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IN THE SUPREME COURT OF THE STATE OF IDAHO

917 LUSK, LLC, an Idaho limited liability
company,

Lusk/Appellant,

vs.

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

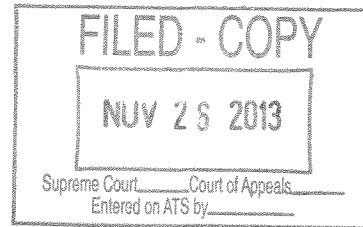
Respondent,

and

ROYAL BOULEVARD ASSOCIATES, LP,
an Idaho limited partnership,

Intervenor/Respondent.

Supreme Court Docket No. 41214-2013



INTERVENOR'S BRIEF

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

Honorable Kathryn A. Sticklen, Senior District Judge, presiding

Joann C. Butler and Richard H. Andrus
Residing at 251 East Front Street, Boise, ID 83702
for Appellant 917 Lusk, LLC

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Residing at 150 North Capitol Boulevard, 3rd Floor, Building 2, Boise, ID 83702
for Respondent City of Boise City

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Residing at 601 West Bannock Street, Boise, ID 83702
for Intervenor Royal Boulevard Associates LP

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I. STATEMENT OF THE CASE

A. NATURE OF THE CASE.

This case is a petition for judicial review challenging the City of Boise's (the "City") approval of a multi-family apartment project called the River Edge Apartments ("River Edge") owned by Intervenor Royal Boulevard Associates, LP ("Royal" or "Intervenor").

B. COURSE OF PROCEEDINGS.

The Boise City Planning and Zoning Commission ("P&Z") approved a height exception for River Edge on March 5, 2012. An adjacent property owner, 917 Lusk, LLC ("Lusk"), appealed the P&Z's decision to the Boise City Council ("City Council"). On April 17, 2012, the City Council upheld the P&Z's decision.¹ On May 17, 2012, Petitioner filed a judicial review action challenging the City Council's decision. The District Court denied the petition on May 31, 2013, and this appeal ensued.

C. STATEMENT OF FACTS.

In recent years, growth at Boise State University has been going hucklede buck.² As a result, there is a need for additional student housing. Intervenor plans to meet some of this need by building River Edge along the Boise River near the Boise State campus.³ The multi-family use proposed for River Edge is allowed as of right in the R-O zone in which the project is located.⁴ The R-O zone is expressly intended for high density residential projects with a

¹ City Council Decision Statement, BC 284-287.

² *Stuard v. Stewart*, 401 F.3d 1064, 1066 (9th Cir. 2005).

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

⁴ BCC § 11.04-05.04 (Table 2.1).

permitted maximum density of 87.1 units per acre.⁵ River Edge is well within the maximum density. River Edge provides all the parking required by the Boise City Code (“BCC”). The BCC’s parking regulations are set forth in Title 11, Chapter 10 of the BCC (the “Parking Chapter”).⁶

The Local Land Use Planning Act, Idaho Code Sections 67-6501 *et seq.* (“LLUPA”) and the BCC allow this use to exceed the standard height limit with a height exception based on the criteria for issuance of a conditional use permit (“CUP”).⁷ The height exception allows Royal to design the project in a desirable way by building structured parking within its building (known as podium parking) rather than by surrounding the building with a surface parking lot that would create a “dead zone” in the project and the neighborhood.⁸

The testimony in the hearings before the City focused on compatibility and impacts of the project on the surrounding neighborhood. Much of the discussion was about parking and traffic impacts. The administrative record contains the following evidence the project and its parking are compatible with surrounding uses and will not have an undue adverse impact on its neighbors.

⁵ BCC § 11-04-05.05 (Table 2.2A).

⁶ BCC Title 11, Chapter 10.

⁷ Idaho Code § 67-6512(f); BCC §§ 11-04-05.06.D; 11-06-06.12.

⁸ BC 72.

1. Compatibility to other uses in the general neighborhood.

- There are numerous buildings of similar height in the immediate vicinity, including Lusk's own building next door that also received a height exception.⁹
- River Edge provides ample separation from shorter structures.¹⁰
- The additional height does not increase the density to the point it exceeds the parking standards in the BCC.¹¹
- The additional height will not create privacy concerns given that adjacent uses consist of offices and park land.¹²
- 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.¹³

2. No adverse effect on other property in the vicinity.

- River Edge will provide 280 parking spaces for 175 units to satisfy the Parking Chapter's requirement of 1.5 spaces per dwelling unit and 1 guest space per 10 units. The project is properly characterized as multi-family for purposes of the Parking Chapter.¹⁴

⁹ Decision Letter, p. 3, BC 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 116; Staff testimony, P&Z Hearing Minutes (3-5-12), p. 1, BC 112.

¹⁰ Decision Letter, p. 3, BC 108; Staff Report (2-6-12), p. 6, in Staff Packet (3-5-12), p. 66, BC 199.

¹¹ Decision Letter, p. 3, BC 108; Staff Report (2-6-12), p. 8, in Staff Packet (3-5-12), p. 68, BC 201.

¹² Decision Letter, p. 3, BC 108.

¹³ Decision Letter, p. 3, BC 108; Applicant testimony, P&Z Hearing Minutes (3-5-12), p. 7, BC 118.

¹⁴ Staff Report (2-6-12), p. 3, in Staff Packet (3-5-12), p. 63, BC 196, BC 71 (project correctly determined to be multi-family).

- 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.¹⁵
- River Edge parking is consistent with parking ratios provided by Boise State University housing developments.¹⁶
- 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.¹⁷
- River Edge will promote bicycle use, U-bikes and rental bikes and will provide secured bicycle parking on site.¹⁸
- 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.¹⁹
- 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.²⁰
- The increase in traffic generated by the development is offset by the potential for existing businesses to capitalize on the increase in

¹⁵ Decision Letter, p. 3, BC 108; Staff Report (2-6-12), p. 8, in Staff Packet (3-5-12), p. 68, BC 201.

¹⁶ Staff testimony, P&Z Hearing Minutes (3-5-12), p. 1, BC 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 261; Applicant letter (2-27-12), in Staff Packet (3-5-12), p. 43, BC 176 (describing 622 bedrooms and 280 parking spaces for a parking to bedroom ratio of .45).

¹⁷ Applicant testimony, P&Z Hearing Minutes (3-5-12), p. 4, BC 115.

¹⁸ Applicant testimony, P&Z Hearing Minutes (3-5-12), p. 4, BC 115.

¹⁹ Decision Letter, p. 3, BC 108; Staff Report (2-6-12), pp. 6, 8, in Staff Packet (3-5-12), pp. 66, 68, BC 199, 201.

²⁰ Staff Report (2-6-12), p. 8, in Staff Packet (3-5-12), p. 68, BC 201.

customers to the surrounding neighborhood as well as by access to bus stops and the greenbelt.²¹

- 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 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.²²

II. ADDITIONAL ISSUE PRESENTED ON APPEAL

1. Should attorneys' fees be awarded to Intervenor?

III. ATTORNEYS' FEES ON APPEAL

Intervenor seeks attorneys' fees on appeal. The basis for Intervenor's claims is set forth in Section IV.I beginning on p. 28.

IV. ARGUMENT

A. Introduction and legal standard.

Lusk raises two primary legal challenges to the approval of River Edge: (1) first, Lusk claims the City Council committed a procedural error by not overturning the P&Z's decision to impose only the parking requirements in the Parking Chapter; and (2) Lusk contends the City Council adopted unlawful findings by not addressing the parking issue in the way Lusk asserts is required. While the argument is almost entirely styled in terms of procedural error, Lusk also asserts without authority or argument that the City Council's decision violates due process, is not

²¹ Staff Report (2-6-12), p. 8, in Staff Packet (3-5-12), p. 68, BC 201.

²² Decision Letter, p. 3, BC 108; Staff Report (2-6-12), p. 7, in Staff Packet (3-5-12), p. 67, BC 200.

supported by substantial evidence and is arbitrary, capricious and an abuse of discretion. Finally, Petitioner requests an award of attorneys' fees. The sections below discuss these issues in turn.

This Court exercises free review of all issues of law decided by the District Court.²³ Thus, Lusk has the 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),²⁴ and (ii) that Lusk's substantial rights have been prejudiced in accordance with Idaho Code § 67-5279(4).²⁵ Lusk has not met these burdens.

B. The City Council did not commit a procedural error: rather, the City Council reasonably interpreted the BCC not to require the imposition of parking requirements beyond the Parking Chapter.

The heart of Lusk's appeal is the City Council committed a procedural error by failing to overturn the P&Z's "refusal to consider" the imposition of parking requirements beyond those in the Parking Chapter. This argument holds no water. As discussed below, the issue is not one of procedure but rather one of ordinance interpretation. Lusk's attacks on the City Council's ordinance interpretation fail because the BCC does not compel the City Council to consider

²³ *Friends of Farm to Market v. Valley County*, 137 Idaho 192, 195, 46 P.3d 9, 12 (2002).

²⁴ 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;
- (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.

²⁵ *Friends of Farm to Market v. Valley County*, 137 Idaho 192, 196, 46 P.3d 9, 13 (2002).

additional parking requirements. Further, the City Council’s interpretation that the BCC does not authorize the imposition of additional parking in the context of River Edge is reasonable. Moreover, the City Council did not turn a blind eye to parking as Lusk contends. Instead, City Council members considered the parking issue in detail and determined that the parking required was adequate.

The subsections below present the following arguments: (1) Lusk mischaracterizes an issue of ordinance interpretation as a procedural error; (2) the plain language of the BCC does not require the consideration of additional parking requirements; (3) the City’s interpretation of the BCC limiting parking to the requirements in the Parking Chapter is reasonable; and (4) any mistake in ordinance interpretation was a harmless error because the City Council adequately considered the merits of the parking issue.

1. Lusk mischaracterizes the issue as procedural error, when the real issue is ordinance interpretation.

Lusk contends the P&Z's refusal to consider the imposition of parking requirements beyond the Parking Chapter is a procedural error because the BCC “clearly and unambiguously”²⁶ requires such consideration.²⁷

However, the issue is not one of procedure but one of ordinance interpretation: did the BCC require the City Council to consider the imposition of parking requirements beyond the

²⁶ Lusk’s Brief at 15.

²⁷ “Where the language of a statute or ordinance is unambiguous, the clearly expressed intent of the legislative body must be given effect, and there is no occasion for a court to consider rules of statutory construction.” *Friends of Farm to Market v. Valley County*, 137 Idaho 192, 197, 46 P.3d 9, 14 (2002). Thus, the City’s interpretation of the ordinance becomes relevant if the BCC is not “clear and unambiguous.”

Parking Chapter when acting on the River Edge height exception? The City Council interpreted its ordinance not to require the consideration of additional parking requirements, and Lusk contends that the City Council's interpretation is unlawful.

Lusk's brief does not address the standard of review if the Court determines the BCC does not "clearly and unambiguously" support Lusk's position. If the ordinance is subject to interpretation, a reviewing Court must apply "a strong presumption of validity to the zoning body's application and interpretation of its own ordinances."²⁸ Unless the City Council's interpretation is "capricious, arbitrary or unreasonable," the interpretation must be upheld.²⁹

2. The BCC does not "clearly and unambiguously" require the consideration of additional parking requirements.

In several respects, the BCC did not "clearly and unambiguously" require the consideration of parking requirements beyond those in the Parking Chapter. Rather, the ordinance is capable of a reasonable alternative reading, and therefore is ambiguous. "An ordinance is ambiguous where reasonable minds might differ or be uncertain as to its meaning; however, ambiguity is not present merely because the parties present differing interpretations to the court."³⁰ The subsections below present the following arguments: (1) the BCC does not unambiguously treat height exceptions identically to other CUPs; (2) the plain language of BCC

²⁸ *In re Jerome County Bd. Of Comm'rs*, 153 Idaho 298, 303, 281 P.3d 1076, 1086 (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).

²⁹ *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)).

³⁰ *Jasso v. Camas County*, 151 Idaho 790, 798, 264 P.3d 897, 905 (2011).

Section 11-06-04.13.C. does not compel consideration of additional parking requirements; and
(3) BCC Section 11-06-04.14.C. does not compel consideration of additional parking requirements.

a. The BCC does not unambiguously require that height exceptions be treated identically to other CUPs.

River Edge was seeking a height exception, not a standard CUP. The multi-family use River Edge proposes is allowed, the project is well within density limits and the project meets all the requirements of the Parking Chapter. Lusk asserts that a height exception is a “full”³¹ CUP subject to a “full blown public hearing,”³² and that the City Council must apply “strict procedure”³³, “rigorously”³⁴ scrutinize the application and allow no “lower level of scrutiny”³⁵ than a CUP. Lusk further contends it is “clear and unambiguous”³⁶ that a multi-family use of 35 feet or below as an allowed use, while a multi-family use above 35 feet becomes a conditional use. Despite these strong statements, the ordinance does not support Lusk's claims.

First, uses requiring conditional use permits are expressly listed as “CC” (defined as “Conditional”) in the use tables in the BCC, while the multi-family use relied on by River Edge is listed as “A” (defined as “Allowed”) in the R-O zone.³⁷ This obvious difference by itself supports a conclusion that an allowed use seeking a height exception may be treated differently

³¹ Lusk’s Brief at 7.

³² Lusk’s Brief at 19, fn. 3.

³³ Lusk’s Brief at 8.

³⁴ Lusk’s Brief at 8.

³⁵ Lusk’s Brief at 15.

³⁶ Lusk’s Brief at 15.

³⁷ BCC § 11-04-05.04 (Table 2.1).

from uses expressly listed “Conditional.” Seeking a height exception does not erase the “A”, any more than seeking a conditional use permit for a drive-through at an allowed pharmacy in a C-1 zone erases the “A” for the pharmacy and turns it into a “CC” for conditional use.³⁸ Rather, the conditional use review of a height exception simply addresses the impacts of the change sought by the permit, i.e. the additional height, pursuant to conditional use criteria, just as the impacts of the drive through, and not the pharmacy itself, must be assessed for the drive through CUP. To illustrate this distinction, if no height exception were granted, Royal would have been allowed to build the same number of units and bedrooms with the same parking with a height of 35 feet (for example, by putting the parking underground or by redesigning the building).³⁹

Second, the ordinance expressly distinguishes between a height exception and other conditional use permits by giving it a different name. Both references in the code call this specialized permit a “height exception” rather than a “conditional use,” indicating the permits are different and allowing the inference that the focus of the height exception is on the impacts of height and not on the overall use.⁴⁰

³⁸ BCC § 11-04-05.09 (Table 3).

³⁹ This example shows the fallacy of Lusk’s contention that the height exemption allowed “two additional habitable stories” to be built. Lusk’s Brief at 7.

⁴⁰ BCC § 11-06-06.12 (“The Commission’s decision on height exceptions shall be based on the criteria set forth in Section 11-06-04.13”); BCC § 11-04-05.06.D (“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”). Lusk contends the reference to BCC Section 11-06-06.13 is a typographical error and the correct reference is to BCC Section 11-06-06.12. We concur the reference is incorrect, but believe the correct reference could be to BCC Section 11-06-06.12 or to BCC Section 11-06-04.13, which are the conditional use criteria. We see no substantive difference in either case.

Third, Lusk’s purportedly “clear and unambiguous” reading of the BCC potentially places the City in violation of the takings clauses of the U.S. and Idaho Constitutions. The concern is that project height lacks any real nexus to the amount of parking. As discussed, Royal could build the same number of units and bedrooms with the same parking without a height exception by changing the design. Thus, permitting the P&Z or City Council to impose additional parking requirements could run afoul of the requirement of *Nollan v. California Coastal Commission*⁴¹ and other cases that the exaction must have a substantial nexus to the impacts of the project. The Constitution forbids the City from requiring every developer to build a statue of the mayor or to do whatever the neighbors ask just because a discretionary permit is needed. Fundamental fairness requires a rational connection between the permit required and the conditions imposed. Under these circumstances, the Court is compelled to seek an interpretation of the ordinance that is constitutional. “There is a strong presumption of the validity of an ordinance, and an appellate court is obligated to seek an interpretation that upholds its constitutionality (citation omitted).”⁴² The City’s interpretation provides such an opportunity while Lusk’s interpretation may not.

b. The plain language of BCC Section 11-06-04.13.C. does not compel consideration of additional parking requirements.

Lusk asserts that BCC Section 11-06-04.13.C requires the consideration of additional parking requirements. This section states that the City must find the following to approve a CUP:

⁴¹ 483 U.S. 825 (1987).

⁴² *State v. Medel*, 139 Idaho 498, 500, 80 P.3d 1099, 1101 (App. 2003); *State v. Cobb*, 132 Idaho 195, 197, 969 P.2d 244, 246 (1998).

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

Petitioner's argument apparently is that the "parking ... required by this title" should include parking beyond the requirements of the Parking Chapter in the event the P&Z determines that the parking impact of a project will "adversely affect" other property in the vicinity of the project.⁴³ But nothing in Section 11-06-04.13.C requires the consideration of additional parking requirements. Lusk contends Section 13.C is simply a "laundry list" of items that must be considered in issuing a conditional use permit. But this reading does not survive even superficial scrutiny. This section states the P&Z must find that "the site is large enough to accommodate the proposed use and all ... parking ... required by this title." Rather than describe a laundry list, this language says something very specific. It says the P&Z needs to look at the required parking and determine whether the use as proposed will fit on site with the required parking and the other required improvements.

The obvious place to look for parking requirements is the Parking Chapter, so on that basis one can argue Section 13.C unambiguously limits the parking review of Section 13.C to the requirements of the Parking Chapter. But even assuming the ordinance can be read to require additional parking, the language is ambiguous and subject to interpretation. As discussed below, the ambiguity means the City's interpretation prevails, and Lusk's argument fails.

⁴³ See BCC § 11-06-04.13.D; Lusk's Brief at 15, 17.

c. The plain language of BCC Section 11-06-04.14.C. does not compel consideration of additional parking requirements.

Lusk then contends that BCC Section 11-06-04.14.C. requires the consideration of additional parking requirements in a height CUP. This is not so. This section states, in pertinent part:

The Commission, in acting upon the [CUP] 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, service drive design and construction standards, vehicular movements within the site and points of vehicular ingress and egress; (emphasis added)

BCC § 11-06-04.14.C.

This language simply states that approval of a CUP is contingent on meeting off-street parking requirements. Nothing in this language suggests the P&Z is required to consider parking requirements in excess of the Parking Chapter. In fact, a reasonable reading of this section is that the permit simply must be contingent on meeting the requirements of the Parking Chapter.

Lusk argues such a reading would make this language superfluous.⁴⁴ This is incorrect. The purpose of the language simply may be the prudent one of ensuring that all requirements related to a project are conditions of a CUP whether they are required elsewhere in the BCC or

⁴⁴ Lusk's Brief at 18-20.

not. Several other provisions in Section 14.C suggest this is the case.⁴⁵ Or the language may mean the City Council has the discretion to impose additional parking requirements where it deems appropriate. In either case, nothing in Section 14.C forbids the City Council from determining as it did in this case that additional parking requirements are not appropriate because the height of the project lacks a sufficient nexus to parking. Further, the issue is entirely moot because the record reflects ample consideration of the parking issue by the City Council⁴⁶ and substantial evidence in the record supports the conclusion that River Edge, including its parking, will not have an adverse impact on its neighbors.⁴⁷ Given that conclusion, the City Council had no basis to impose additional parking requirements. In fact, the City Council saw fit to recognize the low parking demand by imposing additional bicycle parking requirements.⁴⁸

In sum, BCC Section 11-06-04.14.C provides no support for Lusk's argument that the City was obligated to consider parking requirements beyond the Parking Chapter in addressing the height exception application for River Edge.

⁴⁵ E.g. BCC § 11-06-04.14.B, C, H, I & K. Royal's own permit approval demonstrates the City's practice of conditioning a permit on matters that may be self-executing in the BCC. See BC-285 through BC-287 (conditions of approval). For an obvious example, Condition 14 states: "A Building Permit approval is contingent upon the determination that the site is in conformance with the Boise City Subdivision Ordinance. . . ." BC 286. Royal's conditions of approval contain several similar examples.

⁴⁶ April 17, 2013 City Council Transcript at 34-39.

⁴⁷ See Section I.C.2 above.

⁴⁸ BC 285.

3. The City's interpretation of the parking requirements in a height exception application is reasonable.

Given that the parking requirements that may be imposed in a height exception are subject to interpretation, the City's interpretation must be upheld unless it is "arbitrary, capricious, or unreasonable."⁴⁹ As discussed in the subsections below, the City's interpretation is reasonable.

a. The City's interpretation of the distinction between a height exception and other CUPs is reasonable.

For the reasons stated in Section 3.a above, it is reasonable for the City to interpret its height exception ordinance provisions to address only the impacts of height and not the impact of the use. To recap, the multi-family use proposed for River Edge is an allowed use, not a conditional use. Further, the BCC expressly gives different names to height exceptions and conditional use permits, indicating they may be treated differently. Finally, the concern about the nexus between height and parking adds weight to its interpretation. It was reasonable for the City to conclude (1) that height exceptions are different from CUPs, (2) that the focus of a height exception application is the impact of height, not use, and (3) that the lack of connection between height and parking made it improper to impose additional parking requirements as a condition of approval.

⁴⁹ *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)).

b. City's interpretation of BCC Sections 11-06-04.13.C and 11-06-04.14.C are reasonable.

The City Council found that two provisions in the BCC control how much parking is required for a conditional use permit: BCC Section 11-06-04.13(C) and BCC Section 11-10-01.01 (Table 1). BCC Section 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].”⁵⁰ Only one of these seven standards specifically addresses parking: BCC Section 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)

According to the City's interpretation, the parking “required by this title” for the proposed use is set forth in BCC Section 11-10-01.01. It states, “The number of required parking spaces is based on the use of the site.” In Table 1, the number of parking spaces for “Multi-family,” the use category for River Edge, is “1.5 per dwelling unit + one guest space per 10 units”, which requires 1.5 spaces per dwelling unit plus 1 guest space per 10 units. The undisputed evidence in the record is that River Edge meets this parking standard by providing 280 on-site parking spaces.⁵¹ The City found this parking is sufficient to satisfy the needs of the entire five-story structure, not just a smaller structure that would fit within the 35-foot height

⁵⁰ BCC § 11-06-04.13 (emphasis added).

⁵¹ BC 284. Further, Lusk's Brief does not allege any deficiency with meeting this height exception standard and Lusk did not allege any deficiencies with meeting this CUP standard in its appeal to City Council.

limit (without underground parking), without causing the parking to spill onto surrounding streets.⁵²

Lusk makes several arguments opposing the City's interpretation of Section 13.C: (1) that this interpretation "read[s] out the investigation necessary to protect the Project's neighbors (and the Project's tenants);" (2) it reads "conditional uses out of the Boise City Code;" (3) it ignores the instructions in LLUPA that "conditions may be attached" to a conditional use "[r]equiring more restrictive standards than those generally required in an ordinance;" and (4) it ignores the rule of statutory interpretation that all provisions of an ordinance should be given effect where it is possible to do so.⁵³ None of these arguments have merit.

As to the first argument, Lusk invents the requirement to investigate and protect the neighbors from the differences Lusk imagines between River Edge and other multi-family projects. It is perfectly reasonable for the City to conclude that the neighbors are sufficiently protected if the project provides the parking required by the Parking Chapter. No further investigation or protection is required, and no language in the BCC requires or even suggests that further steps need be taken.

As to the second argument, Lusk's contention that the City Council's interpretation reads conditional uses out of the BCC, simply is not true. The City Council retains the authority to impose conditions on conditional uses and height exceptions as it determines based on its reasonable interpretation of the BCC. But the City Council also retains the authority not to

⁵² BC 284.

⁵³ Lusk's Brief at 18-19.

impose conditions where it believes they are not justified or where it would risk violating the law doing so. That is what it did here.

Lusk's third argument similarly is without merit. LLUPA vests discretion in the City Council to impose conditions where it deems appropriate. Here the council deemed it was not appropriate based on a reasonable interpretation of the BCC.

Lusk's fourth argument also fails. Nothing is read out of the ordinance. Rather, the City Council's interpretation is surgical and addresses only the City Council's assessment that River Edge's height lacks sufficient nexus to parking to justify the imposition of additional parking requirements. The conditional use criteria are not otherwise affected.

The City's interpretation of BBC Section 11-06-04.14.C is also reasonable. This section requires that the City condition the permit on compliance with "requirements for off-street parking." This simply means the height exception needs to be conditioned upon compliance with the Parking Chapter. Lusk does not contest that the permit does this.

In sum, the City was fully within its authority to decide that additional parking requirements were not justified because of the disconnect between height and parking. Therefore, Lusk has not established that the City Council's approval of the height exception was made upon unlawful procedure.

4. Any mistake in interpretation was a harmless error because it did not affect the outcome on the application.

As discussed in Section IV.G. below, any mistake in the City Council's interpretation of the BCC did not prejudice Lusk's substantial rights (and thus was a harmless error) because the

City Council weighed the adequacy of River Edge's parking and determined the project and its parking would not have an adverse effect on neighboring properties. Thus, any error in ordinance interpretation had no effect on the City Council's decision.

C. The City provided a reasoned statement in support of its decision in compliance with Idaho Code § 67-6535(b).

Lusk asserts that the P&Z's "Reason for the Decision," as modified by the City Council, violated Lusk's due process rights because it does not address the parking issue according to the interpretation of the BCC that Lusk espouses. Much as the procedural error argument, Lusk's attack on the City's reasoned statement boils down to a disagreement with the City's interpretation of the BCC. This issue is rightly decided based on how the City Council applied its ordinance. The attack on the written statement adds nothing.

D. The City Council's approval of the CUP did not violate Lusk's due process rights (Idaho Code § 67-5279(3)(a)).

Lusk does not raise as an issue on appeal that the City Council's decision violated constitutional or statutory provisions.⁵⁴ Thus, Lusk 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."⁵⁵ Rather, "[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

⁵⁴ See Issues on Appeal, Lusk's Brief at 12. Lusk also did not raise this issue in its issues on appeal before the District Court. See Lusk's District Court brief at 7.

⁵⁵ *Marcia T. Turner, L.L.C. v. City of Twin Falls*, 144 Idaho 203, 211, 159 P.3d 840 (2007).

the respondent's brief."⁵⁶ Thus, the Court should disregard Lusk's references to due process violations.⁵⁷

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

Lusk asserts without argument that the City's decision was not supported by substantial evidence in the record.⁵⁸ Lusk did not raise this issue in its issues for appeal, or provide any basis for the assertion, so it is precluded from further argument on reply.⁵⁹

Even if the argument were raised properly, the allegation is without merit. For the height exception approval, and for each conditional use permit criterion, the record is more than ample.

The summary of record support provided in the Statement of Facts relates to those conditional use permit criteria challenged by Lusk in its City Council appeal.⁶⁰ As mentioned, Lusk only generally asserted the substantial evidence issue in the District Court appeal and this appeal, focusing instead on a purported procedural error.

The record support for the City Council's decision is more than adequate. Lusk's attempts to re-characterize and re-litigate the evidence do not provide a basis for this Court to overturn the City Council's decision.⁶¹ "The agency's factual determinations are binding on the

⁵⁶ *Id.*

⁵⁷ Lusk's Brief at 21, 24 and 28.

⁵⁸ Lusk's Brief at 23 and 26.

⁵⁹ *Marcia T. Turner, L.L.C. v. City of Twin Falls*, 144 Idaho 203, 211, 159 P.3d 840 (2007).

⁶⁰ "[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).

⁶¹ For example, Lusk asserts that "overwhelming evidence" supported a conclusion that the project will create parking problems in the neighborhood. We disagree completely, but even if

reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by evidence in the record.”⁶²

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

Lusk states without argument 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.⁶³ Just as with the substantial evidence argument, Lusk failed to raise this argument in its issues for appeal or to provide substantive argument. Thus, Lusk is precluded from further argument in reply.⁶⁴

Further, even if this issue were properly raised, Lusk’s assertion has no merit. The arbitrary and capricious test boils down to whether the City’s actions were unreasonable. As the Idaho Supreme Court said in 2007, “A city’s actions are considered an abuse of discretion when the actions are arbitrary, capricious or unreasonable. . . . The City’s interpretation of their code is unreasonable and therefore an abuse of discretion”⁶⁵

As described above, the P&Z reasonably considered the required standards for conditional use permits, set forth in BCC Section 11-06-04.13, along with the parking standards

true, this statement is irrelevant. The fact is, substantial evidence supported the conclusion project parking is adequate. See Section I.C.2 (Statement of Facts).

⁶² *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).

⁶³ Lusk’s Brief at 23 and 26.

⁶⁴ *Marcia T. Turner, L.L.C. v. City of Twin Falls*, 144 Idaho 203, 211, 159 P.3d 840 (2007).

⁶⁵ *Lane Ranch Partnership v. City of Sun Valley (“Lane Ranch II”)*, 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)).

for multi-family buildings set forth in BCC Section 11-10-01.01. No provision of LLUPA or the BCC requires specific consideration of parking except as to whether the parking spaces required by the BCC fit within the site—a fact that is both true and unchallenged. Nonetheless, as recognized by the City Council in its appeal decision, the testimony and other evidence in the record also supports the P&Z’s decision as to parking. As summarized above, the record establishes that River Edge will provide student housing and has parking ratios comparable to what is used by residents of Boise State University student housing.⁶⁶ 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.⁶⁷ And, the additional height requested by the CUP does not increase the density to the point it exceeds the BCC’s parking standards, which should prevent overflow parking from spilling into the neighborhood.⁶⁸

The City Council’s approval complied with all BCC criteria for a height exception based on the City’s reasonable interpretation of the BCC.

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

Even if Lusk could show the City erred in a manner specified in Idaho Code Section 67-5279(3), the City Council’s approval of the CUP must be affirmed unless “substantial rights of

⁶⁶ Staff testimony, P&Z Hearing Minutes (3-5-12), p. 1, BC 112; Boise State University Parking Ratios for Select On-Campus Housing Properties (3-2-12), BC 261; Applicant letter (2-27-12), in Staff Packet (3-5-12), p. 43, BC 176.

⁶⁷ Applicant testimony, P&Z Hearing Minutes (3-5-12), p. 4, BC 115.

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

the appellant have been prejudiced.”⁶⁹ The District Court ruled Lusk failed this test because “[t]here 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 appear 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.”⁷⁰ Lusk’s brief fails to address the District Court’s reasoning.

Lusk fails the prejudice to substantial rights test for two reasons: (1) As the District Court determined, Lusk failed to demonstrate impacts to its own property; and (2) Lusk failed to demonstrate that any alleged error in the City’s interpretation of the BCC “reasonably affected the final outcome.”⁷¹ The paragraphs below discuss these issues in turn.

First, the District Court correctly determined Lusk did not demonstrate potential or actual harm to its property rights. Mere conclusory allegations that property rights have been prejudiced are not sufficient to prove prejudice to substantial rights.⁷² Lusk does not mention or analyze the District Court’s conclusion, but apparently responds to it by claiming that “Lusk will suffer a loss in property value as well as the expenditure of considerable time and money policing parking on its own property.”⁷³ This statement raises the question of what showing is required by Lusk to demonstrate prejudice, a question this Court has not addressed. Lusk’s

⁶⁹ Idaho Code § 67-5279(4).

⁷⁰ District Court Memorandum Decision and Order, p. 14.

⁷¹ *Hawkins v. Bonneville County Bd. of Comm’rs*, 151 Idaho 228, 232, 254 P.3d 1224, 1228 (2011).

⁷² *Krempasky v. Nez Perce County Planning and Zoning*, 150 Idaho 231, 235, 245 P.3d 983, 987 (2010).

⁷³ Lusk’s Brief at 25.

claims of harm are conclusory and well as speculative and are contradicted by competent and substantial evidence in the record that project parking will not spill over onto Lusk's property. For one thing, River Edge meets the City's parking standards. For another, the City solicited information from Boise State about the parking use of students, and that information showed that the parking needs of the project's residents should not exceed the parking provided.⁷⁴ Under these circumstances, the question is whether the Court is obligated to accept the Lusk's claims of harm at face value, or whether it can weigh the evidence to determine whether any "prejudice" could occur to Lusk's property rights as a result of construction of River Edge. The information provided by Lusk does not pass the "merely conclusory" test of *Krempasky*.⁷⁵

Second, any error committed by the City Council was a harmless error, or an error that Lusk cannot show "reasonably ... affected the final outcome."⁷⁶ In short, any error in interpretation of the BCC did not affect the outcome because the City Council also assessed the parking issue on the merits.

The City Council's decision letter on River Edge states as follows:

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

The Council also found that the public record from the Planning and Zoning Commission revealed a robust discussion regarding parking. The Commission determined that the project was correctly designated as multi-family and that the level of provided automobile parking was sufficient. The Council required, after

⁷⁴ BC 71-72.

⁷⁵ *Krempasky*, 150 Idaho 231, 235, 245 P.3d 983, 987 (2010).

⁷⁶ *Hawkins v. Bonneville County Bd. of Comm'rs*, 151 Idaho 228, 232, 254 P.3d 1224, 1228 (2011).

visual confirmation from the applicant that they were in agreement, that four bicycle spaces for every 10 parking spaces be provided for a total of 112 bicycle spaces.⁷⁷

This language indicates that the City Council, while respecting the “no additional parking” interpretation of the BCC, also assessed the adequacy of the parking for River Edge. The parties debated the adequacy of the parking at length in the City Council hearing.⁷⁸ The City Council further assessed the substance of the parking issue at length in its deliberations.⁷⁹ Clearly, it has not “ignored”⁸⁰ that debate or approved the parking “automatically”⁸¹ as Lusk claims. Rather, the City’s decision plainly states the City took that information and debate into account and upheld the P&Z’s decision anyway.

Notwithstanding the City's interpretation of the BCC, Lusk was allowed to submit all the evidence it wished regarding the impacts of the level of parking approved, the record contains ample evidence the approved parking for River Edge was adequate⁸² and the City Council considered the evidence in making its decision. In fact, Lusk admits the City could make the same decision even if the City Council’s interpretation of the BCC were in error.⁸³ Moreover,

⁷⁷ BC-284 through BC-285.

⁷⁸ *E.g.* April 17, 2013 City Council Transcript at 21-33 (Lusk, Intervenor and public testimony).

⁷⁹ April 17, 2013 City Council Transcript at 34-39.

⁸⁰ Lusk’s Brief at 28.

⁸¹ Lusk’s Brief at 18.

⁸² *See* Lusk 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; Lusk 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.

⁸³ Lusk’s Brief at 22.

Lusk's allegations of impact were considered and were rejected. Lusk offers no reason why a remand would serve any purpose except additional delay.

Lusk has not demonstrated that the City Council's decision to approve a height exception for River Edge, made in accordance with all applicable standards, prejudices Lusk's substantial rights.

H. Lusk is not entitled to attorneys' fees.

Lusk makes a conclusory demand for attorneys' fees against the City under Idaho Code § 12-117(1) & (5) based on the bald assertion the City acted without a reasonable basis in fact or law. No demand is made against Intervenor, so no award can be made.⁸⁴

Further, Lusk fails to "state the basis for the claim." I.A.R. 35(1)(5) and 35(b)(5). The demand for attorneys' fees references the statute, states that Lusk is entitled to attorneys' fees, and then essentially consists of only a one sentence argument restating the statute and indicating 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." This is insufficient. "[A] request for attorney fees should alert the other party to the basis upon which attorney fees are requested in order that the other party may have a sufficient opportunity to object."⁸⁵ For Lusk to recover its fees on this appeal, "authority and argument establishing a right to fees must be presented in the first brief," as "citation to statutes and rules authorizing

⁸⁴ 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)." These rules require the party "must so indicate in the division of issues on appeal," and Lusk does not state a sufficient basis in its brief regarding attorneys' fees.

⁸⁵ *Mortensen v. Stewart Title Guaranty Co.*, 149 Idaho 437, 448, 235 P.3d 387, 398 (2010).

fees, without more, is insufficient.”⁸⁶ Lusk’s demand lacks sufficient argument and should be excluded from this Court’s review.

Even if this Court finds Lusk’s demand sufficient, we are aware of no precedent that would allow an award of fees against a party that prevailed in the District Court and is simply defending an appeal. We fail to see how any party in such a position could have acted on appeal “without a reasonable basis in fact or law.”⁸⁷ “To award attorney fees under Idaho Code Section 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.”⁸⁸ The purpose of this statute is to serve “as a deterrent to groundless or arbitrary” litigation 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.”⁸⁹ In assessing an award of fees against an agency under this statute, the Idaho Supreme Court looks to “determine whether there was no authority at all for the agency’s actions.”⁹⁰ Obviously there is authority in the form of the District Court’s opinion. Even if this Court disagrees with the District Court’s decision,

⁸⁶ *Borley v. Smith*, 149 Idaho 171, 187, 233 P.3d 102, 118 (2010); *see also*, *Goldman v. Graham*, 139 Idaho 945, 947, 88 P.3d 764, 766 (2004); *Moffett v. Moffett*, 151 Idaho 90, 99, 253 P.3d 764, 773 (Id. Ct. App. 2011) (concluding that a one-sentence conclusion requesting attorney fees, without supporting argument and authority, is insufficient.)

⁸⁷ Idaho Code § 12-117(1).

⁸⁸ *Neighbors for a Healthy Gold Fork v. Valley County*, 145 Idaho 121, 176 P.3d 126 (2007).

⁸⁹ *Id.*; *see also*, *Reardon v. Magic Valley Sand & Gravel, Inc.*, 140 Idaho 115, 118, 90 P.3d 340, 343 (2004).

⁹⁰ *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)).

we see no basis to say that the City and/or Intervenor are defending the District Court decision without a reasonable basis in fact or law.

I. 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 Lusk lacks a reasonable factual or legal basis to prosecute this appeal, after losing at the P&Z, City Council and District Court. In particular, Lusk's argument that the P&Z was required to consider testimony about parking, beyond the City's reasonable interpretation of the CUP criteria and parking standards established in the BCC, has absolutely no basis in law. Further, the City Council properly determined that the P&Z decision was not erroneous based on BCC standards and testimony in the record. The District Court, in turn, has upheld the City Council's decision. Lusk 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 attorney's fees incurred in this appeal under Idaho Code § 12-117(1), which provides:

Unless otherwise provided by statute, in any administrative or civil judicial proceeding involving as adverse parties a state agency, a city, a county or other taxing district and a person, the court shall award the prevailing party reasonable attorney's fees, witness fees and reasonable expenses, if the court finds that the party against whom the judgment is rendered acted without a reasonable basis in fact or law.

Nothing in Section 12-117 precludes an Intervenor from being a "prevailing party." In fact, the Idaho Supreme Court has held that an Intervenor may be assessed fees and expenses pursuant to

this statute.⁹¹ It would stand to reason that, if an Intervenor may be burdened by Section 12-117, then an Intervenor should also be permitted to benefit from it.

V. CONCLUSION

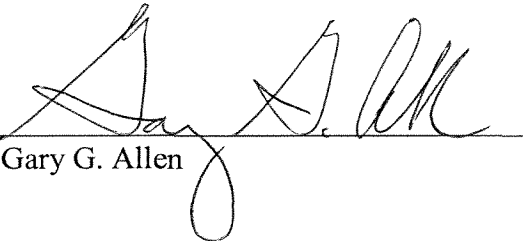
Lusk's argument that the City Council unlawfully affirmed the P&Z's determination with regarding to parking, or any other aspect of the height exception, has no reasonable basis in law or fact. The City Council properly decided based on a reasonable interpretation its own ordinance and the record of the case that the P&Z's decision was not in error.

Lusk 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 Lusk's substantial rights have been prejudiced in accordance with Idaho Code § 67-5279(4). Therefore, this Court must affirm the City Council and District Court's decision.

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

RESPECTFULLY SUBMITTED this 26th day of November, 2013.

GIVENS PURSLEY LLP

By: 
Gary G. Allen

⁹¹ *Rural Kootenai Org., Inc. v. Bd. of Comm'rs*, 133 Idaho 833, 846 (2000).

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of November, 2013, 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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Richard H. Andrus
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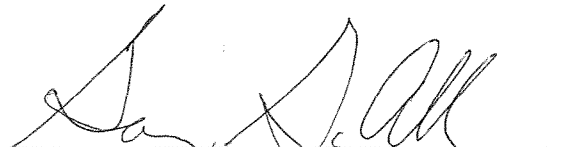
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