a city council meeting. The Planning and Zoning Commission had previously held hearings and taken action, which formed the basis for the appeal before the council. See Boise City Council Meeting 04-17-12_2 Minutes, at 1-2 (Josh Johnson (with the planning department): "[W]e're here tonight to hear an appeal from 917 Lusk LLC for a height exception associated with a multi-family structure located at 1004 West Royal Boulevard . . . The Planning and Zoning Commission correctly determined that parking was not before them as the project meets the parking requirements of a multi-family unit.").

²Royal Boulevard has filed a "response brief" in this proceeding.

FACTS AND PROCEDURAL BACKGROUND

The following facts and procedural history are derived from the City's and Lusk's briefs:

This case is an appeal from the determination by the Boise City Council ('City Council') upholding a decision by the Boise City Planning and Zoning Commission ('P&Z') which approved a conditional use permit ('CUP') for a height exception for Royal Boulevard Associates, LP ('Intervenor') to build a multi-family apartment complex called the River Edge Apartments ('River Edge').

On March 5, 2012, the P&Z unanimously approved the River Edge CUP for a height exception and adopted reasons for the decision and conditions of approval. 917 Luck, LLC ('Petitioner') filed a timely appeal of the P&Z's decision to the City Council, asserting that the P&Z decision failed to meet the requirements for a CUP. On April 17, 2012, the City Council denied the appeal and upheld the P&Z's approval of the height exception.

The subject site is 1004 West Royal Boulevard, to the east of Boise's Ann Morrison Park and to the west of the property owned by Petitioner. Multi-family dwellings are an allowed use for this location as the property is currently zoned as Residential Office with Design Review Overlay ('R-OD'). The Local Land Use Planning Act ('LLUPA') and the Boise City Zoning Ordinance ('Zoning Ordinance') allow this use to exceed the base zoning's standard height limit of 35 feet with the issuance of a CUP. Respondent City of Boise's Brief Opposing Petition for Judicial Review, at 4-5.

Lusk also notes the following facts:

In fall 2011, Applicant applied to the City of Boise for permission to build a student housing project at 1004 West Royal Boulevard in Boise, Idaho. BC-184 to 193. The proposed Project consists of a housing structure for Boise State University students approximately 352,000 square feet in size and with a footprint that would occupy the majority of approximately 3.4 acres directly adjacent to the Boise River Greenbelt (the 'Greenbelt'), Ann Morrison Park, and Petitioner's property. BC-181, 195. The proposed Project would be located in the City's R-OD zone. BC-195.

The City's Zoning Ordinance prohibits buildings over thirty-five feet in the R-OD zone. BCC § 11-04-05.05; Table 2. Applicant could only construct the Project at its proposed height of between fifty-nine and sixty-three feet — nearly double the thirty-five foot height allowed in the R-OD zone—if the

City permitted the additional height after analyzing this now conditional use under the City Code process Petitioner's Brief, at 9.

STANDARD OF REVIEW

"The Local Land Use Planning Act (LLUPA) allows judicial review of an approval or denial of a land use application for an affected person, as provided for in the Idaho Administrative Procedur[e] Act (IDAPA)." *In re Jerome County Board of Commissioners*, 153 Idaho 298, 281 P.3d 1076, 1085 (2012). "For purposes of judicial review of LLUPA decisions, a local agency making a land use decision is treated as a government agency under IDAPA." *Crown Point Development, Inc. v. City of Sun Valley*, 144 Idaho 72, 75, 156 P.3d 573, 576 (2007).

"This court will not substitute its judgment for that of the [local agency] as to the weight of the evidence on questions of fact." *In re Jerome County*, 281 P.3d at 1085. "This Court will defer to the [agency's] findings of fact unless the findings are clearly erroneous; these factual determinations of the board are binding on a reviewing court when supported by substantial and competent evidence in the record, even if there was conflicting evidence before the [agency]." *Id.*

"This court shall . . . affirm the zoning agency's action unless the Court finds that the agency's findings, inferences, conclusions or decisions are: (a) in excess 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." *Id.*, at 1085-86.

"A party that challenges a[n agency's] decision must demonstrate first that the [agency] erred in a manner specified in I.C. § 67-5279(3), next the party must show that one

of its substantial rights has been prejudiced.” *Id.*, at 1086. ““Planning and zoning decisions are entitled to a strong presumption of validity; this includes the [agency’s] application and interpretation of their own zoning ordinances.”” *Id.* This Court will defer to a[n agency’s] ‘interpretation and application of its zoning ordinance, unless such interpretation or application is capricious, arbitrary or discriminatory.’” *Id.*

ANALYSIS

Lusk asserts the following contentions in this petition: (1) “the decision to grant the conditional use request, and the Council’s refusal to overturn the P&Z Commission decision, was in excess of the City Code’s authority of the P&Z Commission and the Council;” (2) “the P&Z Commission’s decision to grant the conditional use request, and the Council’s refusal to overturn the P&Z Commission decision, was made upon unlawful procedure;” (3) the P&Z Commission’s decision to grant the conditional use request, and the Council’s refusal to overturn the P&Z Commission decision, was not supported by substantial evidence in the record;” (4) “the P&Z Commission’s decision to grant the conditional use request, and the Council’s refusal to overturn the P&Z decision was arbitrary, capricious, or an abuse of discretion;” (5) “the ‘Reason for the Decision’ [i]ssued by the P&Z Commission and approved as modified by the Council were inadequate under LLUPA and City Code, and thereby violated Petitioner’s due process rights.” Petitioner’s Brief, at 7.

1. Standing

Before addressing the issues raised by Lusk, the Court must first address the City’s contention that the petitioner does not have standing “under I.C. § 67-6521 to seek judicial review of the City Council’s approval of the River Edge CUP.” Respondent City of Boise’s Brief Opposing Petition for Judicial Review, at 5. The City asserts that Lusk lacks standing

because it cannot show “real or substantial harm to [its] property due to City Council’s approval of the River Edge CUP.” *Id.*, at 7.

Lusk asserts that “[t]he most immediate, real, significant, and anticipated adverse consequence to Petitioner and other property owners in the neighborhood (including the public who travel to and use Ann Morrison Park) is the parking crisis created by the City’s approval of an additional two stories of habitable apartments over and above the allowed height of thirty-five feet in the R-OD zone – all without appropriate conditions being placed on the conditional use request to ensure that adverse impacts are mitigated. In fact, there was no discussion, no analysis, and no deliberation by the City to review the potential adverse parking impacts caused by this [sic] additional habitable apartments that are not allowed by right under the Zoning Ordinance.” Petitioner’s Brief, at 14.

“One ‘fundamental tenet of American jurisprudence’ is ‘that a person wishing to invoke a court’s jurisdiction must have standing.’ The three most basic propositions of the doctrine of standing that our Court uses to guide its decisions [are] . . . (1) that standing ‘focuses on the party seeking relief and not on the issues the party wishes to have adjudicated;’ (2) that in order ‘to satisfy the case or controversy requirement of standing, litigants generally must allege or demonstrate an injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury;’ and (3) that ‘a citizen and taxpayer may not challenge a governmental enactment where the injury is one suffered alike by all citizens and taxpayers of the jurisdiction. Building upon these basic propositions, this Court also considers that standing ‘may be predicated upon a threatened harm as well as a past injury.’” *In re Jerome County*, 281 P.3d at 1086.

“Idaho Code section 67-6521(1)(d) allows an ‘affected person aggrieved by a decision’ to seek judicial review . . . 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(1)(a) . . . ‘an affected person shall mean one having a bona fide interest in real property which may be adversely affected by: (i) (t)he approval, denial or failure to act upon an application required or authorized pursuant to this chapter.” *Id.*, at 1087.

“An affected person shall mean one having a bona fide interest in real property which may be adversely affected by: (i) The approval, denial or failure to act upon an application for a subdivision, variance, special use permit and such other similar applications required or authorized pursuant to this chapter.” I.C. § 67-6521(1)(i).

I.C. § 67-6512 provides: “(a) As part of a zoning ordinance each governing board may provide by ordinance adopted, amended, or repealed in accordance with the notice and hearing procedures provided under section 67-6509, Idaho Code, for the processing of applications for special or conditional use permits.”

“Notwithstanding jurisdictional boundaries, notice shall also be provided to property owners or purchasers of record within the land being considered, three hundred (300) feet of the external boundaries of the land being considered, and any additional area that may be substantially impacted by the proposed special use as determined by the commission. Any property owner entitled to specific notice pursuant to the provisions of this subsection shall have a right to participate in public hearings before a planning commission, planning and zoning commission or governing board.” I.C. § 67-6512(b).

Lusk was entitled to specific notice of the proposed conditional use permit, due to the proximity of its property with the proposed project. *See* Agency Record (hereinafter cited as BC) BC-81. “917 Lusk LLC (‘Keynetics’), owns the Keynetics Inc. building situated immediately east and south of the proposed River Edge Apartment student housing project at 1004 W. Royal Boulevard . . .” BC-81. *See also* BC-160 (photo showing that 917 Lusk’s property is adjacent to the proposed apartment project). In addition, “Lusk . . . appeal[ed] the Planning and Zoning Commission approval of a height exception to construct a five story multi-family residential building on 3.42 acres located at 1004 W. Royal Boulevard in an R-OD (Residential Office with Design Review) zone.” BC-69. In its appeal, Lusk specifically argued that “the proposed project will place an undue burden on transportation and other public facilities in the vicinity”³ and “the proposed project will adversely affect other property in the vicinity.”⁴ BC-84.

The Court finds that Lusk is “[a]n affected person aggrieved by a final decision concerning matters identified in section 67-5721(1)(a) . . . [entitled to] seek judicial review as provided by chapter 52, title 67, Idaho Code.” I.C. § 67-6521(1)(d). Lusk clearly has

³“Parking problems created by the higher density associated with the height of the proposed Project will strain public facilities in the area. Ann Morrison Park, a City owned park, will be clogged with overflow parking. Visitors to the park will not be able to locate parking, and the City will be forced to expend valuable resources policing parking areas within the park and along the Greenbelt. As was noted by the City of Boise in its new comprehensive plan, Blueprint Boise, ‘while many places are tempted to relax standards during uncertain economic times, our high expectations will hold value many decades later.’ The City should resist pressure to make decisions now that will hinder the redevelopment of the area due to impacts of this Project on the attractiveness of the immediate vicinity and the Greenbelt.” BC-84.

⁴“Inadequate parking provided by the proposed Project will severely affect nearby properties . . . the request for a height exception that is nearly twice allowed in the R-OD zone cannot be separated from parking concerns. Each added story increases occupant density and the need for additional parking. Because the housing Project would include 175 dwelling units (of which 139 are four-bedroom units), it will contain 622 bedrooms and house at least 622 student tenants, yet only 280 parking spaces are planned. The application was improperly processed as ‘multi-family’ for purposes of calculating off-street parking requirements. This is a significant error because ‘multi-family’ projects under the City’s off-street parking requirements must include only 1.5 parking spaces per dwelling unit and one guest space per 10 units . . . The leasing arrangement further demonstrates that the proposed Project is not typical multi-family housing, where the lease covers the entire apartment and not, as in this case, a lease for each individual bedroom . . . each unit is a bedroom under the leasing arrangement.” BC-84-85.

standing for purposes of seeking judicial review here. *See also Hawkins v. Bonneville County Board of Commissioners*, 151 Idaho 228, 231, 254 P.3d 1224, 1227 (2011) (“To have a standing in a land-use case, the petitioner needs to allege, not prove, only that the development could potentially harm his . . . real estate interests.”); *Davisco. Foods Int’l, Inc. v. Gooding County*, 141 Idaho 784, 118 P.3d 116 (2005) (possible odor from several miles away conferred standing.).

2. Authority/Procedure Challenge

Lusk’s first contention is that “the decision to grant the conditional use request, and the Council’s refusal to overturn the P&Z Commission decision, was in excess of the City Code’s authority of the P&Z Commission and the Council.” Petitioner’s Brief, at 7.

Lusk cites I.C. § 67-6512(a), wherein it is stated that “[a] special use permit may be granted to an applicant if the proposed use is conditionally permitted by the terms of the ordinance, subject to the ability of political subdivisions, including school districts, to provide services for proposed use, and when it is not in conflict with the plan.”

Lusk appears to argue that the city’s approval of the conditional use permit lacked authority because this approval was not “contingent on conditions of approval that would mitigate the adverse impacts of the conditional use.” Petitioner’s Brief, at 17.

Lusk then goes on to argue, bringing in its other issues, that “the P&Z Commission erred by not following the city’s conditional use procedure,” as well as its contentions that the Commission’s decision was arbitrary and capricious and not adequately supported or supported by substantial evidence. *Id.*

Lusk argues “[t]he language of City Code Section 11-06-04.14.C requires an examination of the off-street parking for any conditional use permit application. The P&Z

Commission must consider all of the particulars of the proposed Project, including parking, and, as necessary, attach conditions of approval regarding off-street parking . . . the P&Z Commission did not go through that exercise but made the conclusory statement that there was adequate parking in order for Applicant to get the most units out of the site as possible.” *Id.*, at 19-20.

The P&Z decision approving the conditional use permit, dated March 6, 2012, provides that “[t]he additional height does not increase the density of the project to the point where parking standards cannot be met . . . [t]he height exception will not place an undue burden on transportation and other public facilities . . . The project is next to the greenbelt that allows a direct walking/biking path that is ¼ mile from BSU . . . [t]he height exception allows for the applicant to maximize the number of units, while providing adequate parking . . .” March 6, 2012 Planning & Zoning Commission decision (CPU11-00090 & CFH11-00036 / 1004 W. Royal Boulevard), at 3 (BC-108).

The P&Z held a hearing prior to issuing its approval decision, on March 5, 2012. The hearing minutes note that “[Lusk’s] letter ends by stating that there is also a shortage of parking and that this issue cannot be separated from the height exception. This building is a multi-family dwelling unit and meets our Parking Code. This issue is not before the Commission tonight. The application tonight only concerns the additional height requested by the applicant.” March 5, 2012 Hearing Minutes, at 1 (BC-112) (Josh Johnson – planning department).

During the hearing, Becky McKay (Engineering Solutions, Applicant Team) stated that “[w]e meet all the parking requirements. They have 1.5 spaces, plus 1 per 10 units, with a total of 280 spaces. We meet that.” (BC-114).

Eileen Barber, “an owner and co-founder of Keynetics,” testified:

Part of the issue is since they are doing 4-bedroom units, which is virtually unheard of in multi-family housing; true multi-family housing consists primarily of 1 and 2-bedroom units. If they actually have all of those as 2-bedroom, not even a mixture of one and two, they would have 311-units and there would be about 500 parking spaces. The fact they have quads and are calling this multi-family housing means the project is terribly under parked. This project should not be classified as multi-family. College students living together are not families. There is nothing in the Boise City Code that fits this type of use. *I suggest the City consider creating a new residential category for private off-campus housing. This is new to Boise. The issue with the proposed five floors and the issue of inadequate parking are the result of a density that deserves a more in-depth examination.* Boise only has four people per acre. That comes right from the census data. Portland is close to 7 and Seattle is a little over 11. BC-121. (emphasis added).

Kate Lenz, Human Resources Director at Keynetics, stated “I just don’t see how there is ample allocations for cars and bikes for these future students, with the proposal that is front of you.” *Id.*

Makho Ngazimbi testified that he had lived at a nearby apartment complex (Morrison Park Apartments) since 2008. He works at Keynetics and was a BSU student. He agreed that “this development would be a great benefit to the city.” However, his

[M]ain concern is the pressure that this development will have on the already limited parking in that part of town. From what I understand the maximum capacity would be about 600 people and they will be providing parking for about 45 percent . . . Chances are the overflow will end up being on Lusk Street, Dale, Island and Royal, which are all streets in that area . . . I think they tried to emphasize what they do is encourage people not to own vehicles. I don’t know how you can do that in Boise . . . I would urge you to consider the impact of this development on surrounding neighborhoods. BC-121-122.

Brad Wiskirchsen, CEO of Keynetics, testified:

The proposal you have before you is clearly not a multi-family housing development. It’s aimed at students by their own admissions. In fact, *it more appropriate fits in with the City’s definition of fraternity or sorority type of living situation, although 622 residents would make an awfully large fraternity . . .* We’re not opposed to the development of this particular parcel.

In fact, we are excited to welcome new neighbors and say goodbye to the truck lot, but . . . we're asking the development of the property be done right and given consideration of the impacts and influx of people in the surrounding areas, including the property's neighbors, and more importantly, the City's own assets, the Boise River and Ann Morrison Park. BC-123. (emphasis added).

Dave Kangas, President of the Vista Neighborhood Association, also testified:

[O]ne of the biggest problems we have with multi-family housing is parking. Planning and Zoning will admit that their ordinance does not adequately address parking. When you look at a proposal, most multi-family housing comes in at two bedrooms and they are allowed so many spots considering that formula. If you're going to one bedroom apartment, you have to realize that there's probably a couple living there and there's going to be two cars. If you have quads and you're gearing towards Boise State students, you're going to have four vehicles and four bikes. That's what they're going to have. That's how they get around. From everything I've heard if there's a proposed 600 residents and they are allowed 45 bike spaces, give me a break. You're imposing big problems on every other business in that area for parking. I love the building. I think it's a unique location and a nice replacement for that industrial park, but if you have 600 people coming in and out of that apartment in the summertime when Ann Morrison Park is full of rafters, that whole shoreline from that building from the bridge, all the way through the park is going to be trashed by people coming in and out of the river . . . The parking addressed by the people who have already testified is a major issue with multi-family housing throughout the City and all the neighborhood associations will testify to that, I would think because that is one of the biggest problems in the neighborhoods. BC-124.

Monika Anderson testified that she lives next to BSU and "parking is a problem. I have two roommates and have proper parking for them . . . Everybody I know has a car. I have two." *Id.*

At the conclusion of the hearing, Commissioner Stevens said: "I want to remind the Commissioners that *the parking issue is not actually before us*. This Commission is not in position to make findings that require our applicant to be held to standards above that which is in our code. That would be arbitrary and would make the City be in some serious hot water, so I want to make sure that when we have our discussion tonight, *we keep the*

parking out of it. It is not before us. They have met code and to require that is above and beyond what we are allowed to do.” BC-126.⁵ (emphasis added).

The commission later voted, unanimously, to approve the conditional use permit.

“This Court exercises free review over the application and construction of statutes. Where the language of a statute is plain and unambiguous, this Court must give effect to the statute as written, without engaging in statutory construction. The language of the statute is to be given its plain, obvious, and rational meaning. If the language is clear and unambiguous, there is no occasion for the court to resort to rules of statutory interpretation.” *State v. Salinas*, 150 Idaho 771, 772, 250 P.3d 822, 823 (Ct. App. 2011). Statutes are interpreted so that the parts make sense of the whole. *See Jacobsen v. City of Rathdrum*, 115 Idaho 266, 270, 766 P.2d 736, 740 (1988).

Boise City Code Section 11-06-04.01 (Conditional Use Permits - “Justification”) states “[c]onditional uses by definition possess characteristics such as to *require* review and appraisal by the Commission to determine whether or not the use would cause any damage, hazard, nuisance or other detriment to persons or property in the vicinity.” (emphasis added).

Boise City Code Section 11-06-04.13 (Conditional Use Permits - “Criteria and Findings”) “The Commission, following the procedures outlined below, may approve a conditional use permit when the evidence presented at the hearing is such as to establish: A. That the location of the proposed use is compatible to other uses in the general neighborhood; and B. That the proposed use will not place an undue burden on

⁵See also BC-126 (Commissioner Storey: “Like you said parking is off the table. This complies. *I can’t say our code is correct on parking and the way it should be handled . . .*”) (emphasis added), (Commissioner Bradbury: “I agree with Commissioner Storey, I think he is correct in . . . what our job is tonight.”); Boise City Council Meeting Minutes, 04-17-12_2, at 36 (Council Member McLean: “There is a parking issue we do need to deal with as a City and we’ve talked about that a little bit and I hope to see that come forward soon.”).

transportation and other public facilities in the vicinity; and C. That the site is large enough to accommodate the proposed use and all yards, open spaces, pathways, walls and fences, parking . . . and such other features as are required by this title . . . D. That the proposed use, if it complies with all conditions imposed, will not adversely affect other property of the vicinity . . .”

Boise City Code Section 11-06-04.14 (Conditional Use Permits - “Conditional Use; Limitations”), states that “[t]he Commission, in acting upon the application, *shall* provide that approval of a conditional use permit shall be contingent upon compliance with specified conditions, including but not limited to the following matters . . . C. Volume of traffic generated, requirements for off-street parking . . . vehicular movements within the site and points of vehicular ingress and egress.” (emphasis added).

Lusk argues that the alleged failure to consider parking as part of the approval procedure, both before the P&Z and the City Council, was a procedural violation of both the conditional use ordinance and due process rights. The Court finds that Lusk’s contention is in error. It is clear from the record that both P&Z and the Council considered the parking issue. Indeed, P&Z reopened the hearing before it to allow presentations on parking by Lusk’s witnesses. However, both determined that the project as proposed in the CUP application met the existing code requirement for parking. It was further noted that the project was within walking distance for students and that bicycle parking was provided. Since both the P&Z and the Council determined that the project met the current code requirements, they determined that there was no need to address the issue further. Although some questioned the adequacy of the code itself, it is not within this Court’s purview in this case to tell the City what the codes should contain. There were no procedural or due process

violations here. Likewise, the Court sees no abuse of discretion here, and clearly both P&Z and the Council acted within their authority.

Finally, the Court concludes that Lusk has failed to demonstrate that any other of its claimed substantial rights have been violated. There is an allegation that the public parking situation may be adversely impacted by the project, but there are no allegations that Lusk's property, the use of the property, or its business could be. Rather, Lusk appears to assert that parking by tenants of the project could impact the entire area, including Ann Morrison Park, but makes no specific argument on its own substantial rights.

The city contends that "P&Z was never required, by the plain language of the ordinance, to condition the River Edge CUP on Boise City Code § 11-06-04.14. This is especially true in light of the parking standards set forth in Boise City Code § 11-10-01.01, Table 1, which were applicable to and met by Intervenor." Respondent City of Boise's Brief Opposing Petition for Judicial Review, at 12 n.47.

Boise City Code Section 11-10-01 ("General Parking Standards") provides that "[t]his chapter establishes standards for motor vehicle and bicycle parking, on-site circulation, loading areas and parking lot design . . . C. The number of required spaces is based on the primary use of the site." Lusk has never contended that the proposed project does not meet the parking requirements of the applicable zoning ordinance.

All parties request an award of attorney fees pursuant to Idaho Code § 12-117. That statute mandates an award to the prevailing party in any proceeding involving a state agency or political subdivision if the Court finds that the non-prevailing party acted without a reasonable basis in law or fact. Lusk is not the prevailing party and is not entitled to fees. The Court cannot find, however, that it acted without a reasonable basis in law because of

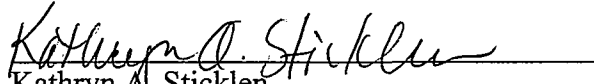
the differing views presented as to the interaction between the ordinances setting parking standards and the ordinance governing CUP applications. Therefore, attorney fees are denied to the City and Royal.

CONCLUSION

Based on the foregoing, the order of the City Council is affirmed.

IT IS SO ORDERED.

Dated this 30th day of May 2013.


Kathryn A. Sticklen
Senior District Judge

CERTIFICATE OF MAILING

I, Christopher D. Rich, the undersigned authority, do hereby certify that I have mailed, by United States Mail, one copy of the MEMORANDUM DECISION AND ORDER as notice pursuant to Rule 77(d) I.R.C.P. to each of the parties of record in this cause in envelopes addressed as follows:

RICHARD H. ANDRUS
JOANN C. BUTLER
SPINK BUTLER, LLP
251 E. FRONT STREET, SUITE 200
BOISE, ID 83702

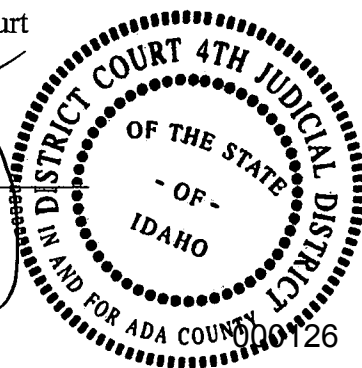
MARY ELIZABETH WATSON
ASSISTANT CITY ATTORNEY
BOISE CITY ATTORNEY'S OFFICE
VIA INTERDEPARTMENTAL MAIL

GARY G. ALLEN
DEBORAH E. NELSON
GIVENS PURSLEY LLP
601 W. BANNOCK
P.O. BOX 2720
BOISE, IDAHO 83701

CHRISTOPHER D. RICH
Clerk of the District Court
Ada County, Idaho

Date: 5/31/13

By 
Deputy Clerk



JUL 12 2013

CHRISTOPHER D. RICH, Clerk
By JAMIE MARTIN
DEPUTY

JoAnn C. Butler, ISB No. 4170
jbutler@spinkbutler.com
Richard H. Andrus, ISB No. 7171
randrus@spinkbutler.com
SPINK BUTLER, LLP
251 E. Front Street, Suite 200
Boise, Idaho 83702
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Boise, Idaho 83701
Telephone: (208) 388-1000
Facsimile: (208) 388-1001
#22868.1

Attorneys for Appellant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

917 LUSK, LLC, an Idaho limited liability)
company,)
Petitioner/Appellant,)

Case No. CV-OC-2012-08871

vs.)

NOTICE OF APPEAL

CITY OF BOISE CITY, a political)
subdivision in the State of Idaho,)
Respondent,)

and)

ROYAL BOULEVARD ASSOCIATES,)
LP, an Idaho limited partnership,)
Intervenor/Respondent.)

TO: THE ABOVE-NAMED RESPONDENTS, CITY OF BOISE CITY AND ITS
ATTORNEYS OF RECORD, BOISE CITY ATTORNEY'S OFFICE, 150 N. CAPITOL

KW

BOULEVARD, 4TH FLOOR, BLDG. 2, BOISE, IDAHO 83702, AND ROYAL BOULEVARD ASSOCIATES, LP, AND ITS ATTORNEYS OF RECORD, GARY G. ALLEN AND DEBORAH E. NELSON, GIVENS PURSLEY LLP, 601 W. BANNOCK STREET, BOISE, IDAHO 83702, AND THE CLERK AND THE ABOVE-ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Appellant, 917 Lusk, LLC, appeals against the above-named Respondents to the Idaho Supreme Court from the Court and Memorandum Decision and Order, entered in the above-entitled action on the 31st day of May 2013, Honorable Senior District Judge Kathryn A. Sticklen presiding.

2. Appellant has a right to appeal to the Idaho Supreme Court, and the Court and Memorandum Decision and Order described in Paragraph 1 above is appealable under and pursuant to Rule 11(f) I.A.R.

3. A preliminary statement of the issues on appeal that Appellant intends to assert in the appeal follows, provided any such list of issues on appeal shall not prevent Appellant from asserting issues on appeal:

(a) Whether the District Court erred in determining the Boise Planning and Zoning Commission and the Boise City Council correctly considered parking as part of the approval procedure.

(b) Whether the District Court erred in determining the application met the Boise City Code requirements for conditional use permits.

(c) Whether the District Court erred in determining the actions of the Boise Planning and Zoning Commission and the Boise City Council met the requirements of the Boise City Code.

(d) Whether the District Court erred in determining the Appellant did not suffer prejudice to its substantial rights.

(e) Whether the District Court erred in not determining whether the Boise City Council failed to provide Findings that Complied with Idaho Code § 67-6535.

4. Has an order been entered sealing all or any portion of the record? **No.**

5. (a) Is a reporter's transcript requested? **No.**

(b) Appellant requests the preparation of the following portions of the reporter's transcript: **No transcript is requested.**

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

- 05/17/2012 - Petition for Judicial Review
- 08/02/2012 - Petitioner's Brief
- 08/30/2012 - Respondent City of Boise's Brief Opposing Petition for Judicial Review
- 08/30/2012 - Intervenor Royal Boulevard Associates LP's Response Brief
- 09/20/2012 - Reply Brief
- 05/31/2013 - Memorandum Decision and Order

In requesting inclusion of the foregoing documents in the clerk's record, Appellant anticipates the entirety of the record and transcripts of the City of Boise Planning and Zoning Commission and the Boise City Council, as filed or lodged with the District Court, will be lodged with the Supreme Court in accordance with Rule 31, I.A.R.

7. I certify:

(a) That a copy of this Notice of Appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below:

Name and address: N/A

Name and address: _____

Name and address: _____

(b) That the Clerk of the District Court or administrative agency has been paid the estimated fee for preparation of the reporter's transcript.

(c) That Appellant is exempt from paying the estimated transcript fee because no transcript is requested.

(d) That the estimated fee for preparation of the clerk's or agency's record has been paid.

(e) That Appellant is exempt from paying the estimated fee for the preparation of the record because _____.


(f) That the appellate filing fee has been paid.

(g) That appellant is exempt from paying the appellate filing fee because _____.

(h) That service has been made upon all parties required to be served pursuant to Rule 20 (and the Attorney General of Idaho pursuant to Section 67-1401(1), Idaho Code).

DATED this 12th day of July 2013.

SPINK BUTLER, LLP

By: 
Richard H. Andrus
Attorneys for Appellant

CERTIFICATE OF SERVICE

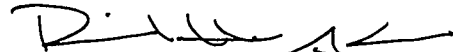
I HEREBY CERTIFY that on this 12th day of July 2013, I caused a true and correct copy of the above NOTICE OF APPEAL to be served upon the following individuals in the manner indicated below:

Boise City Attorney's Office
150 N. Capitol Blvd., 4th Flr., Bldg. 2
Boise, ID 83702
P.O. Box 500
Boise, ID 83701
Facsimile: 208/384-4454

U.S. Mail
 Hand-Delivery
 Federal Express
 Via Facsimile

Gary G. Allen
Deborah E. Nelson
Givens Pursley LLP
601 W. Bannock Street
Boise, ID 83702
P.O. Box 2720
Boise, ID 83701
Facsimile: 208/388-1300

U.S. Mail
 Hand-Delivery
 Federal Express
 Via Facsimile


Richard H. Andrus

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

917 LUSK, LLC, an Idaho limited liability
company,

Peitioner-Appellant,

vs.

CITY OF BOISE, a political subdivision in
the State of Idaho,

Respondent,

and

ROYAL BOULEVARD ASSOCIATES,
LP, an Idaho limited partnership,

Intervenor-Respondent.

Supreme Court Case No. 41214

CERTIFICATE OF EXHIBITS

I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of
the State of Idaho in and for the County of Ada, do hereby certify:

There were no exhibits offered for identification or admitted into evidence during the
course of this action.

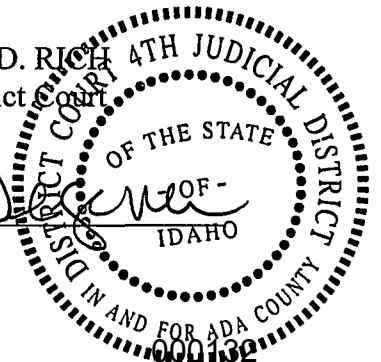
I FURTHER CERTIFY, that the following documents will be submitted as EXHIBITS to
the Record:

1. Administrative Record in a Judicial Review.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said
Court this 19th day of August, 2013.

CHRISTOPHER D. RICH
Clerk of the District Court

By KW
Deputy Clerk



CERTIFICATE OF EXHIBITS

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
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LP, an Idaho limited partnership,

Intervenor-Respondent.

Supreme Court Case No. 41214

CERTIFICATE OF SERVICE

I, CHRISTOPHER D. RICH, the undersigned authority, do hereby certify that I have
personally served or mailed, by either United States Mail or Interdepartmental Mail, one copy of
the following:

CLERK'S RECORD

to each of the Attorneys of Record in this cause as follows:

RICHARD H. ANDRUS
ATTORNEY FOR APPELLANT
BOISE, IDAHO

MARY ELIZABETH WATSON
ATTORNEY FOR RESPONDENT
BOISE, IDAHO

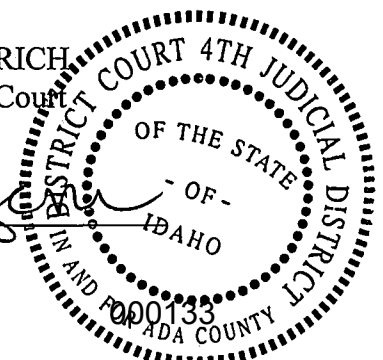
GARY G. ALLEN
ATTORNEY FOR RESPONDENT
BOISE, IDAHO

CHRISTOPHER D. RICH
Clerk of the District Court

Date of Service: AUG 19 2013

By K. W. [Signature]
Deputy Clerk

CERTIFICATE OF SERVICE



IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

917 LUSK, LLC, an Idaho limited liability
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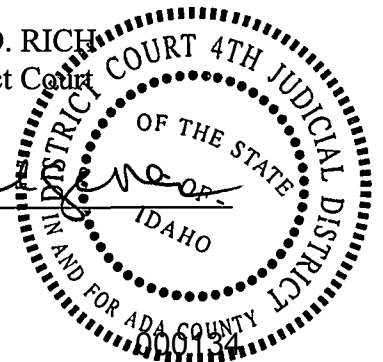
CERTIFICATE TO RECORD

I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the above and foregoing record in the above-entitled cause was compiled under my direction as, and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by Counsel.

I FURTHER CERTIFY, that the Notice of Appeal was filed in the District Court on the 12th day of July, 2013.

CHRISTOPHER D. RICH
Clerk of the District Court

By *K. D. Rich*
Deputy Clerk



CERTIFICATE TO RECORD