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917 Lusk, LLC v. City of Boise Appellant's Reply 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,)

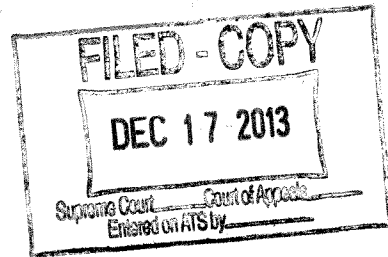
and)

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

Intervenor/Respondent.)

Supreme Court Docket No. 41214-2013

APPELLANT'S REPLY 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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REPLY

This appeal is not about whether the P&Z Commission, or even the Council, was required to attach additional parking conditions to an approval of a conditional use height exception more restrictive than parking for allowed uses set forth in the “Parking Chapter” of the Boise City Code. This appeal is about whether a municipality is required to follow the mandated procedure and criteria for permitting a conditional use. The P&Z Commission expressly refused to follow the mandated procedure and review the required criteria for permitting conditional uses, and the Council turned a blind eye to this refusal. The appropriate action is a remand to the City with instructions to follow the proper procedure for reviewing the conditional use, including whether the proposed parking is adequate.

A. The Council did not consider parking independent of the P&Z Commission’s findings and did not correct the errors committed by the P&Z Commission.

Royal and the City both allege, without any support in the record before the Court, that the Council considered parking at the appeal hearing. *Intervenor’s Brief* pp. 7, 19, and 25; *Respondent’s Brief* pp. 9, 14, and 16. Royal and the City cite to the transcript for the appeal hearing held by the Council on April 17, 2012, but they do not provide the Court with a copy of the transcript. Ultimately, Royal and the City seek to sidestep the clear record that the P&Z Commission was instructed by City Staff to not, and in fact did not, consider parking in its deliberation and decision. R. pp. BC-112 and 126. Royal and the City badly want the Council’s decision on appeal to “clean up” the error created by the P&Z Commission. However, the

hearing transcript does not support the description provided by Royal and the City of what occurred at the Council's hearing.

For the benefit of the Court, a copy of the transcript of the Council's April 17, 2012 hearing, which was prepared by the City, is attached to this brief as Attachment A ("*4-17-12 Transcript*").¹ The actual statements of the Council Members made during the Council's deliberation are instructive. The Council did not consider parking independent of the P&Z Commission's findings and did not correct the errors committed by the P&Z Commission. It is significant that Royal and the City did not provide the Court with a transcript of the Council's hearing for the Court to evaluate their description of what occurred before the Council. It is also telling that most of the sentences in which Royal and the City claim the Council deliberated on a particular issue or made a certain statement do not include a citation to where such deliberation or statement is actually located in the transcript. *Intervenor's Brief* pp. 7, 14, 16, 19, 24, and 25; *Respondent's Brief* pp. 9, 14, and 16.²

¹ By citing to the *4-17-12 Transcript*, Royal and the City have waived objections to the transcript being provided to the Court.

² The unsupported statements made by Royal and the City include the following that they claim the Council considered during deliberation:

- *Intervenor's Brief* p. 7: "City Council members considered the parking issue in detail and determined that the parking required was adequate." – No citation to the Council's transcript supporting the statement.
- *Intervenor's Brief* p. 14: "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." – No citation to the Council's transcript supporting the statement.
- *Intervenor's Brief* p. 14: "Further, the issue is entirely moot because the record reflects ample consideration of the parking issue by the City Council." – A broad citation to pages 34 to 39 of the Council's transcript. However, the cited pages of the transcript do not support the statement.
- *Intervenor's Brief* p. 16: "The City Council found that two provisions in the BCC control how much parking is required for a conditional use permit . . ." – No Citation to the Council's transcript supporting the statement.

In reality, the Council either did not familiarize themselves with the record of what occurred before the P&Z Commission or the Council found it incredulous to think the P&Z Commission would not have considered parking as part of its deliberations. Council Member Jordan stated: “there was no indication in the record of uh concern on the part of the Commissions [sic] that they perhaps were not receiving complete information that allowed them to deliberate properly.” *Transcript 4-17-12* p. 35. Council Member McLean stated: “I saw on the record a lot of conversation about parking . . .” *Transcript 4-17-12* p. 36. Council Member Clegg opined that “I find it hard to believe that in this many hearings um if there were issues to be brought up that they weren’t brought up. . . . I’m convinced given the record at hand that the Planning and Zoning Commission did fully uh consider those.” *Transcript 4-17-12* p. 37.

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- *Intervenor’s Brief* p. 19: “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.” – No citation to the Council’s transcript supporting the statement.
 - *Intervenor’s Brief* p. 24: “[A]ny error in interpretation of the BCC did not affect the outcome because the City Council also assessed the parking issue on the merits.” – No citation to the Council’s transcript supporting the statement.
 - *Intervenor’s Brief* p. 25: “The City Council further assessed the substance of the parking issue at length in its deliberations.” – A broad citation to pages 34 to 39 of the Council’s transcript. However, the cited pages of the transcript do not support the statement.
 - *Intervenor’s Brief* p. 25: “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 adequate and the City Council considered the evidence in making its decision.” – No citation to the Council’s transcript (or the record) demonstrating the Council actually weighed the evidence presented.
 - *Respondent’s Brief* p. 9: “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 . . .” – No citation to the Council’s transcript supporting the statement.
 - *Respondent’s Brief* p. 14: “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.” – No citation to the Council’s transcript supporting the statement.
 - *Respondent’s Brief* p. 16: “[T]he City Council considered the contentious parking issue and determined the project met the current code requirements without any need for further discussion.” – No citation to the Council’s transcript supporting the statement.

The P&Z Commission did not “consider those.” No matter how much evidence about parking came before the P&Z Commission, the Staff expressly instructed the P&Z Commission to not consider any of the evidence, and the P&Z Commission by its own admissions expressly did not consider the evidence. R. pp. BC-112 and 126. No amount of “conversation about parking” by the public in attendance satisfies the requirements of Boise City Code that the P&Z Commission consider parking as part of the conditional use permit review. *BCC* §§ 11-04-05.06.D, 11-06-04.14, and 11-06-06.12.

The City and Royal assume the Council’s decision somehow stands alone and that the Council considered the evidence anew and rectified the errors that occurred by the P&Z Commission. None of these assumptions are true.

The P&Z Commission possesses final decision making authority for conditional use permits for height exceptions under the 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. Accordingly, the Council only reviews conditional use permit matters when a party appeals the P&Z Commission’s final decision on a conditional use permit. *BCC* § 11-03-07.05. On appeal, the Council may only consider the record before the P&Z Commission and not any new evidence. *BCC* § 11-03-07.05.F.5. Thus, the Council was limited to the record before the P&Z Commission and reviewing the decision of the P&Z Commission.

The Council did not weigh the adequacy of the parking independent of what the P&Z Commission determined. The Council Members’ own statements about their understanding of their duty of review under an appeal contradict Royal and the City’s conclusion that the Council

considered parking independent of the P&Z Commission's determination. During the Council's deliberation, Council Member Clegg described her duty as a Council Member as follows:

I'm not here tonight to determine if I think there's an adverse impact, I'm here tonight to determine whether I think they [the P&Z Commission] erred in um the way that they considered this decision.

Transcript 4-17-12 p. 37. Moreover, the statements set forth above from Council Members Jordan, McLean, and Clegg clearly demonstrate the Council viewed its job as reviewing the decision of the P&Z Commission in light of the evidence before the P&Z Commission, and not a fresh review of parking by the Council. The Council's own "Reason for the Decision" also describes the Council's review on appeal as an examination of the P&Z Commission's deliberation and decision. R. p. BC-285 (stating the P&Z Commission's meeting "revealed a robust discussion"). In other words, by the Council's own admissions, the Council did not consider parking anew or independent of the P&Z Commission's decision. The Council upheld the P&Z Commission's decision on appeal without an independent analysis of parking and without regard to the substantial evidence in the record that the P&Z Commission refused to consider parking or the substantial evidence in the record that the amount of proposed parking would have an adverse effect on neighboring properties.

B. Royal and the City's explanation of Boise City Code Sections 11-06-04.13.C and 11-06-04.14.C is not reasonable and not supported by the plain language of the ordinances.

Royal and the City argue the Boise City Code is either (1) clear and unambiguous that conditional uses are treated exactly like allowed uses for parking purposes or (2) ambiguous

regarding how conditional uses are to be reviewed. *Intervenor's Brief* p. 8; *Respondent's Brief* p.

13. Neither contention is supported by the actual language of the Boise City Code.

1. *Royal and the City make much ado about the difference between the name "height exception" and "other" conditional use permits, but the name does not change the review required for all conditional use permits.*

Royal and the City argue conditional use permits for height exceptions are somehow reviewed differently under the Boise City Code than other conditional use permits. *Intervenor's Brief* pp. 9-11; *Respondent's Brief* p. 13. Other than citing to provisions of the Boise City Code giving height exceptions "a different name," Royal cites to no provision of the Boise City Code demonstrating that height exceptions (or any other conditional use permit) are treated differently or under lesser review standards than all conditional use permits. *Intervenor's Brief* pp. 9-11. Royal's distinction between the name given to "height exceptions" and other conditional use permits lacks substantive effect on the review required for all conditional use permits, including height exceptions.³ In fact, Royal admits conditional use permits for height exceptions must

³ Royal's position is also disingenuous given the history of the Project and the Local Land Use Planning Act (LLUPA). When the application for the Project was originally made in November 2011, LLUPA did not allow height exceptions to be processed as conditional use permits but only as variances. R. p. BC-242. After Lusk notified the City that under LLUPA a height exception must be processed as a variance (and subject to the variance standards) rather than as a conditional use permit, Staff responded the application would be "converted" from a conditional use permit application to a variance application. R. p. BC-242. At the P&Z Commission hearing on March 5, 2012, counsel for Royal cheered that a legislative fix was in the works for LLUPA to make height exceptions like any other conditional use. R. pp. BC-118 to 119. When that legislative change came and allowed height exceptions to be processed as a conditional (special) use, LLUPA expressly provided the conditions of approval appropriate for all other conditional use permits were also appropriate for height exceptions, including:

- (1) Minimizing adverse impact on other development;
- (2) Controlling the sequence and timing of development;
- (3) Controlling the duration of development;
- (4) Assuring that development is maintained properly;
- (5) Designating the exact location and nature of development;
- (6) Requiring the provision for on-site and off-site public facilities or services;

meet the same criteria required for all other conditional use permits. *Intervenor's Brief* p. 10 n.40 (citing *BCC* §§ 11-04-05.06.D, 11-06-04.13, and 11-06-06.12). Height exceptions are reviewed under the same criteria as any other conditional use permit. *BCC* §§ 11-04-05.06.D, 11-06-04.13, and 11-06-06.12.

Royal and the City decry the potential for improper takings, but their protestations are based on false premises. They contend the clear and unambiguous language of the Boise City Code “potentially places the City in violation of the takings clauses of the U.S. and Idaho Constitutions” because “height lacks any real nexus to the amount of parking.” *Intervenor's Brief* p. 11; *Respondent's Brief* p. 13. There are problems with their bald conclusion.

To begin, Royal and the City presume additional height can never create adverse parking consequences. However, the Boise City Code does not make the same presumption. In at least two separate instances in the Boise City Code, the City states that any increase in height over a zone's maximum height will only be permitted after a thorough review of the conditional use criteria, including the adequacy of parking. *BCC* §§ 11-04-05.06.D and 11-06-06.12. Height can have a decided nexus to parking and the Boise City Code recognizes that fact. Royal can speculate about alternative building designs that may not require conditional use permit review, *see Intervenor's Brief* p. 10, but the fact remains that the actual proposed Project is nearly double

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- (7) Requiring more restrictive standards than those generally required in an ordinance;
 - (8) Requiring mitigation of effects of the proposed development upon service delivery by an political subdivision, including school districts, providing services within the planning jurisdiction.

I.C. § 67-6512(d) and (f) (emphasis added). It is incredibly ironic that Royal's counsel would now like to distinguish between height exceptions and “other” conditional uses when it advocated so vocally that height exceptions should be treated just as any conditional use.

the allowed height for the R-OD zone, R. pp. BC-141, 229 to 231, and 247, and the Boise City Code demands the requested additional two habitable stories receive scrutiny under all conditional use criteria before being permitted.

All development affects neighboring properties and creates externalities in some manner. Zoning ordinances draw a line that define when these effects and externalities are accepted as a matter of right and when they require further scrutiny. A thirty-five foot tall apartment building creates parking externalities that are deemed acceptable in the R-OD zone, but when an apartment building exceeds thirty-five feet (and includes two additional habitable stories) in the R-OD zone, those parking externalities are no longer deemed automatically acceptable and require full conditional use scrutiny. The scrutiny can uncover the strength of the nexus between height and parking. If the P&Z Commission had actually reviewed the Project under the conditional use process, perhaps it could have concluded that, in this particular instance, no nexus exists between the additional height and parking issues, but that did not occur.

If the additional height truly creates no adverse parking consequences on the surrounding neighborhood then the City would have been justified approving the additional height without attaching additional parking conditions. Likewise, if, upon due deliberation, the City found the additional height does create adverse parking consequences then the City would have been justified in denying the conditional use request or approving the request and attaching appropriate parking conditions. In either event, a rigorous, deliberate review minimizes the City's exposure to a takings claim.

2. *Royal and the City provide no legitimate rebuttal to the plain language of Boise City Code Sections 11-06-04.13 and 11-06-04.14.*

Royal and the City dodge the plain and unambiguous language of Boise City Code Sections 11-06-04.13 and 11-06-04.14. *See Intervenor's Brief* pp. 11-14; *Respondent's Brief* p.

13. They claim Boise City Code Sections 11-06-04.13.C and 11-06-04.14.C either “clearly” do not require a review of parking for conditional uses or the language is somehow ambiguous. In addition to ignoring the actual language of the Boise City Code, their logic would render a conditional use review no different than the review of an allowed use.

In arguing with the plain language of Boise City Code Section 11-06-04.13.C, Royal and the City again trot out the argument that the term “this title” in Section 11-06.04.13.C must only mean the parking standards for allowed uses set forth in Table 1 of Boise City Code Section 11-10-01.01. *Intervenor's Brief* p. 12. Royal and the City take this position even though no language in Section 11-06-04.13.C limits the parking review to the “Parking Chapter” as alleged by Royal. *Compare Intervenor's Brief* p. 12 with *BCC* § 11-06-04.13.C. Royal and the City also fail to mention or discuss the language of Boise City Code Section 11-06-04.13.D that includes an examination that the proposed conditional use “will not adversely affect other property of [sic] the vicinity.” *BCC* § 11-06-04.13.D. Further, as discussed below, reading Boise City Code to limit the parking standards that can be made applicable to a particular conditional use flies in the face of LLUPA – which is the authority for Boise City Code.

The “this title” to which Boise City Code Section 11-06-04.13.C refers includes all of Title 11 of the Boise City Code and not just the “Parking Chapter” of Title 11. Title 11 not only

includes the parking standards acceptable for allowed uses found in the “Parking Chapter” (Section 11-10-01.01 (Table 1)), but it also includes the conditional use review standards 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).

Royal and the City’s strained reading of Section 11-06-04.13.C ignores the authority granted by LLUPA for conditional use permit review. Under LLUPA, conditions of approval may be attached to a conditional use permit to, among other things: (1) minimize adverse impacts on other development; and (2) require more restrictive standards than those generally required in an ordinance. I.C. § 67-6512(d)(1) and (7). That being said, the error committed by the P&Z Commission and propagated by the Council was not the failure to require a more restrictive parking standard, rather, the error was a failure to follow the procedure of conditional use review and examine whether the parking was sufficient or whether the planned parking would cause adverse impacts on neighboring properties. In order to find the City violated the procedure for reviewing the proposed conditional use, the Court does not need to determine the City should have imposed more restrictive parking requirements than those for allowed uses in the “Parking Chapter.” Rather, the Court only needs to look at the plain language of Boise City Code Sections 11-06-04.13 and 11-06-04.14, which requires, at the very least, a review of parking and whether property in the vicinity is adversely affected.

Superfluity undergirds the entire argument that Royal and the City attempt to employ when dismissing the plain language of Boise City Code Section 11-06-04.14. Royal and the City

posit the language means a conditional use permit “simply must be contingent on meeting the requirements of the Parking Chapter.” *Intervenor’s Brief* p. 13; *Respondent’s Brief* p. 13.

Perhaps recognizing the sandy foundation of the foregoing position, Royal then states without any citation to evidence in the record that the Council determined “additional parking requirements are not appropriate because the height of the project lacks a sufficient nexus to parking.” *Intervenor’s Brief* p. 14. This did not occur. The Council did not make the determination and did not review parking independent of the P&Z Commission’s decision.

Although Royal and the City would like to disregard what happened before the P&Z Commission and focus only on what occurred before the Council, the Council did not correct the error created by the P&Z Commission. As discussed above, the Council did not consider parking afresh or independent of the P&Z Commission’s decision. The Council upheld the P&Z Commission’s decision without an independent analysis of parking and without regard to the substantial evidence in the record or the adverse effect on neighboring properties.

C. Lusk properly raised and discussed in its Appellant’s Brief the issues of due process, substantial evidence in the record as a whole, and whether the City’s actions were arbitrary, capricious, or an abuse of discretion.

Royal claims pursuant to the holding in *Marcia T. Turner, L.L.C. v. City of Twin Falls*, 144 Idaho 203, 159 P.3d 840 (2007), that Lusk waived the issues of due process, substantial evidence in the record as a whole, and whether the City’s actions were arbitrary, capricious, or an abuse of discretion. *Intervenor’s Brief* pp. 19-22. Royal does not understand the rule set forth in *Marcia T. Turner, L.L.C.* In that case, an appellant raised an issue in its appellate reply brief that was not included in its initial appellate brief. *Marcia T. Turner, L.L.C.*, 144 Idaho at 211,

159 P.3d at 848. This Court refused to consider the arguments raised for the first time in the reply brief and provided the following rule:

“[T]his Court will not consider arguments raised for the first time in the appellant’s reply brief.” A reviewing court looks only to the initial brief on appeal for the issues presented because those are the arguments and authority to which the respondent has an opportunity to respond in the respondent’s brief.

Marcia T. Turner, L.L.C., 144 Idaho at 211, 159 P.3d at 848 (quoting *Suitts v. Nix*, 141 Idaho 706, 708, 117 P.3d 120, 122 (2005) (quoting *Myers v. Workmen’s Auto Ins. Co.*, 140 Idaho 495, 508, 95 P.3d 977, 990 (2004))).

It is difficult to decipher why Royal believes the rule in *Marcia T. Turner, L.L.C.* applies. Royal certainly understood that Lusk raised certain issues in the Appellant’s Brief, including, violations of due process, lack of substantial evidence on the record as a whole supporting the City’s decision, and the arbitrariness, capriciousness, or abuse of discretion demonstrated by the City’s decision; otherwise, Royal would not have been able to address the specific issues in its response brief. *See Intervenor’s Brief* pp. 19-22. In fact, Royal cites to the various pages of Appellant’s Brief where the issues are discussed. *Intervenor’s Brief* p. 20 nn.57 and 58, p. 21 n.63. Royal cannot claim the issues were not raised and discussed in the Appellant’s Brief. The rule in *Marcia T. Turner, L.L.C.* simply bears no application. If Royal was looking for a technicality to avoid the issues discussed in Lusk’s initial brief, it has failed.

Royal also seems to imply the “Issues Presented on Appeal” portion of the Appellant’s Brief was required to use specific words or incantations even though the issues are discussed substantively in the body of the brief. *See Intervenor’s Brief* p.19 n.54, pp. 20-21. No such

requirement exists. In fact, Idaho Appellate Rule 35 provides the “Issues Presented on Appeal” should be “expressed in terms and circumstances of the case but without unnecessary detail.”

I.A.R. 35(a)(4) (emphasis added). Further, the “statement of the issues should be short and concise, and should not be repetitious. . . . The statement of issues presented will be deemed to include every subsidiary issue fairly comprised therein.” I.A.R. 35(a)(4) (emphasis added).

Even absent the language of I.A.R. 35(a)(4), Royal tacitly admits the issues were properly raised by providing citations to the numerous pages of the Appellant’s Brief where the issues are substantively discussed. *Intervenor’s Brief* p. 20 nn.57 and 58, p. 21 n.63. Royal’s request for the Court to disregard the issues lacks factual basis and legal support.

D. Lusk suffered a prejudice to its substantial rights.

Lusk suffered a prejudice to its substantial rights in at least two ways. First, the City’s actions violated its rights to due process and a procedurally fair process. Second, the Project as approved will materially harm Lusk and its property rights.

1. The City misapplies the holding in Hawkins v. Bonneville County Board of Commissioners.

This Court has not set forth hard and fast rules regarding what does and what does not constitute a substantial right. In *Hawkins v. Bonneville County Board of Commissioners*, the rules governing substantial rights were explained as follows:

This Court has not yet attempted to articulate any universal rules to govern whether a petitioner’s substantial rights are being violated under I.C. § 67–5279(4). This, in part, is due to the fact that each procedural irregularity, legal error, and discretionary decision is different and can affect the petitioner in varying ways.

151 Idaho 228, 232, 254 P.3d 1224, 1228 (2011). Despite the foregoing, the City believes the rules governing substantial rights of non-applicant petitioners can be articulated as follows: a non-applicant petitioner has the right to receive notice and to present evidence and testimony, but the non-applicant petitioner has no right to have the deciding body actually consider the evidence or testimony presented even when the deciding body's governing ordinances require the consideration of the particular evidence presented. *See Respondent's Brief* pp. 7-13. The City's position begs the question – why should a non-applicant petitioner be entitled to notice of a hearing and an opportunity to testify and provide evidence if none of the testimony or evidence must be considered? This Court has rejected the City's position. “Clearly, notice and an opportunity to be heard are components of due process. They are not, however, the only requirements of due process.” *Jasso v. Camas Cnty.*, 151 Idaho 790, 796, 264 P.3d 897, 903 (2011).

Although *Hawkins* may stand for the proposition that a non-applicant petitioner does not have substantial rights in “seeing someone else’s application adjudicated correctly,” the non-applicant petitioner certainly has a substantial right to due process and procedural fairness. “[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)). Lusk has suffered a prejudice to its substantial rights to due process

and procedural fairness because the City refused to follow the authority of LLUPA and the procedure in Boise City Code for reviewing conditional uses.

Additionally, the facts in *Hawkins* are distinguishable from the present case. In *Hawkins*, the non-applicant petitioner claimed a prejudice to his substantial rights in three ways: (1) the zoning authority misapplied its variance policies by finding the applicant held a grandfathered right to the action requested by the variance; (2) new houses on the applicant's property would generate more traffic across the petitioner's property, potentially exceeding the scope of an easement and increasing the risk that petitioner's cattle would escape; and (3) emergency vehicles may not have been able to reach the applicant's property. *Hawkins*, 151 Idaho at 232, 254 P.3d at 1228. None of the substantial rights claimed by the non-applicant petitioner in *Hawkins* were tied to due process or the procedure necessary for reviewing the variance application.

In the present case, Lusk's substantial rights include the right to have the City follow the procedure required under Boise City Code to review a conditional use request for a height exception – this includes a review of parking. This is not a situation in which Lusk merely believes the City “misapplied” a particular parking standard under Boise City Code. Rather, this is a situation in which 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, and all petitioners, including non-applicants, are entitled to due process and procedural fairness.

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.C and D. 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, and the Council did not correct the error. This violated the substantial rights of Lusk.

The City's failure to follow the procedure for reviewing a conditional use permit alone constitutes a prejudice to Lusk's substantial rights. Nevertheless, Lusk will also suffer a prejudice to its substantial rights because of the consequences of the inadequate parking planned for the Project.

2. *Lusk provided specific information to the P&Z Commission and the Council that the parking problems would harm Lusk individually.*

The evidence provided to the P&Z Commission demonstrated that Lusk will suffer under the parking proposed as part of the Project. The District Court erred to the extent it found the harm would only be to the neighborhood generally and not to Lusk individually.

The evidence provided to the P&Z Commission did not constitute “mere conclusory allegations” as claimed by Royal and the City. The record contains abundant evidence and testimony that 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.

The testimony provided to the P&Z Commission by Lusk’s representatives and others who are not affiliated with Lusk clearly demonstrated that parking is a problem and the Project would only exacerbate the problem. Dave Kangas, President of the Vista Neighborhood Association testified that “one of the biggest problems we have with multi-family housing is parking. Planning and Zoning will admit that their ordinance does not adequately address parking.” R. p. BC-124. Monika Anderson, who lives next to Boise State University, testified that “I live next to BSU and parking is a problem.” R. p. BC-124. Others who testified also said the existing parking in the neighborhood is a problem. R. pp. BC-121 to 122. In fact, there was no testimony presented that parking around the Project is not a problem.

The record contains specific evidence that the inadequate parking proposed by the Project will specifically harm Lusk (including Keynetics Inc., which is located in Lusk’s building). 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 money policing the parking on

their properties and dealing with trespassers. R. pp. BC-229 to 231. Congested parking will also drive customers away from businesses in the area and cause added expense to Lusk and Keynetic's employees that will be forced to deal with trespassing and illegally parked cars. R. pp. BC-84 to 88, 229 to 231, and 247. These are not conclusory statements but were part of the evidence provided to the City. Certainly, the City does not believe Lusk cannot suffer a prejudice to a substantial right because the Project has not yet been built or because offenses have not yet been adjudicated in a non-judicial review setting. *See Respondent's Brief* p. 12.

Finally, Lusk is compelled to address Royal's misrepresentation of Boise State University's position on the Project. Royal seeks to imply that Boise State gave tacit approval for the parking planned for the Project. *Intervenor's Brief* pp. 22 and 24. This is not true. In fact, in Boise State's *Application to Appear as Amicus Curiae Pursuant to Idaho Appellate Rule 8* filed with this Court, and which the City rigorously opposed, the University stated:

The University believes that the Development will not provide sufficient parking. The failure of the Planning and Zoning Commission to consider the ramifications of the lack of parking contained within the Development is an error.

Application to Appear as Amicus Curiae Pursuant to Idaho Appellate Rule 8 p. 3. It is astounding that Royal or the City would seek to claim that Boise State somehow approves the parking for the Project when the University is on record stating the opposite.

E. The P&Z Commission's deficient "Reason for the Decision," as modified by the Council, cannot be corrected by the explanations provided after the fact in Royal and the City's appellate briefs.

Royal claims the issue of whether the P&Z Commission's "Reason for the Decision," as modified by the Council, satisfies Idaho Code Section 67-6535(2) and *Jasso v. Camas County*,

151 Idaho 790, 794, 264 P.3d 897, 901 (2011) is part and parcel of the underlying discussion about whether the City followed the Boise City Code. *See Intervenor's Brief* p. 19. Royal is correct to a degree although its stance is based on an incorrect analysis regarding procedure versus ordinance interpretation. To the extent the P&Z Commission and the Council did not examine all of the criteria required by the Boise City Code (i.e., did not follow the correct procedure), the "Reason for the Decision" cannot satisfy Idaho Code Section 67-6535(2) and *Jasso* because the written approval or denial must include an explanation of the "criteria and standards," "contested facts," and "rationale." I.C. § 67-6535(2). In fact, the P&Z Commission expressly refused to consider the required criteria under the Boise City Code, so it could not have reviewed the contested facts or provided the rationale as required by Section 67-6535(2).

The Council then failed to fix the P&Z Commission's error. Footnote 2 of this brief sets forth each allegation made by Royal and the City in which they claim the Council explored a particular issue or made a particular finding in its deliberations relevant to the "clean up" they assert occurred. *See* n.2 *supra*. Yet, Royal and the City cannot provide a single citation to the Council's proceedings that actually supports their description of the Council's action. *Id.* After-the-fact explanations provided in appellate briefs do not rectify the absence of such analysis during the underlying land use proceedings. 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. *Jasso*, 151 Idaho at 797, 264 P.3d at 904. The P&Z Commission's "Reason for the Decision," as

modified by the Council, cannot meet this requirement based on what actually occurred before the P&Z Commission and the Council.

F. Lusk set forth a sufficient argument in the Appellant's Brief for an award of attorney fees on appeal.

Royal claims Lusk's request for attorney fees "essentially consists of only a one sentence argument" and lacks a "sufficient argument." *Intervenor's Brief* pp. 26-27. Royal makes this claims despite the fact two complete paragraphs of the Appellant's Brief set forth Lusk's request for an award of attorney fees as well as the supporting argument throughout the brief about why the City's actions lacked a reasonable basis in fact or law. *Appellant's Brief* pp. 12-13. Lusk sufficiently described why an award of attorney fees is appropriate without belaboring the point. Certainly, Royal is not advocating verbosity merely for the sake of verbosity. Such brief writing huckledebuck is unnecessary.

G. Royal is not entitled to attorney fees under Idaho Code Section 12-117.

Royal claims that "[n]othing in Section 12-117 precludes an Intervenor from being a 'prevailing party.'" *Intervenor's Brief* p. 28. Royal fails to account for the entire language of Section 12-117. In *Neighbors for Responsible Growth v. Kootenai County*, this Court held a party must be adverse to the City (not just a "prevailing party") in order for Section 12-117 to apply. 147 Idaho 173, 177, 207 P.3d 149, 153 (2009). Royal as an intervenor with the City is not adverse to the City and not entitled to request attorney fees under Section 12-117. *Id.*

Royal cites to *Rural Kootenai Organization, Inc. v. Board of Commissioners*, 133 Idaho 883, 846 (2000) in support of its claim for attorney fees. *Intervenor's Brief* pp. 28-29. This

Court has already explained that *Rural Kootenai Organization, Inc.* is simply inapplicable because that decision only addressed costs and expressly excluded attorney fees. *Neighbors for Responsible Growth*, 147 Idaho at 177, 207 p.3d at 153. Because Royal alleged no basis other than Section 12-117 as the authority for an award of attorney fees, even if the Court determines Royal is a “prevailing party,” an award of attorney fees is inappropriate.

H. Lusk, and not the City, is entitled to attorney fees on appeal.

The Appellant’s Brief sets forth why the City acted without reasonable basis in fact or law in approving the conditional use permit and why Lusk is entitled to attorney fees on appeal. However, even if the Court disagrees with Lusk and allows the City’s decision to stand, the City is not entitled to attorney fees on appeal. As an initial matter, the City cannot claim Lusk pursued this appeal without a reasonable basis in fact or law when one of the City’s defenses to the appeal is that the City’s ordinances in question are ambiguous. *See Intervenor’s Brief* pp. 8, 12-14; *Respondent’s Brief* p. 13. This places the City in the dissonant situation of claiming ambiguity on the substance of the appeal but then claiming clarity and unambiguity when requesting attorney fees.

This appeal was pursued in good faith and for a legitimate reason contrary to the City’s statements implying otherwise. Lusk became involved in the review of the conditional use for the Project because it was genuinely concerned about the harmful effects the Project would create not only for Lusk’s own property but for the neighborhood and City as a whole. Lusk believed the City would follow its own ordinances and assure a procedurally fair process. Unfortunately, the City has taken the position that although it may need to notify its citizens and


property owners of what the City is doing, the City does not need to listen or even consider what those citizens and property owners have to say. This is not a situation where the City listened and then ultimately decided against Lusk. This is a situation in which the City expressly refused to consider the concerns that Lusk raised even though Boise City Code required the P&Z Commission to examine parking and the impacts on properties in the vicinity of the Project. Surely, Lusk did not act without a reasonable basis in fact or law when it sought for this Court to determine whether Lusk had a right to be heard and whether the City was obligated to follow the procedure set forth in its ordinances to review a height exception like any conditional use.

CONCLUSION

For the foregoing reasons and those set forth in the Appellant's Brief, Lusk respectfully requests for the Court to remand the application back to the City to review all the criteria required in Boise City Code for conditional use review. Lusk also requests an award of attorney fees on appeal.

DATED this 17th day of December 2013.

SPINK BUTLER, LLP

By: 
Richard H. Andrus
Attorneys for Petitioner/Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of December 2013, I caused a true and correct copy of the above APPELLANT'S REPLY BRIEF to be served upon the following individuals in the manner indicated below:

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Richard H. Andrus

ATTACHMENT A

[SEE ATTACHED.]

BOISE CITY COUNCIL MEETING
04-17-12_2

Mayor Bieter: All right now the next item is uh Item 12B3 CUP11-00090 Appeal 917 Lusk LLC.

Josh Johnson: Mr. Mayor I'm Josh Johnson with the current Planning Department. Council Members, we're here tonight to hear an appeal from 917 Lusk LLC for a height exception associated with a multi-family structure located at 1004 West Royal Boulevard. The property's designation was changed to RO during a city initiated rezone that was executed in 1993. This was tied to the rezone of the downtown to C5 and is one the reasons that staff feels this site is ultimately tied to downtown and all of the benefits that come with that. Part of the appeal speaks to the legality of the application and the opportunity for the public to be heard. Staff would like to note that there have been a total of three public hearings on this item as to date. February 6th it was tried on the Consent Agenda, staff was made aware that members of the public were outside the room and didn't get a chance to testify so it was reconsidered on February 13th, then set over to March 5th. Noticing that was done for those properties within 300 feet of the application which is the maximum amount we notice for. The Appellant contends that the Planning and Zoning Commission erred in their approval of the height exception um based on the height of similar buildings along the river. Staff feels that the Planning and Zoning Commission did take, take into account the appropriate, appropriate nature of this height exception along the river. The most important aspect of the project's design is the increase in height is based on the podium parking. This is parking that is underneath the building, it makes the building more pedestrian friendly, it hides it from, the parking from the view from the river and Royal Boulevard. This is encouraged by the Comprehensive Plan by Policy 7.2.2.2C which states that um the City's desire to de-emphasize parking and emphasize the pedestrian aspect of projects. The building is also modulated along all four sides and has a portion cut out along the greenbelt creating a U shape. Staff feels this prevents a canyon like effect along the river um and the Commission felt that as well. The second consideration that the Planning and Zoning Commission took into account with this application was the height of other buildings along the river. The Appellant contends that there is no building that is 63 in height within the immediate vicinity and that is correct; however, when we look at compatibility um we're not looking at just having a similar um type of building along the entire river corridor along the whole city, um the Cottonwood Grill across the river is of similar height as are the Barnes Towers and the Morrison Center also located along the south side of the river. It was also a major aspect of the Appellant's memoranda was parking. The Planning and Zoning

Commission correctly determined that parking was not before them as the project meets the parking requirements of a multi-family unit. Multi-family units are defined as those units where um there are up to five unrelated individuals sharing a kitchen. The floor plan here shows the layout of these units (break in recording). As you see each bedroom has its own bathroom and then the communal units share a kitchen and a washer and dryer. This meets the City standard for a multi-family development and the project meets those parking standards. With that Staff can stand for any questions the Council may have regarding this appeal.

Mayor Bieter:

Questions? All right um then the Appellant or the Appellant's representative.

Joanne Butler:

Sorry Council I um I'm going a little low tech if I had your IT guy I would've, it probably been, it would've been helpful. I wanted to tell the Council before I started that I've had Steve Sweet take two swarms out of trees in my yard and never got stung. They're quite masterful at it. Um good evening to the Council, Joanna Butler, 251 East Front Street in Boise, representing the Appellant this evening and with me is Ilene Barber who will speak to the Council. I've given the Council a couple of handouts that these are all things that were either part of the Staff report or placed in the record at um at the Commission hearing. Um let me go over the aerial map that you have here before you. This shows the area south of the river between Capital and Ann Morrison Park, it's the area that the City would like to see redeveloped. The City has worked with industrial users in the area trying to help with relocation. The City's Housing and Community Development Departments in there, you control a good portion of the area. Housing and office developers have started to redevelop this area in a process, process that the City has planned for. The redevelopment process started because of the good planning and good zoning done by the City to prepare the way for redevelopment and we will be asking you tonight in part to not ignore what the City has done before. At the time the City planned and zoned both the Applicant's property and our client's property which is located immediately east of their property, the City made the statement that more businesses are likely to redevelop this area if the City projects the image of environmental sensitivity. And that's what our client saw when they developed 917 Lusk. The fear of many property owners in this neighborhood is that environmental sensitivity is on the cusp on being severely threatened. Our client developed the office building directly east in a C2Z, C2 Zone and there are over 100 employees in several related companies in that building. Our client also owns the vacant property south of their building. Like Ilene Barber who will speak to you, there are other property owners in this area such as the Morrison Park Apartment

owners for example, who have expectations for future development on vacant parcels that they own in the area. How the City deals with this project can set the stage for how the neighborhood redevelops, sensitivity or not. Many property and business owners have been here for a long time, long before the City's last major planning effort. They remember that effort, I was here when you went through that planning effort. And the neighbors are watching this project because they strongly believe that the City can review and can condition this project and maintain the health of redevelopment in this area. No one is opposing this project that we know of and we are not appealing this project for the sake of opposition. I know that our client has reached out to the Applicant. I know that the owners of the Morrison Park Apartments have reached out to the Applicant to try to tell them what they see because they live here, they work here, they know their neighborhood and they know how it functions. The Applicant has told our clients and others that they don't believe that there will be problems, especially with parking which we'll touch upon, but if there are problems, they'll address those problems later. But this is a Conditional Use request, this is a developer that is asking you for something and the City has already decided that a Conditional Use request may have adverse impacts and they should be conditioned on the front end, not at the back end. The next item that we've got, I just have a cover page from the Downtown Boise Development Plan from 1993, and in following that is a large, large map, this area that stretches south of the river which is where we are here and from Broadway all the way to just about 31st Street is what you planned for in 1993 and that you did a massive rezoning effort in 1993. In that massive rezone effort you created a new zone, the Residential Office zone the RO zone, it never existed before that. And you can see on the zoning map that you also have here, that what you did in 1993 is you applied, you adopted or you um you adopted the RO Zone along the river, north of the river and immediately south of the river along Ann Morrison Park. Because a comprehensive plan said that the Residential Office District is to provide a transitional buffer between high intensity commercial areas and institutional uses like BSU and the environmentally sensitive areas of the park and the greenbelt. Both standards of the RO zone, including height, which is 35 feet was to apply to all lands and buildings in the RO zone with some ability for flexibility. The issue is how flexible? When does bending the zoning ordinance break it? In this case the zoning ordinance is being broken in a way which we'll explain that even prevented a fair discussion of how to prevent problems for all of the neighborhood, including the Applicant. When you, the City, created the RO Zone with that 35 feet height limit, you put that zone along the river, Ann Morrison and the Applicant's property. In doing that, the City deliberately eliminated zones that were there along the river and south of the river. Those were R3 Zones, multi-family, you eliminated

the, the LO Zone and various commercial zones. They all had 45 feet in those zones along the river and south of the river and you deliberately took those away and set a 35 foot height limit. You did leave some areas along the river zone to allow heights greater than 35 feet, the most immediate example is our client's building immediately to the east, which is a C2 zone, which allows a height of 45 feet and I'll come back to that. When you put this RO zone on these properties you said when you eliminated those heights a 45 feet, you said it was to implement the goals of the Comprehensive Plan, to create buffers, to respect the most important recreational attributes of the area, the Boise River, the greenbelt and you said deliberately it was to prohibit vertical and horizontal intrusions into the greenbelt corridor. And I think this is especially important and with this I would like to incorporate into the record all of the Park's Commissions Minutes and any presentations that were made to the Park's Commission, because in fact what we found in looking at the minutes was when the Park's Commission asked about, we hear there's a height exception that's being asked for and it was almost pooh-pooed as so to say oh yes we, we keep it at about 55, this is what 55 feet, this is what we do in the downtown area and left it at that. And they took staff at their words and they incorporated into their recommendation that okay as long as PDS will Public Planning Development Staff Services will keep it at 55 feet we'll go along with it. But we think that they didn't, I don't think they were told or were made to understand that in fact the City had already previously zoned this for a 35 foot height limit. But there are other, other properties in the area, commercial properties, University properties and the staff has referred to those in their various staff reports, they do allow up to 45 feet and up to 75 feet and there are height exceptions that are allowed. I gave a little silhouette of the Kinetics property because they did ask for a height exception and were given an additional one foot for modulation along the roof line and they also got an additional eight foot to cover the stairwells on the roof, but this.

Council Member Jordan: Mr. Mayor?

Mayor Bieter: Yes?

Council Member Jordan: Joanne when they made that request, had they requested something different from what they received or did they receive what they requested?

Joanne Butler: I will have I.

Council Member Jordan: We can find that out (inaudible).

Joanne Butler: Okay, okay.

Council Member Jordan: I have a feeling we'll be here for a little while.

Joanne Butler: I do think that some of the modulation, the one foot modulation may have come from design review, but we'll have the client answer that.

Mayor Bieter: If you could, I just while we stopped Joanne I, I uh neglected to mention that we're 30 minutes tops.

Joanne Butler: Right.

Mayor Bieter: In your presentation total of your presenters.

Joanne Butler: I'm trying to talk fast.

Mayor Bieter: I assume you know that and I, but I just want to make sure that we're on the same page so.

Joanne Butler: Yeah we are, we are.

Mayor Bieter: Okay.

Joanne Butler: Um when, when Kinetics asked, when they got the modulation to take care of the, the stairwell height and the modulation that did not increase habitable space, it did not increase the need for parking and it didn't put additional strain on the neighborhood. On the other hand, this application is in that 35 foot zone, they do have the right to ask for a height exception and they are asking for an additional height of 59 to 63 feet, which is a change of 69-91 percent over the, over the entire top of the building. This increases the number of apartments by 44 apartments per floor and there are two floors over and above 35 feet. It also appears that, from our count, and I'm not sure that this is correct, that it would include at least 140 additional bedrooms and these bedrooms are leased separately. When discussing the Applicant's request for additional height, both the staff and the Commission noted that there are other buildings nearby the Applicant's property with heights higher than 35 feet, almost as though to say that the Applicant's requested height exception should just some how be automatically allowed. This is just wrong. Line drawing is the essence of zoning and sometimes that line is pencil thin. The Supreme Court in legitimizing zoning said that that line must be drawn and the Legislature has to draw it and that's this City. This is the line the City drew, the circumstances are different on one side of the line from the other. And the circumstances are different for other parcels along the river um and the greenbelt. The issue is what are the circumstances on this Applicant's

parcel and how might those circumstances affect the neighborhood. In drawing that line and in the City deliberately reducing the base height to 35 feet, the City set a standard that allows height exceptions to be granted, but only on a Conditional Use request. Once a project moves into Conditional Use territory the City recognizes the adverse impacts, including parking impacts, impacts on the greenbelt, shadows, can occur and the duty arises for the Commission to use its discretionary review of the project and condition the use in order to mitigate those impacts. I have, I also provided you a portion of your Dwelling Unit definition and I'll be talking about that just briefly. Staff and the Commission focused on the parking standards of the code without a focus on the Conditional Use provisions of the code as though the multi-family building at this requested height, not the automatically allowed 35 feet, but at the 59-63 feet as though that's an allowed use, but it's not it's a Conditional Use. I'd like to talk just a little bit about parking standards and what they're based on, because they are based on dwelling units. The City has only five residential categories set up to determine the number of parking spaces for each front door, single family, multi-family which you define as any building with three apartments or more, and then you have a few odd categories such as retirement centers, halfway houses, and fraternities and sororities. Staff has slotted this project into the broad multi-family category at a 1 1/2 parking spaces for each dwelling unit. Equating a dwelling unit as the space behind each front door. But is it? Behind each front door we have four bedrooms, sometimes two, each bedroom is leased separately with a single kitchen. Does this constitute a dwelling unit under your code? Is this living arrangement or, or family, is this a living arrangement or a family that constitutes a separate housekeeping unit, or is this really up to four families with a communal kitchen? It would be difficult to say and actually pure speculation, because what constitutes a single housekeeping unit is not defined in the City's code. Is there a dwelling unit behind the front doors of the project or is there something greater? Clear definitions are really important because the definition of dwelling unit is the basis used to determine how many parking spaces are needed for each and every multi-family project. With a vague definition for living arrangement this raises the issue, is the parking standard too limited to cover the parking situation for the living arrangements found in this multi-family building, where every bedroom is being leased separately. The answer is we think probably yes. We don't want to stifle alternative living arrangements, but if a project hides the need for parking, hides behind a definition of dwelling unit then they deserve to be scrutinized further to determine if the parking ratio is adequate for this project. Other communities review alternate living arrangements against zoning ordinance requirements typically through the discretionary conditional use process. This is because if the otherwise acceptable living arrangement might have a

negative impact on the surrounding neighborhood then the conditional use process is used to control those secondary effect. But in this instance the City didn't, the Commission didn't make the discretionary conditional use review, it just handed the increased height to the developer for the asking. The Planning Director on Page 5, or Page 2 of the April 5th memo the Council in the last full paragraph says about us, the Appellant, that the Appellant argues that the base zoning classification should be taken into account when, when examining height, and we absolutely do. Its important to understand what the City was trying to accomplish with its plan by reducing the base zone height along the river so that a request for height exception over and above the base zone height is put in context of the goals and objectives of the Comprehensive Plan to keep height relatively low in this zone. And by the way I think we need to point out that the very comprehensive plan, the Boise Downtown Plan, which is part and parcel of the overall Comprehensive Plan has been totally ignored. It wasn't found in the staff reports, it wasn't reference by the Commission. It appears to have been more or less a very inconvenient truth. Going back to the April 5th memo, the Director says it is staff's assertion that the zoning district's height limit is immaterial to an argument about height when each project is judged on its own merits within the Conditional Use findings. Well either way, whether you take into consideration the base zoning height or not, this is exactly what did not happen at the Planning and Zoning Commission. The Commission did not judge this project on its own merits. The Commission was instructed by staff and staff reports at the pre-hearing session and at the hearing ~~as to what the Commission could and could not consider~~. The public was made aware of what would be tolerated as topics of conversation. There were property owners at the hearing ready to speak and stifled themselves ~~because they thought they couldn't speak on the topics they were they~~ wanted to speak on. ~~Given the direction to the Commission, we have to~~ believe that there may have been some Commissioners that felt stifled, they couldn't look at this project, something they are used to doing with Conditional Uses, they couldn't look at the parking, they couldn't look at the living arrangements of this project. They were forced to glance up and down the river and say literally oh well I guess the height has to be granted. This was wrong. We agree with the Planning Director that the test for whether a height exception should be approved in the RO Zone is whether the Conditional Use findings for additional height can be made by the Commission after, after the Commission has fully considered the additional built, human and vehicular impact on the surrounding neighborhood just like any other Conditional Use. Can I, okay thank you. Um the Commission did not consider the facts to determine potential impacts, the Commission did not reasonably condition the project to mitigate those impacts. And not going through this exercise of Conditional Use review alone is erred by the

Commission and it certainly makes it impossible, we think, for the Council to address this appeal. Three hearings, were three hearings where there was not a complete review of this Conditional Use request. I'll try to repeat, but paraphrase a little bit how the Commission started its deliberation from the Chairperson. I just want to remind the Commissioners that the parking issue tonight is not actually before us. We are not in a position in this Commission 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 in some pretty serious hot water. And so I just want to make sure that when we have our discussion tonight we keep parking out of it. They've met code and to require that, that is above and beyond we're not allowed to do. But that's not correct in a Conditional Use application. The local Land Use Planning Act authorizes the City to apply conditions that are more restrictive than found in the zoning ordinance to mitigate the adverse impacts of any development that is a Conditional Use request. Even the recent change to the Legislature that has been talked about and changes to the local Land Use Planning Act repeats this concept in the new language, exceptions, such as a height exception may be permitted by special or conditional use, permit, subject to conditions as may be imposed to minimize adverse impacts, which can include requiring more restrictive standards, such as more restrictive parking standards then generally required by the zoning ordinance. What exactly are the adverse impacts on this of this project on the neighborhood and the greenbelt and the park? We think quite a few, but we really understand that the only way to come to grips with whether there are real adverse impacts is to have a full fledged public hearing where the public is allowed to address the issues, where the Applicant is allowed to address the issues and rebut points brought up, and the Commission is allowed to fully vet the issues before coming to this Council. That didn't happen here. I know I'm about to ask what may be, I don't know, a politically difficult decision. The Applicant has consistently said in hearings that it needs to get its approval because it wants to build housing to capture next fall's students. But what is the procedural and what is the legally correct decision so that you have a fully vetted decision by the Commission in front of you. We are asking you tonight to remand this back to the Commission for a complete hearing on the request for a Conditional Use permit for this height exception. Asking the Council to remand this matter back is a hard thing to ask and I think I feel some daggers in my back coming from some eyes, but it is the right thing to ask. The issue should be worked out before it reaches this Council. We understand the frustration of the Applicant in us asking possibly asking that question. You know that I represent developers and land owners before this Council a lot and they work hard to expeditiously get through your process, but just to push something through the process without considering the impacts on the

neighborhood is, again, just not correct. The Applicant has asked our client and asked others why we didn't bring these issues up at the Commission. We tried. The Commission was told it could not listen. We didn't set out to try to delay this project, but it should be delayed until it is fully reviewed as a Conditional Use by the Commission. We're not asking here tonight for more process, we are asking for the process that is due in any Conditional Use request by the City. And with that I'll turn over my time to Ilene Barber.

Mayor Bieter:

Give your name and address please?

Ilene Barber:

Okay good evening Mayor and City Council, my name is Ilene Barber, my address is 120 Mobey Drive in Boise. I'm co-founder and serve on the Board of Kinetics and I'm one of the owners of the Kinetics Building at 917 Lusk. First off, let me start by saying that I welcome development and I'm thrilled to see the truck lot replaced with a project that enhances the greenbelt and that serves our city. Unfortunately, the project as its proposed today does neither. There are two main concerns of the proposed student housing, the height of the building, especially along the greenbelt and a lack of adequate parking. Kinetics is a three story office building, like most of the other buildings on this stretch of the greenbelt, and yes Kinetics did receive a height exception for aesthetic and design characteristics, not to increase density or to add floors. The proposed five story student housing structure has 175 dwelling units and those are four bedroom units, creating 622 bedrooms. If the project is kept to 35 feet and were to receive a height exception to accommodate just their parapet and exterior stairwells as we did and the majority of the other buildings in the area this project would be 312 student bedrooms. However, the Applicant isn't just asking for a height exception to accommodate design characteristics, they are requesting a CUP to add two floors above and beyond what is allowed for in the ROD Zone. The addition of these two floors doubles the density. I can appreciate that the City's Comprehensive Plan calls for increased density. I believe in using our limited resources wisely and I support increased density, but not density at any cost. This type of density far exceeds any multi-family condominium complex on the greenbelt and downtown for that matter. Please take a moment to think about the proposed project in this way. If this was a true multi-family complex with 1.7 bedrooms per unit and on a side note, 1.7 is actual data provided by Ada Real Estate Surveys and this survey includes all Ada County apartment complexes in excess of 15 units for a total of 184 complexes. Okay, any way's as I was saying, in a typical multi-family complex with 1.7 bedroom units, um bedrooms per unit in a high density zone where 43 dwelling units per acre are allowed this would give the proposed site 237 bedrooms. At downtown density where 87 dwelling units per acre are allowed, this would give the

proposed site 479 bedrooms. So you have 237 bedrooms at high density, 479 bedrooms at downtown density, 622 bedrooms this project as proposed. The one thing that the zoning ordinance of 35 feet does is it keeps the density nicely in check. Notice that at 35 feet and 312 bedrooms this falls nicely between high density and downtown density. But that's not what the Applicant is requesting, they want to build a 63 foot tall building that's 347,000 square feet right on the greenbelt. For some perspective, our building is 28,000 square feet. The Boise Cascade Building, which we're all familiar with, is 280,000 square feet, so this proposed project is bigger than the Boise Cascade Building. And this leads us to our next concern, lack of adequate parking at the proposed project. We're concerned, our neighborhood is concerned, Morrison Park Apartments owners are concerned and we all agree that the students will walk and bike to their classes and that's great; however, we all realize that most of the students will still have cars to drive to the grocery store, to the mall, to their job, to explore our beautiful state or to go home for the weekend. Parking is a huge issue. P&Z would not even consider our concerns about parking, they didn't want to hear about it and they didn't consider it when approving the project. Regardless of the BSU data supplied by staff, the proposed project is not campus housing, it does not have BSU parking garages nearby, it does not have BSU full time parking enforcement. This site is zoned University and it should not be treated as if it's a campus project. This is a private off campus student housing project. Applicants themselves admitted that this project is not market rate apartments when they stated "Appellant's arguments are based on a misunderstanding of the different parking needs of student housing as compared to market rate apartments. Student housing projects simply need less parking." So I say let's figure out this need, let's commission a study and determine appropriate parking ratios for private student housing projects. Applicant can't have it both ways, where parking is calculated on 1.5 parking spaces per dwelling units based on a multi-family condo otherwise known by them as market rate apartments category and then when it's pointed out that 280 parking spaces for 622 student bedrooms is absurd and that this is a serious parking shortage, they then say it's plenty for a student housing project. As mentioned in our PO Memorandum this, this past fall there was another proposed private off campus student housing that came before P&Z, a developer proposed renovating the ParkCenter DoubleTree Hotel rooms into studio apartments for BSU students. Staff's response to P&Z's despair treatments between these two proposed student housing projects, and I quote: "In that instance the Applicant would not commit to the units containing kitchens, without the kitchens, the projects would have been designated a dormitory and would have required additional parking." Well I find this response interesting because I'm not aware of parking code for dormitories, yet that is what staff has read into the code. More

importantly, how does the existence of a kitchen relate to parking needs. And furthermore, this is completely counter to their previous argument that student housing doesn't require as much parking. So if students live in dorms and dorms require a 1:1 parking how does a present project that's clearly student housing not provide 1:1 parking? Look, there's so much inconsistency, all I ask is lets make it consistent. Again, I say lets commission a study, lets determine appropriate parking ratios for student, private student housing projects in the City of Boise. Thank you for your time, any questions? There's four minutes left so.

Mayor Bieter: Yeah you're right. I was just checking. Thank you.

Ilene Barber: And you had, do I answer the question now or later, her question about?

Mayor Bieter: Question?

Council Member ?: Oh the question raised earlier on the uh.

Council Member Jordan: On your height exception. I was just curious if um and just more curiosity than anything. When you applied for your height exception um did you receive the exception that you applied for or did you apply for more than you received?

Ilene Barber: We, I believe, because I did not (inaudible) I think just on Consent Agenda.

Council Member Jordan: Okay.

Ilene Barber: Um we, BRS, Trent (inaudible) is our Architect for that and we did apply for 56 feet and I think even because just to leave a buffer just to make sure as we're constructing the project, but we did not construct, there's one exterior stairwell and its on the Royal side that's 53 feet and it only makes up 5% of our entire roofline so. Um the other stairwell is an interior stairwell, you cannot see that even when you're, if you're standing out in the parking lot, you only see the exterior stairwell on the perimeter.

Council Member Jordan: Okay thank you. Mr. Mayor could I ask a question of staff?

Mayor Bieter: Go ahead.

Council Member Jordan: Um I tread lightly into this question because the, the parking the way that I read this isn't really part of the appeal, but I do think its an important question to ask just to clarify um what was presented to

Planning and Zoning, if we're being asked to make a determination as to whether their hearing was proper or not. And the question is um when I look at our zoning code um 11-10-06 for off-street parking requirements and I read across the matrix for multi-family residential we require 1.5 parking spaces per unit. And then for dormitory, rooming and boarding houses we require .33 per resident. So if we were going to count this building per bedroom, assuming one resident per bedroom that would require, with four bedrooms in each unit, 1.32 parking spaces per unit, which is actually less than what our code already requires and what was built into the application. Do you want this?

Staff: Mr. Mayor, Council Members, can I consult with Josh the project planner on this real quick before we answer that question?

Josh Johnson: Mr. Mayor, Council Member Jordan, um in parking code there's a designation for fraternity and sorority which is one per occupant. Is that what you're referring to?

Council Member Jordan: There's one for fraternity and sorority. No I'm sorry I was looking at the one for dormitory, rooming or boarding house that is .33 per resident 11-10-06. A slightly different number.

Josh Johnson: I wonder if you have an old version of the, of the parking code there.

Council Member Jordan: Oh perfect that's helpful okay.

Josh Johnson: See what we've found is that there's not a dormitory parking standard in the code anymore, there's a fraternity standard and there's a rooming house standard.

Council Member Jordan: Mr. Mayor I'll, I'll.

Josh Johnson: But there's not a, I'd like to take a look at your section.

Council Member Jordan: I'll hold off getting an answer to my question because like I said earlier, we'll be here for a little while and I'll, I'll go online and look at, look at it online I may be working off an old book. I hope not, but. All right do you want this. I can't believe that.

Mayor Bieter: Go ahead.

Council Member Clegg: Thank you Mr. Mayor. I also have a couple of questions of staff. The Appellant brought up the fact that the process at the Park's Commission did not, at least the process that's included in the staff report, did not include a staff report that was given to the Park's Commission to give

them reasons for their decision, did include pretty detailed minutes about the discussion they had. In that discussion, uh there didn't appear to be any discussion about the effect of the height of the building and perhaps the shading that it would, would uh mean on the river and I did ask staff earlier today to check with Park staff to see if that was a concern. So I think its important perhaps to get that on the record. So Josh I don't know if you want to do that or if Hal does?

Josh Johnson: Um Mr. Mayor, Council Member Clegg, I guess the only way I can really answer that is that specifically was not looked at. What I will say is, is that Parks Planners worked with the Applicant on the landscaping along the greenbelt, in-between their building and the greenbelt within that Boise River setback on what would be appropriate there.

Council Member Clegg: Okay and then follow-up this is a Class C uh property if I'm, if I'm not mistaken which is um held to the lowest standard in the River System Permit?

Josh Johnson: Mr. Mayor, Council Member Clegg, that's correct, um its use as an industrial site prior to this application, bumps it down to Class C.

Council Member Clegg: Okay thank you.

Council Member Jordan: Further questions? Go ahead.

Council Member Eberle: Yeah but its not quite formulated yet. On my way to the top of this thing.

Josh Johnson: I apologize for the large packet.

Council Member Eberle: We're learning the technical limitations of iPad's this is one of them. Whereas the computer we could.

Council Member Jordan: Yeah, what page do you need?

Council Member Eberle: Well its early on and I guess my question what I'm looking at here and it really goes to what criteria the Planning and Zoning used to determine uh the height restriction and which, and what are their considerations for mitigation of appropriate sites. Because in several locations as I look, if I come down to other conditional use, and again I don't know if I have a current one or not now that that's been raised. But its Section 11-06-06-.04 High Rise Multiple Family Dwellings, this is within the purview of Planning & Zoning to go ahead and give an exception if I can read the legal description of the area as appropriate. But its quite clear that under H of that section it says no building or structure shall have a height in excess of 45 feet. And then early,

unless approved by Planning and Zoning. So they're quite clear about setting the height limitation on this even though they are allowing and I can't do the math here uh 1 unit per 500 square feet and I don't know what works out to on all these dwelling units in the site. I don't know where we're at is the 622 at 1 per 500?

Josh Johnson: Mr. Mayor, Council Member Eberle, are you speaking to the allowed density on the site?

Council Member Eberle: Yes.

Josh Johnson: They're well under the allowed density for our.

Council Member Eberle: 1 per 500, they're under that?

Josh Johnson: Um yes.

Council Member Eberle: Okay so, so it really comes down to is a couple of things one I, I am persuaded that Planning and Zoning is to consider if you read the Conditional Use in several areas from the definition to justification that they are to, they are to consider and mitigate for uh impacts of that exception on the neighboring properties. And so what I'm looking at is what are those mitigation conditions Planning and Zoning set on this parcel. And that's where I was headed back on my iPad trying to get that question answered, but, but that's really and perhaps you can just refer me to the page quickly.

Council Member Jordan: That's on page 66.

Council Member Eberle: And there's just no quick way to get there is there?

Council Member Jordan: Yeah here.

Mayor Bieter: Get the annotated one, get the.

Council Member Jordan: What are you in? Oh you're in yeah.

Council Member Eberle: Mine just disappears. Anyway do you have it.

Josh Johnson: Mr. Mayor, Council Member Eberle, if I can start to maybe answer your question um it was our feeling that with the project meeting the requirements for a multi-family parking standard that to require more parking of the Applicant there has to be a nexus between what they're asking for and your conditions. In other words, the additional height itself is not driving a parking reduction. The only thing they're requesting through our process is a height exception. So ways they can

mitigate a height exception are additional building modulation, um design features, which were all done in Design Review. That actually drove some additional height, where we went back to the Park's Board. We requested more vertical modulation of the parapet.

Council Member Eberle: Yeah but see, see this is the phrase, straight under the justification, it'll simply say that if you're approving a Conditional Use you've got to validate that there is not any damage, hazard, or nuisance or other detriment to persons or property in the vicinity.

Josh Johnson: Okay.

Council Member Eberle: So once you've opened up the Conditional Use you have opened up the possibility of increasing the restrictions beyond code if a nuisance, damage, hazard or other detriment has been found. And so what I'm looking for here is where the Planning and Zoning addressed their concerns that there were no damage, hazard, nuisance or other detriment? Or if they did, what were those further restrictions. So that's the question I'm trying to answer here.

Josh Johnson: Mr. Mayor, Council Member Eberle, I'm not sure I can.

Council Member Eberle: Being technologically challenged, I'm not as fast on this as I.

Josh Johnson: I'm not sure I can point to, anything in the minutes that specifically says this, but my feeling is that, my understanding is the Planning Commission was aware of the nature of the project, the nature of the housing for students and were supportive of the fact that students would be able to walk to campus and would be able to, basically would be students without, that a good percentage of them would be without cars as they are in a normal student housing situation. So they just basically made the decision, I believe, that, that there would not be a demand for automobiles on this particular site as there would be if they were really looking at 600 normal apartment units.

Council Member Eberle: Right, but the height does more than just parking. Parking is one element of the height and so there's a number, it's the number of people in the area, it's the height, it's the parking, you know I mean there are a list of concerns and so all I'm looking for here is where I don't know what happened, now I've got nothing.

Josh Johnson: Mr. Mayor, Council Member Eberle, perhaps the appropriate place to look is the adopted findings under the Adverse Impacts section of the Conditional Use.

Council Member Eberle: Yeah now I'm down to blank page so I'm losing ground here, but yeah I will continue to pursue, but hopefully Mr. Mayor before we close up I'll, I'll figure it out and ask again.

Council Member McLean: Mr. Mayor though could Josh tell us what page that is?

Mayor Bieter: Tell them about the record or the?

Council Member McLean: The adopted findings that are part of the record.

Josh Johnson: Um if you go to your action letter aspect of your packet um it shows the adopted findings um the reasons for decision are there, and one or two sentences are committed to adverse impacts. Then if you scroll through to the original staff report, and let me find what page that's on.

Council Member ?: I think it starts on 66 if I'm not mistaken.

Council Member McLean: Yeap.

Josh Johnson: Yeah the staff report itself starts around 53, but yeah thereafter there's a longer conditional use report, the original one the, or to Planning and Zoning Commission from February 6th. Um there's a discussion of adverse impacts within that report. Let me get you that page. Within that staff report it is on page 8 of 13 if you look in the heading on that original report.

Mayor Bieter: I think we better keep going here and then we'll figure out our uh. Take it sir you represent the Applicant?

Gary Allen: Are you ready for me?

Mayor Bieter: I am. And you know the rules uh.

Gary Allen: I've got four minutes and five seconds showing on here.

Mayor Bieter: You don't think you can do it in four minutes and five seconds.

Gary Allen: Close, close.

Mayor Bieter: No you also get, get 30 minutes uh in total obviously so.

Gary Allen: Okay, right.

Mayor Bieter: All right.

Gary Allen:

Hopefully I won't take all of that. There we go. All right thank you Mr. Mayor, members of the Council, my name's Gary Allen, my address is 601 West Bannock in Boise. I'm here representing the project Applicant. So tonight you have the opportunity to affirm the City's vision of a downtown, vibrant downtown integrated with Boise State University, one of the City's most important assets. The location will allow more Boise State students to live, work and play near campus, near the river and near downtown. This is an ideal location for this project. As you'll hear more about in a moment, the project offers an appropriate scale, a well modulated façade and quality integration with the greenbelt. The site uses structured parking to enhance the design and avoid an asphalt dead zone on the site, and that structured parking is a significant reason for the height increase here. We should all be celebrating the replacement of a trucking yard with this fine facility. The appeal before you boils down to Yogi Berra's immortal words: "Nobody goes there anymore its too crowded." The Appellants who own a suburban design office building just a few feet shorter than River Edge, argue that River Edge is too tall and it doesn't offer enough parking. As a result, Appellant argues it will harm surrounding properties. Appellant wants a smaller building with fewer residential units and bigger parking lot. It wants this area to be quieter with more places to park cars. Tonight we will argue passionately for a different vision. My client sees this neighborhood as a place that should be vibrant and full of life and people. This is a place where the need to accommodate cars and to perpetuate a low slung development pattern should not prevail. The site is immediate adjacent to, if not part of Boise's downtown and the Boise State campus. The City should take full advantage of this site and should not water it down based on unfounded fears of parking overflows and unjustified claims to view protection. The Planning and Zoning Commission found that this is the right site, the right project, and the right time to build a quality residential project in this location. We ask that you send a rousing affirmation tonight of the P&Z's decision and this project. In a moment, I'm going to turn to the specific claims of error the Appellant has made, but before I do so let me turn the podium over to Becky McKay, the Project Engineer, to discuss some of the design features that this project brings.

Becky McKay:

Good evening members of the Council, Mr. Mayor. Becky McKay, 1029 N. Rosario, Meridian, business address. Um when we first began this project with the Michael's Organization um it was different, it was exciting. It wasn't our standard suburban multi-family development that we see. Uh one it was a redevelopment of an industrial area, uh Esday's Trucking and Express Trucking are located on the site. The buildings that are currently on the site look like they were built in the 40s, the 50s prior to any design standards. No landscaping, no paved

parking areas, um it's a site that's definitely underutilized. When we started working with their architects Kitchen(?) and Associates who have done many projects for Mr. Zapharus(?) in other states at other universities uh adjacent to the campuses um they came up with what I consider was a very revolutionary design. I was very, very impressed. We talk about livability, we talk about sustainability in projects, we, we endorse these design and development standards and we are trying to obviously transition and make these better projects; however, its rare that we have an opportunity that we can work on a project and incorporate such a large number of these principles. And these principles obviously take into consider sitting, design, transportation, open space. This particular project embraces density, it embraces green building principles, its located adjacent to a large public park, it has direct access to a greenbelt, it is pedestrian oriented. We are less than 1,100 feet from the Boise State campus, which is less than 1/4 of a mile. There's a Boise State shuttle that comes by this property during school hours every 20 minutes I was out there for a couple of hours, it came by every 20 minutes like clockwork to provide service to the University. This property has access to buses, its located in your downtown planning area in your new Blueprint Boise. So obviously there's employment centers, retail, restaurants, pubs, which college kids like, um the podium parking concept was extremely unique, um I'd never dealt with that before. All of that parking is internalized. If you notice, we have 17 spots right here along the east side at our entrance here. If you look at the building, the building is shaped like an A, this is the orientation towards the Boise River and the greenbelt and one of the things that we were extremely concerned with was the orientation of the building and we worked with the Park's Department, we worked with your Design Review Staff, your Planning Staff, we went before the Trails Committee, we went before the Park's Commission, we've been to the Planning & Zoning three times and Design Review. There has been significant opportunity for public input. One of the thing, couple things I'd like to mention on sustainability is this particular project will incorporate zip cars, which allow the kids to rent these by the hour, by the day, I guess there's a couple on Boise State campuses, we plan on having five or six. We're going to utilize a U-Rent bicycle program, we have enclosed secure biking storage areas that are located right at these access or entrances out to the north to the greenbelt. We have two secured areas within the parking area. This particular project encourages alternative forms of transportation, it encourages recycling programs, adopts energy efficient building standards, it includes so many new urbanism design standards that uh that it almost seemed foreign because its very rare that we have the opportunity to include those. We've also included permeable driveway uh for a portion of the entrance. We also looked at water quality, environmentally friendly drainage systems. This is

definitely the right project on the perfect site. You couldn't hand pick it, it doesn't get any better than this. This particular building is a modern state of the art building with a media center, hot tub, gathering place, mail room, they want to create an environment for these students that encourages walkability, bikeability, this is a living environment and they build these all over the country and we believe that if you can see the orientation the distance of these wings here which are the end of the A in the orientation, you can see the greenbelt, the river, those are only 40 feet in width and then the building goes back in 140 feet. The parking is underneath the living structures, that was one of the driving forces for the height, get that parking, get that sea of parking out of there, get it out of the view. There's parking within the interior of the A area and we have wrought iron, heavy landscaping and as you can see a masonry wall. This, we meet the 70 foot setback from the river, we have worked with all of the stuff to make sure that we took into consideration these new urbanism standards, we put the building up at Royal Boulevard, we're going to construct an 8 foot sidewalk with an 8 foot parkway to improve and enhance that feel when you're coming in to Ann Morrison Park. There are distribution lines in front of the property. There are distribution lines in front of the property that have been there since the 40s, there's four different utilities on it, we are going to spend almost \$200,000 putting all of those utilities under ground and a question was asked you know what are we doing to mitigate, well we're burying those facilities along the frontage of the Park's Department property for approximately 160 feet off site at our cost in order to approve the aesthetics and improve that gateway into your park. This is a good project, its top notch, they're utilizing different materials, different colors. The height of this increased to improve the aesthetics, it was a recommendation of the Design Review Group that the height increase so we are 63 feet adjacent to Royal Boulevard and we are 59 at the river exposure. This is a perfect project for this area and I can see this area really starting to blossom as we get some density in there and Boise's taken great strides with Blueprint Boise to try to enhance that downtown environment. Let's get people living there, lets get people living where they work, where they recreate, where they go to school, um we're all over 200 feet our building on its, on the eastern side of our building is 200 feet from Kinetics. We feel that the Planning & Zoning Commission made the right moves, they made the right decision, they approved an excellent project that will benefit this whole community. I'll turn it back over to Gary.

Gary Allen:

Thank you Mr. Mayor, members of the Commission, again Gary Allen, 601 West Bannock, representing the Applicant. Um let me turn, there are really two issues here as to whether there are adverse impacts, one is height and one is parking. So I'll talk first about height. Joanne did

a masterful job of trying to paint a picture that the RO Zone um anticipated a 35 foot height limit and, and is going to be a low level of development and it's a, a uh a transition zone and so on. So you heard a lot about policies and lot about plans, but we didn't hear much about the ordinance and about the record, when she's talking about that. And the fact is that the criteria for a height exception in the RO Zone are exactly the same as they are in any of these other zones, and that there really isn't anything in this record that would indicate that those things should be treated differently, um so uh a height exception you have the same criteria, you have exactly the same criteria really basically identical comprehensive plan elements that apply so you are fully within your rights and the Planning and Zoning Commission was in within its rights to find that a 59 foot height for parapet and 63 feet for incidentals above that is consistent, is can be done without adversely impacting other properties here. Now, we really didn't hear much from the Appellants about what the impact of this height is. As we heard, the Kinetics building is over 200 feet away from this building, so its, the impact of that height there is going to be monished, the other residential project is kitty-corner from this so its not going to have a lot of impact based on the height. So just to uh talk a little bit more about what is in the record on this, the Planning and Zoning Commission had a great deal of evidence before it that this is compatible and will not create adverse impacts. And just to go through those quickly, there are other, there was a discussion of the other tall buildings in the vicinity, it doesn't have to be, compatibility and impacts don't have to be addressed based on what's right next door. The Commission was fully within its prevue to say lets look around the neighborhood a little bit more and see what's around. The separation from other structures as I've discussed, the ability to provide sufficient parking, we meet all the parking codes, we're not asking for any reductions, there is no impact on pedestrian views beyond what a 35 foot building would have and there is are no real privacy concerns because adjacent uses are offices and industrial. And the height allows for this podium parking which benefits the project aesthetics and the livability of the entire area. In addition, Becky pointed out the fact the A shape of this building, looking not so much at the impacts on the Appellant here, but more on the public on the greenbelt, pull that building 140 feet, most of the building frontage 140 feet back from the greenbelt, so this whole structure isn't looming over the greenbelt. Um and uh addressing just for a second the shade issue, I just want to point out that this the sun's going to go mostly east to west uh across here so you're going to have limited impacts from the sun because basically the north face of the project is along the greenbelt, the sun will go up and down like this, maybe in the wintertime you would have a small amount of shadow, but that is also limited because of the A shape of the building, which does not put more than two 40 foot frontages on the greenbelt. So with

all of that evidence before you and your job is to determine whether the Planning and Zoning Commission made an error, and whether there was substantial evidence to support this finding. There is clearly substantial evidence to support the decision that there would not be an adverse impact based on the height of these structures and so if you're looking at what your job is on an Appeal that's clearly got to be the answer, because I think its very difficult for the Applicant to say oh well all of the evidence in the record supports our contention that that height, that height is too much. They did not address in any form all of these issues that we talked about. I want to point out before I go to the parking that uh there was a substantial amount of time spent in the Appellant's Appeal Brief about the variance and the burns holding decision. And it appears by their silence on this issue that they concede now that burns holdings no longer has an effect and there is no need to address any of the variance holdings. I, as we said in our brief, the Legislation since they wrote theirs, came into effect, it applies retroactivity to this application and to basically everything that happened before. I was one of the authors of the Legislation and I can say unequivocally that it was intended to make burns holding decision go away as if it had never happened. And I'm happy to answer any details if you're interested. Now let's turn to parking. The Appellant argues that the Planning & Zoning Commission adequately failed, failed to adequately address parking and that this use should have more parking than the code requires for multi-family apartments. This is not the case. The P&Z decision was proper and the project has both adequate parking both as a matter of law and as a matter of fact. First, the law is that Conditional Use Permits may be conditioned, but only based on standards that are contained in your ordinance. The City has interpreted the parking standards that apply to a Conditional Use Permit to be the specific parking standards in Title 11 Chapter 10 of the City Code unless the use is not specified in the code, which it clearly is in this case. So based on this interpretation it would not have been appropriate for the City, uh for the Planning and Zoning Commission to add additional parking as a condition to this application because the amount of parking is called out in the code. And in addition, as Josh mentioned, there is no nexus between more parking and the height of the building, which is the purpose of the CUP, the additional building, Appellant's argument that the more height means more parking impacts fails to address the fundamental fact that this project meets the parking standards at the requested height. So there is per say no incompatibility on this basis. So because of the City's interpretation of the standards, it was and is appropriate for the City to instruct the public that the amount of parking was not an issue on the table for discussion. We think that that was the right decision and that that is a reasonable interpretation of your code um that allows that says look we have made standards and we're going to follow them in this case. Nor is there any doubt that the

multi-family standards, parking standards apply to this use. So the project meets the definition of a multi-family dwelling, which is simply this: a building or portion thereof containing three or more dwelling units. Now the occupancy of four bedroom units by unrelated individuals is clearly stated in your code. The definition of dwelling unit includes the following: a dwelling unit may be occupied by a family or by up to five unrelated individuals. Directly out of the code, I don't say any way to interpret that other than to allow a landlord to rent four bedrooms to four unrelated individuals and this is still a multi-family use. Thus the project falls squarely within the definition of a multi-family dwelling and we believe, and well I think its clear based on the code that multi-family is the only set of parking standards that can be applied to this use. Now Appellants have argued that the City should apply the fraternity and sorority standards, but this is inconsistent with the plain language of the code. The code describes a fraternity and sorority as a facility for housing a club of men—fraternity or women—sorority, college students. This definition clearly doesn't fit because the project is not a club in any sense, there's no fraternity or sorority members, no Greek letters, no hazing, no house songs, maybe even no beer pong. I don't know if that's allowed or not. Further, fraternities and sororities are not allowed uses in the ROD Zone. Nothing in the code indicates that use means anything different in the parking code than it does in the zoning code. In other words, if its multi-family for purposes of zoning, its multi-family for purposes of parking. Thus, the P&Z decision is on firm legal ground all the way around. But notwithstanding, there was no need to do so, the P&Z heard significant testimony about regarding parking from the Appellant, from the Applicant and from others and there is ample evidence in the record, specifically about parking to support the P&Z's determination of no adverse impact in compatibility with the parking requirements imposed. For example, the mere fact that the project meets the code that's evidence that supports the fact that its not incompatible. The code is based on significant experience with multi-family projects of all kinds, it clearly anticipates this type of multi-family use and by itself it is substantial evidence to support the P&Z's findings. Secondly, Michael's builds college housing projects all over the country, including those that are similar to this one. As we testified in the P&Z as the intended owner and operator, they considered the parking needs of the project very carefully, they have every financial incentive to be sure the project serves and appeals to the potential residents. People are not going to rent here if they think there isn't enough parking. Further, if you saw the evidence that Boise State University provided, it shows that the bedroom to parking ratio is the same as students use on the BSU campus, which is based on actual permits that BSU issues. The Appellant's claim that something magically changes when you cross Capital Boulevard, there is simply

no evidence to support that. And Michael's is confident that there is enough parking here and that what they do is exactly comparable to what's on campus at Boise State. Finally, the parking needs of the project need to be balanced against other aspects of compatibility and adverse impact. For example, the building site and site design with structured parking furthers the City's interest in compactors urban housing near downtown with great access to non-car modes of transportation. As Commission Stevens observed the Developer has done a good job of being creative with this site to meet the comprehensive plan goals related to structured parking and not to require us to see an asphalt parking lot. This is important because parking itself creates incompatibilities with the kind of vibrant area that the City wants to create here. So based on the standards the City has adopted, we encourage the City Council to specifically affirm that the project is compatible based on parking and that the parking here will not create adverse impacts. So at the end of the day the Appellant is searching for hyper technical flaws that simply don't exist. The P&Z approval is legally and factually sound, it meets all code requirements and has been carefully considered by the Planning and Zoning Commission, Parks Commission and Design Review. More importantly, this is a development the City can be proud of. River Edge Apartments will provide quality urban housing options for BSU students and the downtown area, while also preserving key public access to the Greenbelt and to the River. So one last point, this is very important to us, is that delaying a decision beyond this evening would be very harmful or possibly fatal for this project. The project needs to be open for the fall semester of 2013 and the construction time table is very tight from now till then if you can imagine for a structure of this size. So Michael's is relying on their public investors who are relying on certain project economics and timing. So we simply and what this means is that we need a decision this evening and we really have no ability to redesign the project or to take time for more studies given the time that that would take and impacts that would have on, on the timing of the project. We ask that you deny the appeal and uphold the Planning and Zoning Commission's approval of this project this evening. Thank you and I would be happy to take any questions.

Mayor Bieter:

Questions?

Council Member Eberle:

Just a comment Mr. Mayor I did find the section (inaudible) iPad working, so thank you.

Gary Allen:

Oh may I comment on, that reminds me I would like to comment on Council Member Eberle's about where's the mitigation since I still have a little bit of time left.

Mayor Bieter: That's what I didn't know.

Gary Allen: Yeah I've got three minutes here, but um clearly there's a lot of mitigation required with this project. We've talked about a lot of the design features that are part of that, but if you look starting on Page 71 there are a couple of pages of different conditions of approval that are designed exactly to do that, um and those refer to more pages of conditions from the Parks Boards and Design Review Committee. So if that was helpful or an answer to your question, I wanted to at least point you where that is. Did I say Page 71?

Mayor Bieter: Yes.

Gary Allen: Okay all right thank you very much and any more questions.

Mayor Bieter: I think I have one, I think I understand your argument Mr. Allen, but I just I want to at least um touch on this point. I mean as I've understood it the height exception in your opinion, the Conditional Use Permit analysis that that height exception triggers in the Conditional Use Permit process is limited to the, to the aspects of that building and not to, to, to the massing or the use that those, that that extra height will, will implicate. Do you understand where I'm going.

Gary Allen: Right.

Mayor Bieter: I mean it's only the?

Gary Allen: Well there must be a nexus between the permit that we're seeking and the, the impacts that the are, are claimed. So we see the weakness of the argument that the Appellant has made Mr. Mayor as uh first of all that the nexus is extremely attenuated, if, if anything, you know they're, the impacts of height are normally on views or possibly on you know immediately adjacent uses.

Mayor Bieter: Okay. Okay.

Gary Allen: Um you know the other aspect of it is you've got very specific standards about parking which really seems to be at the heart of what they're talking about. And so those you know our understanding at least how the, the staff has interpreted the code and how the P&Z interpreted the code is that uh those, those are the standards you apply.

Mayor Bieter: Okay so in other words, if the, the whatever use that that extra height might I mean for instance if its, if its office use and not residential use that according to your argument at least that that its irrelevant if you, if it's a parking standard you know you meet or don't meet that, but even

though those further floors might, might uh raise a concern about more parking, if you've addressed the parking standards, by which the overall building is measured, the height doesn't, doesn't address that it goes to shading, it goes to design, it goes to, but not, not whatever activity those floors might generate.

Gary Allen: Right you have, Mr. Mayor, um.

Mayor Bieter: Stated in a different way, but it's the same question basically.

Gary Allen: I, I yeah I think I, I'm pretty sure I agree with you on what you're saying there. Um the Conditional Use Permit um is, is about you know so, so its about the impacts of that additional height and you have to find all of the Conditional Use findings related to that. But you have already made a decision with regard to parking as to what standards are going to apply to that. And, and there is a highly attenuated nexus between the height and the parking. Particularly where a fair bit of the height has to do with the fact you've created structured parking for, for whatever reasons.

Mayor Bieter: Okay. I understand the argument thank you for that. Anybody else.

Council Member Clegg: Mr. Mayor?

Mayor Bieter: Yes?

Council Member Clegg: Um Gary how far away from the river is the edge of the um project. I know its more than 70 feet, but I can't find it any, anywhere exactly how far it is.

Gary Allen: I'm gonna let Becky answer that, she's got a handy dandy ruler that she carries with her everywhere I was noticing that today.

Council Member Clegg: And then the second part of that is um you talked a little bit about shade, um in response I probably to my question, I assume you didn't do any shading studies, winter shading studies, whether or not the at least the 40 feet that will be facing the river in those two places will shade the river?

Gary Allen: Um I am not aware of a shading study Commissioner or Council Member Clegg, um.

Council Member Clegg: Okay how far away?

Josh Johnson: From the 6,500 CFS line the building is 83 feet and some change.

Council Member Clegg: Okay from 6,300.

Gary Allen: Yeah so it is a little outside of the normal 70 feet in a Class C area.

Council Member Quintana: Mr. Mayor?

Mayor Bieter: Yes.

Council Member Quintana: Quick question for you Gary, not as relevant to this discussion, but for my own curiosity, that wall that separates what looks like would be kind of a courtyard in the front facing the river. What's behind that wall? Is it just an open gathering place? Why is that wall there? I'm not quite sure.

Gary Allen: Mr. Mayor, Council Member Quintana, that's parking behind that wall.

Council Member Quintana: Okay so its exposed parking.

Gary Allen: And then there is an additional courtyard, remember its an A shape.

Council Member Quintana: Uh huh.

Gary Allen: So you have a courtyard that's open internally from, from the fifth floor down at the uh south end of the property that's a courtyard, the other part of the A is a parking lot, but it will be fully screened from the greenbelt by the 8 foot wall.

Council Member Quintana: Okay.

Mayor Bieter: All right. Thank you. Uh next, uh those that signed up to testify, if you also testified at P&Z you get three minutes and I'll just go down the list. Brad Wiskirchen.

Brad Wiskirchen: Can you flip the side view as you would look at it from Ann Morrison Park please?

Josh Johnson: Okay that'd be uh?

Brad Wiskirchen: I think you have a bigger picture, you scroll through it pretty fast when you show it historically. Okay good evening Mr. Mayor and esteemed members of the Council. My name is Brad Wiskirchen, I live at, at uh live 917 Lusk, that's a Freudian slip, that's where I work, uh 3371 S. Longleaf Avenue in Boise. I'm here as a resident of Boise and the CEO of Kinetics. Kinetics is Idaho's largest privately held technology company by revenue. We live in uh we work in the building directly adjacent to the property in question, 917 Lusk, it's a Class A three story

building. We made significant investment in our design to ensure that the building complimented the surrounding development and the greenbelt. I stand before you tonight to ask that you consider making some very practical modifications to the proposed development on Royal Boulevard. While the River Edge Apartments are never going to be in line aesthetically with the surrounding buildings, by stair stepping the project so that its lower on the greenbelt side and higher on the Royal Boulevard side you could, you have a chance to protect the integrity of one of Boise's greatest assets—the Boise River. By creating some relief in the profile of the building you will not only be making a more aesthetically pleasing development you'll also be addressing the other related shortcoming of the development that's been talked about a lot tonight, which is parking. Most of you know that I'm a reformed attorney, so I can't help but put on my attorney's hat as I stand at the podium. In the March 5th P&Z Hearing, Commissioner Stevens said I want to remind the Commissioners that the parking issue tonight is not actually before us. The Commission is not in a position to make findings that require our Applicant to be held to standards above which that which is in our code. However, the Boise, the parking provisions of the Boise City Code, Chapter 11-10-01-01C say the Planning Director shall determine the required parking for uses that are not listed in Table 1. Now it's arguable that as, as our attorney has mentioned that uh, that uh the uses are, of this particular property, are not listed in Table 1. Thus its clear that the parking provisions of the Boise City Code were written anticipating that there would be uses not defined in the table. A large scale student housing project and complex is just such use and its within the purview of the Planning Director to determine the, the required parking for this use. Notwithstanding the foregoing we're here and a student housing development that will house 622 students and only accommodate 280 parking spaces will further compound the parking issues based in this particular area of the city. I don't know if you've been there recently, but the streets are packed with cars all day every day and its actually quite dangerous. There is not a week that goes by when I'm pulling out of our building because of the obstructed view that my car is not, is not nearly sideswiped. This will only exacerbate the problem. Everyone in the neighborhood is concerned about it and now I'm even more concerned now that I hear that there can be roughly 2,488 cats in the development. As it currently stands on any day at any hour you can expect that there won't be any on street parking in our neighborhood and many of the businesses in the area are negatively impacted by taking over their lots. The proposed development that is uh will certainly exacerbate the problem and that is the impact of the height of this building, more apartments equals more cars. It doesn't matter what studies you've concerned we've all been to college. Forcing business owners to spend their days ticketing or towing vehicles just doesn't feel

like an, appropriate in a city that aspires to be business friendly. Finely as I said in the Planning and Zoning Hearing, Boise State's move from a commuter oriented school to a residential oriental school will only create additional needs in the area for well-designed off-campus student housing. And given the recent interest by builders to develop off-campus student housing its probably a good time to consider the standards by which the City will allow student housing. We have a lot of exciting opportunities facing us in terms of development and urban renewal in our area. That's been pointed out several times tonight. We just ask that it be done right. And I urge you to make reasonable changes to the development proposal before you and consider for the long-term health of our community, creating standards for off student housing. I guess I've got a little more time, so I'll just say as well. As Ilene mentioned the proposed student housing process is larger than the corporate headquarters constructed for a then Fortune 100 company, Boise Cascade, imagine the impact of facing that enormous structure from our beloved Ann Morrison Park or as you float the river. Is this really what Boise wants to become? As a citizen deeply committed to and involved with this community I respectfully submit that the answer should be no. And I stand for questions if you have any. Yes?

Council Member Eberle:

Cats. You made my whole evening thank you!

Mayor Bieter:

You know Brad if you'd come up maybe I'd address it to your, to your uh counsel, but I want to make sure that I understand and I don't even know if I'm voting, but uh the problem I'm having by the definition sited earlier of, of multi-family housing where you could have five unrelated (inaudible) bedrooms, you have five unrelated inhabitants.

Brad Wiskirchen:

Uh huh?

Mayor Bieter:

Uh and that's still multi-family and not and not student housing.

Brad Wiskirchen:

Right.

Mayor Bieter:

Uh can you help me out with that difference, because that you know that's the that's the, the crux of what you're saying here is to define it as student housing and say that the Planning Director can treat that differently.

Brad Wiskirchen:

Right.

Mayor Bieter:

The I'm having trouble reconciling what that (inaudible).

Brad Wiskirchen:

Actually think this is something between multi-family and fraternity. I mean you can, you can talk about the fact that they're not a club and

they're not drinking from kegs, um I suspect the latter's probably not entirely true, uh at least not at the University, well one of the University's I went to. Uh but the fact of the matter is, is that this is this is different than a multi-family dwelling. When I say multi-family dwelling do you immediately think of dormitories or these aren't even dormitories because they're not connected with the University. Where are these students going to buy their groceries. Sure they're close to, sure they're close to school, they're going to have cars, these are not Freshman who joined who go to a University, set in a campus and eat out of the cafeteria. They've got kitchens, therefore they need groceries. There's no grocery store anywhere near this particular property, this is, this is just not what one, what one thinks of when you think of multi-family dwelling its just not. Somewhere in-between is what and, and the code probably needs to be amended to account for such a thing because its already come up twice in the last year as far as I understand it if you're looking at the property off of ParkCenter uh, uh down towards the Albertson's headquarters. If its come up twice in a year its going to come up again and we've got to do the right thing, I think we so.

Mayor Bieter: Yeah thank you. All right um I apologize in advance of this pronunciation, uh ha thank you sir. I'm going to let you tell me who you are?

Marcon Gunzombi: Good evening Mayor, Council Members, Marcon Gunzombi.

Mayor Bieter: Sounds just like its spelled.

Marcon Gunzombi: Yeah uh my address is 1117 South Dale Street, Boise 83706. Uh which is the Morrison Park Apartments. So I've been a resident there for uh four years now and uh I'm also employed at Kinetics so you know I live and I work in the neighborhood. Um I spoke last month at the Planning and Zoning meeting and I had two concerns, which I have tonight and I'd like to share those with you. Uh number one parking is already at a premium in that neighborhood. Um anybody's whose been there recently will tell you that. Two, the influx of up to 622 uh people, residents, new residents in that neighborhood would do nothing to alleviate that it would just make it much worse. Um I have a copy of a letter that Gary Allen, who represents the Applicant uh sent to the City Council, um this is dated April 4th, 2012, in that letter on page 4, he states, regarding the Morrison Park Apartments neither the complex owner, nor its residents has objected to the project, um well that's not true because I had already come here as a resident and expressed my concerns. Um in addition, earlier this afternoon I spoke with Mike Keller, who's one of the owners of the Morrison Park Apartments and uh he expressed his concerns to me about the inadequate parking and

also the height of the proposed development. He's actually here today and uh he'd be glad to speak to you and share his concerns. Um I would like to say I, I think this, this development's a great idea, its probably a great benefit to the city um there'd be you know a lot of jobs and it looks very attractive, but I just think it should be done correctly and I hope you consider our proposals. Um I'll answer any questions if you have any.

Mayor Bieter:

Thank you sir. Uh Kate, Kate Lenz.

Kate Lenz:

Hi there um Kate Lenz and I am the Human Resources Director at Kinetics, 917 South Lusk in Boise. We have 101 employees at Kinetics in the building adjacent to the Applicant's proposal. I'm the HR Director, I'm responsible for hiring these great employees in Boise. Their benefits programs, retention, we do a couple of really neat things, um we adopt the section of the greenbelt in front of our building, we clean it, we give out an award for coolest piece of trash and we're celebrating earth day this is uh this is the month with that. We also have a go green program that I created and we have about 20% of our employee base which is about 18 employees who participate regularly in this Go Green Program, and that um just in essence means that they take alternative forms of transportation to work, they walk, they bike, um or they ride the bus. We have about 30 um bicycle parking spaces, combination indoor/outdoor and um they get used, in fact I was just speaking with Ilene Barber earlier today that we might need to get an additional rack because we have such widespread adoption with this. So we've been talking about parking and bicycles and my concerns and being green, um I have concerns with what's been proposed. So in reference to the ParkCenter DoubleTree project that was um uh approved last fall with conditions, it had 142 units, a total occupancy of 200 tenants and the project required 200 bicycle parking spaces, 180 car parking spaces, a 1:1 ratio for bikes and a nearly 1:1 ratio for cars. The Michael's Organization they're uh, they're proposal that's in front of us provides 48 bicycle parking spaces for over 622 residents, 280 car spaces, um it doesn't, it doesn't make sense. Um I think that if the developer is willing to increase bicycle parking spaces it should be a condition um for to insure the adequacy. At the Planning and Zoning Hearing on March 5th um and also um in testimony earlier tonight with um by Becky representing the Applicant, she talked about Zip cars, I love the idea of car sharing I think it sounds so cool. Here's the reality, there's two zip cars for City of Boise, there's two zip cars for Boise State University, there's only two because its based upon usage, so having something available doesn't mean its widely adopted. So again, I would submit that if the Michael's Organization per Becky's statement is going to say we'll have six zip cars, um make that a

condition of the permit and um uh for this development. Um finally I will just let you know its, its kind of offensive to me to assume that.

Mayor Bieter: Excuse me, but your light is flashing there you want to shorten up.

Kate Lenz: Okay I'm yeap, yeap its offensive to assume that you can have inadequate parking and be pedestrian friendly, um you have to, you can't just pay lip service to be in a green building, you have to have everything and I just I don't see it with this development. Thank you.

Mayor Bieter: Thank you. Mike Kelly, Keller I'm sorry.

Mike Keller: (Inaudible).

Mayor Bieter: Oh I'm sorry.

Mike Keller: But I signed up because I would like to testify.

Mayor Bieter: Yeah I, I apologize I, I uh thought I had checked it and I didn't, but thanks for being forthcoming. Those are all the people I have signed up if anybody that did testify at the Planning and Zoning Commission hearing would like to testify I'll allow the opportunity now. Well then uh the Applicant or the Applicant's Representative gets rebuttal. Off we go.

Gary Allen: So I think I have five minutes.

Mayor Bieter: Is that what you had left.

Gary Allen: Okay well plus there was five minutes for rebuttal in the ordinance. I had two something left and five minutes. I don't think I'll take very long. Uh Mr. Mayor, members of the Council, again Gary Allen, 601 West Bannock, um just a couple of points I want to touch on, um we acknowledge there is a parking problem there in this neighborhood right now um its what we understand is a basically a problem of transient parking its one of the places, few places around with free parking and so students who are driving into town come and they park over in this neighborhood um and you know that uses up a lot of the available parking. We think this could be a good place for a parking district and have some understanding that the City may be headed in that direction and that's, that's a much better solution than imposing that issue on us which absolute, obviously has nothing to do with us. So we would definitely support something along those lines. Secondly, I wanted to talk a little bit more about the RO Zone, which has come up here, I want to uh talk a little, uh read some language that wasn't read in the prior presentation which is that uh, it says: The RO Zone is

intended to provide for higher density residential and office uses with an emphasis on high quality urban design and pedestrian orientation. That is exactly what we're talking about here and that's something that would be basically impossible to accomplish with the 35 foot height limit which is basically the limit that you placed on single family residential dwellings. So clearly the uh CUP process is meant to mean something in the RO Zone and its contemplated that it will be frequently used in that zone if you're talking about a higher density residential project. Um there has been a, there have been a couple things uh that may have been stated that are outside of the record in, in the most recently testimony I was most concerned about Mr. Keller testifying since he didn't testify earlier, but since that uh didn't come up I will um simply state an objection to anything that might have been included that was not in the P&Z record. I want to just finish with a little just just another indication of our timing. We, we submitted this application on November 29th and its been delayed several times for a variety of reasons, this developer is really out of time and we need to have a decision here and, and get on with uh with building this project. So we really hope that you can uh approve it um as its been presented this evening. I think Becky wanted to do you have a couple points Becky? Um because I think that's everything that I have.

Mayor Bieter:

Thank you sir. Will you do, I thought, I misunderstand.

Gary Allen:

Excuse me?

Mayor Bieter:

Well I thought you had said that you didn't need more time? Um go ahead, go ahead.

Gary Allen:

Um well we've got a couple more minutes here.

Becky McKay:

Just a couple statements. Mr. Mayor, members of the Council, concerning the bike parking we have two large secured areas in those areas we did not include the vertical racks like they have at Boise State um this project is committed to alternative modes of transportation and if we don't ever provide the opportunity to adopt these new urbanism ideas we're going to continue to do the low density type developments that are reliant on cars, cars, cars and uh I think this is a milestone. This project will be a jewel in the capital, the City of Boise.

Gary Allen:

Nothing further Mr. Mayor.

Council Member Clegg:

I, I don't know who wants to answer it. You're saying you'll provide 48 parking spaces, I'm actually glad this did come up because I noticed that. Um what's, what's the requirement, how many are you required to provide?

Gary Allen: 28 or something like that. I don't know the number.

Council Member Clegg: And what will you do if you find there's more demand for parking, for bicycle parking than what you've provided, what will your response be?

Becky McKay: Mr. Mayor, uh Councilmen Clegg, we did discuss that, some of the students because of the value of their bikes keep them in their rooms, um they find that that's common at some universities, um but they are committed if they need additional bike parking uh areas that they will provide that. Obviously we could provide bike racks on the exterior and, and uh you know meet whatever need is out there.

Josh Johnson: Mr. Mayor, Council Member Clegg, the requirement is one bike space for every 10 required spaces.

Gary Allen: I was right 28.

Council Member Clegg: Too low.

Gary Allen: All right, thank you very much.

Mayor Bieter: All right the Appellant or the Appellant's Representative.

Joanne Butler: Thank you I've got many pages so I'll try to get my thoughts together. Um again Joanne Butler, um Brad Wiskirchen said to the council, offered some suggestive modifications, if you think you can make those modifications than please proceed, but if you think that this decision is really a Commission decision first then it does need to go back and that's not a hyper technical argument. What we are arguing is that the project may produce adverse impacts and if so, it should be adequately conditioned to mitigate those, those, impacts who makes that decision? It's the Commission after they've gotten all of the information, we're asking the developer of the multi-family project to take responsibility to both their tenants and their neighborhood that they want to be part of. The Applicant has told us that 60% of college students will have cars. We calculated, that means of shortage of almost 100 cars, 622 bedrooms I just assume one person per bedroom and there may be more, at 60% that's 373 parking spaces and they are providing 280 spaces, but that information was not considered and addressed by the Commission because they wouldn't address parking. Applicant says they're not asking for a parking reduction, that's true, they're not, but they are asking for a height exception that does impact parking. And so its up to the Commission to decide whether or not that height exception meets the Conditional Use requirements and if there aren't negative

impacts so be it, grant that height exception. If there are, maybe you need to condition it with additional parking requirements, or maybe you reduce the height exception that has been requested. Um we are not asking for special treatment, the criteria for a height exception is the same as Conditional Uses for any other, any other zone and we don't want the project to be treated differently we are asking it, it be treated or processed just as any other Conditional Use is processed. Um the Applicant says that they, just because they, they provide parking at 1.5 spaces per, per front door, they should be allowed to get the height that they requested. At what point is the breaking point? Can they go as high as they like as long as they provide 1.5 parking spaces per apartment? That's not the issue, the issue is what are the Conditional Use requirements, what are the adverse impacts and is there a way to, to adequately condition this project. And we don't think, we don't think the Applicant makes that decision and we don't think just because we stand here and say yeah we think there are going to be adverse impacts because we're in the area, we think the Commission needs to make that decision with all the information before it and making full fledged findings and that just has not happened in this case. We hate to be the bearer of bad news, but we think that, that is a fatal flaw in the process as we stand here today. Thank you.

Mayor Bieter: Questions? Okay. All right uh I'm going to close the public hearing and ask the pleasure of the Council. Hope you don't tie.

Council Member Eberle: Mr. Mayor?

Mayor Bieter: Yes?

Council Member Eberle: Um if I might just make a couple of preliminary remarks. I think this is an issue that you actually raised with our ordinance consultant that we're getting developments that are ahead of our current zoning. The RO Zone is an appropriate, at first I had caught Joshua in an overextension of his position, but unfortunately I found the section of which he was sitting and so he came back into my good graces. Clearly I, I do think that parking zone is, is absolutely critical for here, mostly because the BSU shuttle now goes through that area allowing students a very easy place to park for free. I think all those issues are clear, but having found the sections I needed in both the record and uh reviewing the um code we really are fairly restricted to the issues before us and I know we've got two very accomplished attorneys before us tonight as they definitely swayed me each time they spoke, both of them. So that was well done, but ultimately uh I am going to um move that we uh reject the Appeal of CUP11-00090 and uphold the Commission's uh ruling. And I if I might I'll just base that decision if I might (inaudible) Mr. Mayor?

Mayor Bieter: Go ahead.

Council Member Eberle: And that really gets down to Section 11.06-06.04 which talks about high rise multiple family zone and this land is properly within that and correctly defines it, the justification says that you must not find any damage and the Planning and Zoning Commission didn't and so uh I'm not sure they exceeded their authority. And finally, when we look at the uh purpose of RO Zone it is for higher density with high quality residential design and, and it yes I would like to redesign this, but I don't see where the Commission erred.

Council Member ?: Second.

Mayor Bieter: All right (inaudible) go ahead. Go ahead.

Council Member Jordan: Mr. Mayor um I'm also going to support the motion uh for a couple of reasons, one I have reviewed the three points of the appeal and uh to repeat what Council Member Eberle said I don't find in error on the part of the Commission as identified in the three appeal points. I'm also um persuaded by a couple of other things in the context of both the discussion and the record that we've reviewed. With regard to the record um of the Planning and Zoning hearing, hearings uh because they did allow testimony in that had been someone wasn't there when they started or whatever happened and they, they were good enough to open it back up and allow that testimony. When the issue was raised in the record about the parking not being an issue under consideration that evening because it was determined to have met code uh and code does identify multi-family as up to five unrelated individuals, there was no indication in the record of uh concern on the part of the Commissions that they perhaps were not receiving complete information that allowed them to deliberate properly. And they based their decision on the information that they received in testimony in the record and what they know to be the applicable codes. Um and the other um issue early, early on again not under appeal, but I think important to the process is the river systems permit. I very much appreciated Council Member Clegg's question about the shading was, was persuaded by the direction of both the sun and the building I think that that addresses that concern, but also in the record it indicates that this is Class C land where all allowed and CU in the base zone are permissible. So um this has tracked all along in keeping with the system that we have and I, I do not find error with the Planning and Zoning decision.

Council Member McLean: Mr. Mayor?

Mayor Bieter: Go ahead.

Council Member McLean: Um I'll be supporting the motion as well. Um this project meets code as it stands and I too felt that the record was clear and couldn't find any problems with the Commission's decision where I'd be able to, to say that they erred. And ultimately there is a, I saw on the record a lot of conversation about parking and this project meets parking requirements and because of that I believe that it meets code as it stands and the Commission made the right decision. There's a parking issue we do need to deal with as a City and we've talked about that a little bit and I hope to see that come forward soon. Ultimately if this project does bring density near our urban core and I saw that discussed somewhat in the record as well. Um we've, we've said in our comp plan that we have a multi-family need and this project covers and meets the dwelling unit definition and the multi-family unit definition. This is dense urban housing, its very close to the University and will likely be used for University housing, but its also connected to our parks, our libraries and other things where students can get around without getting in their cars. I, I really believe that it meets the intent of the new comprehensive plan that we've drafted. And again the Commission made the right decision. And in some ways if we can't build this here, where can we build it in Boise? And I think that our code is right in allowing something like this and the Commission made the right decision. I'll stop saying that. I would um I, I would ask though if the maker of the motion would consider a friendly amendment addressing the bike parking. Um and the reason I say that is because I ask is because I would like to require more bike spots knowing that students, when I was in college I took my bike into my apartment where it was allowed. Um, but in the winter people aren't going to do that and if we are truly going to be designing a facility that um encourages biking and is looking for students that don't have cars um to fill some of these spots then we need to have more bike parking facilities available.

Council Member Eberle: The maker of the motion would accept that, do you have a more specific condition you wish to apply?

Council Member McLean: Okay then let me think about that while other people are talking, numberwise and then I'll bring that up.

Council Member Eberle: All right.

Council Member McLean: Does that sound good. Okay.

Council Member Clegg: Mr. Mayor?

Mayor Bieter: Oh go ahead, go ahead I didn't see your hand.

Council Member Clegg:

Thank you. Um I also will be supporting the motion, I um had some concerns as I read through the Staff Report primarily with um whether or not the Commission did fully consider the impacts of the height, um particularly shading on the river, although it wasn't considered necessarily in a formal way um I couldn't find anywhere where the Parks Commission or the Planning and Zoning Commission didn't meet our standards or our ordinance or made an error in judgment for how um, how they looked at that, that issue. And given the, the distance from the river I'm convinced that uh that if there is any impact it will be relatively minimal. The Appellant tried to argue that the um issue at hand is that in fact there might be adverse impacts and that the Planning and Zoning Commission didn't fully address those and didn't have an opportunity to, um having sat on the other side of the dias many times I find it hard to believe that in this many hearings um if there were issues to be brought up that they weren't brought up. Um certainly the people in Boise as I know them are not shy at, shy about bringing up their, their issues at those kinds of hearings. I haven't heard that anyway. So I suspect that those, those issues did come up, um I'm convinced given the record at hand that the Planning and Zoning Commission did fully uh consider those, they made a finding that there was no adverse impact based on the height, given the fact that that height didn't require more parking under our ordinance, given the fact that um part of the reason to have that parking under the building and raise the height of the building was to raise the lower floor above, above, above flood level. And they also made a finding that there was nothing that showed that this um special exception would be materially detrimental to the public health. Um sounds to me like they fully considered the issue and found that there was no adverse impact. I'm not here tonight to determine if I think there's an adverse impact, I'm here tonight to determine whether I think they erred in um the way that they considered this decision. And I can't find that error. Um I would also support a um requirement to add more bike parking as the mother of now five college students, two of whom are still college students, one of whom is in her fifth year of college and still doesn't have a car, is living a mile, mile off campus with a bike, um I, I've found in my experience that uh an awful lot of college students don't have cars and do have bikes. And I think it would be really helpful to add more parking for those.

Mayor Bieter:

Go ahead.

Council Member Thomson:

Thank you Mr. Mayor, well thank you to both of you, you both made very compelling cases and like Council Member Eberle I think said I was definitely swayed on multiple occasions on, on different, different points, but in the end I, I do support the motion I, I do believe that when it comes down to it, did the Planning and Zoning Commission

rule in error, I, I do not believe they did. Based on reasons I'm not going to just repeat everything my colleagues said because they, they made several of the same points I was going to bring up, but I, I believe the criteria was there uh specifically for the height exception in this case and while parking, um you could look from the outside as a lay individual and see that there is potential concern there for parking um the code specifically defines uh what's required for a multi-family dwelling and so I, I just don't see where it, it falls in a conflict with uh our current code. So I can't, I can't see where Planning and Zoning ruled in error and definitely don't see the uh substantial side of evidence. So I, I have to agree with the motion.

Council Member Quintana: Mr. Mayor?

Mayor Bieter: Yes.

Council Member Quintana: I'm jumping on the bandwagon here as the last person to speak. I agree pretty much across the board. I think that Council Member Eberle and Thomson summed up are very similar to where I fit in here. Not 100% sold on every aspect of the plan, but it is a good plan and I cannot find an error in the decision that was made by the Planning and Zoning Commission. So I will also be supporting this effort. But I would also like to see additional bike spaces added.

Mayor Bieter: I just have one quick comment, obviously I'm not voting, uh but I do have uh and I'm not sure there's a way to address this, but I offer it to staff, uh at least going forward. I think, it seems to me the concerns here um with college housing as opposed to other housing is not, is not really although parking is, I used to live in this area, I, I understand the parking concerns fundamentally, but the, the difference in this type of clientele shall we say is not so much the parking requirements as the fact that they're college students uh and everything that means. And I don't know if there's a way to address that, but it seems to me that's one of the concerns here and I'd offer to the to the uh Applicants that you know I think you're, you're the first out of the chute besides the you know the longer term housing of this size and scale you're the first here. Its incumbent upon you to build in to the operations of the uh of the development some type of program that, that allays those concerns and I know that's not technically part of the uh part of the application, but I think that's what's going on so I'll just offer that for what its worth. And the Planning and Zoning I'm not sure how, how we might address that, but I think that's fundamentally what's going on here. In any event the uh the motion is to deny the Appeal and approve the uh.

Council Member McLean: Mr. Mayor?

Mayor Bieter: And uphold the decision of the Planning and Zoning Commission. Go ahead.

Council Member McLean: I'd offer a friendly amendment if the maker of the motion approves.

Mayor Bieter: Okay.

Council Member McLean: Um in the, the friendly amendment I'd offer is that we um we request of staff to bring back findings supporting our decision today and included in which would be a requirement um for a minimum of four bike spots for every 10 units.

Council Member Eberle: The maker accepts that as a friendly amendment.

Council Member McLean: Thank you.

Council Member ?: Second concurs.

Mayor Bieter: All right uh you've heard the motion and the amended.

?: Mr. Mayor if I could just jump in ever so briefly, I'm sorry to interrupt.

Mayor Bieter: Yes.

?: Um with regard to the bike I would ask maybe that we get some visual indication from the Applicant um if they I wasn't able to run those numbers real fast in my head on how many spaces per bike parking that would be.

Council Member McLean: 112.

?: Thank you very much. Um I, I would note that as 28 was required for this and the Applicant is providing, I believe 48, 112 is, is quite a bit more and so to be on the safe side I would ask that perhaps the council members would look for a visual indication from the Applicant that this would be acceptable to them, um otherwise I would have a few concerns.

Council Member McLean: Mr. Mayor I saw a visual indication that it looked really easy so I'd encourage the Applicant to bedazzle us with more than 112. But, but I will keep the minimum of 112 in the motion.

Council Member ?: Just for the record Mr. Mayor I noted two nods from two Appellant speakers this evening.

Mayor Bieter: All right everybody ready. You've heard the motion and the, and the friendly amendment. Will the Clerk please call the roll?

Clerk: McLean?

Council Member McLean: Yes.

Clerk: Quintana?

Council Member Quintana: Yes.

Clerk: Thomson?

Council Member Thomson: Yes.

Clerk: Clegg?

Council Member Clegg: Yes.

Clerk: Eberle?

Council Member Eberle: Yes.

Clerk: Jordan?

Council Member Jordan: Yes.

Clerk: All in favor motion carries.