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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

CITIZENS AGAINST LINSCOTT/INTERSTATE ASPHALT PLANT, an unincorporated non-profit association organized under the laws of the state of Idaho,

Petitioners,

v.

BONNER COUNTY BOARD OF COMMISSIONERS, a public agency of the State of Idaho,

Respondent.

Case No. CV09-19-0629

MEMORANDUM IN SUPPORT OF PETITIONER'S PETITION FOR JUDICIAL REVIEW

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I. STATEMENT OF THE CASE

A. Nature of the Case.

This case is a judicial review of the decision of the Board of County Commissioners for Bonner County ("**Board**") to grant applicants Frank and Carol Linscott ("**Linscotts**") a conditional use permit ("**CUP**") to relocate an existing asphalt batch plant ("**Batch Plant**") from downtown Sandpoint to the existing gravel mining operation on a 139 acre site in Sagle, Idaho. Petitioner is Citizens Against Linscott/Interstate Asphalt Plant, an unincorporated non-profit association organized under the laws of the state of Idaho, whose members include several neighbors owning property and living in the immediate vicinity of the proposed asphalt plant.

B. Course of the Proceedings.

On August 8, 2018, Linscotts filed application C1015-18 seeking a conditional use permit to relocate an existing asphalt batch plant from its location in downtown Sandpoint, Idaho to Linscotts' existing gravel mining operation on a 139-acre site in Sagle, Idaho. (R. at 1-15.) The Bonner County Planning and Zoning Commission ("**PZC**") approved the conditional use permit at a public hearing held on November 15, 2018. (R. at 1008-1016.) On December 11, 2018, Petitioner appealed the PZC's approval to the Board. (R. at 1115-1121.) The Board held a public hearing on January 11, 2019, and voted to grant the conditional use permit. (R. at 999-1007.) On January 14, 2019, the Board issued its written decision granting the conditional use permit ("**Decision**"). *Id*. Petitioner sought reconsideration of the Decision on January 24, 2019. (R. at 1025-1114.) On February 1, 2019, Bonner County Planning Director, Milton Ollerton, recommended that the Board limit the reconsideration to a single issue: non-conforming land use. (R. at 1021.) The Board held a March 22, 2019 public meeting to reconsider non-conforming land use, and voted to approve the CUP application. (R. at 988-998.) The Board approved the CUP for

the installation of an asphalt plant in a pre-existing gravel pit located in Sagle, Idaho on March 25, 2019. (*Opinion and Order on Motion to Dismiss* at 1.)

The Court has determined Petitioner timely filed the Petition. Opinion and Order dated July 26, 2019. (*Id*. at 4.)

C. Statement of Facts.

1. Property Overview.

Linscotts own an existing gravel mining operation (the "**Gravel Pit**") on a 139.3 acre site in Sagle, Idaho (the "**Property**"). The Property is zoned Rural-5 and commercial and the comprehensive plan land-use designation is rural residential and transition. (R. at 1008.)

2. History of Permitting on the Property.

The Linscotts have never had a permit to operate a gravel pit on the Property. Frank Linscott has owned a portion of the Property since March 3, 1972. (R. at 530.) Prior to 1981, it appears no permit was required. *See* Bonner County Code ("**BCC**") 12-341.A.1. (establishing permitting requirements after December 9, 1981). The Bonner County Zoning Ordinance (the "**Ordinance**") established permitting requirements and grandfather rights effective December 9, 1981, BCC 12-341.A.1. At that time, the Gravel Pit occupied approximately 17 acres of the Property. (R. at 354.) After March 1981, Mr. Linscott acquired additional land to expand the Gravel Pit. (R. at 528.) At the time, gravel pit operations occurred only on the original parcel. (R. at 495, 542.) The only use occurring on the newly acquired parcel was material storage. (R. at 496, 543.)

In making the current application, the Linscotts acknowledged that the use of the land for the Gravel Pit is allowed solely through their grandfather rights. The Application states: "[t]he

existing use is commercial aggregate mining and this request does not seek to change those grandfathered rights." (R. at 5.)

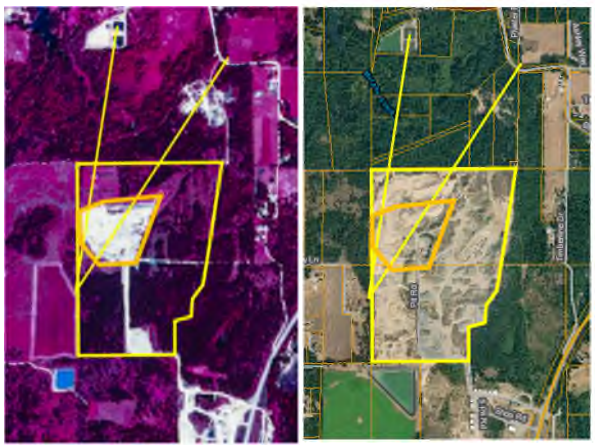
In 1995, a conditional use permit was approved for the Gravel Pit that conditionally permitted some level of expansion. (R. at 440.) However, certain conditions were never met and the permit never came into effect. (R. at 440.) In connection with the current CUP application, Planning Director Milton Ollerton stated that the 1995 conditional use permit which was never issued was not related to the Batch Plant and played no role in the decision to approve the Application. (R. at 445.)

In 2015, the Board of County Commissioners denied an application for a Comprehensive Plan amendment and zone change for an asphalt plant in this location, finding that the proposed comprehensive plan map amendment was not in accord with the Bonner County Comprehensive Plan, specifically Public Services, Transportation and others listed in the report. (R. at 454-465.) Thus, the property remained in rural and commercial zoning.

3. Expansion of the Gravel Pit After 1981.

Aerial photographs show the Gravel Pit occupied approximately 17 acres in 1981, the time at which protected grandfather rights were established.

1981 *2017*

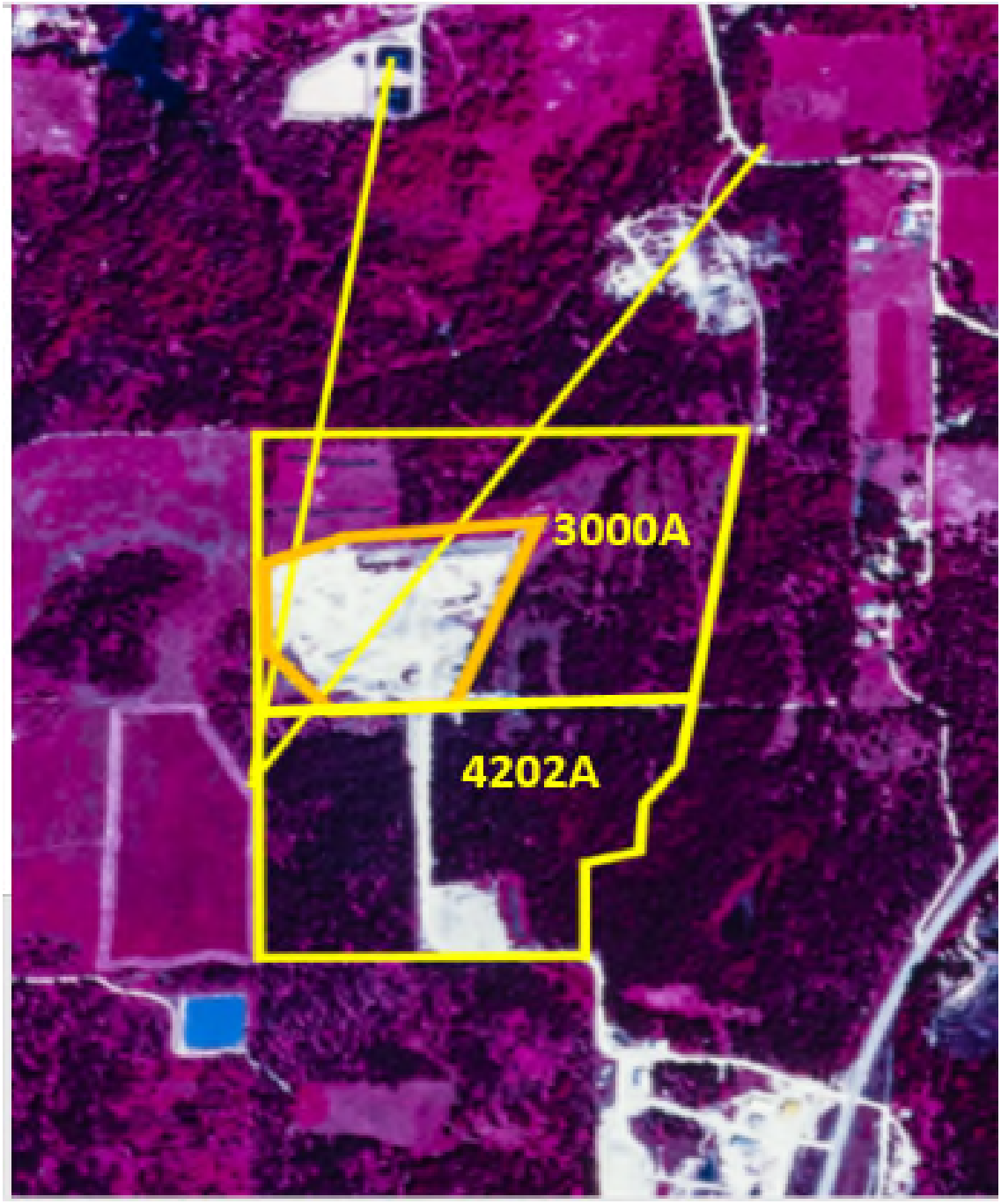


The 1981 image is an infrared image, to better show the area of disturbance. (R. at 494.) In addition, the Applicant represented to the Idaho Department of Lands ("**IDL**") in its 1998 application that only 30 acres were disturbed at that time. (R. at 501, ¶ 2.)

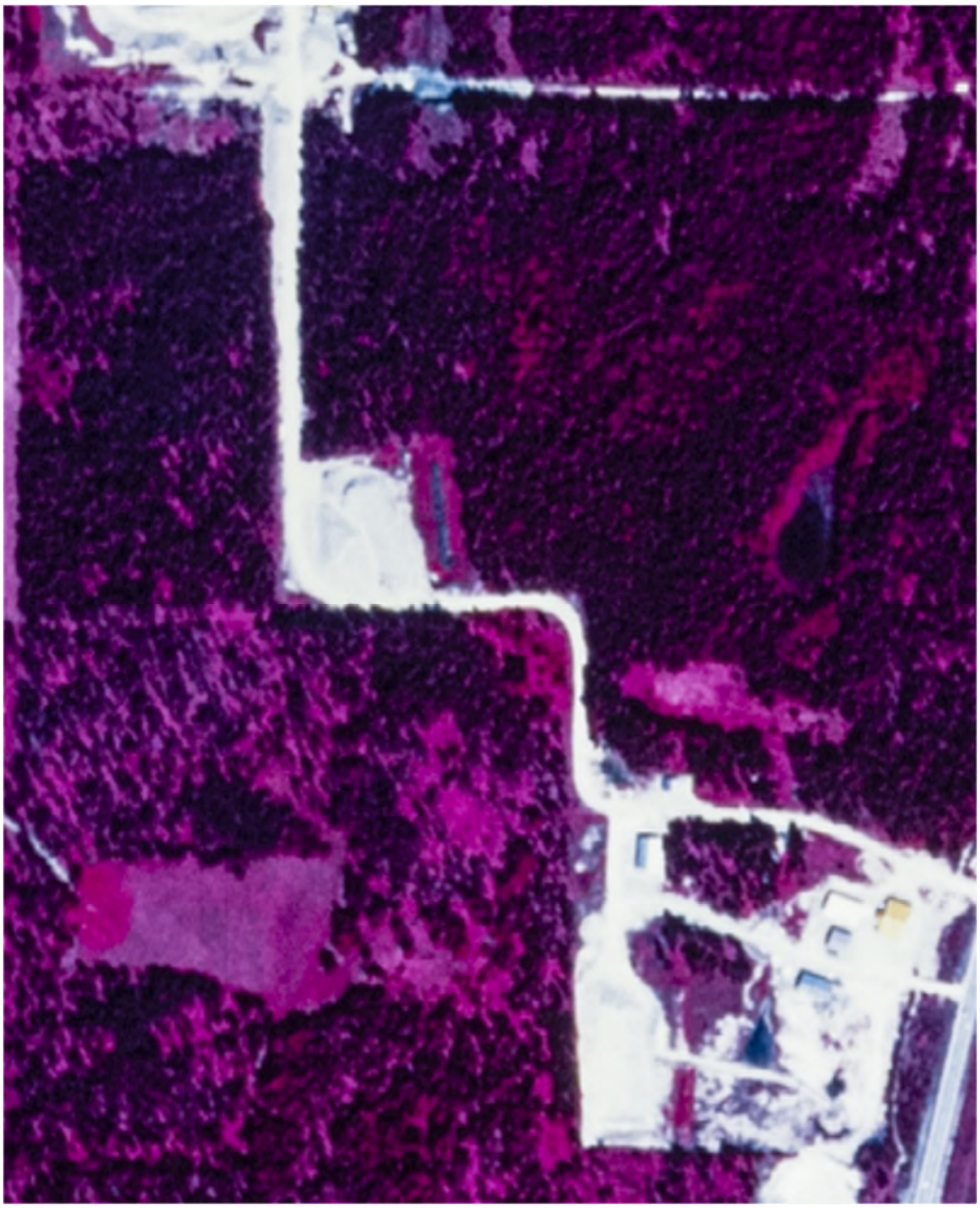
Today, the Gravel Pit occupies somewhere between 98 and 112 acres based on correspondence from the IDL and numerous aerial photographs taken since 1981, such as this one:

(R. at 541.) This evidence demonstrates an expansion of somewhere between 230 percent and over 500 percent.

Further, The Gravel Pit has added additional land parcels since 1981. The Record shows the Gravel Pit operations were limited to Parcel 3000A, the original parcel, at that time, as depicted below:


3000A
4202A

The only use occurring on Parcel 4202A was material storage, as shown in this image:



In addition, in 2001, the Linscotts acquired a portion of the McGoldrick property to the west of the Gravel Pit, to resolve allegations that the Gravel Pit encroached on the McGoldrick land. (R at 506.)

4. Linscotts' Lack of Compliance.

IDL issued Linscotts a letter on February 15, 2019, noting that Linscotts' gravel pit "continues to be in violation of the Idaho Surface Mining Act (Title 47, Chapter 15, Idaho Code), and the Rules Governing Administration of the Reclamation Fund (IDAPA 20.03.03). (R. at 501-504.) IDL listed six specific areas of Idaho Code that Linscotts had violated. (R. at 501-504.) Specifically, Linscotts had violated:

a. Idaho Code § 47-1506(a), requiring operators to submit a reclamation plan covering areas to be mined prior to starting surface mining operations. In 1998, the approved plan permitted 100 acres. IDL noted that, as of the date of the letter, approximately 12 acres of the current disturbance were outside of the approved mining area. (*Id*.)
b. Idaho Code § 47-1506(a)(1)(vi), requiring operators to designate the area affected during the operation's first year. The plan approved in 1998 listed only 30 acres reportedly disturbed but a 1998 air photo showed over 67 acres disturbed. (*Id*.)
c. Idaho Code § 47-1512(b), requiring bonding to be submitted prior to affecting additional lands, which had not happened once over the 20 year life of the mine. (*Id*.)
d. Idaho Code § 47-1512(b) and 47-1512(e), requiring an operator to provide adequate bonding as requested by IDL. (*Id*.)
e. Idaho Code § 47-1513(g), requiring persons who willfully and knowingly falsify any records, plans, specifications or other data required by the board or who willfully fails, neglects, or refuses to comply with any of the chapter's divisions be guilty of a misdemeanor. (*Id*.)
f. IDAPA 20.03.03.017.01 and .018 limit each mine and mine operator to 40 disturbed acres for participation in the Bond Assurance Fund. (*Id*.)

County building permit records demonstrate Parcel 4202A, which includes significant portions of the Gravel Pit, has added a large number of new or modified structures since 1981, including building permits issued in 1985, 1988, 1989, 1990 and 1995. (R. at 508-537.) The 1985 building permit application requests permission to add two 40' x 40' warehouse buildings. (R. at 508-510.) In 1988, Linscotts applied to add a 15' x 80' addition to the property. (R. at 511-513.) In 1989, Linscotts applied to add a pole building to the property. (R. at 514-516.) In 1990, they applied to add another pole building, a 1600 square foot garage. (R. at 517-519.) In 1990, Linscotts

submitted two applications for additional buildings. (R. at 520 to 525.) And in 1995, Linscotts submitted two applications to add a 30' x 36' storage buildings. (R. at 526-527; 531-533; 537.)

Finally, the gravel pit currently encroaches on property to the north. (R. at 365-366.)

5. The 2018 Ordinance Amendment.

On December 13, 2017, the County provided notice to the public that the PZC was considering the following: "BCRC 12-336: Resource Based Code: Amend the uses allowed in the Resource Code." (R. at 368.) On January 4, 2018, the PZC held a public hearing and, based on that decision, the County again provided public notice to amend the Bonner County Revised Code ("**BCRC**") on March 14, 2018. (R. at 372.) The notice stated: "BCRC 12-336: Resource Based Code: Amend the uses allowed to expand uses allowed in a gravel pit located in the industrial zone." (R. at 372.) The PZC held a public hearing April 5, 2018. (R. at 373, 392.) At the April 5, 2018 PZC hearing, the PZC added "Batch Plant-asphalt and/or concrete" as a permitted use in the industrial zone and as a conditional use in the farming, agriculture/forestry, and residential zones. (R. at 379, 392.) The Staff Report for this meeting states: "525802608. A Batch Plant is only permitted in the Industrial Zone with an active gravel pit. . . . The reason batch plants are to be included only with a gravel pit in an industrial zone is due to the impacts included in these comments. Batch plants located outside of an industrial zone will require a conditional use permit with standards addressing these concerns." (R. at 382-383.) On May 1, 2018, the Notice of Public Hearings again stated that a public hearing would be held on May 23, 2018, (this time by the Board of County Commissioners) to decide "BCRC 12-336: Resource Based Code. Amend the uses allowed to expand uses allowed in a gravel pit located in the industrial zone." (R. at 405.) The public hearing decision minutes for the May 23, 2018 hearing state that Bonner County proposed to amend "BCRC 12-336: Resource Based Code. Amend the uses allowed to expand uses allowed

in a gravel pit located in the industrial zone." (R. at 406.) The Board approved the amendment to section 336 "as presented or amended in this hearing." (R. at 407.) While not noticed, the change to 12-336 Resource Table included conditionally allowing batch plants in the farming, agriculture/forestry, and residential zones by conditional use permit. (R. at 410.) The Resource Table standards indicate that a batch plant "is conditionally permitted only with an active gravel pit." (R. at 411.) The change to the Ordinance permitting batch plants in the farming, agriculture/forestry, and residential zones by conditional use permit is referred to as the "2018 Amendment".

II. ISSUES ON REVIEW

A. Was the 2018 Amendment allowing an asphalt plant to be permitted within an active gravel pit lawfully adopted?

B. Did the Decision comply with the Ordinance?

C. Is Petitioner entitled to attorney's fees and costs on appeal?

III. STANDARD OF REVIEW

The Local Land Use Planning Act, I.C. §§ 67-6501 *et seq.* ("LLUPA") authorizes an affected person to seek judicial review of an approval or denial of a land use application, pursuant to the standards provided in the Idaho Administrative Procedure Act, I.C. § 67-5201 *et seq.* ("IDAPA"). *In re Jerome Cnty. Bd. of Comm'rs*, 153 Idaho 298, 307, 281 P.3d 1076, 1085 (2012).

"Affected persons" means "one having a bona fide interest in real property which may be adversely affected by: (i) The approval, denial or failure to act upon an application for a subdivision, variance, special use permit and such other similar applications required or authorized pursuant to this chapter." I.C. § 67-6521(1)(a)(i).

Where a board of county commissioners makes a land use decision, it is treated as a "government agency under IDAPA". *In re Jerome Cnty Bd. of Comm'rs* 153 Idaho at 307, 281

P.3d at 1085. On judicial review, the district court "exercises free review over questions regarding whether the board has violated a statutory provision, which is a matter of law." *Id.*, 153 Idaho at 308, 281 P.3d at 1086. A board's action may be set aside where:

> [A] 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 section 67-5279(3) provides that a board's decision will only be overturned where its 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.

917 Lusk, LLC v. City of Boise, 158 Idaho 12, 14, 343 P.3d 41, 43 (2015) (quoting I.C. § 67-5279(3)).

IV. ATTORNEY'S FEES

Petitioner seeks its attorney's fees and costs on judicial review pursuant to Idaho Code § 12-117 as further discussed in Section V. I. *infra.*

V. ARGUMENT

A. Introduction.

This case is about whether the County properly issued a special use permit for the Batch Plant. It did not for two reasons. First, the 2018 Amendment, authorizing the issuance of conditional use permits for asphalt batch plants in the Rural 5 zone, is invalid, because the County improperly adopted it without the required notice to the public. Second, even if the 2018 Amendment was valid, the Decision does not comply with the Ordinance in that it does not consider the numerous ways the Gravel Pit violates the non-conforming use provisions of the Ordinance. The paragraphs below discuss these issues in turn.

B. The 2018 Amendment was not lawfully adopted.

The Decision relied entirely on the validity of the 2018 Amendment that conditionally allows asphalt plants in residential and farming zones if located within an active gravel pit. Without this amendment, the County had no authority to consider the Application in this location. In fact, the 2018 Amendment was not lawfully adopted, rendering the Decision invalid. *See 917 Lusk, LLC*, 158 Idaho at 14, 343 P.3d at 43 (quoting I.C. § 67-5279(3) to note that a zoning board decision is made in error when it is made "in excess of the statutory authority of the agency").

Idaho Code §§ 67-6511 and 67-6509 require that a hearing notice on a land use ordinance include "a summary of the plan to be discussed". The summary, by law, is to provide adequate notice so the public will know what changes are being considered.

In this instance, neither the PZC nor the Board provided the public with proper notice. As previously stated, notices provided to the public prior to the PZC and Board meetings indicated the following amendment would be considered at the public meetings: "BCRC 12-336: Resource Based Code: Amend the uses allowed to expand uses allowed in a gravel pit located in the industrial zone." The 2018 Amendment went far beyond this, also allowing asphalt batch plants in farming, agriculture/forestry, and residential zones by conditional permit. The notice therefore failed to provide the required summary and likely also violated due process. *Jerome Cty. By & Through Bd. of Comm'rs for Jerome Cty., State of Idaho v. Holloway*, 118 Idaho 681, 684, 799 P.2d 969, 972 (1990) (finding that a notice which fails to contain a summary of the plan does not meet the requirements of I.C. § 67-6509); *see also Taylor v. Canyon Cty. Bd. of Comm'rs*, 147 Idaho 424, 432, 210 P.3d 532, 540 (2009) (finding that failing to adhere to the requirements of I.C. § 67-6509 infringes due process rights).

As a result, the 2018 Amendment is invalid as is every decision the Board has made based upon it.

C. <u>The Decision does not comply with the Ordinance.</u>

Even if the County properly adopted the 2018 Amendment, which it did not, the Decision failed to follow the County's own ordinance and therefore is invalid. The linchpin of the County's analysis is that it only had to find that the Batch Plant was proposed within an "active gravel pit" to approve the Application. The County contends the legal status of the Gravel Pit is irrelevant (R. at 995), and the Batch Plant's expansion of the nonconforming use of the Gravel Pit is similarly irrelevant to the Decision. (R. at 995-96.) As discussed in the sections below, the County is wrong on all counts.

1. The County's determination is unlawful that the non-conforming use status of the Gravel Pit is "not in question" in the Batch Plant Application.

While the County is given latitude in interpreting the Ordinance, the County's interpretation must be rejected if "the ordinance in question has been unreasonably applied to the property . . ." and the County cannot rebut the evidence of unreasonable application. *Sprenger, Grubb & Associates v. Hailey*, 127 Idaho 576, 586, 903 P.2d 741, 751 (1995) [hereinafter "*Sprenger Grubb I*"] (citations omitted).

In this case, the Decision applies the Ordinance in a blatantly unreasonable manner. First, the Decision's claim that the determination of whether the Batch Plant would be within an active gravel pit is "not in question" (R. at 995) is inconsistent with the plain language of the Ordinance. BCC Section 12-130.A. states "[t]he planning director shall not issue a permit unless the intended uses of the buildings and land conform in all respects with the provisions of this title." Thus, the Batch Plant cannot be approved unless the Gravel Pit complies with the nonconforming use

ordinance and the Batch Plant does not cause the Gravel Pit to be out of compliance with the nonconforming use ordinance. Here, the Application fails both of these requirements.

Second, the claim that the Nonconforming Use status of the Gravel Pit is not at issue in the Batch Plant Application is inconsistent with the Linscott's representations and the County's own determinations prior to the reconsideration motion. On multiple occasions, the County explicitly found that the Batch Plant was allowed because the Gravel Pit was a legal nonconforming use.[1] It was only after Petitioner provided extensive evidence on reconsideration that the Gravel Pit is, in fact, operating illegally, that the County changed its tune to say the nonconforming use provisions were "separate". (R. at 241, ¶ 6.) The Court should not fall for this transparent, after-the-fact attempt to cover-up the County's error.

Finally, the County's interpretation that the active gravel pit determination is separate from the determination that Gravel Pit is lawful is unreasonable and absurd. Under the County's interpretation, the applicant could dig an illegal gravel pit in which to site a batch plant and could operate the batch plant lawfully, as long as the County turns a blind eye to the unlawful pit, as it has here. This fails the reasonableness test outlined in *Sprenger Grubb I.* 127 Idaho at 586, 903 P.2d at 751.

[1] The Linscotts acknowledged this fact in their application, stating they did not seek to change "those grandfathered rights" of the existing commercial aggregate mining use. R. at 5. The Planning Department first acknowledged this fact in its 1997 letter noting that the gravel pit operation continued under its grandfathered rights. The Planning Department also acknowledged the non-conforming land use in its November 16, 2018 letter to Linscotts under Section F. Standards Review when it noted that BCRC 12-336 conditionally permitted a batch plant in association with an active gravel pit and stated: "[t]his condition is satisfied as the proposal will occur within *an active, legal nonconforming gravel pit*." R. at 1010, italics for emphasis. The Planning Department again referred to the Linscotts' property as an active, legal nonconforming gravel pit in its letters dated January 14, 2019, (R. at 1002) and March 25, 2019. (R. at 991.)

2. The gravel pit is not a lawful nonconforming use.

The Ordinance provides express standards limiting the extension, expansion and alteration of nonconforming uses. The Record contains overwhelming evidence the Gravel Pit failed to comply with these standards. The Decision unlawfully ignores all of this evidence.

(a) The Ordinance strictly limits the extension or expansion of nonconforming uses.

Idaho Code Section 67-6535 provides:

> *The approval or denial of any application required or authorized pursuant to this chapter shall be based upon standards and criteria which shall be set forth in the comprehensive plan, zoning ordinance, or other applicable ordinance or regulation of the city or county.*

Thus, the County was bound to follow the Ordinance in the Decision. BCC § 12-341.A provides the general standard for nonconforming uses:

> *Subject to the provisions of this subchapter, a nonconforming use or structure may be continued but may not be extended or altered. . . . Exceptions:*
>
> *1. The accumulated expansion by up to ten percent (10%) of a commercial, industrial or public use or structure in any zoning district that was established prior to December 9, 1981, and that has been in use continuously since December 9, 1981, is permitted, provided no additional land area is being acquired for the expansion.*
>
> *2. The accumulated expansion of such use identified in subsection A1 of this section by more than ten percent (10%), but no more than fifty percent (50%) is conditionally permitted, provided no additional land area is being acquired for the expansion.*

The BCC further clarifies the permitted nonconforming use of lands under Section 12-343:

> *Nonconforming uses of land may be continued so long as they remain otherwise lawful, provided:*
>
> *A. No such nonconforming use shall be enlarged or increased, nor extended to occupy a greater area of land than was occupied at the effective date of*

adoption or amendment of this section, except where otherwise noted in this subchapter.

B. No such nonconforming use shall be moved in whole or in part to any portion of the lot or parcel other than that occupied by such use at the effective date of adoption or amendment of this section.

In summary, for the gravel pit to be a legal, nonconforming use, it must:

1. Have been in operation before December 9, 1981, and must have been continuously in operation since then;

2. The use must not have accumulated expansion of more than 10% without a conditional use permit and must not have an accumulated expansion of more than 50% regardless of additional permitting;

3. No additional land may have been "acquired for the expansion";

4. The operation must be "otherwise lawful";

5. The use may not be "enlarged or increased to occupy a greater area of land than was occupied at the effective date of adoption", except as otherwise allowed; and

6. The use may not be "moved in whole or in part to any portion of the lot or parcel other than that occupied by such use at the effective date…"

(b) The County Commissioners acknowledged the "valid arguments" the Gravel Pit violates the Ordinance.

In their reconsideration deliberations, the County Commissioners acknowledged the strength of the evidence that the Gravel Pit violated the nonconforming use requirements. Commissioner Dan McDonald lauded the "great arguments" about the operation of the Gravel Pit. Transcript of Recording of Public Hearing Before the Bonner Board of Commissioners, Conditional Use Permit – Asphalt Batch Plant, File C1015-18 (March 22, 2019, 9:00 a.m.) (the "**March Hearing Transcript**") at p. 64, l. 5. Commissioner McDonald went further, citing the "valid arguments with respect to the quarry". March Hearing Transcript at p. 64, ll. 6-7. Notwithstanding the overwhelming evidence in the record, the Commission determined it could not consider that evidence, because the Commissioners believed the legal status of the Gravel Pit was not pertinent to their decision. This is a reversible error.

(c) The gravel pit has expanded beyond the limits allowed by the Ordinance.

In 1981, when Linscotts' protected grandfather rights were established, approximately 17 acres of Parcel 3000A was disturbed and no acreage was disturbed on Parcel 4202A. (R. at 491-499.) No evidence suggests the gravel pit has not been operating continuously each season since that time. But, to remain lawful, the use of the gravel pit could not have expanded more than 10 percent without a conditional use permit (*i.e.* no more than 1.7 additional disturbed acres) and no more than a total of 25.5 acres regardless of additional permitting. The only CUP found in the record is that referenced by Bonner County in a November 21, 1997 letter noting that Interstate Concrete and Asphalt had applied for and had approval for a CUP to expand the existing operation which was not issued because required improvements were not completed. (R. at 440.) Any expansion of the site occurred under Linscotts' grandfather rights, "that is, the acreage originally developed with the quarry can continue to be quarried by Sandpoint Sand and Gravel." (R. at 440.) Without evidence of additional permits, the gravel pit could not lawfully expand beyond 18.7 acres. Even if the applied for CUP had been granted, or any other CUP granted since 1981, the gravel pit could not exceed 25.5 acres and remain a legal, nonconforming use.

Linscotts' gravel pit has an accumulated expansion of more than 50 percent and is therefore illegal. While Linscotts' 1998 Bond Assurance Fund ("BAF") application informed the IDL that 30 acres were disturbed (already an illegal enlargement of 13 acres), aerial photos that same year show actual disturbance was an illegal expansion to over 67 acres. (R. at 501.) In 2004, aerial imagery suggested an expansion of up to 87.4 disturbed acres. (R. at 503.) In 2014, aerial imagery suggested an expansion of up to 99.56 disturbed acres. (R. at 503.) On January 9, 2018, the Linscotts' BAF acknowledgment form stated that the disturbed acres had expanded from 30 to 32 acres, the bill was paid at the 30 acre level and the acknowledgment form then increased the

disturbed acres from 32 to 40. (R. at 501-502.) While Linscotts only reported 30 to 40 acres of disturbance over the last 20 years (still an expansion over the original 1981 permitted amount), the gravel pit has an actual disturbance area of between 97 and 112 acres. (R. at 501-504.) Per the BCC, even with permitting, the gravel pit could not have expanded more than 50 percent (*i.e.* no more than 25.5 acres) to remain legal. Even if one claimed the 1998 application's 30 acres of disturbance occurred in 1981 when the grandfathered rights were established, which the record does not support, Linscotts' gravel pit (even with permits) could not legally disturb (*i.e.* expand) beyond 45 acres. At the time of the Board's decision, Linscotts' pit had expanded to between 97 and 112 acres and was not a legal, nonconforming use.

(d) The gravel pit has improperly added additional parcels

Linscotts' property is not a legal, nonconforming use because it has added additional parcels in violation of the nonconforming use ordinance. In 1981, the gravel pit operations were limited to Parcel 3000A and Parcel 4202A was used solely for material storage. (R. at 542; *see also* R. at 495-496, 354, 358.) Gravel extraction operations were later extended to Parcel 4202A. Further, a warranty deed dated 2001 confirms that Linscotts acquired a portion of the McGoldrick property to the west of the gravel pit to resolve allegations the gravel pit encroached on the McGoldrick land. (R. at 506.) Because Linscotts accumulated additional land for the expansion, the nonconforming use is not legal.

(e) The gravel pit is not otherwise lawful.

Linscotts' property is not a legal, nonconforming use because the gravel pit is not otherwise lawful pursuant to BCC § 12-343. Use of the gravel pit has violated IDL requirements, there are possible illegal structures on the property, and the gravel pit trespasses on at least one neighboring property. As set forth in the IDL letter noted above, Linscotts have misrepresented the gravel pit's

disturbed footprint for over twenty years and, at the time of the Board's decision, had failed to meet the financial requirements for reclamation. (R. at 501-504.) County building permit records demonstrate that Parcel 4202A, which includes significant portions of the Gravel Pit, has added a large number of new or modified structures since 1981, including building permits issued in 1985, 1988, 1989, 1990, and 1995. (R. at 508-537.) Any post-1981 structures that are part of the gravel pit use have no nonconforming use rights because they were not in existence on December 9, 1981. Therefore, they were required to comply fully with the County's zoning ordinance. While it is unclear what uses many of these building serve and whether they are permitted in the rural or commercial zones, to the extent that the buildings are of use in the gravel operation, they are not allowed. (BCC § 12-336, Table 3-6 (gravel pit uses not allowed in commercial zone, require CUP in rural zone). Finally, the gravel pit is not otherwise lawful because the gravel pit encroaches, at least, on the property to the north. (R. at 628; *see also* 365-366.) Encroachment is both a civil trespass and, potentially a criminal trespass as well. I.C. §§ 6-202 and 18-7008. Each of these three reasons, violations of IDL requirements, possible illegal structures, and trespass, makes the gravel pit an unlawful, nonconforming land use rendering the Decision invalid.

(f) <u>The gravel pit has been enlarged or increased since its grandfather rights were established.</u>

The gravel pit is an unlawful, nonconforming land use because it has enlarged or increased to occupy a greater area of land than was occupied at the effective date of adoption and is not otherwise allowed. BCC 12-341.A. As noted, since 1981, the gravel pit has enlarged or increased its area of land from the original approximately 17 acres to its current occupancy of between 98 and 112 acres. Additional discussion of the gravel pit's illegal enlargement and expansion is set forth below.

(g) The gravel pit has been moved to a part of the parcel it did not occupy in 1981.

The gravel pit is an unlawful, nonconforming land use because its use has been moved in whole or in part to any portion of the lot or parcel other than that occupied by such use on December 9, 1981. BCC § 12-341.A. Linscotts have expanded their use of the land to between 98 and 112 acres (an increase of between 230 percent and 500 percent). This clearly indicates that the use has moved, in whole or in part, to other portions of the lot or parcel other than the original 17 acres. Additionally, when Linscotts purchased the McGoldrick property because of its encroachment, it again moved its use, in part, to another portion of the lot or parcel. And when Linscotts added other buildings to the property, it again moved its use, in whole or in part, to other portions of the lot or parcel. In each instance, it violated BCC § 12-341 and became an illegal, nonconforming land use.

(h) *Baxter* upholds restrictions on the expansion or enlargement of nonconforming uses.

Baxter v. City of Preston,[2] provides clear authority for the County to restrict the enlargement, expansion, extension or alteration of a nonconforming use. In *Baxter*, the defendant had two parcels of land with a grandfathered nonconforming use of his property (similar to Linscotts) which allowed him to farm on one parcel of land and graze twenty head of cattle on the other[3] until the winter months. *Id.*, 115 Idaho at 607-08, 768 P.2d at 1340-41. Defendant than constructed what the Court considered to be, essentially, a feed lot allowing cattle to remain on the property year round, accumulating manure. *Id.* The trial court granted plaintiff's request for an injunction on the basis that the year round use was an expansion or extension of a nonconforming

[2] 115 Idaho 607, 768 P.2d 1340 (1989).
[3] After the farmed parcel was harvested, the cattle would then graze on both parcels. *Id*.

use in violation of the city of Preston's zoning ordinance and the Idaho Supreme Court affirmed. *Id.*, 115 Idaho at 608-09, 611, 768 P.2d at 1341-2, 1344.

In *Baxter*, the Supreme Court focused "on the character of the expansion and enlargement of the nonconforming use on a case by case basis." *Id.*, 115 Idaho at 608, 768 P.2d at 1341. While the defendant argued the nature of the operation had not changed because both a feedlot and grazing cattle are an agricultural use, the Supreme Court declined to accept this reasoning. *Id.* Instead,

> [t]he dispositive factor…is not into which general classification a use can be pigeonholed, but the character of the particular use. Otherwise, a property owner in an "industrial" zone manufacturing thumbtacks could thereafter produce automobiles solely on the basis that both are industrial endeavors.

While the Court found that, as a general rule, intensification of a nonconforming use does not render it unlawful, it drew a distinction between an increase in business[4] and the expansion and enlargement of a nonconforming use. *Id.*, 115 Idaho at 610, 768 P.2d at 1343. The Supreme Court, referencing *Cullen v. Building Inspector of North Attleborough*, 234 N.E.2d 727 (Mass. 1968), noted that

> . . . the owner of a dairy farm increased his herd tenfold, doubled the amount of land used, erected new buildings and installed a new system of milk production. The court held that although mere increase in business is not per se proof of change of use, the expansion of the dairy farm was so great in the aggregate that it constituted an unlawful nonconforming use. Cullen, supra, 234 N.E. 2d at 730. We reach a similar result in this case. [Defendant] has

[4] The Court found that the trial court properly considered the fact that accumulated manure had "an immediate effect on the neighboring owner's comfort and utility of their residences and thus contributed to an illegal change of use." *Id.*, 115 Idaho at 610, 768 P.2d at 1343. Similarly, the increase in noise, dust, etc. that an asphalt plant would add would also have an immediate effect on the neighboring owners' comfort and utility of residences and should also be seen as an illegal change of use.

> substantially enlarged and expanded the character of the property's use in violation of the Preston zoning ordinance.

Baxter, 115 Idaho at 610, 768 P.2d at 1343.

Just as in the *Cullen* case cited by Idaho's Supreme Court, Linscotts have increased the amount of excavated gravel, increased the amount of land used from between 230 percent and 500 percent, and erected new buildings on multiple occasions. As in *Cullen* and *Baxter*, Linscotts have substantially enlarged and expanded the character of the property's use in violation of the BCC.

The Supreme Court noted that the Preston ordinance, just like the Ordinance, specifically prohibited the construction of additional structures to further a nonconforming use. In that instance, the defendant had erected only a portable manger and replaced a loafing shed on the property. Here, Linscotts have added buildings, additions, and storage sheds seven times. (R. 508-527.) The Supreme Court found that the trial court did not err when it ordered Corbridge to remove the new structures.[5] *Id.* "The rule against enlargement or expansion also precludes the erection of new buildings or structures for utilization of the non-conforming use, either in replacement of the original buildings or in addition thereto." *Id.* (citing *Johnny Cake, Inc. v. Zoning Board of Appeals,* 429 A.2d 883 (Conn. 1980) (deeming construction of high radio antenna mast in place of obsolete

[5] While Petitioner in this case is not asking the Court to order Linscotts to remove the illegally expanded buildings on the property, the sheer amount of them, in light of the *Baxter* decision, indicates that Linscotts have unlawfully enlarged and expanded their use of the property and the Board violated statute by granting the CUP. It should also be noted that "[t]he owner of a nonconforming use may lose the protected grandfather right if the use is enlarged or expanded in violation of a valid zoning ordinance." *Baxter*, 115 Idaho at 609, 768 P.2d at 1342 (citing D. Mandelker, LAND USE LAW 2d § 5.61 (1988)). For additional case law regarding how grandfather rights can be lost if the use is enlarged or expanded in violation of zoning ordinances see also *Eddins v. City of Lewiston*, 150 Idaho 30, 34, 244 P.3d 174, 178 (2010). This underscores the extreme importance the courts place on property owners following land use law and the consequences that can occur when a property owner with grandfathered nonconforming land use rights, unlawfully enlarges or expands the use of the land.

nonconforming fire watch tower an unlawful extension); *Seekonk v. Anthony*, 157 N.E.2d 651 (Mass. 1959) (finding the right to maintain nonconforming quarry did not include right to expand by adding nonconforming blacktop facility)). It is clear that if erecting a portable manger and replacing a loafing shed are unlawful expansions, adding permanent structures on multiple occasions is also an unlawful expansion.

Finally, the Supreme Court found that where the cattle were now year round, feed had to be hauled in, manure accumulated, and new structures were added to the property, the character of the property had changed and the expansion and enlargement in the character of use was substantial and violated the zoning ordinance.[6] *Baxter*, 115 Idaho at 610-11, 768 P.2d at 1343-44. It is clear that the Linscotts' increase in acreage disturbed and addition of multiple buildings illegally expanded and enlarged the character of use to such an extent that they are in violation of the BCC. The Board's decision to permit the CUP and allow an asphalt plant on the land, illegally expands and enlarges the land's character still further and was a clear violation of statute.

3. The addition of the Batch Plant unlawfully enlarges and expands the Gravel Pit.

The Decision contends (1) that the Batch Plant has only a "physical relationship" with the Gravel Pit and its uses are separate from and do not extend a nonconforming use, and (2) that the use of the Gravel Pit, nonconforming or otherwise, has no bearing on the CUP request and would not extend the non-conformity of the Gravel Pit. (R. at 995-996.)

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[6] For additional case law regarding uses that expanded improperly, see *Seekonk*, citing *Building Commr. Of Medford v. McGrath*, 312 Mass. 461 (1942). "There was change in and enlargement of the plant which made it 'different in kind in its effect upon the neighborhood.' See *Inspector of Bldgs. Of Burlington v. Murphy*, 320 Mass. 207, 210 (1946), and cases there cited, especially *Marblehead v. Rosenthal,* 316 Mass. 124, 128 (1944) (where a small local tailor shop was held improperly expanded into a mechanized dry cleaning establishment employing seventeen people). *See Adamsky v. Mendes,* 326 Mass. 603, 605 (1950); *Everett v. Capitol Motor Transp. Co. Inc.* 330 Mass. 417, 420-421 (1953). . . ."

In this respect, the Decision fails to address the fact that adding the Batch Plant to the Gravel Pit unlawfully increases, alters, or enlarges the Gravel Pit. BCC § 12-341.A states that a nonconforming use may not be "extended" or "altered" and § 12-343.A does not allow the use to be "enlarged" or "increased". Further, BCC § 12-340 notes the intent of the Title is "that nonconformities shall not be enlarged upon, expanded or extended, nor be used as grounds for adding other structures or uses prohibited elsewhere in the same district or zone". The addition of a batch plant on land whose nonconforming permitted use has only been a gravel plant cannot be interpreted in any other way other than an "extension", "alteration", "enlargement", or "increase" of the Gravel Pit.

D. <u>The Decision prejudices substantial rights of Petitioner.</u>

The Decision prejudices substantial rights of Petitioner by negatively impacting the use and enjoyment, and the value, of the real property owned by members of Petitioner.[7] The members of Petitioner are all citizens who live close enough to the proposed plant to be negatively impacted by it, many of whom live immediately adjacent to it, or within a mile of it. (*See, e.g.*, R. at 830 (member who lives 1,200 ft. from the site); R. at 658 (member who lives right next to site); R. at 779; R. at 857; R. at 979; R. at 1085-1088.[8])

A petitioner who opposes a governing board's decision to grant a permit must show they are "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." *Hawkins v.*

[7] When the party petitioning for judicial review is an organization, it is sufficient to show that the real property of at least one of its members will be affected. If the plaintiff is an organization, it must show that the real property of one of its members would be adversely affected. *Coal. for Agric.'s Future v. Canyon Cty.*, 160 Idaho 142, 147, 369 P.3d 920, 925 (2016).

[8] The electronic signatures on these pages all correspond to the signors' respective addresses in the vicinity of the site. Many of those addresses are within one mile of the proposed site (*e.g.* all the addresses on Meadow Lane in Sagle, ID).

Bonneville Cty. Bd. of Comm'rs, 151 Idaho 228, 233, 254 P.3d 1224, 1229 (2011). Petitioner's members are in such jeopardy here.

The proposed asphalt plant will negatively impact at least the following aspects of the members' real property, which in immediate vicinity of the Batch Plant:

- The value of Petitioner's real property. (*See, e.g.*, R. at 1025 and referenced exhibits (Exh 1, subtitle 5); R. at 1027; R. at 1060)).
- The air quality on Petitioner's real property. The proposed plant will negatively impact the members' real property by creating adverse air quality impacts and odors. (R. at 1025 (Exh. 1, subtitle 7); R. at 1028; R. at 1046-1051.)
- The ability to quietly enjoy the members' real property. The proposed plant will create noise, vibrations, odors, and/or glare that will impact surrounding properties. (R. at 1025; R. at 1052-1059.)
- The water quality on the members' real property. The proposed plant will jeopardize the water quality of the surrounding area. (R. at 1027, 1045.)

Based on any of the above, Petitioner has shown that the Decision puts the members in jeopardy of suffering substantial harm.

E. <u>Petitioner has standing to bring this action.</u>

Petitioner is an affected party based on the potential impacts to its members. As described above, the proposed plant will negatively affect the real property of Petitioners' members in several significant ways. As such, Petitioner has standing to initiate this proceeding. *See Cowan v. Bd. of Comm'rs of Fremont City.,* 143 Idaho 501, 509, 148 P.3d 1247, 1255 (2006) (holding that the mere existence of a "real or potential harm" is sufficient to convey standing and challenge a land use decision). Petitioner is therefore entitled to pursue its claims.

F. Petitioner is entitled to its attorney's fees and costs under I.C. § 12-117 because the Board acted without a reasonable basis in fact or law.

Petitioner is entitled to its attorney's fees and costs under Idaho Code § 12-117 because the Board issued the Decision without a reasonable basis in fact or law. In a proceeding where a "political subdivision and a person" are adverse, the court "shall award the prevailing party reasonable attorneys' fees, witness fees, and other reasonable expenses, if it finds that the non-prevailing party acted without a reasonable basis in fact or law." I.C. § 12-117(1). 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 Slude (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 Idaho Code § 12-117 and acts through the Board. I.C. § 12-117(5)(b); *Hauser Lake,* 162 Idaho at 264, 396 P.3d at 693 (quoting I.C. § 31-602).

The requirements of Section 12-117 are met in this case. The adverse parties are a political subdivision, the County, and Petitioner, who meets the definition of a person under Idaho Code § 12-117(6)(c). *Id.* ("Idaho Code section 12-117(5)(a) defines "person" as "any individual, partnership, limited liability partnership, corporation, limited liability company, association or any other private organization."). In the preceding sections, Petitioner has demonstrated that the Decision must be set aside under Idaho Code § 67-5279 because the Board's grant of the Conditional Use Permit was without a reasonable basis in fact and law. Specifically, the Decision relies upon the unlawfully adopted ordinance, and blatantly ignores applicable sections of the

County's own ordinance and interprets the Ordinance unreasonably. No reasonable basis in fact or law supports the County's position, and therefore the Court is justified in awarding fees.

Petitioner has been forced to incur significant costs and fees to protect its property and the use thereof because of the Board's improper Decision. Because the Board's Decision is without a reasonable basis in law or fact, the Court should award Petitioner its reasonable attorney's fees and costs in this proceeding under Idaho Code § 12-117 should Petitioner prevail.

VI. CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that the Court set the Decision aside and award Petitioner its reasonable attorney's fees and costs incurred in this proceeding.

DATED this 8th day of October, 2019.

Givens Pursley LLP

/s/ Jack W. Relf
Jack W. Relf
Gary G. Allen

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of October, 2019, I caused a true and correct copy of the foregoing to be filed electronically through the iCourt system, which caused the following parties or counsel to be served by electronic means, as more fully reflected below:

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