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917 Lusk, LLC v. City of Boise Appellant's Brief Dckt. 41214

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IN THE SUPREME COURT OF THE STATE OF IDAHO

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

Petitioner/Appellant,)

vs.)

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

Respondent,)

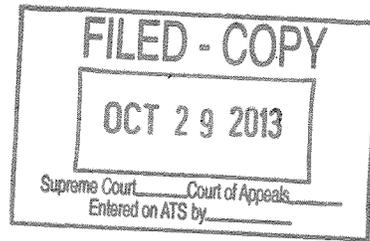
and)

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

Intervenor/Respondent.)

Supreme Court Docket No. 41214-2013

APPELLANT'S BRIEF



Appeal from the District Court of the Fourth Judicial District
for Ada County

Honorable Kathryn A. Sticklen, Senior District Judge, presiding

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Associates, LP)

Table of Contents

Statement of the Case5

I. NATURE OF THE CASE5

II. STATEMENT OF FACTS5

III. ADMINISTRATIVE PROCEEDINGS9

Issues Presented on Appeal.....12

Attorney Fees on Appeal.....12

Argument.....13

I. STANDARD OF REVIEW.....13

**II. THE COUNCIL ERRED IN UPHOLDING THE P&Z COMMISSION’S DECISION BECAUSE
THE P&Z COMMISSION REFUSED TO FOLLOW THE CONDITIONAL USE PERMIT PROCEDURE
REQUIRED BY BOISE CITY CODE.....14**

**III. LUSK’S SUBSTANTIAL RIGHTS WERE VIOLATED WHEN THE P&Z COMMISSION AND
THEN THE COUNCIL REFUSED TO FOLLOW THE PROCEDURE ESTABLISHED IN BOISE CITY
CODE FOR APPROVING A CONDITIONAL USE.24**

**IV. 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 THIS COURT’S DECISION IN *JASSO*.26**

Conclusion28

Table of Cases and Authorities

Cases

<i>Cowan v. Bd. of Comm'rs of Fremont County</i> , 143 Idaho 501, 148 P.3d 1247 (2006)	14
<i>Crown Point Dev., Inc. v. City of Sun Valley</i> , 144 Idaho 72, 156 P.3d 576 (2007).....	13
<i>Eacret v. Bonner County</i> , 139 Idaho 780, 86 P.3d 494 (2004).....	24
<i>Eddins v. City of Lewiston</i> , 150 Idaho 30, 244 P.3d 174 (2010)	24
<i>Evans v. Teton County</i> , 139 Idaho 71, 73 P.3d 87 (2003)	13
<i>Hawkins v. Bonneville County Bd. of Comm'rs</i> , 151 Idaho 228, 254 P.3d 1224 (2011)	14, 24
<i>Hillside Landscape Const., Inc. v. City of Lewiston</i> , 151 Idaho 749, 264 P.3d 392 (2011).....	19
<i>Jasso v. Camas County</i> , 151 Idaho 790, 264 P.3d 897 (2011).....	14, 24, 26, 27, 28
<i>Jerome County Bd. of Comm'rs</i> , 153 Idaho 298, 281 P.3d 1076 (2012)	14
<i>Noble v. Kootenai County</i> , 148 Idaho 937, 231 P.3d 1034 (2010).....	24
<i>Poison Creek Publ'g Inc. v. Central Idaho Publ'g, Inc.</i> , 134 Idaho 426, 3 P.3d 1259 (Ct. App. 2000).....	19
<i>State v. Mercer</i> , 143 Idaho 108, 138 P.3d 308 (2006).....	19

Statutes

I.C. § 12-117	12
I.C. § 67-5201	13
I.C. § 67-5279	14
I.C. § 67-5292	13
I.C. § 67-6501	13
I.C. § 67-6512	16, 18, 22
I.C. § 67-6521	13
I.C. § 67-6535	12, 26, 27, 28
I.C. § 67-6538	13

Ordinances

BCC § 11-03-07.05.....	23, 26
BCC § 11-03-07.05.F.5	11
BCC § 11-04-05.04 (Table 2.1).....	20
BCC § 11-04-05.04 (Table 2.2A).....	20
BCC § 11-04-05.06.....	6
BCC § 11-04-05.06.D.....	8, 9, 15, 19, 20, 27
BCC § 11-06.04.14.C	8, 19, 20
BCC § 11-06-04.01.....	6, 9, 16, 22, 25
BCC § 11-06-04.04.....	9, 16, 22, 27
BCC § 11-06-04.13.....	6, 8, 9, 15, 16, 17, 22, 25, 27
BCC § 11-06-04.13.C	18, 19, 20
BCC § 11-06-04.13.D.....	20
BCC § 11-06-04.14.....	6, 9, 15, 16, 22, 25, 27

BCC § 11-06-06.12.....6, 8, 9, 15, 27
BCC § 11-06-06.13.....8
BCC § 11-10-01.01.....20
BCC § 11-10-01.01 (Table 1).....18, 19, 20, 21

Statement of the Case

I. NATURE OF THE CASE

This is an appeal from a land use decision by the City of Boise (the “City”) in which the Boise City Planning & Zoning Commission (the “P&Z Commission”) refused to follow the legislatively established process for reviewing a conditional use permit application. The district court, ruling on a petition for judicial review, upheld a decision of the Boise City Council (the “Council”) affirming the P&Z Commission’s approval of a conditional use permit application filed by the Michaels Organization on November 28, 2011 with the City. R. pp. BC-181 to 193. The Michaels Organization requested the conditional use permit for a height exception to build a proposed student housing apartment project at 1004 West Royal Boulevard in Boise, Idaho (the “Project”). R. pp. BC-181 to 193. Approval of the height exception would allow the Michaels Organization’s successor in interest, Royal Boulevard Associates LP (“Royal”), to construct the Project at nearly double the thirty-five foot height limit applicable to buildings in the Project’s Residential Office District (with Design Review Overlay) zone (“R-O zone” or “R-OD zone”). R. pp. BC-141, 229 to 231, and 247. 917 Lusk, LLC (“Lusk”) owns property and a building directly adjacent to the Project. R. pp. BC-81, 228, and 242.

II. STATEMENT OF FACTS

In fall 2011, the Michaels Organization applied to the City for permission to build a 352,000 square foot apartment building with a footprint occupying the majority of approximately 3.4 acres directly adjacent to the Boise River Greenbelt, Ann Morrison Park, and Lusk’s property. R. pp. BC-181, 184-193, and 195. Because the Boise City Code prohibits buildings,

including apartment buildings, over thirty-five feet in the R-OD zone, Royal could only construct the Project at its proposed height of between fifty-nine and sixty-three feet if the City permitted the additional height after analyzing the conditional use under the complete process set forth in the City ordinances. R. p. BC-70; Boise City Code (“BCC”) §§ 11-04-05.06, 11-06-04.01, 11-06-04.13, 11-06-04.14, and 11-06-06.12.

The Project’s purpose is to provide college student housing, and the additional height request would allow two additional stories of residential dwelling units – doubling the number of residential stories the Project would include if it complied with the thirty-five foot height limit in the R-OD zone. R. pp. BC-141, 229 to 231, and 247. With the two additional stories (including approximately 156 bedrooms per story), the Project would contain 622 bedrooms, but only be served by 280 parking spaces. R. pp. BC-229 to 231 and 247.

The Project is not a typical multi-family apartment involving one lease and one family unit because it is specifically marketed to students at Boise State University. Behind each front door at the Project are between 2 to 4 separately leased bedrooms. R. pp. 85. The scarcity of provided on-site parking generates a parking ratio of only .45 spaces per each leased bedroom unit. R. pp. BC-86 and 230. At the same time, evidence before the P&Z Commission showed that approximately sixty percent of college students own cars. R. p. BC-230. Sixty percent of the college students in 622 leased bedrooms equates to 373 students with 373 cars. Thus, the number of parking spaces provided at the Project (280 parking spaces) falls short of adequate parking by almost 100 parking spaces.

The additional height added to the Project (which created two additional habitable stories) requires the Project to undergo full conditional use scrutiny. Part of this analysis includes considering impact on the neighborhood. Parking in the neighborhood around the Project is already strained. Ann Morrison Park hosts a variety of high traffic events throughout the year. R. pp. 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. R. pp. BC-229 to 231 and 247. Inadequate parking will adversely affect the businesses in the area (including Keynetics Inc., which is located in Lusk's building), and harm the public's ability to enjoy Ann Morrison Park and the Boise River Greenbelt. R. pp. BC-229 to 231 and 247. Students who cannot find parking within the housing Project will park at adjacent properties, including Lusk's property. R. pp. BC-84 to 88. As a result, Lusk and its neighbors will be forced to expend considerable time and resources policing the parking on their properties. R. pp. BC-229 to 231. Congested parking will also drive customers away from businesses in the area. R. pp. BC-229 to 231.

All the foregoing evidence was in the record before the P&Z Commission and eventually the Council, yet they refused to consider it. When discussing the applicant's conditional use request for additional height, both City staff ("Staff") and the P & Z Commission noted other buildings "near by" the Project with heights greater than thirty-five feet, suggesting similar height in the area automatically means this particular conditional use should be permitted as a matter of right. R. pp. BC-128 and 136. Yet these "other buildings" were constructed in zones that allow heights greater than thirty-five feet. R. pp. BC-83, 228-229, and 246. Moreover, the

closest buildings are actually shorter than the proposed Project and not residential in nature. *Id.* However, that is not the real issue. Regardless of whether the Project is similar to other buildings located near downtown and along the river, it is the use of the Project in the particular zone that requires scrutiny. Given the zoning for the project, the real question is whether the Project as used and parked poses adverse impacts to the surrounding neighborhood that can only be mitigated through appropriate conditions of approval.

The City deliberately set the maximum height at thirty-five feet in the R-O zone. Anyone proposing to exceed that height must meet the City's strict procedure: "Conditional use approval from the Planning and Zoning Commission is required to exceed limits set forth in this ordinance. The Commission's decision on height exceptions shall be based upon the criteria set forth in Section 11-06-04.13." *BCC* § 11-06-06.12; *see also* *BCC* § 11-04-05.06.D.¹ These criteria include consideration of parking. *BCC* §§ 11-06-04.13 and 11-06.04.14.C. In other words, once a project, such as this, moves into conditional use territory, the City recognizes that adverse impacts – including parking impacts – can affect the surrounding neighborhood. The duty arises for the P&Z Commission to rigorously review the Project to determine if the Project must be conditioned in order to mitigate those impacts.

¹ 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. Although Boise City Code Section 11-04-05.06.D refers to Boise City Code Section 11-06-06.13, the reference is a typo and should read "Section 11-06-06.12."

III. ADMINISTRATIVE PROCEEDINGS

“Conditional uses by definition possess characteristics such as to require review and approval 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. The P&Z Commission possesses final authority to approve, deny, or modify a conditional use request only after imposing conditions needed to establish the criteria and findings of Boise City Code. *BCC* §§ 11-04-05.06.D, 11-06-04.04, 11-06-04.13, 11-06-04.14, and 11-06-06.12.

Boise City Code sets out not once, but twice, that any increase in height limits must withstand the rigors of a P&Z Commission-level conditional use review. *BCC* §§ 11-04-05.06.D and 11-06-06.12. An approval for a height exception request may be granted only after review of all the conditional use criteria and findings, and the imposition of appropriate conditions necessary to establish those findings. The City legislatively determined that consideration of parking impacts is part of the conditional use permit analysis in both the regulations specific to the R-O zone and in the general regulations specific to all conditional uses. *BCC* §§ 11-04-05.06.D and 11-06-06.12.

The Michaels Organization submitted an application for conditional use approval for its requested height exception, and the P&Z Commission originally set to hear the application on February 6, 2012. R. pp. BC-70, 181-193, and 195. The P&Z Commission on that date, apparently not realizing two members of the public had signed up to testify at the hearing, approved the Project in error as part of its “Consent Agenda” without hearing public testimony.

R. p. BC-70. To rectify the error, the P&Z Commission reconsidered its decision at its next public hearing. R. pp. BC-70 and 223. On February 13, 2012, the P&Z Commission heard from Staff, Michaels Organization’s representatives, and Lusk’s representative. R. pp. BC-223 to 226. The P&Z Commission continued the hearing to March 5, 2012 for additional testimony. R. pp. BC-226 to 227.

Before the P&Z Commission took any testimony at the March 5, 2012 meeting, Staff erroneously instructed the P&Z Commission that: “The application tonight only concerns the additional height requested by the applicant”, and that potentially negative impacts of the Project due to exceeding the height limit of the R-O zone, such as inadequate parking, were not an “issue before the Commission.” R. p. BC-112. Staff gave this instruction despite the requirements of the Boise City Code to address such potential negative impacts through the conditional use process. The P&Z Commission Chair, Commissioner Stevens, compounded the erroneous direction from Staff by stating 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.

R. p. BC-126 (emphasis added). Commissioner Story echoed Commissioner Stevens’ erroneous direction that the P&Z Commission should somehow divorce the additional height request from the complete conditional use process:

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, but I think the rubber meets

the road where we're talking about height and that's really the only thing we have before us.

R. p. BC-126.

As a result, the P&Z Commission did not deliberate on the relationship between additional habitable height (achievable solely because of the conditional use height exception), the additional apartment bedrooms leased to individual college students, and the parking issues this would create. Yet the overwhelming testimony and written evidence presented to the P&Z Commission demonstrated the Project was severely under-parked, that inadequate parking would adversely impact surrounding property owners, and that a conditional use permit for the requested additional height should not be granted – at least not without appropriate mitigating conditions of approval. R. pp. BC-112, 123 to 124, 229 to 231, and 247. Nevertheless, the P&Z Commission approved the conditional use application for a height exception at its March 5, 2012 hearing, expressly not deliberating on the parking issues as required by the Boise City Code. R. pp. BC-106 to 111.

Lusk timely appealed the P&Z Commission's decision to the Council. R. p. BC-80. Under the Boise City Code, the Council on an appeal from a final approval by the P&Z Commission may only consider the record before the P&Z Commission and not any new evidence. *BCC* § 11-03-07.05.F.5. The Council heard and denied the appeal on April 17, 2012. R. pp. BC-32 to 55 and 284 to 287. Contrary to the evidence in the record, the Council's "Reason for the Decision" concludes that "the public record from the Planning and Zoning Commission meeting revealed a robust discussion regarding parking." R. pp. BC-112, 126, and 285. This conclusory statement completely disregards the fact that no robust discussion occurred

by the P&Z Commission about parking – in fact, the P&Z Commission was instructed to not consider the issue and it did not. R. pp. BC-112 and 126.

Lusk thereafter timely filed its Petition for Judicial Review with the district court. The district court affirmed the City’s decision to approve the conditional use permit. R. pp. 000111 to 000126.

Issues Presented on Appeal

1. Did the Council err in upholding the P&Z Commission’s decision when the P&Z Commission refused to follow the conditional use procedure as set forth in Boise City Code?
2. Were Lusk’s substantial rights violated when the P&Z Commission and then the Council refused to follow the procedure established in Boise City Code for approving a conditional use?
3. Did the P&Z Commission’s “Reason for the Decision,” which the Council approved as modified, fail to meet the requirements of Idaho Code Section 67-6535?

Attorney Fees on Appeal

Lusk is entitled to an award of attorney fees because the City’s actions lacked a reasonable basis in fact and law. I.C. § 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 Boise City Code necessary for establishing the conditional use permit criteria and findings; and (2) the Council ignored the facts of what occurred before the P&Z Commission.

Boise City Code clearly requires the P&Z Commission to make a decision on a conditional use height exception request by considering and deliberating on public testimony, and then conditioning the request as necessary to establish the conditional use criteria and findings. The P&Z Commission failed on both counts. The Council then ignored the record, claiming erroneously the P&Z Commission had performed a robust deliberation, and failed to remand back to the P&Z Commission so it could 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 attorney fees.

Argument

I. 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 an approval or denial of a land use application, as provided in the Idaho Administrative Procedures Act, Idaho Code Sections 67-5201 to 67-5292 (“IDAPA”). *Evans v. Teton County*, 139 Idaho 71, 74, 73 P.3d 84, 87 (2003). An affected person is one having an interest in real property that may be adversely affected by the issuance or denial of a permit authorizing development. I.C. § 67-6521(1) (a). “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 Dev., Inc. v. City of Sun Valley*, 144 Idaho 72, 75, 156 P.3d 573, 576 (2007).

The Idaho Supreme Court reviews decisions of any intermediate court sitting in an appellate capacity independently under IDAPA, reviewing the agency record independently of

any previous decision on judicial review. *In re Jerome County Bd. of Comm'rs*, 153 Idaho 298, 307, 281 P.3d 1076, 1085 (2012).

The decision of a zoning authority will be overturned if the Court finds 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. I.C. § 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 Comm'rs*, 151 Idaho 228, 254 P.3d 1224 (2011); *Cowan v. Bd. of Comm'rs of Fremont County*, 143 Idaho 501, 510, 148 P.3d 1247, 1256 (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, does not identify the evidence supporting that factual determination, and does not explain the basis for legal conclusions, including identification of the pertinent laws and/or regulations upon which the legal conclusions rest must be vacated. *Id.*

II. THE COUNCIL ERRED IN UPHOLDING THE P&Z COMMISSION'S DECISION BECAUSE THE P&Z COMMISSION REFUSED TO FOLLOW THE CONDITIONAL USE PERMIT PROCEDURE REQUIRED BY BOISE CITY CODE.

A. Boise City Code Provides a Clear Procedure for Reviewing a Conditional Use Request to Exceed the Maximum Height in a Zone.

The legislatively adopted language of Boise City Code clearly and unambiguously requires that any request for a height increase above the height limit of any zoning district will only be granted after an applicant has successfully demonstrated that all of the conditional use criteria and findings are met, and that the particular project can be appropriately conditioned to meet those findings. *BCC* §§ 11-04-05.06D and 11-06-06.12. The language of Boise City Code is also clear and unambiguous regarding the procedure for reviewing any conditional use request, including a request for a height exception. *BCC* §§ 11-06-04.13 and 11-06-04.14. A request for a conditional use height exception does not receive a lower level of scrutiny – it is the same as any other conditional use.

A full public hearing and deliberation on all of the issues and findings must be based on all of the criteria set forth in Section 11-06-04.13. Boise City Code 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.

....

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 be contingent upon compliance with specified conditions, including but not limited to . . . requirements for off-street parking.” *BCC* § 11-06-04.14 (emphasis added); *see also* I.C. § 67-6512(d).

This does not mean additional parking conditions must always be a condition of approval.² It does mean, however, that circumstances surrounding the request, including off-street parking, require thorough review by the P&Z Commission to determine if parking is adequate for the proposed Project (and its two additional habitable stories above what is allowed by right). If parking is not adequate, the P&Z Commission imposes conditions to establish the conditional use criteria and findings. *See* I.C. § 67-6512(d)(7) (allowing conditions of approval more restrictive than those generally required); *BCC* §§ 11-06-04.01, 11-06-04.04, 11-06-04.13, and 11-06-04.14. This procedure protects other uses in the surrounding neighborhood by

² Parking ratios for a particular allowed use might be appropriate for certain conditional uses. In this case, the application of the parking ratio for allowed uses in the R-O zone to this particular conditional use would have a severe detrimental impact on the persons and property of the surrounding neighborhood. Regardless, even if the allowed use standards sufficed, the issue is this: the P&Z Commission cannot – as it did here – just assume the allowed use parking ratio fits all conditional use requests without deliberation. The P&Z Commission has an obligation to explore the circumstances surrounding the conditional use request and make a reasoned determination that may include conditions of approval. This the P&Z Commission did not do.

ensuring a conditional use permit is not granted without adequate investigation and conditions of approval.

It is not sufficient for the P&Z Commission to consider only a few or even a majority of the criteria in Boise City Code Section 11-06-04.13. The P&Z Commission was required to determine the proposed conditional use would not adversely affect other property in the vicinity of the Project by examining whether, among other things, the planned parking is sufficient for the conditional use. The Boise City Code requirement of 1.5 parking spaces per dwelling unit may have been legislatively deemed acceptable for a building with a height that does not exceed thirty-five feet in the R-O zone (i.e., a permitted or automatically allowed use). However, when additional habitable height is the result of the conditional use request, the P&Z Commission holds an obligation to consider testimony and evidence from neighbors who may be adversely affected. Only after considering the particulars of the specific conditional use application can the P&Z Commission determine if conditions are necessary to establish the conditional use criteria to ensure the protection of the health, safety, and welfare of the public.

In sum, the conditional use permit process is designed to protect neighborhoods in which conditionally permitted uses maybe approved but that are not allowed by right. The review necessary for a conditional use requires more than a mere conclusion that standard off-street parking requirements for allowed – not conditional – uses in Boise City Code provide the appropriate level of parking. The P&Z Commission could not accomplish this task without considering and deliberating on the parking need created by the Project and the impact on the surrounding neighborhood, as presented in the evidence and testimony at the public hearings.

B. The Parking Standards for Allowed Uses in Boise City Code Do Not Automatically Satisfy the Parking Necessary for a Conditional Use.

The P&Z Commission's decision and the Council's determination to uphold that decision is based on the parking standards for allowed – not conditional – uses set forth in the Boise City Code. *See BCC* § 11-10-01.01 (Table 1). For conditional uses, Boise City Code Section 11-06-04.13.C requires the P&Z Commission to make the finding: “That the site is large enough to accommodate the proposed [conditional] 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 this title” refers to the laundry list of issues to be considered in determining whether the site is large enough to accommodate the proposed use. Parking is prominently listed among them.

The City and Royal claimed before the district court 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 for allowed uses found in Boise City Code, giving the P&Z Commission a free pass to ignore parking impacts on this neighborhood. R. pp. 000051 and 000077. Not only does this read out the investigation necessary to protect the Project's neighbors (and the Project's tenants), but it would read conditional uses out of Boise City Code. It also ignores the instructions provided in LLUPA that conditions of approval for a conditional use may be added “[r]equiring more restrictive standards than those generally required in an ordinance.” I.C. § 67-6512(d)(7).

The position of the City and Royal ignores a basic rule of statutory interpretation that requires all provisions of an ordinance to be read to give each effect. *Poison Creek Publ'g Inc.*

v. Central Idaho Publ'g, Inc., 134 Idaho 426, 431, 3 P.3d 1254, 1259 (Ct. App. 2000); *see also Hillside Landscape Const., Inc. v. City of Lewiston*, 151 Idaho 749, 753, 264 P.3d 388, 392 (2011) (quoting *State v. Mercer*, 143 Idaho 108, 109, 138 P.3d 308, 309 (2006) (“In determining the ordinary meaning of a statute ‘effect must be given to all the words of the statute if possible, so that none will be void, superfluous, or redundant.’”).

A conditional use height exception requires the City to follow conditional use permit procedures. If, as the City and Royal argued, a conditional use needs only to meet the off-street parking requirements for allowed uses under Boise City Code Section 11-10-01.01 (Table 1) without any further review, the language of Boise City Code Section 11-06-04.13.C (which requires consideration of parking as part of the conditional use permit review) and Boise City Code Section 11-06-04.14.C (which permits a condition of approval for off-street parking) would be read out of Boise City Code.³

If this were a three-story building that did not require a conditional use permit, then Table 1 would apply and that would be the end of the inquiry. That is not the case. The Project is a five-story building requiring a conditional use permit, meaning Boise City Code Section 11-10-

³ Boise City Code makes it clear that any request for a height exception “shall require a commission-level conditional use permit,” BCC § 11-04-05.06.D; *see also* BCC § 11-06-06.12, thereby signaling that nothing less than a full-blown public hearing before the P&Z Commission is required for a height exception request. All public testimony, all zoning ordinance standards, all conditional use criteria must be deliberated upon. In this instance, the P&Z Commission violated the procedure even before the hearing started by advising the public that they could talk all they wanted about the detrimental impacts the request would have on the surrounding neighborhood but – at least with regard to parking generated by this conditional use – the P&Z Commission, by its own choice and admission, was deaf to the issue.

01.01 (Table 1) is not the only provision of “this” zoning title that applies. At least two sections of “this title” apply to off-street parking. The first is Boise City Code Section 11-10-01.01 (Table 1) that sets forth the standard off-street parking requirements for allowed uses.⁴ The second is Boise City Code Section 11-06-04.14.C that applies to conditional uses. The two sections do not 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 the conditional use appropriately parked without further deliberation. If that were the case, there would be no need for Section 11-06-04.14.C that allows a condition of approval for parking requirements. This makes further sense in light of Boise City Code Section 11-06-04.13.C, which requires the P&Z Commission to consider parking for a conditional use request, and Boise City Code 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 have the option of attaching a separate condition of

⁴ Before the district court, City and Royal attempted to separate the height from the multi-family residential nature of the proposed conditional use. R. pp. 000041 to 000042 and 000063. 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), and 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), and 11-04-05.06.D.

approval tied to parking for the conditional use if all that is required is a arithmetical calculation under Boise City Code Section 11-10-01.01 (Table 1).

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

Holding a hearing and allowing citizens to testify is not all that is required to satisfy the procedure for approving a conditional use. The P&Z Commission must actually follow the procedure, deliberately consider the testimony and evidence, and provide an adequate reasoned written decision on that testimony and evidence, if any semblance of due process is to be found. This did not occur.

The P&Z Commission unequivocally refused to consider any evidence related to parking, including the abundant evidence and testimony submitted by Lusk. That evidence demonstrated the Project did not provide adequate parking for a structure with two stories of additional habitable space containing individually leased bedrooms for students, and that this failure to provide adequate parking would adversely affect other property in the Project's vicinity. BC-123 to 124, 229 to 231, and 247.

The record is replete with evidence showing the P&Z Commission refused to consider any parking impacts and did not understand its role in considering the conditional use request. Staff erroneously instructed the P&Z Commission that parking was not an "issue before the Commission." R. p. BC-112. The P&Z Commission Chair compounded Staff's error by stating 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.

R. p. BC-126. A second commissioner repeated and compounded the error of this position during deliberation. *Id.*

This Court does not need to agree with Lusk that the parking for the Project is dire to find that the P&Z Commission's decision was fatally flawed. The issue is whether the mandated procedure (and thus, due process) was followed. Contrary to the P&Z Commission Chair's statement, the duty of the P&Z Commission is to determine whether the particular requested conditional use should be held to a standard different than those standards for a permitted use. *See* I.C. § 67-6512(d)(7); BCC §§ 11-06-04.01, 11-06-04.04, 11-06-04.13, and 11-06-04.14. The P&Z Commission behaved arbitrarily when it refused to treat the Project as the conditional use that it is, ignored the evidence on parking (including the larger parking burden posed due to the fact students would reside at the Project), and did not consider whether appropriate conditions for parking were necessary to prevent undue impacts on the surrounding neighbors.

If the P&Z Commission actually considered the Project as a whole, including the student tenants and their probable parking requirements, the P&Z Commission admittedly might have determined that parking was not an issue under Section 11-06-04.13 and, assuming evidence supported such a conclusion, could have declined to attach additional off-street parking conditions as provided by Section 11-06-04.14. If the P&Z Commission had made a finding

regarding parking, this argument would be altogether different. However, by refusing to consider evidence regarding how this multi-story residential building was leased and impacted parking needs or deliberate on whether parking was adequately conditioned, the P&Z Commission acted upon unlawful procedure. 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 reconsideration of the matter. Even more troubling is the fact 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 such robust discussion occurred. BC-112 and BC-126. Merely allowing Lusk to submit information and testimony regarding parking does not satisfy the procedural requirement that the P&Z Commission actually consider and deliberate on the parking and the possible adverse effect on property in the vicinity when the P&Z Commission expressly stated it was refusing to do so.

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 Boise City Code Section 11-03-07.05. The P&Z Commission's approval and then the Council's 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.

III. LUSK’S SUBSTANTIAL RIGHTS WERE VIOLATED WHEN THE P&Z COMMISSION AND THEN THE COUNCIL REFUSED TO FOLLOW THE PROCEDURE ESTABLISHED IN BOISE CITY CODE FOR APPROVING A CONDITIONAL USE.

This 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 Comm’rs*, 151 Idaho 228, 333, 254 P.3d 1224, 1229 (2011). Notwithstanding the foregoing, even a non-applicant affected party, such as Lusk, 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 (emphasis added) (citing *Eacret v. Bonner County*, 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 County*, 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 Boise City Code to review a conditional use request for a height exception. The Council then ignored the record showing the refusal. This is not a situation where Lusk merely disagrees with the way the City interpreted a particular parking standard under the Boise City Code. Rather, this is a situation where the City refused point blank to consider criteria required as part of the procedure for reviewing a conditional use height exception application. The P&Z Commission's explicit refusal violates the procedure set forth in Boise City Code.

The City's failure to follow Boise City Code provisions constitutes a procedural defect. Boise City Code Section 11-06-04.01 requires the P&Z Commission to review and determine whether the proposed conditional use, including the amount of parking provided, 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 amount of parking planned for the Project would adversely affect other property in the vicinity. *BCC* § 11-06-04.13. 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 and 11-06-04.14. The P&Z Commission did none of this. Given the P&Z Commission was considering a conditional use permit application, this refusal violated the substantial rights of Lusk. As a result, Lusk will suffer a loss in property value as well as the expenditure of considerable time and money policing parking on its own property.

The Council's decision to uphold the P&Z Commission's approval rubber stamped what was already a defective process. The Council's decision completely ignored the plain record. Not only did the Council's decision run counter to the substantial evidence in the record, but it wholly contradicted it. For the Council to state the P&Z Commission reached its decision after a "robust discussion" ignores what actually occurred before the P&Z Commission. R. pp. BC-112, 126, and 285. No robust discussion occurred. BC-112 and BC-126. The P&Z Commission adamantly refused to consider parking and its relationship to the Project as a conditional use.

No amount of testimony or evidence presented to the P&Z Commission can sanitize the P&Z Commission's refusal to consider the testimony and evidence and follow the procedure mandated by Boise City Code. The Council's decision to uphold the P&Z Commission's approval violated the standard of review set forth in Boise 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.

IV. 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 THIS COURT'S DECISION IN *JASSO*.

LLUPA requires an approval or denial of a conditional use permit to be in writing and to include a reasoned explanation for the decision. 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.

I.C. § 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.

The “Reason for the Decision” issued by the P&Z Commission and approved as modified by the Council fails to meet the basic requirements of a reasoned written statement required by LLUPA. *See R.* pp. BC-106-111, 263, and 284. As noted above, Boise City Code sets out the criteria necessary to consider for a conditional use request (*BCC* § 11-06-04.13) and requires the P&Z Commission to address all of the criteria set forth in Boise City Code Section 11-06-04.13, and if necessary, adopt conditions of approval to mitigate, if possible, the impact on a neighborhood. *BCC* §§ 11-04-05.06.D, 11-06-04.04, 11-06-04.13, 11-06-04.14, and 11-06-06.12. Because of this failure, it would be impossible for the P&Z Commission to provide a written statement that complies with Section 67-6535(2) of LLUPA. Yet, the P&Z Commission’s “Reason for the Decision” concludes, without explaining the criteria and standards considered relevant or the relevant contested facts relied upon for the conclusion, that the Project provides “adequate parking.” *R.* p. BC-108.

The P&Z Commission committed a foundational error about what it would consider, as a result, there was no deliberation related to parking. The written findings are entirely suspect as the parking issue was not considered, meaning the written findings do not reflect the standard required under Idaho Code Section 67-6535 and 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. R. pp. 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.

Conclusion

The conditional use permitting process intends to protect neighborhoods by ensuring uses that may otherwise be disparate can coexist. The Court does not have to agree the parking problems set forth in the record will actually occur, but the P&Z Commission was required to at least consider the issue. The P&Z Commission and the Council refused to follow the City’s procedure for reviewing the conditional use permit application and failed to provide a reasoned statement that explains the criteria and standards considered relevant under Boise City Code. Accordingly, Lusk requests the Court to remand this matter back to the P&Z Commission for a

new public hearing to fully consider all of the criteria required for conditional use permit approval under Boise City Code, including parking.

DATED this 29th day of October 2013.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of October 2013, I caused a true and correct copy of the above APPELLANT'S BRIEF to be served upon the following individuals in the manner indicated below:

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