STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

DOUGLAS AND MICHELLE STAFFORD,)
)
Petitioners/Plaintiffs/Appellants,)
vs.)
)
KOOTENAI COUNTY, et al.)
)
Respondent/Defendant/Respondent.)

Case No. **CV 2009 2516**

MEMORANDUM DECISION AND ORDER ON APPEAL

I. PROCEDURAL HISTORY AND BACKGROUND.

This is an administrative review of a decision by the respondent Kootenai County Board of County Commissioners (Board) pursuant to the Idaho Administrative Procedure Act, I.C. § 67-5201, *et seq.* Petitioners Douglas and Michelle Stafford (Staffords) appeal to this Court from a decision of the Board, which upheld the decisions of the Kootenai County Building and Planning Department (Planning Department) (R. Vol. III, p. 615-624), which upheld the decision of the Kootenai County Hearing Examiner, which found Staffords in violation of Kootenai County Ordinance No. 374, the "Site Disturbance Ordinance." R. Vol. III, pp. 468-474.

The Staffords made improvements in the 25-foot buffer area between their property and the shore of Lake Coeur d'Alene. The Ordinance reads:

> For lots with frontage on a recognized lake or the Coeur d'Alene or Spokane Rivers, an undisturbed natural vegetation buffer shall be retained at the waterfront. A stairway or walkway (which does not exceed 4 feet in width), stairway landings (which do not exceed 6 feet in width or length), or a tram shall be allowed to encroach within the buffer. The buffer shall be a minimum of 25 feet in slope or distance from the high water mark of the water body…

On August 29, 2007, the Planning Department issued a Notice of Violation, alleging Staffords violated Ordinance No. 374 by causing a site disturbance within the 25-foot setback. R. Vol. I, p. 5. On March 19, 2008, the Planning Department again issued a Notice of Site Disturbance Ordinance Violation (R. Vol. I, p. 136), which Staffords timely appealed on March 21, 2008. Following the October 2, 2008, hearing, the Hearing Examiner found Staffords had violated Ordinance No. 374. R. Vol. III, pp. 468-474. Staffords then appealed to the Board. On February 12, 2009, the Board held a hearing on Staffords' appeal and issued a written Order of Decision on March 19, 2009. The Order required, *inter alia,* a design professional to prepare a remediation plan for the no-disturbance zone; the Order was later amended on April 16, 2009, changing the timeline for compliance. Staffords timely filed a Petition for Judicial Review on March 27, 2009, and a First Amended Petition for Judicial Review on April 24, 2009.

Staffords raise three issues on appeal:

1. Whether the Board's Order denying their appeal was erroneous as a matter of law?

2. Whether the Board's Order denying their appeal was arbitrary, capricious, and abuse of discretion, or unsupported by substantial evidence in the record?

3. Whether the County should be estopped from citing Staffords for a violation of Ordinance No. 374?

II. STANDARD OF REVIEW.

The standard governing judicial review in a case involving the Local Land Use Planning Act (LLUPA) provides this Court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." Idaho Code § 67-

5279(1). Rather, this Court defers to the agency's findings of fact unless they are clearly erroneous. In other words, the agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial, competent evidence in the record. *Fischer v. City of Ketchum,* 141 Idaho 349, 352, 109 P.3d 1091, 1094 (2005).

A county zoning board is treated as an administrative agency for the purposes of judicial review. *Chisholm v. Twin Falls,* 139 Idaho 131, 75 P.3d 185 (2003). "As administrative bodies having expertise in the zoning problems of their jurisdiction, their actions are presumptively valid." *Gordon Paving Co. v. Blaine Co. Bd. Of Comm'r.,* 98 Idaho 730, 731, 572 P.2d 164, 165 (1977). The reviewing court must limit its review to the factual record compiled in proceedings before the zoning board. *Bone v. City of Lewiston,* 107 Idaho 844, 693 P.2d 1046 (1984). The party that attacks a Board's finding must illustrate that the Board erred pursuant to I.C. § 67-5279(3). A Board's findings may not: (1) exceed the agency's statutory authority; (2) violate statutory or constitutional provisions; (3) be made upon unlawful procedure; (4) not be supported by substantial evidence in the record; or (5) be arbitrary, capricious, or an abuse of discretion; *and* a substantial right must have been prejudiced. *Price v. Payette County Bd. of Comm'rs,* 131 Idaho 426, 429, 958 P.2d 583, 587 (1998).

III. ANALYSIS.

A. The Board's Decision Sustaining the Violation of Ordinance No. 374 Was Not Erroneous as a Matter of Law.

Staffords argue the adoption of Ordinance No. 374 post-dated the conduct that gave rise to the violation charged because there is no dispute that the Staffords' actions were performed in 2001, while Ordinance No. 374 came into effect on December 12, 2005. The Staffords go on to argue Ordinance No. 283, which had been in effect at the

time of Staffords' actions and contains similar language to Ordinance No. 374, is irrelevant to these proceedings because Staffords were not charged under Ordinance No. 283, and Ordinance No. 283 no longer exists as the superseding of Ordinance No. 283 means it was "'obliterated,' 'annulled,' and 'rendered of no force and effect'" by adoption of Ordinance No. 374. Petitioners' Opening Brief on Appeal, pp. 12-13. Staffords' final argument in this regard is that the Board's determination in this matter was contrary to the language of Ordinance No. 374 because there is no evidence the acts of the Staffords caused significant adverse effects to property or water and the undisturbed natural vegetation buffer promoted by Ordinance No. 374 was previously logged, developed and used prior to Staffords' purchase in 1999. *Id.*

In response, the Board notes the language of Ordinance Nos. 374 and 283 are identical to one another and to their predecessor, Ordinance No. 251, which was adopted on October 15, 1996, and was in effect until Ordinance No. 283 was adopted on July 21, 1999, replacing it. Brief of Respondents, pp. 8-9. The Board argues Staffords caused site disturbances, and work to be performed, in the no-disturbance zone beginning in the summer of 2001 and the landscaping performed by Staffords "within the no-disturbance zone is an ongoing violation of the Site Disturbance Ordinance in effect at any given time." *Id.*, pp. 9-10. (emphasis in original).

> The presence of rock bulkheads, waterfalls, manicured lawns, swales, sand and boulders all violate this clear mandate, and do so every day they continue to be present within this no-disturbance zone, regardless of however aesthetically pleasing these features may be. Therefore, it was perfectly lawful and appropriate to cite Stafford for an ongoing violation of this provision of the Site Disturbance Ordinance currently in effect, Ordinance No. 374.

Id., p. 10. (emphasis in original). Because of the ongoing nature of the violation, the Board claims any argument regarding Ordinance No. 374 superseding Ordinance No.

283 (and thereby rendering Ordinance No. 283 obliterated or annulled) is moot. *Id.* In this regard, the Board cites the saving clause of the Kootenai County Code, at § 1-2-3, which states in relevant part:

> No new ordinance shall be construed or held to repeal a former ordinance…as to any offense committed against such former ordinance…or in any way whatever to affect such offense or act so committed or so done, or any penalty, forfeiture or punishment so incurred or any right accrued or claim arising before the new ordinance takes effect, save only that the proceedings thereafter shall conform to the ordinance in force at the time of such proceeding, so far as practicable.

Kootenai County Code, § 1-2-3, adopted via enactment of Kootenai County Ordinance No. 337. Additionally, the Board argues foreign case law has defined "supersede" to mean "to take the place, room, or position of, …to displace in favor of another" and while Ordinance No. 283 had no force and effect beyond December 12, 2005, its being superseded by Ordinance No. 374 nevertheless cannot turn unlawful conduct at the time of occurrence into lawful conduct. Brief of Respondents, p. 12, *citing Pula v. State,* 40 P.3d 364, 374 (Mont. 2002). Finally, as to Staffords' argument the Board's determination is contrary to the language of Ordinance No. 374, the Board argues the purpose of the Ordinance (protecting property, surface water and ground water against significant adverse effects) does not require a finding of actual significant adverse effects to cite a landowner for violation of the requirement to maintain a 25-foot undisturbed vegetation buffer from the ordinary high water mark. *Id.,* p. 13. The Board argues it acted properly in recognizing that remediation of the site disturbance was necessary (due to watering/fertilizing the lawn in the buffer area, and erosion of sand placed in the buffer area) regardless of the aesthetically pleasing features of Staffords' additions. *Id.,* pp. 13-14.

Preliminarily, a public body may not permit a use that is prohibited by a land use

ordinance. *City of Coeur d'Alene v. Simpson,* 142 Idaho 839, 846, 136 P.3d 310, 317 (2006); *County of Ada, Board of County Com'rs v. Walter,* 96 Idaho 630, 632, 533 P.2d 1199, 1201 (1975) (county commissioners may not allow a use that would violate a zoning ordinance); *Hubbard v. Canyon County Com'rs,* 106 Idaho 436, 437, 680 P.2d 537, 538 (1984) (county commissioners may not permit an implied variance violative of land use ordinances); *City of Burley v. McCaslin Lumber Co.,* 107 Idaho 906, 909, 693 P.2d 1108, 1111 (Ct.App. 1984) (a variance request contemplates no modification of the zoning ordinance). As such, the Board has no authority to deviate from the Site Disturbance Ordinance. Ordinance No. 251, No. 283, and No. 374 are identical as to Section 8(B) of each of those iterations. Section 8(B) of each of those Ordinances reads:

> Waterfront Lots For lots with frontage on a recognized lake or the Coeur d'Alene or Spokane Rivers, an undisturbed natural vegetation buffer shall be retained at the waterfront. A stairway or walkway (which does not exceed 4 feet in width), stairway landings (which do not exceed 6 feet in width or length), or a tram shall be allowed to encroach within the buffer. The buffer shall be a minimum of 25 feet in slope or distance from the high water mark of the water body.

R. pp. 57-58; Appendix to Petitioners' Opening Brief on Appeal, p. 13; R. p. 89. Idaho Courts have followed the reasoning of jurisdictions which hold that where an applicant has complied with all existing requirements, a public official must issue a building permit. *Ben Lomond, Inc. v. City of Idaho Falls,* 92 Idaho 595, 600-601, 448 P.2d 209, 214-15 (1968) (discussing *State ex rel. Ogden v. City of Bellevue,* 45 Wash.2d 492, 275 P.2d 899 (1954); *Sgromolo v. City of Asbury Park,* 134 N.J.L. 195, 46 A.2d 661 (1946)). An occupancy permit, however, is likely a matter of discretion. Although no Idaho case law directly on point exists, foreign jurisdictions consistently find issuance of a certificate of occupancy as discretionary. *See Assoko v. City of New York,* 539 F.Supp.2d 728,

739 (S.D.N.Y. 2008) ("If a building does not conform to the requirements for a Certificate, the Commissioner has no discretion to issue one."); *Collins v. Olin Corp.,* 418 F.Supp2d 34, 62 (D.Conn., 2006) (Finding no question of material fact regarding the fundamentally discretionary nature of issuance of a permit or license); *Silver v. Franklin Township Board of Zoning Appeals,* 966 F.2d 1031, 1034 (6th Cir. 1992) (holding plaintiff had not established a substantive due process violation because the board had discretion to grant him a permit even if plaintiff complied with "minimum, mandatory requirements; therefore, plaintiff had no "justifiable expectation" or "legitimate claim of entitlement".)

Here, Staffords' initial application for building permit was issued in July 1999. A.R. Vol. I, p. 28. Staffords' initial certificate of occupancy was granted on March 23, 2000. *Id.,* pp. 39-40. In 2001, Staffords "cleaned up" their property within the 25 foot setback zone; this included re-greening, moving rocks, adding sand, and adding a barbeque pit. Petitioners' Opening brief on Appeal, p. 7. In August of 2005, Staffords applied for another building permit for an addition to their home; the permit was approved in October 2005. R. Vol. I, p. 67. In August of 2007, Staffords requested a certificate of occupancy on the addition and the request was denied by letter dated January 15, 2008. *Id.,* pp. 113-114. Staffords argue the determination that they violated Ordinance No. 374, giving rise to the denial of the certificate of occupancy, was improper because the violation was based on "improvements that the Department acknowledges were completed in July 2001" and at that time, Ordinance No. 283 was in effect, not Ordinance No. 374. Petitioners' Opening Brief on Appeal, p. 8.

Again, issuance of a certificate of occupancy is a matter of discretion. Additionally, Staffords complaint of being cited for violation of an ordinance not yet in

effect at the time of their actions, results in no prejudice to Staffords because Ordinance No. 374 does not differ in any way from Ordinance No. 283. The language and purpose of each consecutive site disturbance ordinance was identical. Staffords state, "[t]he charging document which carries criminal penalties, was based solely upon Ordinance No. 374." *Id.,* p. 12.

An *ex post facto* analysis is inappropriate here. Article I, Section 9, Clause 3 of the United States Constitution and Article I, section 16 of the Idaho Constitution prohibit *ex post facto laws.* The clauses prevent enactment of "any statute which punishes as a crime an act previously committed, *which was innocent when done*; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with a crime of any defense available according to law at the time when the act was committed…" *Collins v. Youngblood,* 497 U.S. 37, 42, 110 S.Ct. 2715, 2716-17 (1990) (quoting *Beazell v. Ohio,* 269 U.S. 167, 169-70, 46 S.Ct. 68, 70 (1925)); *Wheeler v. Idaho Dept. of Health and Welfare,* 147 Idaho 257, ___, 207 P.3d 988, 993 (2009). (italics added).

First of all, the italicized portion demonstrates why this is not an *ex post facto* application. Staffords' actions took place in 2001. At that time Ordinance No. 283 was in effect. While Staffords were accused of violating and determined to have violated Ordinance No. 374 (the successor ordinance to Ordinance No. 283), in no way does that punish Staffords for acts previously committed, "*which were innocent when done"*, because Ordinance No. 283 punished the same behavior prior to 2005.

Second, there is also no evidence before the Court that Ordinance No. 374 makes "more burdensome the punishment for the crime [Staffords' violation]" as outlined in *Collins,* because even though the ordinance number changed, the potential

punishment has always remained the same.

Third, there is no evidence before the Court that the newer ordinance "deprives one charged with a crime of any defense available according to law at the time when the act was committed", as set forth in *Collins*. Staffords have simply not identified how they were deprived of any defense available according to law at the time their acts were committed.

Fourth, the *ex post facto* prohibition applies only to criminal or penal, not civil, actions. *Wheeler,* 147 Idaho 257, ___, 207 P.3d 988, 993. Staffords argue:

> The County cannot argue that there are any chargeable violations under Ordinance No. 374 from and after December 12, 2005 based upon the clear language of the ordinance (specifying a prospective effective date), and the constitutional prohibitions against *ex post facto* laws.

Petitioners' Reply Brief on Appeal, p. 3. Staffords have not set forth support for their contention the Kootenai County's site disturbance ordinance is criminal or penal, nor have they established that, to the extent the ordinance was intended to be civil, it is nonetheless so punitive as to negate that intention. *See U.S. v. Ward,* 448 U.S. 242, 248-49, 100 S.Ct. 2636, 2641-42 (1980). Staffords state, "[t]here is no question that Ordinance No. 374 is criminal in nature in that it specifically provides that violations *may* constitute criminal misdemeanors punishable by a maximum fine of $300 or six (6) months in jail or both." Petitioners' Reply Brief on Appeal, p. 3. (emphasis added). First of all, Staffords have never been charged criminally, not that such fact makes or does not make such Ordinance criminal in nature. Second, "Violations of this Ordinance may be considered a criminal misdemeanor…" Ordinance No. 374, Section 13; R. p. 93. The use of the word "may" makes it discretionary. Most crimes make a combination of certain facts (eg., driving and being in control of a vehicle on a public highway) a crime. There is nothing discretionary about the following language of I.C. § 18-8004: "*It is*

unlawful for any person who is under the influence of alcohol, drugs or any other intoxicating substances…..to drive or be in actual physical control of a motor vehicle within this state, whether upon a highway, street or bridge, or upon public or private property open to the public." (emphasis added). Third, and most importantly, it is unlikely that the Kootenai County Ordinance(s) at issue are criminal and/or penal in nature, as a remediation plan was proposed to bring the Staffords' property within the site disturbance ordinance requirements. *See* R. Vol. I, pp. 102-104, 111-114.

Staffords focus much of their argument on the fact that their actions were taken back in 2001. This Court is convinced that the Ordinance covers the "status" of property, not just the "actions" taken that placed that property out of compliance with the Ordinance. This interpretation, that the Ordinance covers the *status* of property, is indicated by phrases such as: "…an undisturbed natural vegetation buffer *shall be retained* at the waterfront", and "…shall be allowed to encroach within the buffer." Ordinance No. 374, Section 8(B); R. p. 89. (italics added). This interpretation that the Ordinance covers the *status* of property (not simply the actions taken by the landowner that created that status), is made clear by the penalties section of the Ordinance. The penalties for violation of Ordinance No. 374 are as follows:

> Violations of this Ordinance may be considered a criminal misdemeanor and shall be punishable by a maximum fine of three hundred dollars ($300.00) or six (6) months in jail or both. *Each day of violation shall constitute a separate offense*. The county may also take civil action to compel performance and completion of, or maintenance of, improvements installed pursuant to this chapter.

Ordinance No. 374, Section 13; R. p. 93. (emphasis added). The plain language of the penalties section of the ordinance supports the Board's statement that:

> The presence of rock bulkheads, waterfalls, manicured lawns, swales, sand and boulders all violate this clear mandate, and do so <u>every day they continue to be present</u> within this no-disturbance zone, regardless of

however aesthetically pleasing these features may be.

Brief of Respondents, p. 10. Because each day of violation constitutes a separate offense, and because the County cannot permit Staffords to engage in a use prohibited by an ordinance, *see supra,* the Staffords' violation of the site-disturbance ordinance was properly charged under Ordinance No. 374, despite Staffords' acts having violated the Ordinance before December 2005, at a time when Ordinance No. 283 was in effect.

Staffords' final argument that the Board's determination is contrary to the language of Ordinance No. 374 also fails. Staffords' argument is in two parts.

First, Staffords argue: "The stated purpose of Ordinance No. 374 is "to protect property, surface water, and ground water against significant adverse effects from excavation, filling, clearing, unstable earthworks, soil erosion, sedimentation, and storm water run-off…' See AR, Vol. 1, p. 0078." Petitioners' Opening Brief on Appeal, p. 14. Staffords argue there was no showing of "significant adverse effects" due to the placement of a barbeque pit, lawn sand and basalt rocks. Petitioners' Opening Brief on Appeal, p. 14. Staffords appear to claim that since there has been no showing of "significant adverse effects" (the stated purpose of the ordinance), there can be no violation of Ordinance No. 374. If the stated purpose of I.C. § 18-8004 is to reduce injury and death on the highway caused by drunk drivers, and the statute accomplishes that stated purpose by making it illegal to drive while under the influence of alcohol or drugs, the prosecuting attorney does not need to prove that the impaired driver would have caused death or injury on the highway. The prosecutor need only prove that the person was driving or in control of a vehicle on a highway while impaired. It is the status that is the violation of the law, not the stated purpose that is the violation of the law. In the present case, the violation is in not having "…an undisturbed natural

vegetation buffer…retained at the waterfront." Ordinance No. 374, Section 8(B): R. p. 89. The violation charged is not a violation of the "Purpose" section of that Ordinance, Section 3, which reads: "The purpose of this Ordinance shall be to protect property, surface water, and ground water against significant adverse effects from excavation, filling, clearing, unstable earthworks, soil erosion, sedimentation, and stormwater runoff and to provide maximum safety in the development and design of building sites, roads, and other service amenities."

Second, Staffords argue that logging and development which took place prior to Staffords' purchase of the property results in there not having been an "undisturbed natural vegetation buffer" in place when Staffords bought the property in 1999. Petitioners' Opening Brief on Appeal, pp. 14-15. Staffords' argument is that since the 25-foot setback zone had already been logged, developed and used before Staffords bought the property in 1999, and "…since the purpose of leaving an undisturbed natural vegetation buffer is to preclude development activity, then that purpose is irrelevant when development activity has already occurred." *Id.* Essentially, Staffords argue they can't have violated the Ordinance by disturbing the natural vegetation buffer (by Staffords planting grass, placing sand and rocks, building a barbecue pit), because some prior owner before them had disturbed the natural vegetation buffer in different ways (by logging and placing slash in this strip). That argument is simply not supportable. Ordinance No. 374, Section 4, specifically defines "Undisturbed Natural Vegetation Buffer" as:

> An area where no development activity has occurred or will occur including, but not limited to, logging, construction of utility trenches, roads, structures or surface and storm water facilities. Buffer areas shall be left in their natural state.

Given the "or" language used in the definition, it appears the ordinance, which requires

"an undisturbed vegetation buffer shall be retained at the waterfront", prohibits development activity from occurring prospectively as well as retroactively. Thus, again, the Board is correct in noting a violation of Ordinance No. 374 has occurred each day forward from the ordinance's enaction in December 2005. To the extent a prior owner engaged in logging and other development activities on that buffer zone, the ordinance nonetheless prohibits development activity which "will occur" and Staffords' actions beginning in 2001 amounts to activity which occurred regardless of the previous owners' development activity having already occurred before their purchase of the property. One also needs to look at where the phrase "natural vegetation buffer" is used, and that is in Section 8(B) of these ordinances, specifically Ordinance No. 374. Under that section, for waterfront lots, "…an undisturbed natural vegetation buffer *shall be retained* at the waterfront." Under this Ordinance, the landowner has a duty to *retain* twenty-five feet of "undisturbed natural vegetation". There is no possible way to construe that Ordinance to mean that if some prior landowner has previously come in and "disturbed" the area, that fact means all bets are off and the current landowner can disregard the Ordinance and "disturb" that area even more, or "disturb" it in a different way. Such an interpretation is neither supported by any rule of statutory construction, nor by logic.

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B. The Board's Decision Was Not Arbitrary, Capricious, an Abuse of Discretion, or Unsupported by Substantial Evidence in the Record.

Staffords argue only, "the Board's application of the Ordinance [No. 374] to the facts at bar was arbitrary, capricious, and to the extent necessary, constituted an abuse of discretion" for the reasons Staffords articulated in their argument above. Petitioners' Opening Brief on Appeal, p. 15. In response, the Board states:

…[T]he undisputed evidence in the record shows that a violation of the no-

> disturbance zone mandate of the Site Disturbance Ordinance currently exists on the Stafford property. Therefore, the Board's decision that the Department properly issued a citation to Stafford for violating the Site Disturbance Ordinance was based on substantial evidence in the record as a whole.

Brief of Respondent, p. 15.

As noted by the Board, even where there is conflicting evidence before an agency, the agency's factual determinations are binding on the reviewing court as long as they are supported by substantial competent evidence in the record. *Lane Ranch Partnership v. City of Sun Valley,* 144 Idaho 584, 590, 166 P.3d 374, 380 (2007). Substantial and competent evidence is "relevant evidence which a reasonable mind might accept to support a conclusion." *Lamar Corp. v. City of Twin Falls,* 133 Idaho 36, 43, 981 P.2d 1146, 1153 (1999). In the instant case, the Board made nine findings of fact. A.R. Vol. III, pp. 619-20. The Board discussed the first and second applications for building permits and certificates of occupancy and the presence of an unpermitted waterfall, manicured lawn, bulkhead, swales and sand in the no-disturbance zone. *Id.* There is no support for the contention that the evidence considered by the Board was not relevant evidence a reasonable mind may accept to support the conclusion reached. *Lamar Corp.,* 133 Idaho 36, 43, 981 P.2d 1146, 1153. And even Staffords do not make the claim that they engaged in no development within the twenty-five-foot setback area. Staffords readily admit they cleaned-up their property, including areas within the setback, and added sand, re-greened, and added a barbecue pit. Petitioners' Opening Brief on Appeal, p. 7. It follows that the Board did not act in an arbitrary or capricious manner or abuse its discretion in reaching its conclusion. And rather than merely affirming the Notice of Violation, the Board ordered Staffords "shall submit and receive approval for a Site Disturbance remediation plan and pay all associated fees." A.R. Vol.

III, p. 623. The record does not indicate any attempt by the County to enforce the penalties Staffords identify as criminal for the violation at issue.

C. The County Should Not Be Estopped from Citing Staffords for a Violation of Ordinance No. 374.

Staffords' final argument is that the County be estopped, under the unique facts of this case, from charging Staffords with a violation of an Ordinance which post-dates the offenses charged. Petitioners' Opening Brief on Appeal, pp. 16-17. Staffords admit the doctrine of estoppel generally does not apply to governmental agencies, but argue "the people in their collective and sovereign capacity ought to observe the same rules of honesty and fair dealing that is expected of a private citizen, and should no more be allowed to lull a citizen to repose and confidence in what would otherwise be false and erroneous position than should a private citizen." *Id.,* p. 15, citing *Murtaugh Highway Dist. V. Twin Falls Highway Dist.,* 65 Idaho 260, 142 P.2d 579 (1943). The Board cites Idaho case law setting forth the "extraordinary circumstances" rule regarding estoppel against governmental entities. *Harrell v. City of Lewiston,* 95 Idaho 243, 506 P.2d 470 (1973); *Sprenger, Grubb & assoc. v. City of Hailey,* 127 Idaho 576, 903 P.2d 741 (1995); *Terrazas v. Blaine County,* 147 Idaho 193, 198, 207 P.3d 169 (2009).

As in *Terrazas,* Staffords here do not explicitly identify whether the doctrine of equitable estoppel or quasi-estoppel is applicable. Equitable estoppel elements are: (1) a false representation or concealment of a material fact; (2) that the party asserting estoppel did not know or could not have known; (3) the false representation being made with the intent that it be relied-upon; and (4) actual reliance and action on the representation or concealment to the party's detriment. *Williams v. Blakely,* 114 Idaho 323, 325, 757 P.2d 186, 188 (1987). Quasi-estoppel, on the other hand, applies where: (1) the offending party took a position different than their original position; and (2) either

(a) the offending party gained an advantage or caused a disadvantage to the other party or (b) the other party was induced to change positions or (c) it would be unconscionable to permit the offending party to maintain an inconsistent position from one he or she already derived a benefit from or acquiesced in. *Allen v. Reynolds,* 145 Idaho 807, 812, 186 P.3d 663, 668 (2008). Here, there is no allegation of any false representation or concealment of a material fact. Thus, it is likely Staffords are invoking the doctrine of quasi-estoppel. As in *Terrazas,* it cannot be said the Board here took inconsistent positions; determination that Staffords' actions took place in the twenty-five foot setback zone has been the only official position taken and there is no evidence Staffords were induced to change their position. "If this Court were to apply the doctrine of estoppel in the instant case, then all future boards of commissioners in similar circumstances would be estopped from disagreeing with the opinions of a staff member simply because a landowner expended money in reliance on these opinions." *Terrazas,* 147 Idaho 193, ___, 207 P.3d 169, 177. (Discussing statutory authority to approve or deny subdivision applications). And, as stated above, the Board had no authority to permit Staffords to engage in an action prohibited by ordinance. *See City of Coeur d'Alene v. Simpson,* 142 Idaho 839, 846, 136 P.3d 310, 317; *County of Ada, Board of County Com'rs v. Walter,* 96 Idaho 630, 632, 533 P.2d 1199, 1201; *Hubbard v. Canyon County Com'rs,* 106 Idaho 436, 437, 680 P.2d 537, 538; *City of Burley v. McCaslin Lumber Co.,* 107 Idaho 906, 909, 693 P.2d 1108, 1111. There is no evidence of any advantage inuring to the County as a result of its affirming a Notice of Violation. Therefore, it cannot be said the County maintained an inconsistent position from one it already derived a benefit from. Nor was there any acquiescence in Staffords' second building permit of request for certificate of occupancy as the Board states, "no plans [were] shown for any

development of activity within the no-disturbance zone." A.R. Vol. III, p. 619. Under these facts, Staffords have not shown the exigent circumstances (which the parties in *Harrell, Spenger, Grubb & Assoc.,* and *Terrazas* were all also unable to demonstrate) and the application of estoppel is, likewise, not warranted here. **IV. CONCLUSION AND ORDER.**

For the reasons stated above, the Board's decision must be affirmed.

IT IS HEREBY ORDERED the March 19, 2009, Findings of Fact, Applicable Legal Standards, Conclusions of Law and Order of Decision of the Board (Petition for Judicial Review, p. 6, ¶ 27; First Amended Petition for Judicial Review, p. 6, ¶ 26, Exhibit A to Petition for Judicial Review; Exhibit A to First Amended Petition for Judicial Review), rejecting Stafford's appeal and finding a violation under Ordinance 374 (R. Vol. III, pp. 615-624) is AFFIRMED.

IT IS FURTHER ORDERED the April 16, 2009, Amended Findings of Fact, Applicable Legal Standards, Conclusions of Law and Order of Decision of the Board (First Amended Petition for Judicial Review, p. 6, ¶ 26, Exhibit B), rejecting Stafford's Appeal and finding a violation under Ordinance 374 (R. Vol. III, p. 628-636) is also AFFIRMED.

Entered this 2nd day of December, 2009.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of December, 2009, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #	Lawyer	Fax #
John F. Magnuson	667-0500	Patrick M. Braden	446-1621

_____
Jeanne Clausen, Deputy Clerk