
IN THE SUPREME COURT OF THE STATE OF IDAHO

FRANK P. HUNGATE and THOMAS K.
HUNGATE, as Trustees of The Hungate Trust;
THE A&E FAMILY L.L.C., an Idaho limited
liability company; ANNE E. ASHBURN, an
individual; ELEANOR JONES, an individual;
FRANK HUNGATE, an individual; and JOHN
HUNGATE, an individual,

Appellants,

v.

BONNER COUNTY, a political subdivision of
the State of Idaho, acting through the Bonner
County Board of Commissioners,

Respondent,

STEJER'S, INC., a Washington corporation,

Intervenor-Respondent.

Supreme Court Docket No. 46114-2018
Bonner County No. CV-2017-01438

BRIEF OF APPELLANTS

Appeal from the District Court of the First Judicial District
of the State of Idaho, in and for the County of Bonner,
Honorable Cynthia C.K. Meyer, District Judge, Presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal from the district court sitting in its intermediate appellate capacity. Below, the district court conducted a judicial review of the Bonner County Board of Commissioners' ("Board") decision to grant applicant, Stejer's, Inc., three variances from applicable lot setbacks required by the Bonner County Revised Code ("BCRC"). Neighboring land owners, Frank P. Hungate and Thomas K. Hungate, as Trustees of The Hungate Trust, the A&E Family L.L.C., Anne E. Ashburn, Eleanor Jones, Frank Hungate, and John Hungate (collectively, the "Hungates"), petitioned the district court for judicial review and now appeal the decision of the district court affirming the Board.

B. Course of the Proceedings.

On February 3, 2017, Stejer's, Inc. filed application V-486-17 seeking three variances from applicable setbacks ("Variances"). R. Vol. 1, Ex. pp. 218–39. The Variances were filed to bring Stejer's, Inc.'s illegal non-conforming structures and uses into compliance.

The Bonner County Planning and Zoning Commission ("PZC") denied the Variances. R. Vol. 1, Ex. pp. 476–82. Stejer's, Inc. appealed to the Board. R. Vol. 1, Ex. pp. 527–28. On June 21, 2017, the Board held a public hearing and voted to grant the Variances. R. Vol. 1, Ex. pp. 170–74. On June 22, 2017, the Board issued its written decision granting the Variances ("Decision"). R. Vol. 1, Ex. pp. 468–75. On September 18, 2017, the Hungates timely filed a Petition for Judicial Review. R. Vol. 1, pp. 8–11. On October 23, 2017, Stejer's, Inc. intervened in the judicial review action. R. Vol. 1, pp. 26–29. Following briefing, the district court heard oral

argument on April 9, 2018. On May 5, 2018, the district court issued its Memorandum Decision and Order on Petition for Review (“Memorandum Decision”) denying the Hungates’ petition and affirming the Board’s Decision. R. Vol. 1, pp. 168–85. On May 13, 2018, the district court entered a Judgment affirming the Board’s Decision. R. Vol. 1, pp. 186–89. On June 28, 2018, the Hungates timely filed their Notice of Appeal to this Court. R. Vol. 1, pp. 190–216.

C. Statement of Facts.

1. Property overview.

Stejer’s, Inc. owns three parcels at the north end of Priest Lake: (1) Tax Parcel 2, (2) Tax Parcel 9, and (3) Tax Parcel 10. R. Vol. 1, Ex. pp. 266, 447. Stejer’s, Inc.’s parcels are depicted on the Site Plan inserted herein.¹ All three parcels are zoned Rural-5, which allows one dwelling unit per five acres. R. Vol. 1, Ex. p. 267; BCRC § 12-411. Although not depicted on the Site Plan, a three-bedroom house is located on Tax Parcel 2. R. Vol. 1, Ex. p. 448. A six-bedroom duplex with an attached lean-to structure is located partially on Tax Parcel 9 and partially on Tax Parcel 10 (“Green Building”). R. Vol. 1, Ex. p. 444. A two-bedroom house (“Yellow Building”) and a three-bedroom house (“Beige Building”) are located on Tax Parcel 10. R. Vol. 1, Ex. p. 444. Stejer’s, Inc. has five dwelling units where only three are allowed in the zone. R. R. Vol. 1, Ex. p. 444. Stejer’s, Inc. accesses its property via Thistlede Lane, a private easement over the Hungates’

¹ The Site Plan (R. Vol. 1, Ex. p. 247) was provided to the County with Stejer’s, Inc.’s application for the Variances. Petitioner includes the Site Plan as a general depiction of the lot lines and building sizes and locations on Tax Parcels 9 and 10. However, the Site Plan’s labels of the structures as a “1-bedroom house”, “2-bedroom house” and “storage/shop” are not accurate and not supported by the Record on appeal. Further, the Site Plan does not show the residential structure located on Tax Parcel 2.

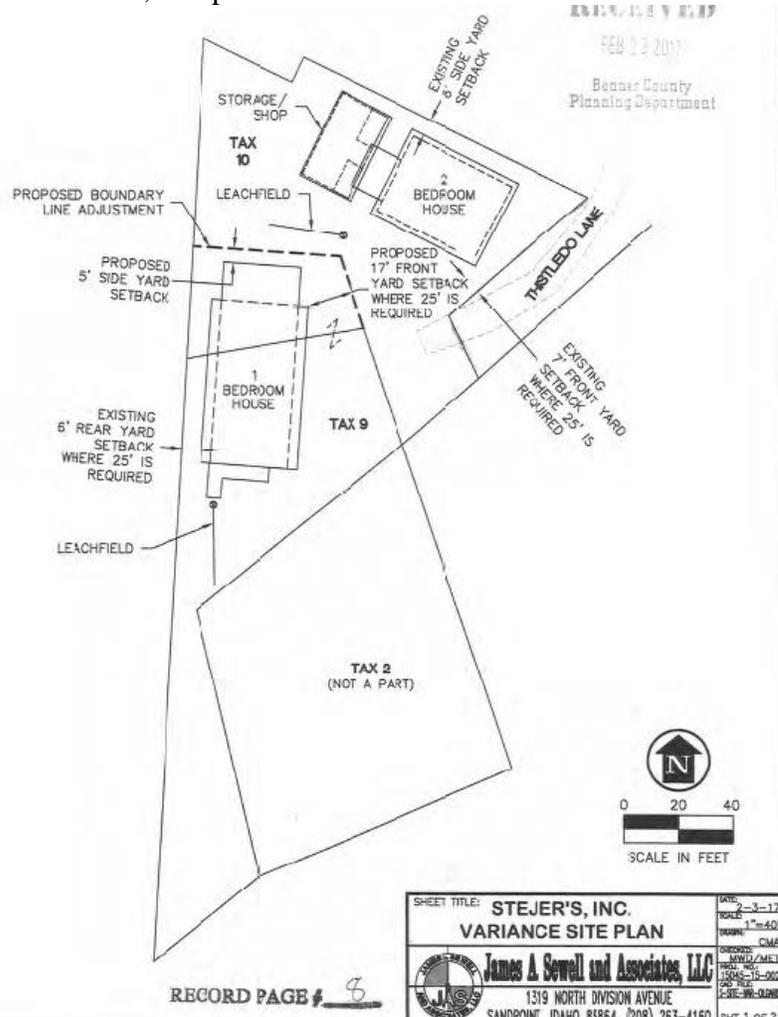
land. R. Vol. 1, Ex. p. 219. The Hungates' property is located to the east of Stejer's Inc.'s property. Tr. Vol. 1, p. 27, l. 11–p. 28, l. 5.

Stejer's, Inc. requested setback variances for the Green Building on Tax Parcel 9 and for the Beige Building on Tax Parcel 10. R. Vol. 1, Ex. p. 264. Tax Parcel 9 and Tax Parcel 10 were illegally developed as described in the following sections.

2. Tax Parcel 9.

Tax Parcel 9 is 0.28 acres and was described and conveyed to Stejer's, Inc. in a 1967 deed. R. Vol. 1, Ex. pp. 219, 470, 474. In 1980, Bonner County adopted its zoning ordinance and setback minimums. R. Vol. 1, Ex. p. 470. Nineteen years later, in 1999, Stejer's, Inc. constructed the Green Building, a 35'X75' two-story structure that straddles the

boundary between Tax Parcel 9 and Tax Parcel 10. R. Vol. 1, Ex. pp. 296, 416; *see* Site Plan. Stejer's, Inc.'s 1999 building location permit for the Green Building described the structure as a



“Garage + Storage”, which was planned and approved with a 25-foot front yard setback. R. Vol. 1, Ex. p. 457.

As built, however, the Green Building has a 17-foot front yard setback, no side yard setback, a five-foot rear yard setback, and is out of compliance with the building permit and the County’s zoning ordinance. R. Vol. 1, Ex. p. 265; R. Vol. 1, Ex. p. 270 (wherein the Bonner County staff concluded: “Therefore ... [Stejer’s, Inc.] willfully altered the location of the [Green Building], making it non-compliant...”). At the time Stejer’s, Inc. constructed the Green Building, the BCRC imposed a 25-foot front yard setback, a 5-foot side yard setback, a 25-foot rear yard setback for residential structures, and a 5-foot rear yard setback for non-residential structures. R. Vol. 1, Ex. p. 281. In the 1999 building location permit and in a 2007 building location permit, Stejer’s, Inc. represented to the County that the Green Building was located entirely within Tax Parcel 9, which is false. R. Vol. 1, Ex. p. 458.

Despite permitting the Green Building for non-residential storage use, Stejer’s, Inc. converted the Green Building to a residential dwelling without authorization and without obtaining septic permits. R. Vol. 1, Ex. pp. 223-24, 268, 444-45.

In 2015, Stejer’s, Inc. described the Green Building as a multifamily “duplex with a total of 6 bedrooms.” R. Vol. 1, Ex. p. 448. In connection with the Variances, Stejer’s, Inc. proposed a lot line adjustment to place the Green Building entirely within Tax Parcel 9. R. at 281; *see also* Site Plan.

In summary, Stejer’s, Inc. violated setbacks for Tax Parcel 9, constructed the Green Building in violation of the applicable zoning codes and permits, illegally converted the Green

Building to a residential use without necessary permits, and placed two residential units on Tax Parcel 9 where only one is allowed under the BCRC.

3. Tax Parcel 10.

Tax Parcel 10 is 0.22 acres and was described and conveyed to Stejer's, Inc. in 1971. R. Vol. 1, Ex. pp. 219, 233–35. In addition to a portion of the Green Building, Stejer's, Inc. constructed two additional structures on Tax Parcel 10: (1) the Beige Building and (2) the Yellow Building. In 1997, without any permits, Stejer's, Inc. constructed the Beige Building, a 30'X40' two-story structure. R. Vol. 1, Ex. p. 142. When Stejer's, Inc. first constructed the Beige Building, it was located partially outside of Tax Parcel 10 and encroached on the Thistledo Lane private road easement. R. Vol. 1, Ex. p. 434. Stejer's, Inc. confirmed this encroachment in a letter to Frank Hungate stating: "We [Stejer's, Inc.] agree that the SW Corner of our new 30X40 foot garage is on the private road approximately 1½ feet and then [sic] we need a 5-foot setback." R. Vol. 1, Ex. p. 434. Stejer's, Inc. moved the Beige Building six feet off the side yard boundary and seven feet off the front yard boundary, still in violation of the BCRC's 25-foot front yard setback for non-residential structures. R. Vol. 1, Ex. pp. 265, 270. Soon after completion of the Beige Building as a "garage", Stejer's, Inc. converted the two-story structure into a three-bedroom residential dwelling without any authorization or septic permits. R. Vol. 1, Ex. pp. 444–45, 447–48.

In 2015, Bonner County notified Stejer's, Inc. that Tax Parcel 10 was in violation of the applicable setbacks. R. Vol. 1, Ex. pp. 142, 474 ("Tax-10 had a zoning violation ZV-259-97 concerning building setback, stating clearly the front yard setback is 25 feet.").

Stejer's, Inc. constructed the Yellow Building, a 20'X30' single story structure, then moved it to different locations on the property throughout the years, placing it in its current location on Tax Parcel 10 in approximately 1997. R. Vol. 1, Ex. pp. 290, 394, 416. Stejer's, Inc. has used the Yellow Building as a residential two-bedroom bunkhouse. R. at 227, 416. The record does not include any evidence of building permits for the Yellow Building; no septic permits were obtained. R., pp. 223-24.

In sum, Stejer's, Inc. violated setbacks for Tax Parcel 10, constructed two structures without obtaining necessary permits and placed two residences on Tax Parcel 10 where only one is allowed under the BCRC.

4. Stejer's, Inc.'s health department violations.

On December 22, 2015, Panhandle Health Department sent a Notice of Violation to Stejer's, Inc. for construction of residential homes on Tax Parcels 9 and 10 without obtaining necessary septic permits and approvals. R. Vol. 1, Ex. pp. 444–45. On February 5, 2016, Panhandle Health Department and Stejer's, Inc. entered into a Consent Order. R. Vol. 1, Ex. pp. 447–48.

To bring Tax Parcels 9 and 10 into compliance, Panhandle Health Department has required Stejer's, Inc. to: (1) convert the Green Building from a six-bedroom duplex to a one-bedroom single-family residence; (2) convert the Beige Building from a three-bedroom dwelling to a two-bedroom dwelling; and (3) convert the Yellow Building from a two-bedroom bunkhouse to a storage building. R. Vol. 1, Ex. p. 448. Attached to the Consent Order are Stejer's, Inc.'s construction plans to implement these corrective actions. R. Vol. 1, Ex. pp. 451–55.

5. The Variances.

Stejer’s, Inc. sought the Variances to obtain legal authorization to convert the Green Building and the Beige Building to residential structures and to have its construction plans approved by the County. R. Vol. 1, Ex. pp. 276. As to the Green Building on Tax Parcel 9, Stejer’s, Inc. sought: (1) a six-foot rear yard setback where 25 feet is required, and (2) a 17-foot front yard setback where 25 feet is required. R. Vol. 1, Ex. pp. 218. As to the Beige Building on Tax Parcel 10, Stejer’s, Inc. sought: (1) a seven-foot front yard setback where 25 feet is required. R. Vol. 1, Ex. pp. 218.

The following table summarizes facts related to each structure on Tax Parcels 9 and 10:

Structure	Location	Actual Use	Permitted Use	Variances Sought
Green Building	Partially on Tax Parcel 9 and partially on Tax Parcel 10	6-bedroom residential duplex, built as “storage” and converted without permit	Non-residential; non-compliant with building permit and no septic permits obtained	17’ front yard setback where 25’ required; 6’ rear setback where 25’ required
Beige Building	Tax Parcel 10	3-bedroom residential dwelling, built as “garage” and converted without permit	No building or septic permits obtained	7’ front yard setback where 25’ required
Yellow Building	Tax Parcel 10	2-bedroom residential dwelling (“bunkhouse”)	Unknown as to building permits; no septic permits obtained	None

Bonner County staff recommended denial of the Variances, and the PZC denied the Variances, because staff and the PZC concluded the Variances did not meet the applicable standards in the BCRC § 12-234. R. Vol. 1, Ex. pp. 278–79, 281, 476.

Petitioner and County citizens argued for denial of the Variances due to: (1) increased intensity of use and density beyond that contemplated in an R-5 zone (R. Vol. 1, Ex. p. 336); (2) increased traffic volumes on Thistledo Lane used for vehicle and pedestrian access and youth recreation (R. Vol. 1, Ex. pp. 336, 341, 394, 412); (3) excessive lot coverage and unsightly architecture out of character with the surroundings (R. Vol. 1, Ex. pp. 336, 338, 394); (4) reduced privacy (R. Vol. 1, Ex. pp. 395, 412); (5) safety concerns (R. Vol. 1, Ex. p. 412); (6) reduced property values (R. Vol. 1, Ex. p. 412); (7) reduced enjoyment of wildlife and scenic views found on Priest Lake (R. Vol. 1, Ex. pp. 341, 401); and (8) impacts on adjacent wetlands and the water quality of Priest Lake (R. Vol. 1, Ex. pp. 341, 401, 412; R. Vol. 1, Ex. pp. 148-49). Ultimately, the Board approved the Variances, concluding, without support, that the application met the standards in BCRC § 12-234.

6. **Judicial Review.**

On judicial review, the district court concluded that the Board committed several errors in approving the Variances (R. Vol. 1, pp. 178–79) but that the Hungates failed to demonstrate that they were prejudiced by the Board’s Decision made in error. R. Vol. 1, pp. 179–83. Thus, the district court affirmed the Board’s Decision.

II. ISSUES PRESENTED ON APPEAL

A. Did the Board commit reversible error in a manner specified in I.C. § 67-5279(3)?

- B. Were the Hungates prejudiced by Bonner County’s erroneous Decision approving the Variances?
- C. Did the district court err in concluding the Hungates were not the prevailing party and by failing to award the Hungates attorney fees and costs under I.C. § 12-117?
- D. Are the Hungates entitled to attorney fees and costs under I.C. § 12-117 on appeal?

III. ATTORNEY FEES ON APPEAL

As set forth in the Argument section below, the Hungates are entitled to attorney fees and costs on appeal under I.A.R. 40 and 41 and I.C. § 12-117.

IV. STANDARD OF REVIEW

Idaho’s Local Land Use Planning Act, I.C. § 67-6501 *et seq.* (“LLUPA”), allows judicial review by the district court of an approval of certain land use applications by affected persons pursuant to the Idaho Administrative Procedure Act, I.C. § 67-5201 *et seq.* (“IDAPA”). *In re Jerome Cty. Bd. of Comm’rs*, 153 Idaho 298, 307, 281 P.3d 1076, 1085 (2012). Where a board of county commissioners makes a land use decision, it will be treated as a government agency under IDAPA. *Id.* This Court reviews the district court’s decision on judicial review “as a matter of procedure.” *917 Lusk, LLC v. City of Boise*, 158 Idaho 12, 14, 343 P.3d 41, 43 (2015) (quotations omitted). On appeal from the district court, this Court conducts “an independent review of the agency record.” *Id.* “This Court will affirm a district court’s decision upholding a zoning board’s action unless the party contesting the zoning board’s decision demonstrates that (1) the board erred in a manner specified in Idaho Code section 67-5279(3), and (2) the board’s action prejudiced its substantial rights.” *Id.* Idaho Code § 67–5279(3) provides that the board’s action may be reversed if the board’s “findings, inferences, conclusions, or decisions are: (a) in violation of constitutional

or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion.” I.C. § 67-5279(3). Where error and prejudice are demonstrated, the zoning board’s decision “shall be set aside, in whole or in part, and remanded for further proceedings as necessary.” *Id.*

V. ARGUMENT

The record supports, and the Hungates have established, both error and prejudice as required under IDAPA to set aside the Board’s Decision. In this appeal, the Hungates do not challenge the district court’s decision as to error; the Hungates only challenge the district court’s decision as to prejudice.

A. **It is undisputed that the Board committed several reversible errors under I.C. § 67-5279(3) in its Decision to approve of the Variances.**

On judicial review, the Hungates set forth nine errors committed by the Board. R. Vol. 1 pp. 85–105.² Bonner County did not rebut any of these errors, and Stejer’s, Inc. only partially rebutted some. R. Vol. 1, pp. 177–78. Relying on *Estes v. Barry*, 132 Idaho 82, 87, 967 P.2d 284, 289 (1998), for the proposition that “a party waives an issue cited on appeal if either authority or

² Specifically, the Hungates provided argument and authority that the Board’s Decision was made in error because: (1) the Decision violated I.C. § 67-6516; (2) the Decision violated BCRC § 12-234; (3) Stejer’s, Inc. failed to demonstrate the criteria for a variance were met under I.C. § 67-6516; (4) the Decision fails to comply with the written decision requirements of I.C. § 67-6535; (5) the Decision, specifically the finding that Stejer’s, Inc.’s actions did not cause the alleged hardship, is not supported by substantial evidence; (6) the Decision was arbitrary, capricious, or an abuse of discretion because undisputed evidence established that Stejer’s, Inc. caused the alleged hardship on the property; (7) the Decision was arbitrary, capricious, or an abuse of discretion because the Board ignored evidence establishing that Stejer’s, Inc. caused the alleged hardship; (8) the Decision was arbitrary, capricious, or an abuse of discretion because the Board applied irrelevant standards to grant the Variances; (9) the Decision was arbitrary capricious, or an abuse of discretion because the Board considered and relied on irrelevant personal statements offered by the Stejers in granting the Variance.

argument is lacking”, the district court properly held that Bonner County and Stejer’s, Inc. waived the argument that the Variances were not granted in error. R. Vol. 1, pp. 177–78 (“[The Hungates] have established that the Board’s decision was in error based on their uncontested assignments of error”).

The district court also concluded that even if the error argument was not waived, the Hungates showed the Board committed error in granting the Variances for two reasons: (i) the Decision was made in violation of the applicable statute, BCRC § 12-234, because Stejer’s, Inc.’s illegal construction of the Green Building and the Beige Building was the cause of the need for the Variance, a reversible error under I.C. § 67-5279(3)(a); and (ii) the Decision was not supported by substantial evidence because the record clearly showed Stejer’s, Inc.’s illegal actions gave rise to the need for the Variance, a reversible error under I.C. § 67-5279(3)(d). R. Vol. 1, pp. 178–79.

The district court did not address the Hungates’ arguments that the Board’s Decision was also arbitrary, capricious, or an abuse of discretion. The Hungates maintain that the Decision was arbitrary, capricious, or an abuse of discretion for the reasons set forth in their briefing to the district court. *See* R. Vol. 1, pp. 97–104. The only remaining issue is whether the Board’s uncontested errors prejudiced the Hungates.

B. The Board’s Decision granting the Variances prejudiced the Hungates’ substantial rights, and the district court erred in holding that the Hungates failed to show prejudice.

To set the Board’s Decision aside, I.C. § 67-5279(4) requires the Hungates to show the Decision potentially prejudices the Hungates’ substantial rights. *Lusk*, 158 Idaho at 19, 343 P.3d at 48 (“real or potential prejudice” is sufficient). Whether a petitioner’s substantial rights are

prejudiced is a “case-by-case” determination because “each procedural irregularity, legal error, and discretionary decision is different and can affect the petitioner in varying ways.” *Hawkins v. Bonneville Cty. Bd. of Comm'rs*, 151 Idaho 228, 232, 254 P.3d 1224, 1228 (2011). To show prejudice “[t]he petitioner opposing a permit must be in jeopardy of suffering substantial harm if the project goes forward, such as a reduction in the opponent’s land value or interference with his or her use or ownership of the land.” *Id.* at 233, 254 P.3d at 1229 (citing *Price v. Payette Cty. Bd. of Cty. Comm'rs*, 131 Idaho 426, 431, 958 P.2d 583, 588 (1998)).

When analyzing whether rights are potentially prejudiced, it is “instructive to look to law relating to property rights, nuisance, and trespass...” *Id.* Prejudice under I.C. § 67-5279(4) is analyzed by looking at the entire record before the Board. *Lusk*, 158 Idaho at 19, 343 P.3d at 48 (reversing the district court’s decision affirming the Boise City Council’s decision to grant a conditional use permit because there was error and “[t]he record before the Commission set[] forth substantial evidence supporting [Petitioner’s] claim of potential prejudice to its substantial rights”).

1. The district court erred by analyzing prejudice to the Hungates using the current illegal and non-conforming status of Stejer’s, Inc.’s property as the baseline.

The district court incorrectly analyzed the prejudice to the Hungates caused by the Variances. This is because the district court analyzed prejudice to the Hungates without taking into account the fact that Stejer’s, Inc.’s structures and uses are illegal, non-conforming, and should not be there in the first place and would not be there without the Variances.

For instance, in finding that the Hungates failed to show prejudice based on interference with use and enjoyment, the district court reasoned: “[the Hungates] have failed to show how granting the variance will affect their use of their property given that these structures have been in place for 20 years.” R. Vol. 1, p. 183. Similarly, as to a reduction in property value caused by the Variances, the district court reasoned: “It is important to note that these structures have been in place for at least 20 years; if the structures have negatively impacted [the Hungates’] property values since their construction, [the Hungates] should be able to show a reduction in value...” R. Vol. 1, p. 181.

The district court’s analysis looked at the current illegal non-conforming status of Stejer’s, Inc.’s property and then asked whether granting the Variance, which would allow the same illegal non-conforming status to continue, would cause prejudice. This type of analysis would never result in prejudice because it is comparing the same thing and does not take into account the effect of the Variance. The proper analysis is to ask whether a variance causes real or potential prejudice when compared with a legal and conforming use on the subject property.

Prior to the Board’s Decision, Stejer’s, Inc. was subject to a building location permit violation and a zoning violation notice that would require the property to be brought into conformance with the County’s zoning ordinance. R. Vol. 1, pp. 153–54.³ Therefore, without the Variances, Stejer’s, Inc.’s illegal structures and uses would need to be terminated or brought into

³ At the public hearing before the Planning and Zoning Commission, where the Variances were properly denied, staff confirmed for the Commission that Stejer’s, Inc.’s property was subject to a building location and zoning violation notice. *See* R. Vol. 1 Ex. pp. 26–27.

conformance with LLUPA and the BCRC. *See Wohrle v. Kootenai Cty.*, 147 Idaho 267, 276, 207 P.3d 998, 1007 (2009) (holding that illegal and non-conforming docks built in setbacks had to be removed and that denial of a variance to bring the docks into conformance did not prejudice the landowners because they “were not making lawful use of their properties when they built within the setback areas without first receiving a variance or building permit.”). Furthermore, the district court’s reliance on the illegal “long-existing situation” on Stejer’s, Inc.’s property to find no prejudice is improper because the same facts that demonstrate the Decision violated the ordinance—i.e., the prior improper and illegal construction of the structures—was also the district court’s basis for claiming there is no new harm arising from the Decision.

The district court’s conclusion of no harm based on the pre-existence of Stejer’s, Inc.’s illegal structures appears to be based on the district court’s misapplication of *Hawkins*. This case is not analogous to *Hawkins*, and *Hawkins* does not stand for the proposition that a variance for an existing illegal structure cannot cause prejudice. In *Hawkins*, the landowner and applicant, the Meyers, sought a lot frontage variance for two *legal* non-conforming lots accessed by a spur road crossing the petitioner’s open grazing land. 151 Idaho at 230, 254 P.3d at 1226. The petitioner argued the variance prejudiced him because it would result in additional use of the spur road on his land. *Id.* at 151 Idaho 232, 254 P.3d at 1228. Bonneville County argued the petitioner could not show prejudice because the variance “merely allows the Meyers to continue using the property for dwelling sites as they always have.” *Id.* This, however, was not the basis for the *Hawkins* Court’s finding of no prejudice. The *Hawkins* Court concluded the petitioner failed to demonstrate prejudice because the nature of the spur road was unadjudicated. *Id.* at 151 Idaho at 233–34, 254

P.3d at 1229–30 (“Hawkins ... cannot show prejudice ... because no court has adjudicated the easement rights the Meyers might have in the spur road Further, there was evidence produced before the Board that the spur road may actually be a public right-of-way, in which case Hawkins would have certainly suffered no harm.”). Another key distinguishing fact in *Hawkins* was that the structures at issue there were legal conforming (i.e., grandfathered in), and no variance was even required for the Meyers’ project. *Id.* at 230, 254 P.3d at 1226. Conversely, in this case, Stejer’s Inc.’s structures were illegally constructed under the applicable zoning codes and permits and not grandfathered in. Furthermore, Bonner County and Panhandle Health Department each issued violation notices to Stejer’s, Inc. that could only be resolved by the Decision to grant the Variances. Without the Variances, the illegal structures could not stay in place.

This Court should find that the district court’s analysis was fundamentally flawed because it analyzed prejudice to the Hungates based on Stejer’s, Inc.’s pre-existing illegal structures and uses.

2. The Board’s Decision granting the Variances prejudiced the Hungates’ substantial rights and the district court erred in concluding otherwise.

The Decision to grant the Variances substantially harms the Hungates by devaluing their property and interfering with their use and enjoyment on their property. *See Hawkins*, 151 Idaho at 233, 254 P.3d at 1229 (holding that that prejudice, *i.e.*, “jeopardy of suffering substantial harm”, can include a reduction in land value or interference with use or ownership).

Substantial evidence was presented to the Board that granting the Variances would have significant prejudicial impacts on the Hungates’ property. On judicial review, the Hungates

compiled this evidence for the district court. *See* R. Vol. 1, p. 83 (summarizing evidence before the Board). This evidence showed that approval of the Variances results in: (1) increased intensity of use; (2) increased traffic volumes on Thistleto Lane; (3) excessive lot coverage and unsightly architecture out of character with the surroundings; (4) reduced privacy; (5) safety concerns; (6) reduced property values; and (7) reduced enjoyment of wildlife and scenic views found on Priest Lake. R. Vol. 1, pp. 336, 341, 394, 396, 401, 402-03, 412.

The Variances allow structures that are significantly larger than those that could be legally built outside of the setbacks. Larger structures accommodate more people, more people means more cars and more vehicle trips over the Hungates' land on Thistleto Lane. Each of these negative effects supports the conclusion that the Variances will prejudice the Hungates because they have the effect of devaluing and interfering with the use and enjoyment of their property.

Understanding the consequences of denying the Variances highlights how the Board's Decision to erroneously approve them prejudices the Hungates. Without the Variances, the number and size of structures on Stejer's, Inc.'s property cannot continue. Given the overbuilt condition of the Stejer's, Inc.'s small parcels, with more residential units than are allowed and significant encroachment of two different two-story structures into the setbacks, to bring the property into compliance, Stejer's, Inc. will have to reduce the size of and/or remove some structures. For example, the Green Building is encroaching 19 feet into the setback on the west side. *See* Site Plan. To correct the illegal placement, Stejer's, Inc. cannot simply move the Green Building back to the east because there is no room. The Green Building will have to be redesigned. Similarly, the Beige Building is encroaching 15 feet into the setback on the east side (where the Hungates' property is).

To correct the illegal placement, Stejer's, Inc. cannot simply move the Beige Building back to the west because the Yellow Building (another unauthorized residential structure on the same lot) is in the way. The structures will need to be removed and/or reduced in size.

Stejer's, Inc. cannot deny it created the problem or argue that it is too burdensome to correct. The burden on Stejer's, Inc. is irrelevant. The County Code expressly disallows variances to applicants who caused the need for the variance. BCRC § 12-234 (requiring that the "special conditions and circumstances" warranting a variance "do not result from the actions of the applicant"). Because Stejer's, Inc. is not entitled to a variance to correct its own wrongs, it has to remove the structures regardless of any cost or inconvenience. *See Wohrle v. Kootenai Cty.*, 147 Idaho at 276, 207 P.3d at 1007.

The significant amount of work needed to correct these wrongs illustrates the extent of prejudice to the Hungates by the Board's erroneous Decision to allow these illegal structures to remain. As described in the record, the overbuilt and encroaching structures block views and light, crowd out wildlife, add more traffic, and create an unattractive property that negatively impacts the value and enjoyment of the Hungates' adjacent property. R. Vol. 1, p. 83.

Setbacks protect property values and the use and enjoyment of one's property. An infringement into setbacks is, therefore, evidence of a reduction of property values and diminishment of use and enjoyment. As described in Rathkopf's *The Law of Zoning and Planning* § 53:4 (4th ed.),⁴ setback minimums conserve property values and promote aesthetic and

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Setbacks are considered by courts to promote a variety of public purposes. They are held to relate to provision for light and air, fire protection, traffic safety, prevention of overcrowding, rest and

psychological values. *See* R. Vol. 1, p. 150. The U.S. Supreme Court has also recognized the inherent property value and aesthetic benefits bestowed by zoning setbacks, which:

[A]fford room for lawns and trees, keep the dwellings farther from the dust, noise, and fumes of the street, add to the attractiveness and comfort of a residential district, create a better home environment, and, by securing a greater distance between houses on opposite sides of the street, reduce the fire hazard; that the projection of a building beyond the front line of the adjacent dwellings cuts off light and air from them, and, by interfering with the view of street corners, constitutes a danger in the operation of automobiles.

Gorieb v. Fox, 274 U.S. 603, 609 (1927).

To show prejudice, specific evidence of property valuation from an appraiser or other expert evidence is not required.⁵ This Court has taken a common sense approach to recognizing prejudice based on impacts to property value or the use and enjoyment of property. For example, in *Price*, the Court found that Payette County erred in amending its comprehensive plan and that “[t]he Board’s actions result in a lack of orderly growth within the county, thereby diminishing [petitioner’s] property value and hampering his use and enjoyment of his land.” *Price*, 131 Idaho at 431, 958 P.2d at 588. Similarly, in *Lusk*, the Court held that petitioner adequately showed prejudice to a substantial right based on claims in the record that inadequate parking in the area next to their business would be exacerbated by the conditional use permit. *Lusk*, 158 Idaho at 19,

recreation, solving drainage problems, protecting the appearance and character of a neighborhood, conserving property values, and may, in particular cases, promote a variety of aesthetic and physiological values as well as ecological and environmental interests.

3 Rathkopf’s *The Law of Zoning and Planning* § 53:4 (4th ed.)

⁵ The district court’s Memorandum Decision incorrectly states that prejudice is shown by establishing “substantial economic harm.” R. Vol. 1, p. 180. That is incorrect. Substantial economic harm does not need to be shown under *Hawkins* or *Lusk*.

343 P.3d at 48; *see also In re Variance ZV2011-2*, 156 Idaho 491, 497, 328 P.3d 471, 477 (2014) (stating in dicta that a subdivision approval taking access over the petitioner's servient estate arguably prejudices his substantial rights).

Like *Price* and *Lusk*, the lack of orderly development and the increased intensity of use and traffic immediately adjacent to or on the Hungates' property caused by the Variances makes it less enjoyable, less usable, less marketable, less appealing, and less valuable. Testimony to the Board stated this same position: "[S]etbacks serve many important purposes like safety ... privacy, property values and density control just to name a few." R. Vol. 1, p. 421. The record plainly demonstrates that the Variances allow structures to be located in setbacks. The Hungates' citations to the record and legal authorities show that reduced setbacks have the potential to cause a prejudice because the setbacks themselves provide property value and material property rights. Deprivation of such property rights is precisely the type of harm the *Hawkins* Court held should be considered when determining prejudice. 151 Idaho at 233, 254 P.3d at 1229.

Stejer's, Inc. has significantly overbuilt its property in a manner that increases the intensity of use beyond what is allowed by the BCRC and encroaches into setbacks. This intensity of use and reduction of setbacks negatively impacts the Hungates' use and enjoyment of their property and the value of their property. Accordingly, the erroneous grant of the Variances prejudices the Hungates' substantial rights. The district court should be reversed, and the Board's Decision should be overturned because it was made in error and prejudices the Hungates.

C. **The district court erred in concluding that the Hungates were not the prevailing party, and the Hungates are entitled to their attorney fees and costs before the district court under I.C. § 12-117.**

The Hungates are entitled to their attorney fees and costs under I.C. § 12-117 because the Board issued the Decision without a reasonable basis in fact or law and, as established above, the Hungates should have been the prevailing party in the judicial review before the district court.

In a proceeding where a “political subdivision and a person” are adverse, the court “*shall* award the prevailing party reasonable attorney’s fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.” I.C. § 12-117(1) (emphasis added). Idaho Code § 12-117(1) expressly applies to “any proceeding” including judicial review where a political subdivision and a person are adverse parties. *Hauser Lake Rod & Gun Club, Inc. v. City of Hauser*, 162 Idaho 260, 263, 396 P.3d 689, 692 (2017); *see also Cty. Residents Against Pollution From Septage Sludge (CRAPSS) v. Bonner Cty.*, 138 Idaho 585, 589, 67 P.3d 64, 68 (2003) (ordering Bonner County to pay the prevailing party’s attorney’s fees and costs in a judicial review proceeding where Bonner County failed to follow its own ordinance and acted arbitrarily). The County is a “political subdivision” for the application of I.C. § 12-117 and acts through the Board. I.C. § 12-117(6)(d); *Hauser Lake*, 162 Idaho at 264, 396 P.3d at 693 (quoting I.C. § 31-602).

Adverse in this proceeding is a political subdivision, the County, and a person, the Hungates. As set forth above, reversal under I.C. § 67-5279 is warranted in this case because the County committed several blatant errors in approving the Variances and the errors prejudiced the Hungates’ substantial rights. As such, the Hungates should have been the prevailing party below.

In addition to being the prevailing party, the County acted without a reasonable basis in fact or law in issuing the Decision. R. Vol. 1, pp. 177-78 (noting that the County waived any argument that the Variances were not granted in error and that the Variances were *actually* granted in error because: (1) the Board failed to analyze and apply applicable sections of the BCRC; (2) the Decision was in violation of applicable sections of the BCRC; and (3) the Decision is not supported by facts in the record); R. Vol. 1, pp. 106-07 (setting forth all of the specific reasons the Board acted without a reasonable basis in factor law). The Hungates have been forced to incur significant costs and fees to protect their property and the use thereof because of the Board's improper Decision. Because the Hungates are the prevailing party and Bonner County acted without a reasonable basis in fact or law, the Hungates are entitled to attorney fees and costs under I.C. § 12-117.

D. The Hungates are entitled to their attorney fees and costs on appeal under I.C. § 12-117.

Idaho Code § 12-117 provides:

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

I.C. § 12-117(1) (emphasis added); *see also Hauser Lake Rod & Gun Club, Inc. v. City of Hauser*, 162 Idaho 260, 266, 396 P.3d 689, 695 (2017) (holding that the Rod & Gun Club, as the prevailing party on appeal, was entitled to fees on appeal under section 12-117 because the City of Hauser

did not act with a reasonable basis in fact or law “by attempting to enforce its code outside City limits on the [Rod & Gun] Club, a non-resident.”)

As set forth above, adverse in this appeal is a political subdivision, the County, and a person, the Hungates. Because the Hungates have shown that the district court erred in concluding that the Hungates failed to establish prejudice to a substantial right, the Hungates are the prevailing party on appeal. Furthermore, for the reasons set forth herein, and in the Hungates’ briefing to the district court (R. Vol. 1, pp. 106-07), the County acted without a reasonable basis in fact or law in issuing the Decision. The Hungates were able to articulate nine errors made by the Board, none of which the County defended. Accordingly, the Hungates are entitled to attorney fees and costs under I.C. § 12-117.

VI. CONCLUSION

For the reasons set forth above, the Hungates respectfully request this Court reverse the district court and award the Hungates reasonable attorney fees and costs before the district court and on appeal.

DATED: November 16, 2018.

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