Exhibit 30

FILED IN CHAMBERS AT REXBURG,
MADISON COUNTY, IDAHO.
Date: April 30, 2012
Time: 4:30 pm
By: G W Moeller
DISTRICT JUDGE

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR FREMONT COUNTY

STEPHEN A. HUBER, RACHEL HUBER, BENJAMIN HILDEBRAND, and ELOISE HILDEBRAND, **Petitioners,** **v.** **FREMONT COUNTY BOARD OF COUNTY COMMISSIONERS,** **Respondent,** **and** **STODDARD BROTHERS, LLC, an Idaho limited liability company,** **Intervenor.**	**Case No. CV-2011-215** **DECISION ON REVIEW**

I. INTRODUCTION

This matter comes before the District Court on a petition for judicial review filed by Stephen A. Huber, Rachel Huber, Benjamin Hildebrand, and Eloise Hildebrand ("Petitioners"). Petitioners seek judicial review of certain actions and decisions made by the Fremont County Board of Commissioners ("the County" or "the BOC") on an application for a Class II Permit submitted by Stoddard Brothers, LLC ("Intervenors" or "Stoddard Brothers"). Petitioners allege that the BOC violated numerous constitutional and statutory requirements, as well as the provisions of the Fremont County Development Code ("FCDC"), in granting Permit No. 10-022.

Oral argument took place on February 28, 2012, after which the Court took this matter under advisement.

II. FACTUAL BACKGROUND

This appeal stems from the June 3, 2010, Class II applications filed by Stoddard Brothers seeking permits to operate a gravel extraction and manufacturing operation in Fremont County.[1] On June 28, 2010, the Fremont County Planning and Zoning Commission ("P&Z") held a public hearing on two applications: one for an excavation permit (No. 10-022) and the other for a gravel manufacturing permit. Mr. Huber, a petitioner, testified at the hearing and objected to the applications. After the close of the hearing and discussion, Stephen Loosli (then a member of the planning and zoning commission), moved to approve the application. The motion passed unanimously on a voice vote.[2] A decision letter indicating approval of both applications was sent to the applicant on July 7, 2010.[3]

On July 16, 2010, Petitioners filed their first notice of appeal in this matter. Their appeal only concerned the excavation permit, not the permit to allowing gravel manufacturing.[4] On September 8, 2010, the Fremont County Board of County Commissioners ("BOC") was scheduled to hold a public hearing on petitioners' first appeal. However, due to a defect in the notice for the hearing, the meeting was vacated without any public comment or testimony.[5]

Following proper public notice, another hearing was held on October 7, 2010. At this meeting, Petitioners were represented by Hyrum Erickson, who appeared and argued on their behalf. Petitioners, Mrs. Huber, Mr. Hildebrand, and Mrs. Hildebrand, all testified before the BOC. At the completion of the hearing, it was determined that the matter would be considered further during a public work meeting the following week.[6]

The work meeting took place October 12, 2010. The BOC chose to delay making any decision and requested additional study and hearing before the Planning and Zoning

---

[1] R., pp. 31-32.
[2] R., p. 153:1-16.
[3] R., p. 214.
[4] R., p. 222.
[5] R., p. 247.
[6] R., pp. 283 – 369.

Commission. The BOC identified a number of concerns and directed that further proceedings occur below before a final decision would be entered. The BOC then "remanded" the permit back to the planning and zoning commission.[7] Although minutes were taken, no transcribable record was produced.

On October 25, 2010, P&Z held a work meeting to discuss the status of the remanded application. P&Z determined that they should address the issues raised by the commissioners, receive new facts relative to their concerns, and essentially start over again in reviewing the application.[8] No evidence or testimony was received at this meeting.

On November 29, 2010, P&Z held a public hearing on the remanded application. All four Petitioners testified. No decision was made at the close of this hearing.[9]

On January 10, 2011, P&Z held another work meeting and began deliberations on the application. Following discussion and deliberation, P&Z unanimously approved Stoddard Brothers application and again recommended approval by the BOC.[10] On January 21, 2011, Petitioners filed their second notice of appeal to the BOC.

On March 10, 2010 the BOC held a public hearing on the second appeal.[11] Petitioners were represented by attorney Karl Lewies. Prior to the appeal hearing, Lewies presented a binder containing nearly 400 pages of documentary evidence.[12] This consisted of Lewies' *Memorandum in Support of the Appeal*, which outlined the alleged personal, business, and financial relationships he claimed established bias by the BOC, P&Z Administrator Stephen Loosli, and Fremont County Prosecuting Attorney Joette Lookabaugh. Included with the memorandum was documentation offered to show the existence of various social and financial relationships among the aforementioned Fremont County officials and Stoddard Brothers, affidavits of Mr. Huber and Mrs. Hildebrand concerning ex parte communications, bankruptcy documentation offered to show a conflict of interest, copies of news articles, P&Z meeting minutes, copies of local ordinances, photos of the site in question, and a visual flowchart

---

[7] R., pp. 1097 – 1099.
[8] See file, *Transcript of Proceedings of Planning and Zoning Work Meeting* (October 25, 2010).
[9] R., pp. 431 – 512.
[10] R., pp. 522 – 582.
[11] R., pp. 594 – 727.
[12] R., pp. 730 – 1126. See also file, *Affidavit of Steve Huber* (March 1, 2011) and *Affidavit of Kurt Hibbert* (March 2, 2011), attached to Petitioners' *Second Objection to Agency Record* (August 18, 2011).

illustrating the alleged network of relationships.[13] Stoddard Brothers moved to strike most of the documents, claiming they were "irrelevant".[14]

After oral argument by both sides, the BOC determined that it would only consider the evidence it deemed relevant to the substantive facts of the pending application, essentially striking all materials related to bias or ethical misconduct.[15] Following the public comment, the BOC chose to take the matter under advisement and deliberate further at a later work meeting.[16]

On March 28, 2011, the BOC deliberated on its decision and ultimately affirmed the P&Z decision by a two-to-one majority vote, with Commissioners Hurt and Miller voting "aye" and Commissioner Stoddard voting "nay."[17] Proposed Findings of Fact and Conclusions of Law were prepared by P&Z staff, which were signed and approved by Commissioners Hurt and Miller at a subsequent meeting held April 6, 2011.[18] In response, Petitioners filed a petition seeking judicial review of the BOC's decision on April 15, 2011.[19]

III. STANDARD OF REVIEW

In *Cowan v. Board of Com'rs of Fremont County*, 143 Idaho 501, 508, 148 P.3d 1247, 1254 (2006), the Idaho Supreme Court explained that the Local Land Use Planning Act (LLUPA) "allows an affected person to seek judicial review of an approval or denial of a land use application, as provided for in the Idaho Administrative Procedural Act (IDAPA)." See I.C. § 67–6521(1)(d). On judicial review of decisions made pursuant to LLUPA, "a local agency making a land use decision, such as the Board of Commissioners, is treated as a government agency under IDAPA." *Urrutia v. Blaine County*, 134 Idaho 353, 357, 2 P.3d 738, 742 (2000).

An agency decision should only be overturned if it violates a substantial right and its findings, conclusions, or decisions: (a) violate statutory or constitutional provisions; (b) exceed the agency's statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence in the record; or (e) are arbitrary, capricious, or an abuse of discretion. I.C.

---

[13] R., p. 755.
[14] R., pp. 600:11 – 604:10.
[15] R., pp. 618:17 – 619:3.
[16] R., pp.725:23 – 726:3.
[17] R., p. 1520 (pp. 15:12 – 16:7).
[18] R., pp. 1524 – 1529; 1530 – 1541.
[19] *Petition for Judicial Review* (April 15, 2011).

§ 67–5279(3) and (4). See also *Price v. Payette Cnty. Bd. of Cnty. Comm'rs*, 131 Idaho 426, 429, 958 P.2d 583, 586 (1998).

Judicial review is confined to the record, and the reviewing court does not substitute its judgment for that of the administrative agency on questions of fact. "There is a strong presumption of favoring the validity of the actions of zoning boards, which includes the application and interpretation of their own zoning ordinances." *Sanders Orchard v. Gem County*, 137 Idaho 695, 698, 52 P.3d 840, 843 (2002). Factual determinations are not erroneous when they are supported by competent and substantial evidence even though conflicting evidence exists. *Wulff v. Sun Valley Co.*, 127 Idaho 71, 73-74, 896 P.2d 979, 981-82 (1995). Erroneous conclusions of law made by an agency may be corrected on appeal. *Love v. Board of County Comm. of Bingham County*, 105 Idaho 558, 671 P.2d 471 (1983).

Accordingly, this Court's role is not to substitute its judgment for the County's as to the weight of the evidence on a question of fact, but it can freely review any questions of law.

IV. ISSUES PRESENTED ON REVIEW

Petitioners present the following issues for consideration by the Court on review:

1. Did alleged unfairness and bias in the application permitting process violate Petitioners' constitutional due process rights to a fair hearing?

2. Did Planning and Zoning Administrator Stephen Loosli have conflicts of interest in violation of I.C. §§ 59-704 (Ethics in Government Act) and 67-6506 (LLUPA)?

3. Did Commissioner Hurt, Commissioner Miller, and Prosecuting Attorney Lookabaugh engage in ex parte communications prohibited by I.C. § 67-5253?

4. Did Fremont County's alleged failures to produce written findings and conclusions in reporting its decisions violate I.C. § 67-6535(2) and FCDC, Ch. III., R.?

5. Did the BOC decision to remand the application back to Planning and Zoning Commission exceed its authority under I.C. § 67-6521(c)(i) and (ii) and FCDC, Ch. III, R.?

(a) Did the BOC's failure to make a transcribable record of its October 12, 2010 meeting violate I.C. § 67-6536?

(b) Did the BOC's failure to determine whether the appealed decision complied with the comprehensive plan and development code violate FCDC, Ch. III, M(5)?

(c) Did the BOC's failure to notify Petitioners of its October 12, 2010 remand action violate FCDC, Ch. III, M(6)?

6. Was the BOC's decision to strike Petitioners' evidence of alleged bias and due process violations itself a due process violation, a statutory violation, arbitrary, capricious, and/or an abuse of discretion?

7. Was the BOC's failure to consider ten of Petitioners' eleven legal arguments presented during its March 10, 2011 appeal hearing arbitrary, capricious, and an abuse of discretion?

8. Was it arbitrary, capricious, and an abuse of discretion for the BOC to adopt findings and conclusions that allegedly failed to reflect its actual deliberations, findings, and conclusions?

9. Did Fremont County Ordinance No. 2010-03 fail to repeal the then existing gravel pit standards contained in FCDC, Appendix J?

V. PETITIONERS' MOTION TO AUGMENT THE AGENCY RECORD.

On December 8, 2011, Petitioners filed a motion to augment the agency record with a variety of documents it claimed were omitted, including: (1) an outline of Petitioners' presentation on March 10, 2011, (2) affidavits from Kurt Hibbert and Stephen A. Huber, (3) an outline of key events prepared by Petitioners, and (4) a transcript of the P&Z work meeting held October 12, 2010. The County and Intervenors have jointly objected to the motion, noting that the motion is untimely pursuant to I.R.C.P 84(1) and the Court's Order Settling Record, dated November 8, 2011.

Idaho Rule of Civil Procedure 84(1) provides:

> Any party desiring to augment the transcript or record with additional materials presented to the agency may move the district court within twenty-one (21) days of the filing of the settled transcript and record in the same manner and pursuant to the same procedure for augmentation of the record in appeals to the Supreme Court.

The Court agrees that Petitioners' motion was not timely filed. Ordinarily, the Court would deny Petitioners' motion due to the risk of prejudice to the other parties, as well as the additional attorney fees they would necessarily incur if additional briefing was required.

However, after reviewing the file, the Court finds that the time for filing should be extended, and the motion to augment granted, as to two of the omitted items: the *Affidavit of*

Steve Huber, dated March 1, 2011, and the *Affidavit of Kurt Hibbert*, dated March 2, 2011. These affidavits were attached to Petitioners' *Second Objection to Agency Record*, dated August 18, 2011.[20] Although Intervenor now objects to making these affidavits part of the record,[21] they initially stated they had "no objection to the inclusion of those affidavits" and conceded that the affidavits were "timely submitted . . . and were referred to by the parties at the hearing on March 10, 2011."[22] During a hearing held October 11, 2011, in which the Order Governing Appeal was discussed, and the parties agreed that only one item was missing—a transcript of the October 25, 2011 P&Z work meeting. That transcript was later filed with the Court.[23] Clearly, Petitioners had every reason to believe these affidavits would be part of the record because two other affidavits, submitted at the same hearing, were originally included in the agency record.[24]

In their briefs, both the County and Intervenor referenced the accusations contained in the *Affidavit of Kurt Hibbert,* dated March 2, 2011. The County has made no effort to deny that the ex parte conversation set forth in the *Affidavit of Steve Huber*, dated March 1, 2011, took place. Instead, they only argue that the conversation was not "improper."[25] As noted earlier, Intervenor earlier took the position that the affidavits were part of the proceedings below. There is nothing substantively unique about the second Huber affidavit that would cause Intervenor to vary its response from how it responded to the first Huber affidavit – both allege similar ex parte communications, only with different commissioners. Therefore, in the interest of justice and fairness, the Court will exercise its discretion pursuant to I.R.C.P. 6(b) and allow both affidavits to become part of the record on appeal.

The remaining documents requested by Petitioners are more problematic. The requested "outlines" have little evidentiary value and contain information available in other portions of the agency record. Additionally, there is no evidence that a transcribable record of the October 12, 2010 "work meeting" even exists. Therefore, the Court denies the motion to augment as to the remaining items.

---

[20] *Second Objection to Agency Record*, ¶ 1(b) and (c) (August 18, 2011).
[21] *Objection to Motion to Augment Agency Record* (January 5, 2012); *Joinder in Objection to Augment Agency Record* (January 9, 2012).
[22] *Response to Petitioners' Second Objection to Agency Record*, ¶ 1 (September 12, 2011).
[23] *Transcript of Proceedings of P&Z Work Meeting, October 25, 2010* (filed November 2, 2011)
[24] R., pp. 959-62. The County has offered no explanation why these two affidavits were omitted from the record.
[25] *Respondents' Brief in Opposition to Petition for Judicial Review*, p. 13 (January 3, 2012);

VI. DISCUSSION

Although Petitioners bring this matter before the Court seeking judicial review of a decision granting a permit to excavate gravel, they have not raised any factual issues pertaining to the relevant safety, nuisance, or environmental concerns typically associated with such applications. Instead, Petitioners focus entirely on procedural and ethical issues they claim tainted the process. Additionally, at various times the attorneys for the parties have attempted to assert issues related to the pending local election into their oral arguments. The Court has consistently refused to allow any discussion of such matters. Although the Court is mindful that two of the attorneys involved in this case are currently running against each other for elected office, such considerations have played absolutely no role in this decision or the timing of its release.[26]

In order to more logically develop its analysis of the issues presented on review, the Court has departed from the organization used by Petitioners and divided its opinion in two parts. Section VI(A) will address the issues of bias, conflict of interest, and other ethical issues (Issues Presented Nos. 1, 2, 3, 6, and 7), while Section VI(B) will deal with the general procedural issues (Issues Presented Nos. 4, 5, 8, and 9). The issues identified as 5(a), 5(b), and 5(c) by Petitioners have been renumbered and addressed separately in this decision.

A. Petitioners' Allegations of Unfairness, Bias, Conflict of Interest, Ex Parte Communications, and Other Ethical Concerns.

1. Did alleged unfairness and bias in the application permitting process violate Petitioners' constitutional due process rights to a fair hearing?

The Idaho Supreme Court has unequivocally declared that "actual bias of a decisionmaker is constitutionally unacceptable." *Ferguson v. Board of Trustees of Bonner County School Dist. No. 82*, 98 Idaho 359, 365, 564 P.2d 971, 977 (1977). However, the mere appearance of bias is not enough:

[26] In order to avoid influencing the upcoming primary election, the Court considered delaying the release of this decision until after the election. However, the Court concludes that doing so could also be perceived as an attempt to influence the election. Therefore, it has determined that the most proper course is to treat this case like any other and release its decision within the normal timeframe for deciding such matters.

> This Court has never adopted the appearance of fairness doctrine of our westerly neighbor [Washington]. Rather, we recognize that due process 'entitles a person to an impartial and disinterested tribunal[,]' but we require a showing of actual bias before disqualifying a decision maker even when a litigant maintains a decision maker has deprived the proceedings of the appearance of fairness.

Cowan v. Board of Com'rs of Fremont County, 143 Idaho 501, 514, 148 P.3d 1247, 1260 (2006), citing *Davisco Foods Int'l, Inc. v. Gooding County*, 141 Idaho 784, 791, 118 P.3d 116, 123 (2005). Here, Petitioners begin their argument with general allegations of bias based upon alleged friendships, financial relationships, and business dealings among certain County officials. They essentially argue that these alleged connections taint the BOC with actual bias.

As the Court noted at oral argument, it is not unusual in a small community for government leaders to know each other, work together, and associate with each other socially or in their business dealings. The Court takes judicial notice that as of the 2010 U.S. Census, Fremont County has a population of only 13,242. Its two largest cities are St. Anthony and Ashton, which have populations of 3,542 and 1,127 respectively.[27] It is not surprising that most public officials and business people know each other. Therefore, a showing of actual bias must be more than the mere allegation of past association or acquaintance. The Court has carefully reviewed the diagram submitted by Petitioners that illustrates the alleged business and financial relationships, as well as the other materials contained in the record.[28] Although the information submitted suggests that some County leaders know each other, live near each other, attend the same churches, worked together in the past, or may have social relationships with one another, such allegations alone do not amount to actual bias.

In their brief, Petitioners focus on what they claim is powerful evidence of a financial relationship: the overheard statements contained in the *Affidavit of Kurt Hibbert*. Hibbert alleges that he overheard Greg Stoddard, president of Stoddard Brothers say: "[t]he Commissioners will not overturn the decision if it's appealed because they owe us too much money."[29] During the hearing, Stoddard flatly denied ever making such a statement.[30] It is worth noting that this

---

[27] US Bureau of the Census, April 2010 Data, as cited in 2011/2012 IDAHO BLUE BOOK, pp. 356, 359, and 362.
[28] R., pp. 735 – 744; 755.
[29] R., pp. 607:21 – 609:19.
[30] R., pp. 706:25 – 707:13.

statement, if actually made, referenced Stoddard's relationship with the Commissioners—not Planning and Zoning Administrator Stephen Loosli or County Prosecutor Joette Lookabaugh, with whom he may have had past financial dealings. The information provided by Petitioners contains no evidence that Stoddard Brothers had a financial relationship with *any* of the county commissioners who made the decision under review. The Court is not persuaded that a statement allegedly overheard during an off-the-record break is sufficiently probative of actual bias.

While the appearance of bias may suggest other issues, such as a conflict of interest, it is not the same thing as actual bias. Actual bias requires a showing that a commissioner "definitely indicated his predetermination on the question" presently before him or her. *Floyd v. Board of Com'rs of Bonneville County*, 137 Idaho 718, 735, 52 P.3d 863, 870 (2002). Here, the statement at issue was not even made by a commissioner. The fact that a county attorney and a planning and zoning administrator may share business interests does not lead to the conclusion that the BOC was actually biased. The Court concludes that the information presented by Petitioners at most suggests an *appearance* of bias. However, as will be discussed further below, *actual* bias may be established in other ways.

2. Did Planning and Zoning Administrator Stephen Loosli have a conflict of interest in violation of I.C. §§ 59-704 (Ethics in Government Act) and 67-6506 (LLUPA)?

The rules concerning conflicts of interest for public officials are set forth in two pertinent statutes: I.C. § 59-704 (the Ethics in Government Act) and I.C. § 67-6506 (the Local Land Use Planning Act). These statutes contain slightly different approaches and requirements for declaring a conflict of interest. For example, I.C. § 59-703 defines a conflict of interest as:

> [A]ny official action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit of the person or a member of the person's household, or a business with which the person or a member of the person's household is associated.

In *Gooding County v. Wybenga*, 137 Idaho 201, 205, 46 P.3d 18, 22 (2002), the Idaho Supreme Court concluded that "the definition of 'conflict of interest' in the Ethics in

Government Act does not apply to Idaho Code § 67–6506." Therefore, the Court should focus on I.C. § 67–6506, which provides:

> A member or employee of a governing board, commission, or joint commission shall not participate in any proceeding or action when the member or employee or his employer, business partner, business associate, or any person related to him by affinity or consanguinity within the second degree has an economic interest in the procedure or action. *Any actual or potential interest* in any proceeding shall be disclosed at or before any meeting at which the action is being heard or considered. For purposes of this section the term "participation" means engaging in activities which constitute deliberations pursuant to the open meeting act. No member of a governing board or a planning and zoning commission with a conflict of interest *shall participate in any aspect of the decision-making process* concerning a matter involving the conflict of interest. A knowing violation of this section shall be a misdemeanor.

(Emphasis added).

The record establishes that Stephen Loosli had a significant business relationship with DePatco, a sister company to Stoddard Brothers,[31] when he served as a member of the Fremont County Planning and Zoning Commission ("P&Z") on June 28, 2010. It is undisputed that Loosli owed DePatco $4,714.24 on the day of the hearing.[32] It also appears that DePatco maintained a recorded lien in the amount of $210, 046.36 against Falls Crossing, LLC, a company managed by Loosli.[33] The County argues in its brief that Loosli was terminated as manager of Falls Crossing, LLC, on November 1, 2008.[34] However, they have cited no evidence from the record to support this assertion. Even assuming this is true, it remains undisputed that Loosli was still a debtor of the applicant on the date of the first P&Z hearing. As a debtor of the applicant, the Court finds that Loosli had a potential financial interest in the outcome of the proceeding.[35] It takes no great stretch of reasoning for a public official, such as Loosli, to conclude that his vote to grant a permit to his creditor would reasonably be seen as compromised under these circumstances. Loosli should have realized this and made a proper disclosure.

---

[31] Compare R., p. 793 with p. 794. The members of Stoddard Brothers, LLC and the officers of DePatco, Inc. are almost identical.
[32] R., p. 841.
[33] R., pp. 795; 796-798.
[34] *Respondents' Brief in Opposition to Petition for Judicial Review*, p. 19.
[35] There are examples in the law where a debtor/creditor relationship disqualifies a fact finder from serving. For example, although not controlling here, I.R.C.P. 47(h)(3) provides that a juror can be challenged for cause if they have debtor/creditor with either party in a case.

Loosli failed to declare either an actual or an apparent conflict of interest. Instead, Loosli fully participated in that hearing and even made the motion to approve the application.[36] Although the County and Stoddard Brothers correctly note that Loosli had already filed a personal bankruptcy at the time of the first hearing, it is also undisputed that Loosli's debt was not discharged until July 29, 2010. Even after discharge, Loosli still could have paid the debt back voluntarily out of a sense of moral obligation. Based on the forgoing, the Court concludes that Loosli had an actual conflict of interest which he should have disclosed. He should have immediately recused himself from any participation in the Stoddard Brothers application.

The County and Stoddard Brothers argue that any unreported conflict by Loosli does not necessarily taint the subsequent decisions of P&Z or the BOC. After the initial approval, this application was appealed to the BOC, which remanded it back to the Planning and Zoning Commission where the process began again. By the time of the second hearing before the Planning and Zoning Commission on November 29, 2010, Loosli had been hired as the interim Planning and Zoning Administrator. Loosli deferred the public handling of the application to another administrator, Joshua Chase.[37] He also deferred to Chase during the work meeting on January 10, 2011.[38] When the final vote was taken on January 10, 2011, Loosli did not vote because he was no longer a voting member of the commission.[39]

Loosli's purported deferment notwithstanding, it is clear from the record that Loosli continued to play a significant role in every hearing related to the Stoddard Brothers application before P&Z and the BOC. For example, although he initially announced at the November 29, 2010 P&Z work meeting that he was "deferring" to Chase, Loosli spoke frequently and advised the commissioners and Petitioners about procedural matters.[40] Similarly, during the January 10, 2012 P&Z work meeting, where the commission again approved the application, Loosli repeatedly commented and gave advice to the commission. At times he even appeared to speak on behalf of the BOC.[41] Loosli also appeared at the appeal hearing before the BOC on March

---

[36] R., p. 153:1-5.
[37] R., p. 423:12-21.
[38] R., pp. 523-26.
[39] R., pp. 581-82.
[40] See R., pp. 459:17 – 462:20; 479:5 – 480:9; 504:7 – 508:16; 510:10-18.
[41] See R., pp. 527:20 – 528:5; 537:1 – 539:5; 544:10-13; 547:4 – 549:17; 562:20 – 565:18; 571:18 – 572:16; 575:9 – 576:14.

10, 2012. He formally presented the P&Z decision, the staff report, the record of the proceedings below, and even offered to answer questions from the commissioners.[42] He also participated in the April 6, 2011 work meeting where the County's Findings and Conclusions were adopted.[43] Nowhere in the record does Loosli indicate he "deferred" from drafting the final staff reports or the Findings and Conclusions. Therefore, the Court finds that Loosli's activities constituted ongoing participation in the deliberations. Idaho Code § 67–6506 provides that "[n]o member of a governing board or a planning and zoning commission with a conflict of interest shall participate *in any aspect* of the decision-making process concerning a matter involving the conflict of interest." (Emphasis added). Even if well-intentioned, Loosli's frequent comments during the deliberations before the P&Z, as well as his input in preparing staff reports and other documents, constitutes an inappropriate level of participation in the decision-making process.

The Court rejects the notion that the promotion of Loosli from an unpaid P&Z member to the interim Planning and Zoning Administrator somehow mitigates the conflict of interest. Idaho Code § 67–6506 expressly applies to a "member *or* employee of a . . . commission." (Emphasis added). The P&Z actions after the first appeal were essentially focused on providing the BOC with additional information to support their initial recommendation to approve the permit. Even if Loosli did not vote on the application after the first hearing, he continued to assert great authority and influence over the entire process.

The County and Intervenors rely upon the aforementioned case of *Gooding County v. Wybenga*. There, a county commissioner violated I.C. § 67–6506 because he participated in a vote despite the fact his employer had an economic interest in the adoption of an ordinance. The very next day, the two remaining commissioners reconvened and adopted the ordinance. The Supreme Court held that the second decision, only one day later, was "sufficiently independent of the proceedings the day before to purge the taint of the [commissioner's] participation in those proceedings." 137 Idaho at 205, 46 P.3d at 22. However, unlike the Commissioner in *Wybenga*, Loosli continued to remain involved in the application. Although he was no longer technically a decisionmaker with P&Z and the BOC, he was still in a powerful position to influence the proceedings. Rather than completely removing himself from the process, at best Loosli

[42] R., pp. 597:22 – 598:12; 599:12-18. See also R., p. 697:15-19.
[43] R., pp. 1525:16 – 1526:11.

unsuccessfully tried to watch the proceedings from the sidelines, while periodically running on to the field when he felt his input was necessary.

The case of *Manookian v. Blaine County*, 112 Idaho 697, 735 P.2d 1008 (1987), is instructive. That case involved two planning and zoning commissioners who each had an economic interest in the matter before them. They failed to disclose their conflicts of interest and participated in the hearing until immediately before the voting took place. Similar to the case at hand, Blaine County argued that because they did not participate in the vote, there was no conflict of interest. The Supreme Court rejected this analysis and held:

> I.C. § 67-6506 pronounces in clear and unambiguous terms that where a conflict of interest exists a commission member "shall not participate in any proceeding or action...." The record shows that both Purdy and Gardner did "participate" in the zoning proceedings up until the last minute before disqualifying themselves when the voting took place. Because of the inherent economic interest of Purdy and Gardner in the affected land, they were barred from participating in the proceedings.
>
> I.C. § 67-5215(g)(2) allows a reviewing court to reverse a zoning decision where the appellant has been prejudiced because the administrative decision is made "in violation of ... statutory provisions." Purdy's and Gardner's participation violated I.C. § 67-6506. Accordingly, we affirm the district court's reversal.

Id., 112 Idaho at 701, 735 P.2d at 1012.[44] In *Manookian*, the Supreme Court explained the public policy considerations for such a rule:

> The policy behind the statute is essential because, under the Idaho Administrative Procedure Act, I.C. §§ 67-5201 *et seq.*, the findings of fact of an administrative agency are subject to review only under the "substantial evidence test" on appeal to a district court. I.C. § 67-5215(f), (g)(5); *Van Orden v. State Dept. of Health & Welfare*, 102 Idaho 663, 637 P.2d 1159 (1981). In Idaho a district court may reverse a zoning decision only if one of the grounds set forth in subsection (g) of this section is found to exist. *Love v. Board of County Comm'rs*, 108 Idaho 728, 701 P.2d 1293 (1985). With appellate review so limited, it is imperative that biased or potentially biased commissioners be barred from participating in the zoning procedure.

This Court finds that the same reasoning is applicable here. As a voting member of P&Z commission, Loosli participated in a hearing without ever disclosing even a potential conflict —

[44] The Court is aware that I.C. § 67-5215(g)(2), cited in this holding, was repealed in 1993. However, the provisions of I.C. § 67-5279, (2)(a) and (3)(a) contain similar prohibitions against actions taken "in violation of . . . statutory provisions."

eventually making the motion to approve the application. After Loosli was later promoted to interim P&Z Administrator, he continued to participate in subsequent hearings without declaring even a potential conflict. Although he could not vote, he participated in every hearing in a significant way by providing direction and advice to the voting members of P&Z. What occurred here was not only a violation of the letter of I.C. § 67-6506, but it violated the intent of the law, which the Idaho Supreme Court expressed as follows:

> In adopting 67-6506, the legislature acted to assure that, consistent with our democratic principles, only impartial and objective persons make decisions affecting other persons' liberty and property.

Id., 112 Idaho at 701, 735 P.2d at 1012.

Consistent with this principle, the Court concludes that all actions taken on the Stoddard Brothers application by P&Z, before and after Loosli's promotion, are void. The Court also concludes that Loosli's actions not only violated the statutory restriction on conflicts of interest, but also substantially prejudiced Petitioners' right to have the matter considered by a fair and impartial tribunal.[45] I.C. § 67-5279(4). See also *Eacret*, 139 Idaho at 780, 86 P.3d at 494.

3. Did Commissioner Hurt, Commissioner Miller, and Prosecuting Attorney Lookabaugh engage in ex parte communications prohibited by I.C. § 67-5253?

Petitioners allege that the appeal process before the BOC was further tainted by multiple instances of ex parte communications. Idaho Code § 67-5253 forbids certain public officials from engaging in ex parte communications:

> Unless required for the disposition of ex parte matters specifically authorized by statute, a presiding officer serving in a contested case shall not communicate, directly or indirectly, regarding any substantive issue in the proceeding, with any party, except upon notice and opportunity for all parties to participate in the communication.

---

[45] The Court notes that it would behoove public officials to heed the sound advice of the Idaho Attorney General's Office offered to a city council member under similar circumstances:

> We also recommend that public officials refrain from participation in close cases. In close cases, the public's trust in having an unbiased decision and proceeding is at stake. Consequently, we recommend erring on the side of caution.

Idaho Attorney General Guideline, p. 6 (February 9, 1994).

The County concedes that two of the commissioners and the prosecuting attorney initiated ex parte communications with the Petitioners. Although the County conceded at oral argument that these conversations were generally inappropriate, they argue that the communications did not violate the statute. The Court will review each incident in chronological order.

On September 3, 2010, five days before the first appeal before the BOC, Commissioner Hurt made a telephone call to Petitioner Steve Huber at his home. Huber testified that Hurt spoke angrily, with an intimidating tone, and told him:

> DeVerl Stoddard told me that you've been talking to one of his employees about me. You should talk to the horse's mouth if you have a problem with me, or anyone else under county employ.[46]

The County does not appear to deny the content of the conversation, but notes that it was permissible because the conversation did not deal with any substantive issues before the BOC. They further argue that the conversation was disclosed at the public hearing and the BOC concluded it was not an improper communication.

The next ex parte communication occurred on January 14, 2011, when Fremont County Prosecutor, Joette Lookabaugh, made a telephone call to Petitioner Kay Hildebrand. Hildebrand said Lookabaugh raised her voice and loudly told her: "I will not allow you to talk to the Commissioners."[47] The County does not deny that this conversation took place, but argues that Lookabaugh was not a "presiding officer" under the statute and that the conversation did not address substantive issues. The substance of the conversation was to discourage efforts by Petitioners to engage in ex parte conversations with the commissioners.

Finally, on February 25, 2011, less than two weeks before the second appeal hearing, Commissioner Miller made a telephone call to the home of Stephen Huber. Huber testifies that the night before he had participated in a pre-appeal strategy meeting with his neighbors. He relates the conversation as follows:

> The very next morning, Commissioner Miller phoned me and said, "I hear my name was dragged through the mud last night."
>
> I replied that "No, that isn't the case at all. We shouldn't be talking about this."

---

[46] R., pp. 959-60.
[47] R., pp. 961-63.

> Commissioner Miller said, "This isn't about the gravel pit."
>
> I explained "I wouldn't ever let your name be dragged through the mud."
>
> Commissioner Miller said: "I want you to know that all the people I work with are honest people."[48]

The County has apparently conceded that this call took place, but again denies that it was improper because no substantive issues were discussed. The County also argues that Miller was not *the* presiding commissioner, so the statute is inapplicable to him.

Initially, the Court agrees with the County that Lookabaugh is not covered by I.C. § 67-5253 because she was neither a presiding officer nor a decisionmaker. Her influence appears to have been minor inasmuch as her civil deputy was far more involved in the proceedings than she was. The Courts notes, however, that it was imprudent and unwise for Lookabaugh to make such a telephone call. If she felt it was necessary to contact Hildebrand directly—rather than merely advising her own clients to avoid any communication with Petitioners—a simple letter would have sufficed. This would have adequately addressed her concerns, while protecting her from allegations of impropriety by documenting the exact content of the communication. The issue of whether her telephone call violated any other ethical rules is not properly before this Court.[49]

The Court disagrees with the County's analysis that I.C. § 67-5253 only applies to Commissioner Hurt because he is the chairman of the county commissioners, and thus "the" presiding officer. The statute clearly reads "***a*** presiding officer serving in a contested case." If the Legislature had intended this statute to only apply to one officer, it would read "***the*** presiding officer." There are many governing boards covered by LLUPA that have more than one presiding officer. Here, although Hurt may be the chairman, all the commissioners have an equal

---

[48] See *Affidavit of Steve Huber* (March 1, 2011), attached to *Second Objection to Agency Record* (August 18, 2011).
[49] There is no evidence in the record indicating that Hildebrand was represented by counsel on January 14, 2011, and if so, that Lookabaugh was aware of this. Although Hyrum Erickson represented Petitioners during the first appeal before the BOC, the record suggests that Hildebrand was not represented at either of the two subsequent hearings she attended (November 29, 2010 and January 10, 2011). The record is unclear as to when Karl Lewies, Petitioners' current attorney, began representing Petitioners. If Lookabaugh was aware Hildebrand was represented by an attorney at the time she made the telephone call, it would potentially raise ethical issues beyond those set forth in LLUPA. See Idaho Rule of Professional Conduct 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.")

vote. It would be nonsensical to read the statute to exempt two of the three county commissioners from the prohibition against substantive, ex parte communications.

The Court further disagrees with the County assessment that the telephone calls by Commissioners Hurt and Miller were not related to any substantive issues before the BOC. Huber had apparently been outspoken in his views about certain Fremont County officials. While the specifics of the application may not have been discussed, both commissioners clearly took umbrage with Huber's public statements *about the County's handling of the application and the appeal.* Both telephone calls were initiated by the commissioners on the eve of critical appeal hearings. Taken in context, it is clear that the calls were made to express anger at Huber's public discourse.

Although this is admittedly a close question, the Court notes that these conversations were improper for other reasons. The more difficult question before the Court concerns the legal consequences of commissioners repeatedly initiating ex parte conversations. In *Eacret v. Bonner County*, 139 Idaho 780, 786, 86 P.3d 494, 500 (2004), the Idaho Supreme Court explained the purpose behind I.C. § 67-5253:

> The purpose of the disclosure requirement is to **afford opposing parties with an opportunity to rebut the substance of any ex parte communications**. In a similar vein, the opportunity to be present at a view provides opposing parties the opportunity to rebut facts derived from the visit that may come to bear on the ultimate decision and create an appearance of bias.

This shows that the statute was intended to prevent parties from initiating an ex parte conversation to gain an advantage with the presiding officer(s). This clearly did not happen here because the commissioners in question initiated the calls and certainly did not learn of facts favorable to the Petitioners. Nevertheless, I.C. § 67-5253 still affirmatively places the burden on a presiding officer in a contested case to avoid ex parte communications, not on the third party with whom the communication occurs. The use of the language "shall not communicate, directly or indirectly, regarding any substantive issue in the proceeding, with any party," could not be any clearer. Here, the fact that the conversations may not have directly addressed testimony or evidence is hardly a saving grace. This was not a casual discussion about the weather or the

score of last night's ball game—the clear context of the discussions concerned the commissioners' displeasure over Huber's public comments *about the pending appeal.*

The Supreme Court's analysis in *Eacret* is important because it discloses another serious consequence of ex parte communications:

> In our view, [the commissioner's] pre-hearing, **ex parte contacts with the applicant** himself concerning the variance at issue **reveal a lack of impartiality** and denial of an opportunity for opponents of the variance to challenge or answer the ex parte evidence. [The commissioner] effectively had evidence derived from the ex parte contacts and the unauthorized view that was not available to the entire Board or equally to the parties.
>
> . . .
>
> Under these the circumstances, [the commissioner's] comments not only created an appearance of impropriety but also underscored the likelihood that he could not fairly decide the issue in the case. The totality of these factors supports the trial court's conclusion that [his] mind was irrevocably closed on the subject of the setback variance sought by [applicant]. Moreover, since the variance was granted with a vote of two to one, [the commissioner's] participation mandates a reversal of the decision of the Board.

Id., 139 Idaho at 787, 86 P.3d at 501.

This means that even if the conversations were not substantive, an ex parte conversation by its very nature can show actual bias. In *Eacret*, the commissioner's ex parte communications convinced the Supreme Court that he was biased *for* the applicant. Taken separately, the tone and tenor of the telephone conversations initiated by both commissioners likely violated the statute. However, taken together, these actions begin to paint an unmistakable picture that Petitioners were confronted by a hostile board. It is also important that the vote on this matter, like in *Eacret*, was two to one. The sole opposing vote was cast by the only commissioner not involved in any ex parte communications.

What distinguishes this case from almost every ex parte communication case reviewed by the Court is that the communications at issue were initiated by the two commissioners. One can scarcely imagine a scenario where a presiding authority would ever be justified in initiating a private conversation with a party in which he expresses dissatisfaction, anger, or even justifiable frustration, about public comments made by that party. For a county commissioner to make such a telephone call on the eve of a highly contested and controversial appeal hearing is indicative of

either poor judgment or great hubris. Taken together, these calls provide substantial evidence of actual bias. If these commissioners were so angry with Huber that they disregarded state law and called him directly, it is reasonable to assume they were too angry to impartially consider his appeal. Such conduct falls far below the standard of fairness and impartiality expected of public servants sitting in judgment of other citizen's property rights and personal liberties. Due process demands that even when provoked by inflammatory discourse, elected officials must perform their public duties without acting pursuant to personal feelings.

4. Was the BOC's decision to strike Petitioners' evidence of alleged bias and due process violations itself a due process violation, a statutory violation, arbitrary, capricious, and/or an abuse of discretion?

At the beginning of the March 10, 2011, appeal hearing before the BOC, Stoddard Brothers moved to strike all materials submitted by Petitioners related to the issues of unfairness and bias. Intervenors argued that such material was irrelevant to the decision being appealed and should be struck pursuant to Chapter III, Section O.6, of the Fremont County Development Code, which provides:

> All statements given must address the merits of the proposed development as measured by its compliance or lack of compliance with the comprehensive plan and this ordinance.

After considerable argument, the BOC granted the motion, effectively striking all evidence relating to allegations of bias, conflict of interest, and ex parte communications.[50] However, the County did preserve these materials for inclusion in the record on appeal.

In the case at hand, the County and Intervenors appear to take the position that an appeal of a P&Z decision is not the appropriate forum to discuss issues related to bias, conflict of interest and ex parte communications. They argue that the appeal hearing should only consider issues related to "compliance or lack of compliance with the comprehensive plan and [the applicable] ordinance."

---

[50] R., pp. 618:17 – 619:3.

The Idaho appellate courts have consistently held that parties appealing an administrative decision must first raise an issue before the agency if they wish it to be reviewed by them on appeal. This principle not only applies to appeals *from* a district court to the Supreme Court, but it also applies to petitions *to* the district court seeking judicial review of administrative decisions. In *Knight v. Department of Ins.*, 124 Idaho 645, 649, 862 P.2d 337, 341 (Ct. App., 1993), the Idaho Court of Appeals held:

> Review on appeal is limited to the issues raised before the lower tribunal, and an appellate court will not decide issues presented for the first time on appeal. *This rule applies to procedural errors and encourages litigants to raise the issue below, to give the lower tribunal an opportunity to correct errors before harm occurs or becomes incurable.* The rule applies equally to contested cases in administrative settings as well as proceedings before the courts. It also applies to preclude consideration of constitutional issues raised for the first time on appeal.

(Emphasis added, citations omitted). In *Balser v. Kootenai County Board of Commissioners*, 110 Idaho 37, 40, 714 P.2d 6, 9 (1986), the Idaho Supreme Court considered an issue raised for the first time on review before the district court. It noted that because "[Respondents] did not raise the issue . . . before the board of commissioners . . . [i]t was error for the district court, sitting as an appellate court, to nevertheless address and decide the issue."

The evidence Petitioners attempted to submit concerned fundamental issues related to the fairness of the proceedings below, especially as it concerned Loosli's conflict of interest and the ex parte conversations initiated by two commissioners. "Actual bias on the part of a decisionmaker is constitutionally unacceptable." *Bowler v. Board of Trustees*, 101 Idaho 537, 543, 617 P.2d 841, 847 (1980). Fairness and impartiality on the part of the decisionmaker are basic requirements of due process. *Eacret*, 139 Idaho at 787, 86 P.3d at 501. The United States Supreme Court has held:

> The Due Process Clause entitles a person to an impartial and disinterested tribunal...This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process. The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," by ensuring that

> no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) (citations omitted).

Here, the evidence stricken by the BOC clearly concerned issues of fairness and impartiality. Due process demands that the materials at least be considered and evaluated. Although the Court agrees, after looking at the materials, that some of the information was merely speculative and, at best, only showed evidence of an appearance of bias. However, some of the information, supported by sworn testimony, raised legitimate questions of ethical and statutory violations by the BOC and Loosli.

Had Petitioners not raised these issues then, they could not have raised them in their Petition for Review. If the County had admitted the materials, rather than merely striking them without a serious response, they could have squarely addressed the substance of allegations in their written findings and conclusions.[51] Instead, they refused to fully consider the information beyond a few brief questions on the record. Given that at least two of the commissioners were implicated in improper ex parte communications, one would reasonably have expected some official explanation for initiating the telephone calls. If the information in the affidavits was inaccurate, some form of response would have been appropriate. Fundamental principles of fairness and open government required at least some review of the accusations. The BOC also should have examined the conflict issue with Loosli directly, and excluded him from any further involvement in the matter.

By striking the information, without a careful review on the merits, the BOC has essentially allowed the information to be submitted to this Court for review without the benefit of specific findings and conclusions about the substance of the information presented to the Court. Had it done so, the Court would have given appropriate deference to the County's factual determinations and would have affirmed the County's findings if "supported by competent and substantial evidence even though conflicting evidence exists." *Wulff*, 127 Idaho at 73-74, 896 P.2d at 981-82. By failing to treat the accusations seriously, the Court has no substantive

[51] See R., p. 1537. Finding of Fact (F) summarily concludes that no improper ex parte communication took place.

findings upon which it can support the BOC's ruling. Therefore, the Court concludes that the BOC erred in granting the motion to strike.

5. Was the BOC's failure to consider ten of Petitioners' eleven legal arguments presented during its March 10, 2011 appeal hearing arbitrary, capricious, and an abuse of discretion?

Petitioners argue that because the BOC "merely recited, verbatim, from administrator Loosli's March 2, 2011 staff report," they committed error.[52] Setting aside the concerns over Loosli's involvement addressed above, the Court finds that there is nothing inherently wrong about a BOC incorporating the contents of a staff report into its findings and conclusions.

However, the Court agrees that it was error for the BOC to largely ignore the serious ethical and statutory violations alleged by Petitoners and addressed more fully above. The Court has already concluded that these lapses, taken separately and as a whole, constitute actual bias, conflict of interest, and improper ex parte communications. In addition to the statutory violations noted by the Court, each incident could additionally be considered as a denial of Petitioners' substantive rights and considered arbitrary, capricious, and an abuse of discretion. I.C. § 67–5279(3) and (4); *Price,* 131 Idaho at 429, 958 P.2d at 586.

6. Conclusion

After considering the entire course of proceedings in this matter, the Court concludes that Petitioners have submitted sufficient evidence of actual bias, conflict of interest, and ex parte communications. Taken alone, each incident noted above establishes a violation of the applicable statutory standards. However, when the "totality of the factors" associated with this application and appeal are examined together in context, they "reveal a lack of impartiality" by certain decisionmakers in Fremont County. *Eacret*, 139 Idaho at 787, 86 P.3d at 501. The evidence before the Court has convinced it that this matter involves more the mere appearance of bias. Therefore, the matter will be remanded to the County for further consideration by impartial decisionmakers.

---

[52] *Petitioners' Brief in Support of Petition for Judicial Review*, p. 43 (December 8, 2011).

For these reasons, the actions of both P&Z and the BOC must be set aside in whole and remanded to P&Z for further proceedings as provided by I.C. § 67-5279. Commissioners Hurt and Miller, and P&Z Administrator Loosli, shall not participate in any future consideration of Stoddard Brothers' application. The Court is mindful of the difficulties this may cause the County and Stoddard Brothers. For example, apparently "there is no provision in the law for the appointment of a substitute" county commissioner. *In re Application for Zoning Change*, 140 Idaho 512, 515, 96 P.3d 613, 615 (2004). Therefore, Stoddard Brothers must determine whether to proceed with one commissioner or to withdraw their application and wait until the legal conflicts are eventually resolved through the electoral process. In the end, the Court concludes that constitutional principles must not be discarded for mere economic or political expediency; the right to due process far outweighs the inconvenience and delay this decision may cause.

B. Procedural Due Process Concerns

Although the Court's ruling, *supra*, is dispositive of the *Petition for Review*, Petitioners have raised additional procedural issues that may come up again on remand. In the interest of judicial economy, the Court will briefly discuss the remaining issues in the hope that it will not need to address these issues in the future.

1. Did Fremont County's alleged failures to produce written findings and conclusions in reporting its decisions violate I.C. § 67-6535(2) and the FCDC?

Petitioners claim that Fremont County violated I.C. § 67-6535(2) because not every decision was accompanied by written findings and conclusions. Idaho Code § 67-6535(2)(b)(2) provides:

> The approval or denial of any application required or authorized pursuant to this chapter shall be in writing and accompanied by a reasoned statement that explains the criteria and standards considered relevant, states the relevant contested facts relied upon, and explains the rationale for the decision based on the applicable provisions of the comprehensive plan, relevant ordinance and statutory provisions, pertinent constitutional principles and factual information contained in the record.

Here, the decision appealed was reduced to writing. The record shows that the BOC issued a twelve page decision setting forth the basis for its decision. While the overall adequacy of the findings and conclusions will be discussed further below, it certainly complies with the written decision requirement of I.C. § 67-6535(2). The earlier remand decision by the BOC was not an "approval or denial" of the application, so the statute does not apply. As far as any inadequacies in the previous decisions by P&Z, this issue has become moot.

2. Did the BOC's decision to remand the application back to P&Z exceed its authority under I.C. § 67-6521 and the FCDC?

Petitioners argue that the BOC exceeded its authority by remanding the application back to P&Z at the conclusion of the first appeal hearing on October 7, 2010. Idaho Code § 67-6521 (1)(c)(ii) allowed the BOC to "delay such a decision for a definite period of time for further study or hearing." The statute does not specify who must perform the further study. The record indicates that the BOC felt the initial findings made by P&Z were incomplete. They wanted P&Z to further address the following issues: the applicant's compliance with the existing permit, the necessity of a new development agreement, and the need for additional infrastructure, berms and fencing.[53]

By remanding the matter back to P&Z, the BOC was essentially asking P&Z to perform more study on the matter. This is exactly what P&Z did. They conducted additional hearings, allowing Petitioners a full opportunity to address the BOC's concerns and to repeat their objections to the application. The Court concludes that a tribunal granted legal authority to review a lower panel's work normally has the implied authority to remand a decision back to the lower panel if it believes it did not do its job sufficiently. By doing so here, the BOC actually gave Petitioners additional opportunities to present their evidence, make a record, and persuade P&Z to change its first decision. Furthermore, the remand gave Petitioners additional time to marshal their evidence, organize opposition, and develop legal arguments against the application. Therefore, the Court cannot conclude that a substantial right was violated.

---

[53] R., p. 1098.

3. Did the BOC's failure to make a transcribable record of its October 12, 2010 meeting violate I.C. § 67-6536?

Petitioners allege that the BOC violated I.C. § 67-6536 by failing to produce a transcribable record of the October 12, 2010 work meeting. Idaho Code § 67-6536 requires:

> In every case in this chapter where an appeal is provided for, a transcribable verbatim record of the proceeding shall be made and kept for a period of not less than six (6) months after a final decision on the matter. The proceeding envisioned by this statute for which a transcribable verbatim record must be maintained shall include all public hearings at which *testimony or evidence is received or at which an applicant or affected person addresses the commission* or governing board regarding a pending application or during which the commission or governing board deliberates toward a decision after compilation of the record. Upon written request and within the time period provided for retention of the record, any person may have the record transcribed at his expense.

(Emphasis added).

Here, the record establishes that the October 12, 2010 BOC meeting was merely a work meeting held for the purpose of determining how to proceed on the remanded application. The meeting occurred only two days after the appeal hearing. No evidence or testimony was received at that meeting, and neither the applicant nor any affected persons addressed the BOC. The BOC made no decisions from which "an appeal is provided for." Although a transcript was not produced, extensive minutes were prepared.[54]

After the matter was remanded to P&Z, all testimony and information gathering occurred during their work meetings on November 29, 2010 and January 10, 2012. The County provided a transcript of both of these work meetings.[55] Therefore, the Court cannot conclude that either I.C. § 67-6536 or any substantial right was violated. Petitioners were provided sufficient due process. See *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 91, 982 P.2d 917, 926 (1999).

---

[54] R., pp. 1097 – 1099.
[55] R., pp. 431 – 512; 522 – 582.

4. Did the BOC's failure to determine whether the appealed decision complied with the comprehensive plan and development code violate FCDC, Ch. III, M(5)?

Petitioners allege that the BOC's Findings and Conclusions are legally inadequate because they fail to adequately address whether its decision complied with the Comprehensive Plan and the Fremont County Development Code. As cited more fully above, I.C. § 67-6535(2) provides that the document approving or denying any application must "explain the rationale for the decision based on the applicable provisions of the comprehensive plan, relevant ordinance and statutory provisions, pertinent constitutional principles and factual information contained in the record."

In *Workman Family Partnership v. City of Twin Falls*, 104 Idaho 32, 655 P.2d 926 (1982), the Idaho Supreme Court held that a governing body must produce a written decision that gives a district court enough information to conduct judicial review. "[I]n order for there to be effective judicial review of the quasi-judicial actions of zoning boards, there must be a record of the proceedings and adequate findings of fact and conclusions of law." *Id.*, 104 Idaho at 37, 655 P.2d at 931. The Court clarified what constitutes "*adequate* findings of fact and conclusions of law" by citing and adopting the reasoning of the Oregon Supreme Court in *South of Sunnyside Neighborhood League v. Board of Commissioners*, 280 Or. 3, 569 P.2d 1063 (1977). The Oregon Supreme Court concluded that to prevent ad-hoc or arbitrary decisions, the governing body issuing the decision must "clearly and precisely state what it found to be the facts and fully explain why those facts lead it to the decision it makes. Brevity is not always a virtue." *Id.*, 280 Or. at 21, 569 P.2d at 1076-77. The Oregon Court continued:

> *What is needed for adequate judicial review is a clear statement of what, specifically, the decision-making body believes, after hearing and considering all the evidence, to be the relevant and important facts upon which its decision is based. Conclusions are not sufficient.*

Workman, 104 Idaho at 37, 655 P.2d at 931, citing 280 Or. at 21, 569 P.2d at 1076-77. (Emphasis supplied by the Idaho Supreme Court).

This court has carefully reviewed the Findings and Conclusions issued by the BOC on April 6, 2011. The BOC made the following conclusion related to the Comprehensive Plan:

> The Board concludes that Application #10-022, as submitted, is in accordance with the duly adopted Comprehensive Plan.[56]

It reaches this conclusion without citing any facts or referencing the relevant provisions of the Comprehensive Plan. The BOC has made no effort to set forth or "explain why [the] facts lead it to the decision it makes." *Id.* The brief conclusory statement cited above is merely perfunctory, and falls short of the requirement in I.C. § 67-6535 for conclusions that "explain the rationale for the decision."

Similarly, the Court notes that the BOC also concluded that the application complied with the Fremont Development Code:

> The Board concludes that Application #10-022, as submitted, meets the requirements of the Fremont County Development Code, . . .[57]

Unlike the unsupported conclusion concerning the Comprehensive Plan, this finding contains some reference to specific ordinances and provisions of the Development Code.[58] However, the Findings and Conclusions again failed to include a detailed explanation for why the BOC concluded the application complies. Again, it appears to be a perfunctory approval of the application without any discernable factual basis set forth in the decision.

Both conclusions, essential to the granting of the permit, are virtually unsupported by recitation the facts related to the substance of the permit. Unlike the Findings and Conclusions in *Cowan v. Board of Com'rs of Fremont County*, 143 Idaho 501, 512, 148 P.3d 1247, 1258 (2006), this Court cannot conclude that "[a] review of the various written findings and conclusions reveals that the Board complied with the requirements of I.C. § 67–6535(b) because it included the criteria and standards it considered relevant, provided detailed facts, and explained its rationale for its decisions." The conclusory statements contained in this case are inadequate.

Fremont County argues that Petitioners "failed to identify any standard or criteria . . . which is unsatisfied by the Board's decision."[59] The Court agrees. It would have behooved Petitioners to set forth specific reasons why the Findings and Conclusions did not comply with

---

[56] R., p. 1539, ¶ 1.
[57] R., p. 1539, ¶ 2.
[58] R., p. 1537, ¶¶ B, C, D, and E.
[59] *Respondents' Brief in Opposition to Petition for Judicial Review*, p. 6.

the Comprehensive Plan and/or the Fremont County Development Code. Frankly, without express examples of noncompliance, its objections are just as vague as the BOC's Findings and Conclusions. For this reason, the Court has determined that this issue would not be the primary basis for its decision to remand. Nevertheless, this issue provides an additional and alternative basis for remanding the BOC's decision.

5. Did the BOC's failure to notify Petitioners of its October 12, 2010 remand action violate the FCDC?

Petitioners allege that they were not provided formal notice of the BOC's October 12, 2010 decision to remand the application to P&Z for further fact-finding. They assert that this is a *per se* violation of the notice requirements of the FCDC, Ch. III, M(6). Although they claim prejudice, Petitioners have not identified a substantial right actually denied by this alleged failure.

The Court notes that Petitioners appeared and were allowed to participate and provide testimony at every subsequent proceeding where evidence was received. Petitioners obviously received notice of those proceedings. Therefore, even if this allegation is completely true, the Court finds no due process violation or prejudice under the circumstances presented here.

6. Was it arbitrary, capricious, and an abuse of discretion for the BOC to adopt findings and conclusions that allegedly failed to reflect its actual deliberations, findings, and conclusions?

Petitioners argue that the BOC erred by relying upon staff to prepare the Findings and Conclusions, especially where additional information is added. This argument is without merit. There is nothing unusual or inappropriate for a governing board to delegate drafting of the findings and conclusions to professional staff. For example, even courts sometimes rely upon law clerks to assist in drafting legal decisions.

Similarly, there is also nothing wrong in including additional information or analysis not specifically discussed at a hearing, as long as there is evidence in the record to support the information. Once again, as with a judicial decision, it is unreasonable to expect a judge issuing a bench ruling to include all of the details he or she might later include in a written ruling.

Although the Court has already held that the Findings and Conclusions were inadequate pursuant to I.C. § 67-6535, the method by which they were drafted had no bearing on the Court's decision.

7. Did Fremont County Ordinance No. 2010-03 fail to repeal the existing gravel pit standards contained in FCDC, Appendix J?

Petitioners argue that because Fremont County Ordinance No. 2010-03 failed to expressly repeal the gravel pit standards contained in Appendix J of the Developments Code, the BOC's decision is invalid. Appendix J contains a provision prohibiting gravel mines from being "located in productive cropland." Petitioners cite 6 McQuillan, *Municipal Corporations*, § 21:18 (3rd Ed.) for the position that "in the absence of an express repealer," the Court must "construe seemingly repugnant ordinances . . . so as *not* to affect a repeal of one by the other, if that is possible." (Emphasis added). The County argues that since passage of an ordinance is a legislative action, the general rules of statutory construction are applicable.

The law is clear that the Court must interpret ordinances or legislation in a manner that gives effect to the purpose of the law. *Otteson v. Board of Commrs. of Madison County*, 107 Idaho 1099, 1100, 695 P.2d 1238, 1239 (1985). The Court should "give force and effect to every part of the provision." *Dohl v. PSF Industries, Inc.*, 127 Idaho 232, 237, 899 P.2d 445, 450 (1995). The Court must not "deal in any subtle refinements of the legislation," but should interpret it by "lending substance and meaning to the provisions." *Ada County Assessor v. Roman Catholic Diocese of Boise*, 123 Idaho 425, 428, 849 P.2d 98, 101 (1993).

The Court finds that Ordinance 2010-03 was obviously passed with the intent of replacing the earlier version of Appendix J. Additionally, even if not repealed, the former prohibitions in Appendix J relating to gravel mines on cropland cannot be reconciled with the current provisions of Ordinance 2010-03. Therefore, the Court must construe the newer ordinance as a *de facto* repeal of the older.

Additionally, the BOC made a specific finding that "all previous versions of Appendix J were repealed and replaced with Ordinance 2010-03."[60] As noted above, "[t]here is a strong

[60] R., p. 1537.

presumption of favoring the validity of the actions of zoning boards, which includes the application and interpretation of their own zoning ordinances." *Sanders Orchard v. Gem County*, 137 Idaho 695, 698, 52 P.3d 840, 843 (2002). For all these reasons, the Court concludes that the BOC's finding was correct.

C. Petitioners' Request for Costs and Attorney Fees.

Petitioners have requested costs and attorney fees pursuant to I.C. §§ 12-117, 12-119, 12-120, and 12-121, and I.R.C.P. 54(e). The County objects, citing the recent holding of the Idaho Supreme Court in *Smith v. Washington County, Idaho*, 150 Idaho 388, 247 P.3d 615 (210).

Although Petitioners are the prevailing parties, they are not entitled to attorney fees or costs pursuant I.C. § 12-117 because this matter was initiated through a petition for judicial review. The holding in *Smith* explains:

> [A]s amended, I.C. § 12–117(1) does not allow a court to award attorney fees in an appeal from an administrative decision. First, to be an "administrative proceeding," this action would have to be before an agency. This case was originally styled as an application for a writ of mandate, which the district court correctly treated as a petition for judicial review. Even if this were an administrative proceeding, the amendment does not allow courts to award attorney fees anyway. It empowers only "the state agency or political subdivision, or the court, as the case may be," to award the fees. As described above, no mechanism exists for courts to intervene in administrative proceedings to award attorney fees. By using the phrase "as the case may be," the Legislature indicated that only the relevant adjudicative body—the agency in an administrative proceeding or the court in a judicial proceeding—may award the attorney fees.
>
> This action is also not a "civil judicial proceeding." A civil action must be "commenced by the filing of a complaint with the court." I.R.C.P. 3(a)(1). Since this is a petition for judicial review, a proceeding that does not commence with a complaint filed in court, the courts cannot award fees.

Id., 150 Idaho at 391, 247 P.3d at 618. By implication, this would also make I.C. § 12-119 inapplicable.

Additionally, the Supreme Court in *Smith* noted that I.C. §§ 12-120 and 12-121 are not available as a basis to award fees against a county because I.C. § 12–117 "is the exclusive means for awarding attorney fees for the entities to which it applies." *Id.*, citing *Potlatch Educ. Ass'n v.*

Potlatch Sch. Dist., 148 Idaho 630, 635, 226 P.3d 1277, 1282 (2010). This would also render I.R.C.P. 54(e) inapplicable.

The same analysis applies to Petitioners' request for costs. In *Smith*, the Supreme Court concluded that since that case "was treated as a petition for judicial review of an administrative decision," it was "not a civil action." Therefore, the petitioner was not awarded costs under I.R.C.P. 54(d)(1).

Because the law on this point is clear and well-settled, the Court respectfully declines the invitation by Petitioners' counsel at oral argument to ignore the Idaho Supreme Court on this matter.

VII. CONCLUSION

This has been a weighty and difficult matter for the Court to decide. This decision is the result of many long hours of pouring over the record, reviewing the law, and agonizing over the proper outcome. The Court wishes to make clear that it was not convinced, as argued by Petitioners, that the poor choices made by public officials noted herein were necessarily indicative of rampant "cronyism,"[61] "a good old boy's relationship,"[62] or some high-level conspiracy by Fremont County officials. While serious mistakes in judgment were made by certain county officials, these appear to have been isolated instances of human frailty—not orchestrated corruption. Nevertheless, after considering the collective impact of each individual violation and ethical lapse, the Court concludes that they created an atmosphere that erodes public confidence in the justice of the proceedings below. Viewed in full context, the totality of the circumstances strongly suggests Petitioners were not provided the level playing field required by due process. In the end, the Court must conclude that due process demands a higher level of fairness, impartiality, and transparency than the record below demonstrates.

Therefore, for the reasons set forth above, the Court rules as follows:

A. Petitioners' motion to augment the agency record is GRANTED as to the *Affidavit of Kurt Hibbert* and the second *Affidavit of Stephen A. Huber*, but is DENIED as to all others materials.

---

[61] *Petitioners' Reply Brief*, p. 7 (January 24, 2012).
[62] Oral Argument, February 28, 2012.

B. Loosli participated as both a P&Z commissioner and as the P&Z administrator without disclosing his conflict of interest in violation of I.C. § 67-6506. Therefore, this matter is hereby SET ASIDE in whole and REMANDED to P&Z for further proceedings as provided by I.C. § 67-5279. Loosli must have no involvement, direct or otherwise, in any future consideration of this application.

C. Commissioner Hurt and Commissioner Miller knowingly initiated ex parte communications with an interested party in violation of I.C. § 67-5253. Therefore, the Findings and Conclusions of the BOC, dated April 6, 2011, are hereby SET ASIDE in whole. Due to the violations by Loosli before P&Z noted above, this matter is REMANDED to P&Z for further proceedings as provided by I.C. § 67-5279. Commissioner Hurt and Commissioner Miller are hereby disqualified from further participation in any proceedings related to the pending application of Stoddard Brothers.

D. Prosecuting Attorney Lookabaugh did not violate I.C. § 67-5253 because she was not a decisionmaker and did not discuss the substance of a pending application.

E. The Findings and Conclusions issued by the BOC on April 6, 2011 do not comply with the specificity requirements of I.C. § 67-6535. Therefore, they are hereby SET ASIDE in whole. Due to the violations by Loosli before P&Z noted above, this matter is REMANDED to P&Z for further proceedings as provided by I.C. § 67-5279.

F. There is no merit to the other issues asserted on review by Petitioners. All remaining claims for relief are hereby DENIED.

G. Petitioners' request for attorney fees and costs is hereby DENIED.

SO ORDERED this 30th day of April, 2012.

Gregory W. Moeller
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing DECISION ON REVIEW was this 30 day of April, 2012, served upon the following individuals via U.S. Mail.

Karl H. Lewies
Attorney at Law
343 East 4th North, Ste. 125
Rexburg, Idaho 83440

Joette C. Lookabaugh
Fremont County Prosecutor
22 West 1st North
St. Anthony, Idaho 83445

Blake Hall
Fremont County Deputy Prosecutor
P.O. Box 51630
Idaho Falls, Idaho 83405

Fremont County Board of Commissioners
C/O Skip Hurt, Chairman
151 West 1st North
St. Anthony, Idaho 83445

Mark R. Fuller
FULLER & BECK, PLLC
410 Memorial Drive, Ste. 201
P.O. Box 50935
Idaho Falls, Idaho 83405

By: _____
Law Clerk