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917 Lusk, LLC v. City of Boise Respondent'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,

v.

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

Respondent

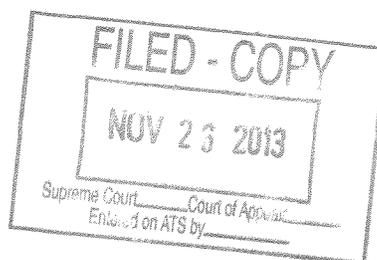
and

ROYAL BOULEVARD ASSOCIATES LP,
an Idaho limited partnership,

Respondent/Intervenor

Supreme Court Docket No. 41214-2013

RESPONDENT'S BRIEF



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

HONORABLE KATHRYN A. STICKLIN, SENIOR DISTRICT COURT JUDGE, PRESIDING

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I. STATEMENT OF THE CASE

A. Nature of the Case

This case is an appeal by 917 Lusk, LLC (“Lusk”) from the decision by the Boise City Council (“City Council”) approving a height exception so that Royal Boulevard Associates, LP (“Royal”) can build a multi-family apartment complex called the River Edge Apartments (“River Edge”) to a height exceeding the zone. (R. p. 000132, Ex. 1, pp. BC-284 through BC-287.) The subject site is 1004 West Royal Boulevard in Boise which is situated on the Boise River to the east of Ann Morrison Park and to the west of the property owned by Lusk. (R. p. 000132, Ex. 1, p. BC-162.) Lusk brings this appeal pursuant to the Local Land Use Planning Act, Idaho Code §§ 67-6501 *et seq.* (“LLUPA”) and the Idaho Administrative Procedure Act, Idaho Code § 67-5201 *et seq.* (“IAPA”).

B. Course of Proceedings and Disposition

On February 6, 2012, the Planning and Zoning Commission (“P&Z”) approved on its consent agenda a height exception for River Edge. The following week, P&Z voted to reconsider the application upon discovering that two members of the public associated with Lusk who wished to provide testimony had been outside the hearing chambers when the application was approved.

On March 5, 2012, P&Z held a full hearing on the River Edge application, receiving testimony from City staff, the applicant team, and members of the public. (R. p. 000132, Ex. 1, pp. BC-112 through BC-128.) Thereafter, P&Z unanimously approved the River Edge height exception and adopted reasons for the decision and conditions of approval, including twelve site-specific conditions. (R. p. 000132, Ex. 1, p. BC-128; pp. BC-106 through BC-111.) Lusk filed

an appeal of P&Z's decision to the City Council asserting that the P&Z decision failed to meet the requirements for a CUP. (R. p. 000132, Ex. 1, p. BC-80; pp. BC-82 through BC-89.)

On April 17, 2012, the City Council upheld P&Z's approval of the River Edge height exception and denied Lusk's appeal. (R. p. 000132, Ex. 1, pp. BC-284 through BC-287.) In addition to adopting P&Z's Reason for Decision, the City Council added that the height exception was appropriate for the neighborhood for a number of reasons, including that the property's R-O zone is purposefully designed for high density multi-family projects and that the amount of provided parking was sufficient. (R. p. 000132, Ex. 1, p. BC-285.) The City Council also required, as a condition of its approval and because of River Edge's proximity to Boise State University, that Royal increase the number of bicycle parking spaces from 48 to 112. (R. p. 000132, Ex. 1, Tr., 4/17/2012 Boise City Council Hearing, pp. 36, 39; R. p. 000132, Ex. 1, p. BC-285.)

Upon appeal by Lusk to the District Court, on May 31, 2013, the Honorable Senior District Judge Kathryn A. Sticklen affirmed the City Council's decision approving the River Edge height exception. (R. pp. 000111-000126.) The District Court found Lusk's arguments about procedural violations of both the conditional use ordinance and due process rights to be in error. (R. pp. 000123-000124.)

C. Statement of Facts

The River Edge Apartments is a five-story, modern, state-of-the-art living environment oriented toward Boise State University students. (R. p. 000132, Ex. 1, p. BC-176.) Located within a quarter-mile of the university campus, the property is currently zoned Residential Office with a Design Review Overlay ("R-OD"). (R. p. 000132, Ex. 1, p. BC-284; BC-159, BC-161.)

Multi-family housing is an allowed use for this location. Boise City Code § 11-04-05.04, Table 2.1: “Multiple Family Dwellings”. While the Boise City Zoning Ordinance (“zoning ordinance”) limits construction height to 35 feet, LLUPA and the City’s zoning ordinance allow this use to exceed the height limit upon issuance of a conditional use permit (CUP). Boise City Code § 11-04-05.05, Table 2.2A: “Maximum Dwelling Units Per Acre”; Idaho Code § 67-6512(f). Height exceptions for the R-O zone, like this project, are suitable since it would be very difficult to construct the mixed-use urban development contemplated by the R-O zone while maintaining a 35-foot height limitation.

As designed, River Edge with its 280 parking spaces complies with the City’s established off-street parking requirements. Boise City Code § 11-10-01.01, Table 1: “Residential Categories: Multi-family/Condominium.” Also as designed, the density of River Edge easily meets the density limits set forth in the City’s zoning ordinance. Boise City Code § 11-04-05.05, Table 2.2A: “Maximum Dwelling Units Per Acre.” Essentially, *but for the height exception*, Royal is entitled to build River Edge without any review by P&Z nor any input from Lusk.

At the public hearings, the parties associated with Lusk sought to persuade P&Z and City Council that River Edge was not compatible with and would adversely impact the surrounding neighborhood because of its height and different style of housing product. Both elements were used by Lusk in an attempt to bring the focus to the project’s impact on parking. Royal countered by presenting extensive evidence that River Edge would not cause adverse impacts on its neighbors.

The City’s parking code, set forth in Title 11, Chapter 10, Boise City Code, establishes the off-street parking and loading standards for all use categories within the City. Since the

River Edge application was for a different height than what was allowed in the zone, not a different use, both the P&Z and the City Council chose to interpret the parking code as sufficient and reasonable to address any concerns about compatibility and adverse impacts. (R. p. 000132, Ex. 1, Tr., 4/17/2012 Boise City Council Hearing, pp. 36-38; R. p. 000132, Ex. 1, pp. BC-126 through BC-128.) Without a clear nexus, height was only tangentially related to parking. By meeting the established parking standards and with the addition of more bicycle parking, the City Council determined River Edge did not adversely impact the neighborhood. It is with this valid interpretation of the City's own zoning ordinance that Lusk disagrees and pursues this appeal.

II. ADDITIONAL ISSUES ON APPEAL

Whether attorney's fees should be awarded to the City.

III. ATTORNEY FEES ON APPEAL

The City requests attorney fees on appeal pursuant to Idaho Code § 12-117 for the reason that Lusk brought its Petition for Judicial Review in the District Court and thereafter pursued the action in this Court without a reasonable basis in fact or law. The City's claim is set forth in Section V., beginning on page 15.

IV. ARGUMENT

A. Introduction

Lusk has devoted the majority of its argument to alternative theories of procedural error, asserting that the City Council's approval of the River Edge height exception: failed to follow proper conditional use permit procedure; failed to consider enough parking information and the parking standards; failed to consider the neighbors' parking concerns; and failed to provide a

reasoned decision that meets the requirements of Idaho Code § 67-6535. Also, Lusk asserts that the procedural errors amount to prejudice to substantial rights. These claims are addressed in more detail below.

B. 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). Idaho Code § 67-6521(1)(d); *In re Jerome County Bd. of Com'rs*, 153 Idaho 298, 307, 281 P.3d 1076, 1085 (2012). The issuance of special or conditional use permits is allowed by Idaho Code § 67-6512 and includes exceptions or waivers of standards for building height as addressed by Idaho Code § 67-6516.¹ 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.

In an appeal from a district court decision in which the district court was acting in its appellate capacity under the IAPA, the Supreme Court reviews the agency record independently of the district court's decision. *In re Jerome County*, 153 Idaho at 307, 281 P.3d at 1085. As to the weight of the evidence on questions of fact, the Court shall not substitute its judgment for that of the zoning agency. Idaho Code § 67-5279(1). “The Court defers to the agency’s findings of fact unless they are clearly erroneous and the agency’s factual determinations are binding on

¹ Idaho Code § 67-6512 (f) provides:

In addition to other processes permitted by this chapter, exceptions or waivers of standards, other than use, inclusive of the subject matter addressed by section 67-6516, Idaho Code, in a zoning ordinance may be permitted through issuance of a special use permit or by administrative process specified by ordinance, subject to such conditions as may be imposed pursuant to a local ordinance drafted to implement subsection (d) of this section.

the reviewing court, even when there is conflicting evidence before the agency, so long as the determinations are supported by evidence on the record.” *Neighbors for a Healthy Gold Fork v. Valley County*, 145 Idaho 121, 126, 176 P.3d 126, 131 (2007). “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.” *Marcia T. Turner, L.L.C. v. City of Twin Falls*, 144 Idaho 203, 209, 159 P.3d 840, 845-846 (2007); *see also, In re Jerome County*, 153 Idaho at 308.

C. Lusk Fails to Prove Any Prejudice to Substantial Rights

Idaho Code § 67-5279(4) requires that the agency action “be affirmed unless substantial rights of the appellant have been prejudiced.” On a number of occasions, this Court has noted there is no IAPA requirement that courts address the requirements of Idaho Code § 67-5279(3) and Idaho Code § 67-5279(4) in any particular order. *See, Hawkins v. Bonneville County Bd. of Com’rs*, 151 Idaho 228, 232, 254 P.3d 1224, 1228 (2011); *Krempasky v. Nez Perce County Planning and Zoning*, 150 Idaho 231, 235-236, 245 P.3d 983, 987-988 (2010); *Kirk-Hughes Dev., LLC v. Kootenai County Bd. of County Com’rs*, 149 Idaho 555, 557-558, 237 P.3d 652, 654-655 (2010). Therefore, this Court can affirm the City Council’s decision solely on the grounds that Lusk has failed to prove prejudice to substantial rights. *Hawkins*, 151 Idaho at 232. The Court may completely “forego analyzing whether the governing board erred in a manner specified by Idaho Code § 67-5279(3) if the petitioner cannot show that his or her substantial rights were violated.” *Id.* The City believes the issue of substantial rights is dispositive and will address it first.

1. The City Council adopted a reasoned decision that meets the requirements of Idaho Code § 67-6535 and abides by this Court's ruling in *Jasso v. Camas County*.

This Court has affirmed that “all the parties involved in a land-use decision have a substantial right to a reasonably fair decision-making process” that is “free from procedural defects that might reasonably have affected the final outcome.” *Id.* In addition to notice and the opportunity to be heard before an impartial decision-maker, “[d]ue process also requires that parties be afforded a meaningful opportunity for judicial review.” *Jasso v. Camas County*, 151 Idaho 790, 796, 264 P.3d 897, 903 (2011). This is accomplished with the adoption of a reasoned statement in conformance with Idaho Code § 67-6535. *Id.*

Lusk does not allege improper notice or a failure to present evidence. Certainly, the agency record is clear there was adequate notice and fair hearings wherein P&Z and City Council received substantial amounts of evidence about River Edge from the parties associated with Lusk. (R. p. 000132, Ex. 1, Tr. 4/17/2012 Boise City Council Hearing, pp. 2-11, 26-31, 33-34; R. p. 000132, pp. BC-81 through BC-95, BC-120 through BC-124, BC-224 through BC-225, BC-228 through BC-231, BC-239 through BC-261.) The impact of that evidence is highlighted by the fact the City Council took active steps to require River Edge to increase the number of bicycle parking spaces. (R. p. 000132, Ex. 1, Tr. 4/17/2012 Boise City Council Hearing, pp. 36-37, 39; R. p. 000132, Ex. 1, p. BC-285.)

Rather, Lusk claims that the City Council's Reason for Decision “fails to meet the basic requirements of a reasoned written statement required by LLUPA.” (R. p. 000132, Ex. 1, p. BC-284-85; Appellant's Br., p. 27.) In order to satisfy the “reasoned statement” requirement of Idaho Code § 67-6535, the decision-maker must articulate in writing the facts found, the

conclusions reached, and the rationale underlying the decision. *Jasso v. Camas County*, 151 Idaho 790, 794, 264 P.3d 897, 901 (2011).

Idaho Code § 67-6535 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).

Lusk relies on *Jasso v. Camas County* to elevate its simple displeasure in the City Council’s decision into prejudice to substantial rights – but this reliance is flawed. In *Jasso*, this 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. *Jasso*, 151 Idaho at 797. “Due to the inadequacy of the Board’s findings and conclusions, neither the district court nor this Court possesses the information necessary to meaningfully review the Board’s approval of the preliminary plat application.” *Id.* In that failure, this Court found prejudice to the parties’ substantial right to due process. *Id.* The same cannot be said for the situation at hand.

A review of the agency record reveals that the City Council adopted a reasoned statement that meets the standard set forth in Idaho Code § 67-6535 as explained by *Jasso*. At a minimum, the City Council could have simply adopted P&Z’s “Reason for the Decision” to conform to Idaho Code § 67-6535. (R. p. 000132, Ex. 1, pp. BC-108 through BC-111; *Cowan v. Board of Com’rs of Fremont County*, 143 Idaho 501, 511, 148 P.3d 1247, 1257 (2006)). But the City Council went further with its own reasoned statement, articulating its own rationale based on

relevant law and facts as required by Idaho Code § 67-6535. After review of the record and consideration of extensive testimony about parking standards and parking concerns, the City Council did formally adopt its Reason for Decision that clearly articulates acceptance of the original findings adopted by the P&Z and which adopts additional language as a result of the City Council hearing. (R. p. 000132, Ex. 1, pp. BC-121 through BC-122, BC-114 through BC-115, BC-125, BC-284; BC-285 [top of page, “New Language from City Council”]; R. p. 000132, Ex. 1, Tr., 4/17/2012 Boise City Council Hearing, pp. 6-11, 17-19, 21-23, 25, 27, 29-34.) In total, the Reason for Decision expresses the elements the City Council considered, the facts measured as important, and the zoning ordinance standards used and interpreted. Furthermore, the City Council added thirteen (13) site-specific and ten (10) standard Conditions of Approval deemed necessary and appropriate for the River Edge CUP – clear evidence of the City Council’s thoughtful consideration of River Edge. (R. p. 000132, Ex. 1, pp. BC-285 through BC-287.)

In sum, the City Council’s action satisfied both Idaho Code § 67-6535 (2) and the reasoning of *Jasso*. The City Council’s Reason for Decision is sufficient, “because it included the criteria and standards [the City Council] considered relevant, provided detailed facts, and explained its rationale for its decision.” *Cowan*, 143 Idaho at 512, 148 P.3d at 1258. This Court, in turn, is “directed to consider the proceedings as a whole and to evaluate the adequacy of procedures and resultant decisions in light of practical considerations with an emphasis on fundamental fairness and the essentials of reasoned decision-making.” Idaho Code § 67-6535(3). The City Council’s reasoned statement was comprehensive and complete – and, despite efforts to

persuade this Court to the contrary, Lusk's claims of prejudice to substantial rights based on an insufficient reasoned statement are erroneous. (Appellant's Br., pp. 26-28.)

2. As the non-applicant appellant, Lusk has failed to prove prejudice to substantial rights.

Since the City Council's actions for River Edge satisfy the due process requirements of notice, an opportunity to be heard before an impartial decision-maker, and a reasonable opportunity for judicial review, non-applicant appellant Lusk must "show something more in order to prove prejudice of a substantial right under Idaho Code § 67-5279(4). Lusk limits its argument to the assertion that "due process and a procedurally fair decision are substantial rights of even a non-applicant petitioner." (Appellant's Br., p. 24.) This assertion completely misinterprets and disregards the significant distinctions articulated in this Court's decision in *Hawkins v. Bonneville County Board of Commissioners*, 151 Idaho 228, 254 P.3d 1224 (2011).

The decision in *Hawkins* makes it clear there is a difference 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 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. (internal citations omitted)

Hawkins, 151 Idaho at 233.

Lusk, as the non-applicant opponent in the case at hand, cannot claim harm to a substantial right by merely asserting that the City Council failed to condition the River Edge height exception on each standard contained in Boise City Code § 11-06-04.14. (Appellant's Br., p. 25.) *Hawkins* is clear Lusk has no such right to seeing Royal's application adjudicated correctly.²

In the time since *Hawkins*, the Idaho Court of Appeals has provided a helpful interpretation that a court's review of harm to substantial rights under Idaho Code § 67-5279(4) must involve consideration of the dual components of prejudice and standing. *State Transp. Dept. v. Kalani-Keegan*, 155 Idaho 297, ___, 311 P.3d 309, 314-15 (Ct. App. 2013) ("The *Hawkins* Court references and requires, as to opposing or interested parties such as Hawkins who was a neighbor to the property but not an applicant, demonstration of both the materiality of the harm and the existence of a substantial right.") The right to notice and a chance to participate is the standing component or "the materiality of the harm" – the City does not dispute Lusk has standing. *Kalani-Keegan*, 311 P.3d at 314. As the District Court noted, Lusk was entitled to

² The City 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 Royal. 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).

If the P&Z had been required to condition the CUP on Boise City Code § 11-06-04.14, following Lusk'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)).

specific notice of Royal's height exception for River Edge due to proximity to the project. (R. p. 000117.) Those "statutorily provided rights to notice and a chance to participate" is the standing component of Idaho Code § 67-5279(4). *Kalani-Keegan*, 311 P.3d at 314.

But Lusk fails to prove the second component: "the existence of a substantial right." *Id.* at 314-315. This is the "something more" that the *Hawkins* Court demanded of the non-applicant appellant. *Hawkins*, 151 Idaho at 233. If one assumes that the decision-making process was fair, the owner-applicant has "a substantial right to develop their own property." *Id.* In *Hawkins*, this Court proposed that a determination on the substantial rights of the non-applicant appellant could be made by looking to evidence about property rights, nuisance, or trespass. *Id.* At present, Lusk has provided only speculation and conjecture: "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." (Appellant's Br., p. 25.) The District Court confirmed that Lusk failed to make any specific argument about its own unique substantial rights. (R. p. 000124.)

This Court should re-affirm its "something more" reasoning from *Hawkins*, affirm the Court of Appeal's explanation in *Kalani-Keegan*, and find that Lusk has provided nothing more than conclusory allegations of prejudice to imagined substantial rights. The extent of Lusk's affected property interests would be critical to determining prejudice to substantial rights, but those interests are not before the Court. *See, Hawkins*, 151 Idaho at 234. This case is not a civil action regarding property rights, it is a petition for judicial review under IAPA. Therefore, the only matter at issue is the propriety of granting a height exception to Royal to build River Edge as it is designed. Within these strict parameters, non-applicant appellant Lusk 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 Lusk's appeal instantly. *Id.*, at 232.

D. The City Council did not commit error in its approval of the River Edge CUP.

In addition to Lusk having to prove that its substantial rights were prejudiced in accordance with Idaho Code § 67-5279(4), Lusk must prove that there was error in at least one of the standards of review set out in Idaho Code § 67-5279(3) when the City Council affirmed the P&Z decision and approved the height exception for River Edge.³ Lusk has failed to meet this burden.

Because of the City's and Royal's indistinguishable interests in this case, and in the interests of brevity and ease of this Court's review, the City concurs with the arguments proffered by Royal concerning the standards of Idaho Code § 67-5279(3) and Lusk's failure to demonstrate error by the City Council. These arguments are set out in Royal's Brief and the City adopts them in their entirety, with the following additional comments.

Lusk seeks to persuade this Court that the City Council failed to follow proper conditional use permit procedure, failed to consider enough parking information or the correct

³ 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.

parking standards, and failed to consider the neighbors' parking concerns when it approved the River Edge CUP. The agency record, however, is filled with substantial evidence of the City Council's consideration of evidence and its coming to a reasoned decision that this Court cannot now second guess. (R. p. 000132, Ex. 1, Tr., 4/17/2012 Boise City Council Hearing, pp. 35-40; Idaho Code § 67-5279(1).) 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 agency so long as the determinations are supported by substantial and competent evidence. *Fischer v. City of Ketchum*, 141 Idaho 349, 352, 109 P.3d 1091, 1094 (2005); *Wohrle v. Kootenai County*, 147 Idaho 267, 274, 207 P.3d 998, 1005 (2009). Substantial and competent evidence is “relevant evidence which a reasonable mind might accept to support a conclusion.” *Wohrle*, 147 Idaho at 274 (quoting *Lamar Corp. v. City of Twin Falls*, 133 Idaho 36, 43, 981 P.2d 1146, 1153 (1999)).

Lusk's desire for a different outcome is apparent. With so much detail in the record about parking impacts, the City Council reviewed the evidence in a reasonable manner to reach its conclusions. Upon review, “[t]he court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.” Idaho Code § 67-5279(1); *see also*, *Marcia T. Turner, L.L.C. v. City of Twin Falls*, 144 Idaho 203, 209, 159 P.3d 840, 845 (2007). Furthermore, “[t]here is a strong presumption favoring the validity of a governing board's zoning decisions, including its application and interpretation of its own zoning ordinance.” *Marcia T. Turner, L.L.C.*, 144 Idaho at 209.

Lusk has failed to meet the burdens imposed by Idaho Code § 67-5279. Therefore, this Court must affirm the City Council's decision approving the height exception for River Edge.

V. ATTORNEY FEES ON APPEAL

A. Lusk is not entitled to attorney's fees.

Lusk's demand for fees is not warranted. Attorney's fees can only be awarded pursuant to Idaho Code § 12-117 if: first, the Court finds in favor of a party; and second, the non-prevailing party acted without a reasonable basis in fact or law. *Burns Holdings, LLC v. Madison County Bd. Of County Com'rs*, 147 Idaho 660, 664, 214 P.3d 646, 650 (2009). According to this Court, it is necessary "to determine whether there was no authority at all for the agency's actions." *Wohrle*, 147 Idaho at 276, 207 P.3d at 1007 (quoting *Ralph Naylor Farms, LLC v. Latah County*, 114 Idaho 806, 809, 172 P.3d 1081, 1084 (2007)). If an agency has no authority to take a particular action, it is said to act without a reasonable basis in fact or law. *Fischer v. City of Ketchum*, 141 Idaho 349, 356, 109 P.3d 1091, 1098 (2005). For the reasons argued herein, the City Council was not acting outside the scope of its authority when it approved the River Edge height exception. LLUPA, as well as the plain language of the City's zoning ordinance and parking standards, empowers the City Council to take the action it took. Therefore, Lusk should not be awarded attorney's fees in this matter.

B. The City is entitled to attorney's fees.

The arguments presented herein and those adopted from Royal's brief establish that the City is entitled to attorney's fees. The City requests attorney fees on appeal pursuant to Idaho Code § 12-117 for the reason that Lusk has continued to insist, without basis in fact or law and for seemingly no other purpose than construction delay, that the City Council failed to properly adjudicate the River Edge CUP. The District Court's decision rightfully noted that the agency

record shows both the P&Z and the City Council considered the contentious parking issue and determined the project met the current code requirements without any need for further discussion. (R. p. 000123.) The City Council's formally adopted reason for decision with its 13 site-specific conditions clearly is in accordance with Idaho Code § 67-6519(4)⁴ and the controlling standards of the City's zoning ordinance.

Lusk has failed to provide any rational legal argument for why this Court should overturn the City Council's decision under the applicable standards of review in Idaho Code § 67-5279(3) and has provided no justification why their substantial rights as the non-applicant appellant have been prejudiced, as required by Idaho Code § 67-5279(4). At the end of the day, this case boils down to the fact that on April 17, 2012, the City Council properly decided that the River Edge height exception was appropriate based on the City's own zoning ordinance and extensive testimony in the record. Lusk is dissatisfied with that decision, but dissatisfaction forms no basis for reversal and remand. This Court should uphold the City Council decision because of Lusk's failures as outlined herein and the Court's deference to the City Council's interpretation of its own laws. *See, Marcia T. Turner, L.L.C.*, 144 Idaho at 209.

"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." *Neighbors for a Healthy Gold Fork*, 145 Idaho at 143, 176 P.3d at 138. Lusk's appeal is groundless and has served no other purpose than to delay desired multi-family

⁴ Idaho Code § 67-6519(4): "Whenever a governing board ... grants or denies an application, it shall specify: (a) The ordinance and standard used in evaluating the application; (b) The reasons for approval or denial; and (c) The actions, if any, that the applicant could take to obtain approval."

development and burden the City with defense of its lawful planning and zoning actions. Accordingly, the City is entitled to be reimbursed for its reasonable attorney fees incurred in this appeal pursuant to Idaho Code § 12-117.

VI. CONCLUSION

Based upon the above arguments and those expressed in Royal's brief which the City has adopted, the City respectfully requests this Court's order affirming the April 17, 2012, decision by the City Council granting the River Edge height exception and its order affirming attorney's fees for the City for fees incurred in this appeal.

RESPECTFULLY SUBMITTED this 26th day of November 2013.

BOISE CITY ATTORNEY'S OFFICE



Mary Elizabeth Watson
Assistant Boise City Attorney

VII. CERTIFICATE OF SERVICE

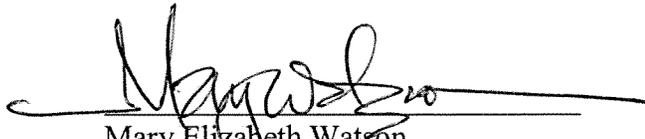
I hereby certify that I have on this 26th day of November 2013, served the foregoing document on all parties of record as follows:

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