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Rouwenhorst v. Gem County Appellant's Brief Dckt. 47668

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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

JOHN and DEBORAH ROUWENHORST, husband and wife; DESERT FOOTHILLS DRY, LLC, an Idaho limited liability company; and DESERT FOOTHILLS WET, LLC, an Idaho limited liability company,

Petitioners-Respondents,

v.

GEM COUNTY, a political subdivision of the State of Idaho; and GEM COUNTY BOARD OF COMMISSIONERS,

Respondent-Appellants.

Supreme Court Docket No. 47668-2019

Gem County Case No. CV23-19-0398

APPELLANT'S BRIEF

Appeal from the District Court of the
Third Judicial District for Gem County

Honorable George A. Southworth, District Judge, Presiding

Erick B. Thomson, ISB No. 8010
GEM COUNTY PROSECUTING ATTORNEY
Tahja L. Jensen, ISB No. 8510
Deputy Prosecuting Attorney
P.O. Box 671
Emmett, Idaho 83617
Telephone (208) 365-2106
Facsimile (208) 365-9411
tjensen@co.gem.id.us

Attorneys for Respondent-Appellants

Matthew C. Parks, ISB No. 7419
STACEY & PARKS, PLLC
802 W Bannock St., Suite LP 110
P.O. Box 2265
Boise, Idaho 83701
Telephone (208) 917-7780
Facsimile (208) 917-7804
mcp@splawidaho.com

Attorneys for Petitioners-Respondents

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I. STATEMENT OF THE CASE

A. Statement of the Case

This is a land use case involving the rezone of property in Gem County, Idaho. Gem county appeals the Decision and Order on Petition for Judicial Review issued by the District Court reversing the Gem County Board of Commissioners (the "Board") decision denying the application for a rezone of 696 acres of land zoned as A-1 Prime Agriculture (forty (40) acre minimum lot size) to A-2 Rural Transitional Agriculture (five (5) acre minimum lot size) owned by John and Deborah Rouwenhorst holding the subject property as Desert Foothills Dry, LLC and Desert Foothills Wet, LLC (the "Applicants").

B. Procedural History

On or about July 30, 2018, Applicants filed a Master Public Hearing Application requesting a rezone of 696 acres of land from A-1 Prime Agriculture (forty (40) acre minimum lot size) to A-2 Rural Transitional Agriculture (five (5) acre minimum lot size). Record ("R") pp. 115-17. The matter came before the Zoning Commission for public hearing on October 9, 2018. R. p. 149. The Zoning Commission recommended approval of the rezone of the applicant property and issued a written decision on November 14, 2019. R pp. 154-59. This matter came before the Board on November 26, 2018, December 4, 2018, and December 17, 2018, for hearings on the rezone. The Board issued Findings of Fact, Conclusions of Law and Order on February 25, 2019. R. pp. 27-31. The applicants, through counsel of record, filed a Petition for Reconsideration on March 8, 2019. R. pp. 211-17. The Board held a public hearing on Applicants' Petition for Reconsideration on April 16, 2019. R p. 240. The Board issued Findings

of Fact, Conclusions of Law, Decision on Motion for Reconsideration and Order ("Reconsideration Order") on May 20, 2019. R pp. 242-50.

Applicants filed a Petition for Judicial Review on May 28, 2019. The District Court issued its Decision and Order on the Petition on November 11, 2019. R p. 410. Oral Argument was heard before the Hon. George A. Southworth, District Court Judge on November 4, 2019. Tr. pp. 3-12. The Court issued the Judgement on November 27, 2019. R. pp. 437-38. Respondents filed a Memorandum of Costs and Attorneys Fees and an Affidavit on November 19, 2019. R. pp. 421-36. Gem County filed an Objection to the Memorandum of Costs on December 3, 2019. R. pp. 439-44. Applicants filed a Response to the Objection to Memorandum of Costs on December 9, 2019. R. pp. 445-51. The District Court entered the Memorandum Decision and Order on Costs and Attorney Fees and Judgement on Costs and Attorney Fees on December 24, 2019. R. pp. 469-76.

C. Factual Summary

The Applicants' property, consisting of approximately 696 acres, lies entirely in an area of Gem County zoned as A-1 Prime Agriculture; this zone requires a forty (40) acre minimum lot size. R p. 121. The property lies within the Priority Growth Area 3 of the County Residential Area, as designated on the Future Land Use Map in the Comprehensive Plan. The property has approximately one (1) mile of frontage on East Black Canyon Highway (State Highway 52). The property is bisected by the Northside Main Canal which is under the jurisdiction of Emmett Irrigation District. The subject area encompasses five tax parcels, identified by the Assessor's Office as follows: Parcel 07N01W281355 (512.60 acres), Parcel 07N01W285738 (10.2 acres),

Parcel 07N01W290000 (29.87 acres), Parcel 07N01W290600 (48.94 acres), and Parcel 07N01W292400 (94.67 acres). *Id.* The existing land use is agricultural with two single family residences and outbuildings. R p. 122. The character of the surrounding area includes active agricultural lands and low-density single-family residential properties. R. p. 123.

The Applicants seek the rezone in order to "rezone for the next generation." R p. 151. Applicants state that their intent is to keep farming and to not change their current operation. R pp. 149, 151. Further, Applicants stated they would like the ability to have their son build a house on something less than forty (40) acres. R p. 149.

The county ordinance governing amendment or rezone is found at Gem County Code, Title 11, Chapter 15. The Zoning Commission first hears the application and makes a recommendation to the Board of County Commissioners. Gem County Code ("GCC") § 11-15-6. The Board *may* grant, conditionally grant, partially grant, or deny an application to amend the zoning ordinance text or map and shall specify: A) The ordinance and standards used in evaluation the application; B) The reasons for approval or denial; and C) The actions, if any, that the applicant could take to obtain a favorable ruling. GCC § 11-15-7. (*Emphasis added.*)

II. STANDARD OF REVIEW

The Local Land Use Planning Act (Idaho Code § 67-6501, et seq.) ("LLUPA") allows judicial review of certain land use applications in accordance with the Idaho Administrative Procedures Act (Idaho Code § 67-5201, et seq.) ("IDAPA"). *Cowan v. Board of Com'rs of*

Freemont County, 143 Idaho 501, 508, 148 P.3d 1247, 1254 (2006). "A strong presumption of validity favors an agency's actions." *Cooper v. Bd. of Prof'l Discipline*, 134 Idaho 449, 454, 4 P.3d 561, 566 (2000). IDAPA requires the reviewing court to "affirm the agency action unless the court finds that the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by the substantial evidence on the record as a whole; or (e) arbitrary, capricious or an abuse of discretion. I.C. § 67-5279(3). The Applicants have the burden of showing that the Board erred in one of the reasons enumerated in Idaho Code section 67-5279(3) and that a substantial right of the applicant has been prejudiced. I.C. § 67-5279(4); *Barron v. Idaho Dep't of Water Res.*, 135 Idaho 414, 417, 18 P.3d 219 (2001).

The reviewing court may not substitute its judgment for that of the agency as to the "weight of the evidence on questions of *fact*." (*Emphasis added.*) *Wohrle v. Kootenai Cty.*, 147 Idaho 267, 274, 207 P.3d 998, 1005 (2009); I.C. § 67-5279. "A reviewing court defers to the agency's findings of fact unless they are clearly erroneous, and the agency's factual determinations are binding on the reviewing court, even when there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record." *Idaho Ground Water Assoc. v. Idaho Dep't of Water Res.*, 160 Idaho 119, 125, 369 P.3d 897, 903 (2016), reh'g denied (May 9, 2016) (internal quotations omitted). "Discretionary decisions of an agency shall be affirmed if the agency (1) perceived the issue in question as discretionary, (2) acted within the outer limits of its discretion and consistently with

the legal standards applicable to the available choices, and (3) reached its own decision thorough an exercise of reason." *Id.*

III. ISSUES ON APPEAL

A. Whether the District Court committed error when it ruled that the Board of Commissioners Gem County's ("Board") decision was arbitrary and capricious and therefore an abuse of discretion and when it ruled that the Board's findings were not supported by substantial and competent evidence.

B. Whether the District Court committed error in finding that the substantial rights of the Applicants had been prejudiced.

C. Whether the District Court committed error when it awarded attorney fees and costs to the Applicants.

IV. ARGUMENT

A. The District Court erred in ruling that the Board's decision was arbitrary and capricious and therefore an abuse of discretion and in ruling that the Board's findings were not supported by substantial and competent evidence.

The District Court ignored the Idaho Supreme Court's longstanding standard in *Bone v. City of Lewiston,* 107 Idaho 844, 850, 693 P.2d 1046 (Idaho 1984), when it ruled that the Board's decision was arbitrary and capricious and therefore an abuse of discretion. The decision of the Board was based on Gem County Code and the required findings therein. The District Court ignored the factual record when it ruled that the findings were not supported by substantial and competent evidence. The Board had before it evidence that the Idaho Transportation Department objected to the rezone and therefore, the Board could not make a finding that the effects of the proposed zone change upon the delivery of services by any political subdivision providing public

services, including school districts, within Gem County's planning jurisdiction have been considered and no unmitigated adverse impacts upon those services.

1. The applicants are not entitled to have their property rezoned in conformance with the comprehensive plan's future land use map as a matter of law.[1]

The Applicants insist that because the property requested for rezone lies entirely within Priority Growth Area 3 as set forth on the Gem County future land use map, a component of Gem County's comprehensive plan, it is proper to be rezoned as a matter of right. This goes against Idaho Supreme Court long-standing precedent. The Idaho Supreme Court, in *Bone v. City of Lewiston*, 107 Idaho 844, 850, 693 P.2d 1046 (Idaho 1984), disagreed for two reasons: (1) that permissive language of 67-6511(b) allows that the "zoning commission *may* recommend and the governing board *may* adopt or reject the zoning amendment," and (2) that "adopting [such reasoning] would elevate the comprehensive plan and land use map to the status of a zoning ordinance." *Id.* at 850. The "land use map, as § 67-6508(c) indicates, is a map displaying 'suitable *projected* uses for the jurisdiction.' (*Emphasis added.*) It is not a map of how the [County] should presently be zoned, but a map of projected uses..." *Id.* at 850. The Court held "that a city's land use map does not require a particular piece of property, as a matter of law, to be zoned exactly as it appears on the land use map." *Id.* It is not a requirement that the zoning ordinance exactly mirror the Comprehensive Plan, which necessarily includes the future land use map as but one component. *Love v. Board of Cty Comm'rs of Bingham County*, 108 Idaho 728, 730, 701 P.2d 1293, 1295 (1985).

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[1] *Bone* at 851.

In *Bone*, Mr. Bone requested that his land be rezoned from low-density residential use to a limited commercial use. The Zoning Commission recommended denial because it would not be compatible with the existing uses of the bordering properties and also because there was no present need for further classification of property for commercial use. The City Council agreed with the Commission and denied the application. In a recent case citing *Bone*, he Idaho Supreme Court has not changed the analysis " that the use or residential density designation of property in a comprehensive plan creates no present right or enforceable expectation that the property will ever be zoned in accordance with the comprehensive plan." *Martin v. Camas Cty ex rel. Bd. Com'rs*, 248 P.3d 1243, 150 Idaho 508, (Idaho 2011).

Applicants pay great attention to the undisputed fact that the property subject to the application lies entirely within Priority Growth area 3 and argue that its inclusion there should entitle them to a rezone. While true that the property does lie within the Priority Growth area 3 on the future land use map, whether or not the application complies with the Comprehensive Plan and Future Land Use Map is but one of the five findings that must be made under Gem County Code § 11-15-4. In fact, the fifth legally required finding [that the rezone would not have any adverse impact on the delivery of services] tempers the Comprehensive Plan argument by asking whether Gem County and the currently zoned applicant property found in the A-1 zone is ready at the current time, given the current resources and delivery of required services. The Board considered this and found that in fact it was not time for a rezone, as it would have an adverse impact on the delivery of services regarding Idaho Department of Transportation permitted access and impact on county roads.

The Board considered this and it is reflected in the transcripts. Commissioner Butticci specifically stated, "the purpose of the development agreement [is to] give control to make sure what goes in is acceptable and sustainable, and no impact on the residents." R. p. 47 (ll. 219-220). Butticci went on to say

> And maybe in five years it would be read[y] for an A1. I mean a residential . . . Maybe they'll be one acre ready in five years. But, you know, so hopefully the growth will be such that, you know, that would build out to that point. And then hopefully the infrastructure will be – which always lags behind all growth . . . our job as Commissioners is we're the stewards of the money for the county. And have to try to figure out how to provide all these services for the county with the amount of dollars that we have.

R. p. 65 (ll. 569-580).

In weighing the evidence before the Board, Commissioner Elliott considered, "The comprehensive plan is a plan. It's a plan for the future. It's not a plan that has to be today and so I think at the present time as we look at this we have to question the comp plan's looking to the future and I think we need to look to today for the comprehensive or factual considerations." R. p. 107 (ll. 918-22). Elliott had considered at the November 17, 2018 hearing

> I agree that in Priority Growth Area is designed at some time to be five acres. But everything Growth Priority Area is not just entitled to that because they want it. That is unfortunately or fortunately responsibility that is placed on the Commissioners to okay some of those things, one direction or the other. And my thought at the present time is that that area is not needed to be five acres for the present amount of growth that we have.

R. p. 79 (ll. 127-133).

The Board's Findings of Fact, Conclusions of Law, Decision on Motion for Reconsideration and Order reads, "The Board believes the Comprehensive Plan to be a guide.

The Comprehensive Plan guides development long-term, but the Board is to consider the present factual circumstances surrounding the proposed zoning." R. p. 247.

2. **The Board could not make the *required* finding that the effects of the proposed zone change upon the delivery of services by any political subdivision providing public services, including school districts, within Gem County's planning jurisdiction have been considered and no unmitigated adverse impacts upon those services. This was the basis for the Board's denial.**

The Board applied the standards found at Gem County Code § 11-5-4. R p. 246-8. The Board's final decision was unanimous, with three votes for denial. By the majority vote, the application was denied. The Board's decision and order on reconsideration, issued May 20, 2019, states the reasons for denial, most specifically that in order to approve a rezone, all five findings of Gem County Code § 11-15-4 must be met and the facts in the record do not support that "the effects of the proposed zone change upon the delivery of services by any political subdivision providing public services, including school districts, within Gem County's planning jurisdiction have been considered and no unmitigated adverse impacts upon those services will impose additional costs upon current residents of Gem County's planning jurisdiction." R pp. 242-48.

The District Court erred when it found that "the Board erroneously treated the rezone application as a subdivision application, and in so doing, its actions were made without a rational basis in fact or law, and in disregard of the facts and circumstances. The Board's finding was

arbitrary and capricious, and therefore, an abuse of discretion pursuant to I.C. § 67-5279(3)." R. p. 417. As outlined in both the Board's *Decision and Order Denying Rezone* (R. pp. 37-32) and the Board's *Findings of Fact, Conclusions of Law, Decision on Motion for Reconsideration and Order* (R. pp. 242-48), the Board could not make a finding that the effects of the proposed zone change upon the delivery of services by any political subdivision providing public services, including school districts, within Gem County's planning jurisdiction have been considered and that there would be no unmitigated adverse impacts upon those services. This was the basis for the Board's denial. An approval made when all five findings could not be made would be illegal.

Gem County Code §11-15-4 requires the board to make each five findings in order to approve a rezone:

> (1) The requested amendment complies with the comprehensive plan text and future land use map; **and**
>
> (2) The requested amendment is not materially detrimental to the public health, safety, or welfare; **and**
>
> (3) For zoning ordinance map amendments[2]:
>
> a. The subject property meets the minimum dimensional standards of the proposed zoning district; **and**
>
> b. The uses allowed under the proposed zoning district would be harmonious with and appropriate for the existing or intended character of the general vicinity and that such uses would not change the essential character of the same area; **and**

[2] Gem County Code § 11-15-4 is codified where (B) includes the distinct criteria for zoning ordinance map amendments as a., b., and c. Throughout the administrative proceedings in this matter, the standards are referred to as one (1) through five (5), assigning the three subsets of 3 as 3, 4 and 5.

> c. The effects of the proposed zone change upon the delivery of services by any political subdivision providing public services, including school districts, within Gem County's planning jurisdiction have been considered and no unmitigated adverse impacts upon those services will impose additional costs upon current residents of Gem County's planning jurisdiction.

(Emphasis added.) The finding at (3)(c), also referred to as the fifth finding, and the one that the Board heard the most testimony and evidence on is the effects of the proposed zone change on delivery of services. So important is this finding, that the Legislature saw fit to codify it at Idaho Code § 67-6511(2)(c). The Board is required to make each of the findings, if one cannot be met, the application must be denied. GCC § 11-15-4.

Included as part of the record as a whole are the written comments submitted to the Zoning Commission. Where the Zoning Commission recommended approval of the rezone and felt that the findings could each be made, the Board received the information and can consider it as a whole in making its determination. R. pp. 154-6. Dirk Veenstra writes: "It is stated in the information letter that the property has multiple access points. It has only one main entrance to Highway 52. The others are only field entrances." R. p. 144. Testimony in the record at the Zoning Commission indicates five residents in opposition of the rezone. R. pp. 150-1. Debbie Brenzel, speaking in opposition, relayed a concern about "the houses and the people and the cars and the pollutants." R. p. 150. Kim Lebow, in opposition states in part, "Ingress and Egress is a concern. People zoom around those corners and logging trucks come through here. Another concern, where are the roads going to go in there? She heard that they were going to put a road in between their houses to access that property." *Id.*

The Board held a public hearing on the matter pursuant to Gem County Code § 11-15-5. The Board heard from the applicant who testified in favor of the rezone. Deborah Brendsel, a property owner who lives adjacent to the applicant property testified in opposition of the rezone stating, "There's no infrastructure in place...there's two lanes of traffic everywhere. How's this going to support all these extra people? You know, they don't put a timeline on anything they're going to do." R. p. 46 (ll. 152-160).

Idaho Transportation Department objected to the application by way of letter to the Zoning Commission dated September 27, 2018. R. pp. 141-2. Per the written correspondence, Idaho Boulevard to the north is a private road and is currently not permitted and that the two existing field approaches (which are not residential/agricultural accesses) onto Highway 52 have not been properly permitted. *Id.* While Applicants argue that these access issues are ones that should be considered at the time of development, not rezone, it is relevant to the rezone argument in that the access issues exist at the time of the application for rezone. In fact, the Idaho Supreme Court has weighed in recently regarding access issues in light of a development application. "If a land use application is submitted and property access to the land is not certain, the decision-maker must make the application's approval expressly contingent upon judicial resolution of the access issue." *Shinn v. Clearwater Cty*, 156 Idaho 491m 496, 328 P.3d 471, 476 (2014). The *Shinn* case involved resolution of an easement dispute prior to approval of the application. The Board certainly can consider that by rezoning and creating five (5) acre minimums, thereby a potential of upward of 130 parcels relevant as it relates to access. The Board considered this an impact to the planning jurisdiction and that it was an unmitigated

impact on the delivery of services, specifically access along State Highway 52 and Gem County roads. R pp. 133-5.

Applicants argue that there is a lack of any evidence of unmitigated adverse impacts to Gem County's planning jurisdiction. See *Memorandum in Support of Petition for Judicial Review* (hereinafter "Applicants' Memorandum"), R. p. 323. The evidence in the record as a whole, as outlined in the above paragraph, shows otherwise. Applicants argue that the impacts can all be mitigated and suggested that the Board could condition a rezone on "a future analysis of potential impact fees to off-set the costs of any future development." R p. 188. The Board outlined what mitigation would be required, specifically that the issues regarding access would need to be resolved and a robust concept plan provided that would allow for the parties to condition the rezone as allowed for by law, in a development agreement.

In deliberating, the Board considered the agency record as a whole. The Board considered the application with regard to its impact on delivery of services. Commissioner Butticci, "Especially with a parcel of this size. This is probably one of the largest ones we probably have probably ever done and so this is going to take some steady, on our part, as we go forward." R. p. 49 (ll. 297-299). Butticci also stated

> We do have a CIP in place. But I don't feel that going to be enough to cover all the roadways that are going to be impacted when we bring it up to maybe – if you think about 135 lots minus those that are given for roadway and stuff, so 100 to 120 extra lots and road traffic and car trips of those potentials its going to greatly impact the road systems and safety out there in the surround roads.

R. p. 56 (ll.139-145). Butticci's concerns that the extra lots would expand the need for services, including law enforcement, rural fire district (noting that they don't have a letter from them on this), Road and Bridge Service "just to maintain the roads that we would inherit, not just the building of those roads but maintenance and snow removal and such." *Id.* (ll. 157-165).

The record reflects that Commissioner Rekow stated concerns with road maintenance and staffing levels. *Id.* He explains the costs of road maintenance in the County in general and as it relates to the applicant property

> We have no concept plan or idea what that's going to look like and what state, county road systems, one thing and another looking at the number of dividable parcels and, you know, there's going to be other infrastructure there that, you know, will certainly not make all of those buildable parcels, but you know the potential still lies for better than a 1000 trips a day on and off that property or properties. So that is where my hang up lies is again with Item 5. It seems like the thought is well, build it and we'll deal with those problems later.

R. p. 78 (ll. 80-7).

The Applicant, Deborah Rouwenhorst even contemplated the concerns regarding the roads in the context of a development agreement, stating "We put a Development Agreement in for whomever wants to. See how much Lawrence has spent on his roads and stuff. Forget it. There's no way in the world we—we will never develop. We, us." R. p. 62 (ll. 422-5). The applicant property, as currently zoned A-1, has "agricultural with single family residence and outbuildings" as its existing land use. R. p. 123. The existing use allows for the applicant to continue farming. Although the applicant testified that she wished to continue farming at this time, the rezone "signals" a new use of the property. A zoning change is about development and

if the applicant is not ready to outline that development, then the rezone request is premature and unsupported.

The agency record as a whole contains evidence that there would be an unmitigated impact on the delivery of services, specifically roadways. Applicants argued that a Development Agreement would cause such impacts to be mitigated. However, the evidence in the record is that the Applicants did not intend on developing any time soon and did not submit a concept plan. The Board found that without a robust concept plan, the drafting of a development agreement that would address the demonstrable adverse impacts upon the delivery of services, specifically the roads, was not possible.

3. The Board properly considered the option of a development agreement pursuant to Idaho Code § 67-6511A and Gem County Code § 11-15-8.

Per Idaho Code § 67-6511A, a rezone can *only* be conditioned with a development agreement. Gem County Code § 11-15-8 provides the process by which a development agreement can be considered by the Board. It was proper and appropriate for the Board to consider a development agreement with regard to the application of a rezone of nearly seven hundred acres.

The applicant included willingness to enter into a development agreement in the initial submitted application, and never, until appeal, questioned whether a development agreement was proper. The Board considered the development agreement in light of the concerns it had on the impact of services to the area, as a measure or tool to mitigate those concerns.

The Board's position remains that requirement of a development agreement was not unreasonable but rather an appropriate and codified route in determining whether the concerns regarding the adverse impact on the delivery of services. The applicant and counsel entertained the idea, provided draft copies of a development agreement and therefore cannot now say that requirement of such agreement somehow was unreasonable. Ultimately, the Board determined that without a robust concept plan, the very details of a development agreement would be impossible to obtain—that a development agreement based upon the current factual record would be so vague as to not mitigate the adverse impact on the delivery of services. It is of note that the Idaho Supreme Court has ruled that the authority to enter into a development agreement under Idaho Code §67-6511A is purely discretionary. See *Price v. Payette Cty. Bd. of Cty. Comm'rs*, 131 Idaho 426, 431, 958 P.2d 583, 588 (1998).

Development agreements are common practice in the area of rezoning and allow an applicant an opportunity to make commitments that would assist or help the County favor the rezone. The Idaho Supreme Court has routinely held that development agreements are valid. See generally, *Sprenger, Grubb & Associates v. Hailey* ("Sprenger Grubb I"), 127 Idaho 576, 903 P.2d 741 (1995). In fact, following the Sprenger decision, the Legislature enacted Idaho Code § 67-6511A allowing for the adoption of a local development agreement ordinance. Gem County Code § 11-15-8 reads that "approval of all other applications for zoning ordinance map amendments may be conditioned upon the applicant's entry into a development agreement." Development agreements are a tool by which a rezone may be approved when the circumstances surrounding the application require it. The Board engaged in discussions regarding the

Development Agreement as the Zoning Commission and Staff Report indicated that any concerns regarding the rezone could be addressed by a development agreement. R. p. 128. "The DA should address those broad design, land use and mitigation issues that apply to development of the 696 acres." *Id.* The Board, in reviewing the rezone application and recommendations noted that there was no submitted concept plan (Exhibit 3 of the draft development agreement). AR p. 26. Commissioner Rekow indicated, "We have no concept plan or idea what it's going to look like." R. p. 78 (ll. 80-1). In fact, Petitioners readily stated that there was no development planned at this time. *See* R. p. 44.

Throughout the process, Applicants attempted to quell the Board's concerns regarding the unmitigated impacts the rezone would have by indicating that the development agreement would mitigate those impacts. *See* R. p. 58, Matthew Parks, "I think really the mitigation of those impacts is now going to be covered by a Development Agreement."

B. The District Court erred in determining that the Board's decision violated a substantial right.

Even if the Board's process or decision was flawed, the applicant cannot show violation of a substantial right and the District Court erred in making this finding. In *Noble v. Kootenai Cty.*, 148 Idaho 937, 231 P.3d 1034, 1040 (2010), the Idaho Supreme Court found that even where the Board's actions were improper, the decision did not prejudice the substantial rights of the applicants in light of the fact that the applicant failed to submit the application requirements and the applicants "have no right to approval of a subdivision application that does not meet the requirements of the governing ordinances."

In the Board's case here, the governing ordinances required that all five findings be made in order to grant the rezone. The Board's factual record supports that it could not make the finding that "the effects of the proposed zone change upon the delivery of services by any political subdivision providing public services, including school districts, within Gem County's planning jurisdiction have been considered and no unmitigated adverse impacts upon those services will impose additional costs upon current residents of Gem County's planning jurisdiction." GCC §11-15-4.

The applicant repeatedly insisted that they were not applying for development yet. The Board's decision clearly outlined that the applicant could reapply for a rezone once a development plan was developed. The applicant must "show, not merely allege, real or potential prejudice to his or her substantial rights." *Hawkins v. Bonneville Cty. Bd. of Comm'rs*, 151 Idaho 228, 233-34, 254 P. 3d 1224, 1229-30 (2011).

C. The District Court erred in awarding Applicant attorney fees.

The District Court awarded attorney's fees under the prevailing party analysis found at Idaho Code § 12-117. R. p. 465. The District Court incorrectly reasoned "The Board failed to follow its own ordinances, and acted without a reasonable basis in fact or law by requiring a concept plan and by considering the wrong legal standard." *Id.*

The Board acted with a reasonable basis in both fact and law and applied the appropriate legal standard. The Board based its denial on its inability to make all five required findings as set forth in Gem County Code § 11-15-4, a requirement also mirrored by Idaho Code § 67-6511(2)(a). Therefore the requested rezone could not legally be approved. R. at 246. The Board

considered the impact that the rezoning would have on delivery of services by any political subdivision providing public services. Idaho Transportation Department objected to the rezone, specifically citing that access issues related to the parcels were currently unresolved. The Board's findings related to this are supported by the factual record made before the board, specifically the letter from Idaho Transportation Department ("ITD"). That letter reads, "ITD objects to the proposed application due to access concerns." R. p. 141-42.

The Board's written finding that "the Board will not approve a rezone of the applicant property until the access issues are resolved and a robust concept plan is submitted," is a restatement of the basis for denial. R. p. 247. The Board did not use the subdivision ordinance, did not even refer to it, and did not deny the application solely because no concept plan had been submitted.

V. CONCLUSION

The Board's decision was not arbitrary or capricious and was not an abuse of discretion. The Board based it's denial on its inability to make all five required findings as set forth in Gem County Code § 11-15-4. Specifically, the Board could not find that the rezone would not have an impact on delivery of services by any political subdivision as under the current factual circumstances related to the property that Idaho Transportation Department objected due to unresolved access issues.

The Board's findings were supported by substantial and competent evidence. The factual record shows an objection by Idaho Transportation Department to the project based upon access issues. Testimony presented before the Board further illustrated the access issues. These factual

findings were present in both the Board's *Decision and Order Denying Rezone* issued February 25, 2019 (R. p. 27) and the Board's *Findings of Fact, Conclusions of Law, Decision on Motion for Reconsideration and Order* issued May 20, 1019 (R. p. 242).

An award of attorney's fees to Applicant is improper. The Board acted with a reasonable basis in both fact and law and applied the appropriate legal standard. The Board's findings were supported by substantial and competent evidence. The Board's actions were not arbitrary and capricious or an abuse of discretion. The District Court's decision on attorney fees ignores the application of the law and the factual record. The Applicant is not entitled to attorney fees.

Appellant, Gem County Board of Commissioners, respectfully asks that this Court affirm the Board's decision denying the rezone application and reverse the District Court's order for attorney fees.

DATED this 1st day of May, 2020.

Erick B. Thomson
Gem County Prosecuting Attorney

Tahja L. Jensen

By: Tahja L. Jensen, Deputy Prosecuting Attorney
Attorneys for Gem County

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on or about this 1st day of May, 2020, I caused a true and correct copy of the foregoing to be served upon the following in the manner indicated:

Board of County Commissioners	[ ]	U.S. Mail
Gem County Courthouse	[ ]	Overnight Delivery
415 E. Main Street	[ ]	Hand Delivery
Emmett, Idaho 83617	[ ]	Efile
	[x]	Email
Matthew C. Parks	[ ]	U.S. Mail
Stacey & Parks, PLLC	[ ]	Overnight Delivery
PO Box 2265	[ ]	Hand Delivery
Boise, Idaho 83701	[x]	Efile
mcp@splawidaho.com	[x]	Email

Tahja L. Jensen
Attorney for Gem County