STATE OF IDAHO)
County of KOOTENAI)ss

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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

COEUR D'ALENE PAVING, INC.,

Plaintiffs,

vs.

KOOTENAI COUNTY.

Defendants.

Case No. **CV 2008 7426**

MEMORANDUM DECISION AND ORDER ON PETITION FOR JUDICIAL REVIEW, AFFIRMING KOOTENAI COUNTY BOARD OF COUNTY COMMISSIONERS

I. INTRODUCTION AND PROCEDURAL BACKGROUND.

This is an appeal from the August 21, 2008, Findings of Fact, Applicable Legal Standard, Conclusions and Findings and Order of Decision in the Matter of the Application of Coeur d'Alene Paving for an Asphalt Batch (Plant) on Approximately 30 Acres in the Mining Zone, in Case No. SPN08-0001. Petition for Judicial Review, p. 1. Petitioner, Coeur d'Alene Paving (CDA Paving) seeks judicial review and moves to remand the Order of the Board of Commissioners (Board) denying its application for a Special Notice Permit (SNP) to operate an asphalt batch plant on land CDA Paving owns, located at 2492 W. Highway 53, Rathdrum, Idaho, which is zoned for mining. R. Vol. I, p. 4.

The public hearing was held on this application on May 29, 2008. Tr. p. 1-117. After the public hearing, the Board left the matter open to conduct a site visit. The site visit took place on July 17, 2008. Tr. p. 120-172. The Board, following deliberations,

denied the application and signed the Findings of Fact, Applicable Legal Standards, Conclusions and Findings and Order of Decision on August 21, 2008. The Board found: the proposal was not compatible with existing homes, businesses, and the neighborhood due to the proximity to residential development; negative environmental, social, and economic impacts had not been mitigated; the proposal had not adequately addressed site constraints; and the proposal may cause adverse affects on health, safety and welfare of Kootenai County residents because negative environmental, social and economic impacts had not been mitigated. R. Vol. 6, pp. 918-923.

CDA Paving seeks review of this decision before this Court, filing its Petition for Judicial Review on September 18, 2008. Based on a stipulation between CDA Paving and the Board, on November 12, 2008, this Court allowed several citizens living near the site of CDA Paving's proposed batch plant to intervene in this petition for review. CDA Paving, the Board and the Intervenors submitted briefing. Oral argument was held on February 4, 2009. On February 13, 2009, CDA Paving submitted "Appellant's A[u]gmentation of Briefs."

II. ANALYSIS.

A. Standard of Review.

The standard governing judicial review in a case involving the Local Land Use Planning Act (LLUPA) provides that 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, 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), showing that the Board's findings: (1) exceeded the agency's statutory authority, (2) violated statutory or constitutional provisions, (3) were made upon unlawful procedure, (4) were not supported by substantial evidence in the record, or (5) were arbitrary, capricious, or an abuse of discretion, and that party must also show a substantial right must have been prejudiced. *Price v. Payette County Board of Commissioners,* 131 Idaho 426, 429, 958 P.2d 583, 587 (1998).

B. CDA Paving's Due Process Rights Were Not Violated by the Site Visit.

CDA Paving argues the Board's site visit of the property at issue in the proposal and the other locations the Board visited (Interstate Asphalt, Acme Materials, Haman Asphalt, Idaho Asphalt Supply, Poe Asphalt, and Spokane Rock) violated CDA Paving's due process rights in several respects. Appellant's Brief, p. 15. CDA Paving claims the Board, in viewing the properties it did, "took in evidence during the viewing that is not part of the record" and further violated CDA Paving's due process rights by not offering CDA Paving "an opportunity to comment about the site visit at the subsequent hearing."

Id., p. 16. Additionally, CDA Paving claims the lack of a transcribable record, at least as concerns Commission Chairman Currie's site visit (Chairman Currie arrived to the visit at a later time and in a separate car than the other two Commissioners [Tr. p. 176, Ll. 11-21], and there was no recording device in Chairman Currie's vehicle), has resulted in CDA Paving having neither a record of his visit nor any sort of opportunity to address any flaws, misconceptions, or improprieties in the site visit. *Id.,* p. 17. CDA Paving cites to the entire transcript of the site visit for the proposition that: "There was no recording device in Chairman Currie's vehicle. Appellant's Brief, p. 12. Nothing in that transcript makes it clear whether Chairman Currie had a recording device, but since his comments do not appear in any transcript, it is assumed by this Court that Chairman Currie did not have a recording device in his vehicle. CDA Paving claims: "A transcript of all which occurred on the site visit, particularly that which was considered by Chairman Currie on the 7 stop tour, is indispensible." Appellant's Reply Brief, p. 6.

CDA Paving argues all four of the following must be provided or "due process is not afforded": "notice, a transcript, specific findings of fact and the opportunity to present and rebut evidence**."** *Id.* There is no dispute that notice was given. There is a transcript of the site visit, but no transcript of Chairman Currie's comments. There were specific findings of facts made. Regarding "the opportunity to present and rebut evidence", if there was no evidence taken by the Commissioners on the site visit, then neither CDA Paving nor Intervenors has an opportunity to rebut evidence…because there wasn't any evidence taken during that portion of the hearing *to* rebut.

CDA Paving claims the site visit constituted new evidence, and because there was no transcript of what occurred in Chairman Currie's car, its due process rights were violated. This Court finds as a matter of law that CDA Paving would need to prove both

propositions in order for there to be a due process violation. In other words, if there was no evidence taken in the site visit, no transcript of what occurred in Chairman Currie's car is necessary. If the site visit was evidence, then the issue of the adequacy of the transcript would need to be addressed by this Court.

The Board and the Intervenors both argue that the site visit in this matter served only to clarify evidence already in the record or to place such evidence in context, not for additional fact-finding purposes. Respondent's Brief, p. 10; Intervenor's Memorandum in Opposition to Petition for Judicial review, p. 5. Intervenors claim the Board's viewing of other asphalt batch plant sites was not independent from the evidence proffered at the hearing, but rather there was ample evidence concerning other batch plants presented at the hearing. Intervenor's Memorandum in opposition to Petition for Judicial Review, pp. 6-7. When those opposed to the permit argued at the public hearing that too many new homes encroached on the mining area to warrant a new batch plant, CDA Paving rebutted that claim with evidence of mitigating factors such as a quieter, less noxious proposed process, compared to other batch plants. *Id.* at pp. 7-8.

CDA Paving also complains the Board did not provide an opportunity for CDA Paving to explain distinctions between its proposed plant and the ones the Board viewed. *Id.* The Board and Intervenors both argue that no new evidence was considered and that CDA Paving had the opportunity to rebut evidence at the public hearing. Respondent's Brief, pp. 15-16; Intervenor's Memorandum in Opposition to Petition for Judicial Review, p. 7. As explained in the next paragraph, this Court agrees and finds the Board took in no new evidence. Additionally, this Court notes that CDA Paving's representative, Sandy Young, in discussing these other plants at the *initial*

hearing on May 29, 2008, could have set forth the distinctions between its proposed plants and the plants he mentioned. Tr. p. 8, L. 22 – p. 10, L. 4. CDA Paving had an opportunity to be heard.

This Court finds no additional evidence was taken in the site visit. Other plants were discussed *during the hearing* by CDA Paving's representative, Sandy Young. Tr. p. 8, L. 22 – p. 10, L. 4. CDA Paving argues that in addition to the several other batch plants mentioned by its representative, Sandy Young, the Commissioners went to two other plants that were not mentioned at the hearing, Idaho Asphalt and Spokane Rock Products. Appellant's Reply Brief, p. 8. That argument misses the mark, as CDA Paving notes in its brief that "Neither plant makes asphalt as does Coeur d'Alene Paving." *Id.* That being the case, what evidence, relevant or otherwise, could have been gained from such a view? The Commissioners made it very clear they did not view the site visit as evidence. Tr. p. 177, L. 6 – p. 181, L. 7. This Court finds that finding by the Commissioners, that they did not view the site visit as evidence, is supported by substantial evidence. CDA Paving argues: "Commissioner Tondee at one of the locations, rolled down his window to see if there was any smell." Appellant's Brief, p. 12. If by that CDA Paving infers the "smell test" to be new evidence, this Court is not persuaded. If the purpose of a site visit is to put what is already in evidence into context, smelling during the site visit is simply putting what is already in evidence in context.

Although this Court specifically finds no new evidence was taken during the site visit, even if there were evidence taken, this Court finds the transcript is adequate.

The Board argues that where proper notice of a site visit is provided, no verbatim transcript is necessary. Respondent's Brief, p. 12. In other words, a Board must "only

give notice, and if they do not give notice then they must have a verbatim transcript so that the parties in interest have the opportunity to rebut what the commissioners saw." Respondent's Brief, p. 12, citing *Chambers v. Kootenai County Board of Commissioners,* 125 Idaho 115, 118-119, 867 P.2d 989, 992-993 (1994). The Board states that the record was not left open following May 29, 2008, and because the public hearing involved evidence regarding setbacks, air quality, proximity to residences, the height of the asphalt plant's stack, and topography, in addition to CDA Paving's "repeated comparisons of their proposed plant with other plants in the area", the Board wanted to view the subject property and those other batch plants to which the proposed plant had been compared. Respondent's Brief, pp. 13-14.

Due process issues are generally questions of law and because zoning agency decisions are quasi-judicial, they are subject to due process restraints. *Neighbors for a Healthy Gold Fork v. Valley County,* 145 Idaho 121,____, 176 P.3d 126, 132 (2007). The Idaho Supreme Court has held that in planning and zoning decisions, due process requires notice of the proceedings, a transcribable verbatim record of the proceedings, specific, written findings of fact, and an opportunity to present and rebut evidence. *Id.; Cowan v. Board of Commissioners of Fremont County,* 143 Idaho 501, 510, 148 P.3d 1247, 1256 (2006). A transcribable record is indispensible to meaningful judicial review where the issues of notice, the opportunity to present and/or rebut evidence, and questions of whether the findings of fact are supported by evidence may arise. *Gay v. County Commissioners,* 103 Idaho 626, 651 P.2d 560 (Ct.App. 1982). But the "verbatim" requirement, that agency transcripts reflect proceedings word for word, is difficult because of the informal, quasi-judicial nature of these proceedings. *Rural Kootenai Organization, Inc. v. Board of Commissioners,* 133 Idaho 833, 843-844, 993

P.2d 596 (1999). Site visits may be utilized in zoning board decisions. *Comer v. County of Twin Falls,* 130 Idaho 433, 439-440, 942 p.2d 557, 563-564 (1997).

As this Court reasoned in its decision in *Brewster v. Kootenai County,* Kootenai County Case No. CV 2008 1144, 2008 WL 4202389 (September 4, 2008), site visits likely do not require verbatim transcripts because the Idaho Supreme Court has done away with the requirement of verbatim transcripts of hearings in its decision in *Rural Kootenai Organization, Inc. v. Board of Commissioners,* 133 Idaho 833, 843-44, 993 P.2d 596, 606-607 (1999). Thus, the Idaho Supreme Court's reasoning should apply to site visits as well. *Brewster v. Kootenai County,* Kootenai County Case No. CV 2008 1144, Memorandum Decision and Order on Appeal from the Kootenai County Board of Commissioners, p. 10. In *Rural Kootenai Organization,* the Idaho Supreme Court disagreed with the petitioner, who sought a strict application of the "verbatim" requirement under I.C. § 67-6536, and did not require transcripts to reflect agency proceedings word-for-word because the "informal, quasi-judicial nature of these proceedings would make satisfaction of such a requirement difficult." 133 Idaho 833, 844, 993 P.2d, 596, 607. However, the Board's argument that a transcribable record is only necessary where no notice is given is misplaced. If notice alone satisfied due process requirements, a transcript would not have been found indispensible to meaningful judicial review in *Gay v. County Commissioners.* However, there was notice in the present case, and that notice coupled with: 1) this Court's reading of *Rural Kootenai Organization* (which acknowledges a verbatim account of hearings is difficult); and 2) the fact that there was a transcript of what transpired in the other vehicle containing the other two Commissioners; and 3) the fact that all three Commissioners acknowledged on the record that they did not view the site visit as evidence (Tr. p. 177,

L. 6 – p. 181, L. 7), convinces this Court that due process does not require a verbatim transcript of what, if anything, occurred in Chairman Currie's vehicle.

CDA Paving admits notice of the site visit was given, but points out that the transcribed record only included two of the three Commissioners' comments and what comments by others those two Commissioners considered. Appellant's Reply Brief, p. 6. CDA Paving argues it is unclear from the transcript whether Chairman Currie heard the same information or viewed the same things as the other Commissioners. *Id.* Chairman Currie's arriving late and driving in his own vehicle (although visible to representatives of CDA Paving and others present) indicates a possible problem. As discussed by CDA Paving, Chairman Currie was not present for discussions that took place in the car containing the other two Commissioners regarding whether or not these other plants were operating when viewed and how the plants compared. Appellant's Reply Brief, p. 7. CDA Paving argues that where one Commissioner's view and information are not recorded, CDA Paving cannot know if that Commissioner noted the relevant features of the premises viewed. *Id.* In *Evans v. Board of Commissioners of Cassia County,* 137 Idaho 428, 50 P.3d 443 (2002), the Idaho Supreme Court stated that when it reviews proceedings of Boards of Commissioners, it is to "consider the proceedings as a whole and to evaluate the adequacy of procedures and the resultant decision in light of practical considerations with an emphasis on fundamental fairness and the essentials of reasoned decision-making." 137 Idaho 428, 448, 50 P.3d 443, 433, citing I.C. § 67-6535. This Court determines that in light of the whole proceedings, the procedures were adequate (the site visit and everything that was said between two of the Commissioners was transcribed, there is no indication that anyone said anything to Chairman Currie nor is there any indication he said anything to the other

Commissioners during the site visit, and *all* Commissioners agreed no new evidence was taken), the decision was reasoned, and there is nothing fundamentally unfair about the Commissioners' decision. The fact that there is no transcript of what, if anything, was said in Chairman Currie's vehicle does not make what happened an "inadequate procedure" or result in a "fundamentally unfair decision" when the proceedings as a whole indicate that Chairman Currie in all likelihood was alone and did not call in to anyone in the other vehicle. There simply was no "arbitrary deprivation" of CDA Paving's due process rights. *Cowan v. Board of Commissioners of Fremont County,* 143 Idaho501, 510, 148 P.3d 1247, 1256 (2006), *citing Aberdeen–Springfield Canal Co. v. Peiper,* 133 Idaho 82, 91, 982 P.2d 917, 926 (1999).

CDA Paving argues:

> It would seem that the Commissioners would all need to hear and see the same things on a site visit, and that the transcript would need to reflect that, for due process to occur. Otherwise, there is no way to know what information is being considered, particularly, if one commissioner's view and information are not recorded.

Appellant's Reply Brief, p. 7. No citation is given by CDA Paving to support this argument. At oral argument, this Court asked counsel for CDA Paving for a citation that would support such an argument, that all three Commissioners need to be together, to see and hear the same thing on a site visit. Counsel for CDA Paving said she was unaware of any such authority. Counsel for intervenors said he was unaware of any such authority. No citation was given. The reason the Court asked the question was if there *is* a requirement that *all* Commissioners attend *all* views, then that would militate toward requiring all Commissioners to go together, or at least require a transcript of what was said in each commissioner's vehicle. If there is no requirement that all Commissioners attend all views, then why would a transcript be necessary of a solitary

commissioner, when there is a transcript of the view with the other Commissioners? There is no evidence in the record that Chairman Currie had anyone else in his vehicle. There is no evidence from that transcript of the vehicle that contained the other two Commissioners, that anyone in that vehicle communicated via cell phone or otherwise with Chairman Currie. A transcript of a solitary commissioner in a car which had no other occupant would be pointless. Thus, there is no due process violation.

In their briefing, the parties extensively cited the recent Idaho Supreme Court decision in *Akers v. Mortensen,* 2008 Opinion No. 68, 08.12 ISCR 555, 2008 WL 226993 (June 4, 2008). At the February 4, 2009, oral argument in the instant case, counsel for CDA Paving was unaware that a substitute opinion had been filed by the Idaho Supreme Court on January 22, 2009 (*Akers v. Mortensen,* 2009 Opinion NO. 6, January 22, 2009), and counsel for the Board and counsel for Intervenors had only just become aware of this fact. The original *Akers* opinion made it clear that it was error for this Court to enter its findings based on results of an examination of the premises; the Supreme Court stated that, "and inspection of the premises is only useful to evaluate and apply the evidence submitted at trial." 08.12 ISCR 557. This Court has already found that the view by the Commissioners in the present case was only used to evaluate and apply the evidence submitted at trial. The substituted *Akers* opinion omits all reference to the view of the road that was at issue in that case. While it is doubtful that the Idaho Supreme Court has overruled precedent that a view of the premises "is not of itself evidence upon which a verdict may be based", citing *Tyson Creek R.R. Co. v. Empire Mill Co.,* 31 Idaho 580, 590, 174, P. 1004, 1007 (1918), it is likely that the Idaho Supreme Court realized that in taking a view of the road at issue, the court was simply placing into context evidence of the road taken during the trial. The Board in the

present case specifically stated it only used its site view to evaluate the evidence it had already received at the public hearing. There is no evidence to contradict that finding.

The Record indicates that the July 24, 2008, public hearing regarding the July 17, 2008, site visit was limited to information gathered on the site visit. R. Vol. 6, p. 890. At the hearing, only Steve Wetzel (counsel for the Intervenors) was permitted to speak; he discussed the law regarding the neighbors' right to testify at the hearing. The transcript bears this out: Mr. Wetzel sought an opportunity to have the neighbors/intervenors rebut what the Commissioners saw during the site visit (Tr. pp. 177-78); Chairman Currie agreed to open up the hearing for testimony from the three neighbors that had been on the site visit (Tr. p. 178); counsel for the Board clarified that if the Board had no questions, they did not have to take testimony and if they did take testimony, the Applicant would have the chance to rebut (Tr. p. 179); and the Commissioners agreed that the site visit did not raise any questions for any of them and closed the public hearing. Tr. pp. 180-181. Once in deliberations, the minutes of the Recording Secretary, Sandi Gilbertson, show Commissioner Piazza was in support of the application and Commissioner Tondee opposed it, stating that "the site visit showed him the proximity of the neighbors' homes to the proposed plant." R. Vol. 6, p. 894. Commissioner Tondee also noted other issues to consider included health issues and diminished property values. *Id.* Commission Chairman Currie "said the site visit showed that the residential development is extremely close." "He added that he didn't want Kootenai County to be the first to use a state of the art facility and he was also concerned with health issues." *Id.*

The record clearly shows that Commission Chairman Currie and the other Board members did not hear testimony on July 24, 2008. The reasoning by each of the

Commissioners in their deliberations on this application indicates that the site visit merely showed the proximity of the neighbors' homes, evidence of which had already been presented at the public hearing. *See e.g.,* Tr. pp. 60, 67, and 75. Commissioner Tondee and Commission Chairman Currie noted the proximity of neighbors while Commissioner Piazza noted that the neighbors knew the area was a mining zone when they purchased their properties. R. Vol. 6, p. 894.

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). Here, the Board, acting as an agency, has evaluated and given weight to the testimony it heard at the public hearing on May 29, 2008. Thereafter, the Board visited the site of the proposed asphalt batch plant to provide a context for the testimony it heard and evidence it received on May 29, 2008. As argued by Intervenors, there is no evidence in the record that the Board improperly relied on facts or speculation acquired at the site visit or that such facts/speculation were used to make the Board's decision. Intervenor's Memorandum in Opposition to Petition for Judicial Review, p. 7. The only issue pertaining to due process remaining is whether a substantial right of CDA Paving's was violated via the absence of any record of Chairman Currie's site visit. *See* I.C. § 67-5279(4) ("agency action shall be affirmed unless substantial rights of the appellant have been prejudiced.") In *Eacret v. Bonner County,* 139 Idaho 780, 86 P.3d 494 (2004), the Idaho Supreme Court upheld this Court's findings of bias where a board of commissioners member's *ex parte* contacts and prehearing statements created an appearance of impropriety and "underscored the likelihood that he could not fairly decide the issue in the case." 139 Idaho 780, 787, 86 P.3d 494, 501. *Eacret* also involved a *de facto* "view" without proper notice and this Court's decision to remand the

matter to the Board because the variance was granted by a two to one vote because the board member's mind appeared irrevocably closed on the subject of the set back sought. *Id.* Here, although there is no record of Chairman Currie's site view, he himself was in plain view of everyone attending and there has been no claim of impropriety on his part. Especially when viewed in light of the facts of *Eacret,* no showing has been made here that the substantial rights of CDA Paving have been prejudiced as a result of Commission Chairman Currie's site view having arguably not complied with I.C. § 67-5279.

The Board provided adequate notice of their proposed site visit via certified mail. R. Vol. 1 pp. 39-44, 119. The Board provided a verbatim transcript of that visit. Tr. p. 121-174. This Court finds the site visit in this matter, including a view of other batch plants, served only to clarify evidence already in the record or to place such evidence in context and was not for additional fact-finding purposes.

C. The Board's Findings Are Supported by Substantial and Competent Evidence.

CDA Paving argues that, in reaching its decision, the Board: ignored the only competent evidence presented; ignored CDA Paving's expert and agency support; made conclusory findings of fact and conclusions of law were broad and conclusory; and failed to conduct a proper analysis regarding health, safety, and environmental issues or regarding ordinance and Comprehensive Plan requirements. Appellant's Brief, pp. 18-26. CDA Paving claims the Board erred in ignoring the testimony of its expert, Marie Piper (Piper), who presented evidence on air quality effects where no competent evidence to the contrary was presented. *Id.,* pp. 18-19. Additionally, although CDA Paving conceded not having had Panhandle Health District (PHD) or Department of Environmental Quality (DEQ) permits at the time of the application, such

final permits are not a requirement or prerequisite to county approval. Appellant's Reply Brief, pp. 12-13. CDA Paving also argues that the Board failed to consider the benefits of the newer facility, and did not compare it to the old plant currently operating in Athol. Appellant's Brief, pp. 21-22. CDA Paving points out for the Court the ways in which the proposed plant complies with the Kootenai County Comprehensive Plan: it would reduce gas usage, emissions, traffic, and would use recycled materials; it would further the goal of integrating land use types by allowing mixed uses; it would aid in economic growth by employing over 40 people in-season; it supports the maintenance of mining land uses; it encourages the quality and quantity of public support systems by increasing competition in the market; it encourages the use of alternate energy sources; and it encourages waste reduction and recycling. *Id.,* pp. 22-24. Finally, CDA Paving argues the Board's findings of fact were broad and conclusory, and its conclusions were arbitrary and unsupported by the evidence or testimony. *Id.,* p. 25. CDA Paving claims the requirements of I.C. § 67-6535(b) were not met. Idaho Code § 67-6535(b) requires approval or denial of an application be:

> [I]n 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 ordinances and statutory provisions, pertinent constitutional principles and factual information contained in the record.

In considering a request for a zoning change, the Board must make specific, written findings of fact and conclusions upon which its decision is based. *Supra, Price v. Payette County Board of Commissioners,* 131 Idaho 426, 431, 958 P.2d 583, 588 (1998).

The Board argues it properly listened to and considered Piper's testimony, and cites to the transcript in support of its argument. Respondents' Brief, pp. 18-10. The

Board argues Piper was unable to specifically answer the Board's questions about odors the proposed plant would emit. *Id.,* pp. 19-20. The Board also argues neither PHD nor DEQ granted CDA Paving the required permits and until such permits are issued, DEQ is *presumed* to have air quality concerns. *Id.,* p. 21. The Board claims its findings and conclusions are sufficient and although the Board Analysis section is concise, it summed up the majority of the findings regarding increased residential development. *Id.,* p. 22. Regarding the Board's findings and their application to the Comprehensive Plan, the Board argues: the Commissioners found negative environmental impacts had not been mitigated and an air-quality permit had not been issued; neighboring property rights and values would be negatively impacted and encroachment of incompatible land uses would result; no buffer zone was proposed to mitigate the proximity of the requested use and the existing homes; and the proposal was not environmentally friendly as pertains to surrounding land uses. *Id.,* pp. 23-25. These findings, the Board argues, indicate that the proposal was not in conformance with the Comprehensive Plan. *Id.,* p. 25.

Intervenors concur with the Board and argue that the Board's findings and conclusions were supported by substantial and competent evidence. Intervenor's Memorandum in Opposition, p. 8. After citing to the transcript at length, Intervenors conclude that CDA Paving is asking this Court to conclude that its expert testimony was superior to the evidence submitted by the opposition and that "such is not the purview of the courts." *Id.,* p. 13. Intervenor argues the Board properly assessed the compatibility of the request with the surrounding area and the potential for adverse effects on infrastructure or health, safety, and welfare of Kootenai County citizens where a historical mining area has become surrounded by residential development. *Id.,* p. 16.

In response, CDA Paving clarifies its belief that the only competent evidence submitted was its own. Appellant's Reply Brief, p. 10. CDA Paving argues the opponent's expert Ms. West, did not evaluate the proposed plant at issue, but rather asphalt plants in general; therefore, the testimony was not relevant and not competent. *Id.* The items listed as being missing from the application by the opposition's expert are not required in a Special Notice Permit Application and although Petitioner did not yet have a DEQ permit or PHD approval, such permits could have been made conditions of approval by the county. *Id.,* pp. 11-12. CDA Paving also claims the opponent's expert performed her analysis based on incorrect portions of the applicable ordinances and application materials, and that the opponent's experts and the other reports relied upon by the Board are not competent and substantial evidence upon which to base a denial in this case. *Id.,* p. 15.

This Court has read the materials provided by Ms. West. R. Vol. 5., pp. 790-95. The Commission had Ms. West's report accurately summarized by area attorney Scott Reed. Tr. p. 53, Ll. 6 – p. 59, L. 12. Ms. West is a "..certified planner of the American Planning Association (AICP and serve[s] as a Hearing Examiner for Canyon County." R. Vol. 5., p. 790. She has a B.S. in chemistry, an M.B.A., extensive experience in environmental planning/permitting and regulatory issues. *Id.* She served five years as Canyon County Development Services Director overseeing all aspects of land use issues in Canyon County. *Id.* Before that she served eleven years as the Chief of the Watershed and Aquifer Protection Bureau at the State of Idaho Department of Environmental Quality. *Id.* She stated she was "uniquely qualified to review this proposal [of CDA Paving] from the zoning, planning, environmental and public health and welfare perspectives." *Id.* CDA Paving did not object nor question her credentials.

Ms. West spent five pages discussing 27 factors she had reviewed, summarizing the materials and evidence she had considered. *Id.,* pp. 790-94. Then, Ms. West concluded:

> The applicant has failed to describe how they will address the local community's concerns with regard to quality of life, noise, air pollution, ground water contamination, hours of operation, and transportation safety. Additionally, no commitments have been made by the applicant with regard to these concerns. It is hard to conceive of an entity expressing a desire to "be a good neighbor" while at the same time failing to address these concerns. Many of the issues raised are required by County Ordinance and it would seem the Board is required to deny the request or add appropriate conditions to the Special Notice Permit to assure the facility will operate within the existing regulatory framework.
>
> Notwithstanding the aforementioned arguments as to why this request should be denied, it is recognized the County may still yet decide to grant Coeur d'Alene Paving Incorporated's request for a Special Notice Permit once the applicant provides an adequate narrative submittal that can demonstr4ate it is in compliance with the County's requirements.

Id., p. 794. That is clearly substantial competent evidence in the record. That conclusion can be made by this Court without even reviewing the conflicting evidence.

However, a review of that conflicting evidence sheds some light on perhaps why CDA Paving's permit was denied. CDA Paving's expert, Ms. Piper, is an air quality dispersion modeler. Tr. p. 22, Ll. 23-24. She was retained by CDA Paving to assess essentially the air quality impacts of their proposed hot-mix plant. Tr. p. 23, Ll. 1-4. While primarily discussing pollution in terms of particulate matter, and weather modeling (Tr. pp. 23-39), Ms. Piper was asked by Chairman Currie about odor. Tr. p. 27, Ll. 3-4. Ms. Piper responded:

> Oh, an odor? An odor threshold? There are – boy – there are many (inaudible) to the – and each of those would have an odor uh – an odor threshold the lends to itself. I do not -- I could not tell you without research what the odor threshold relative to the ambient standard. My experience is – you're not going to smell that up there. This is a very, very clean plant. That's my experience but I – I could – I'd have to research to answer your question more expertly.

Id., Ll. 5-12. Apparently, Ms. Piper did no additional research. At no time during Ms. Piper's testimony did she discredit or even discuss Ms. West's opinions.

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, ___, 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 six findings of fact, addressed the applicable goals of the Comprehensive Plan, provided one paragraph of analysis and reached the conclusion that "[c]onsidering the residential and commercial growth in close proximity to this request, it seems most likely that the subject property is not a suitable location for an asphalt plant. Negative environmental, social, and economic impacts cannot be mitigated in this location." R. Vol. 6, pp. 922-23.

Here, the Board has provided specific, written findings of fact and conclusions upon which its decision is based. CDA Paving has not met its burden that the evidence relied upon by the Commissioners voting to deny the application was not of the sort which a reasonable mind might accept to support a conclusion. The Board members voting to deny the petition felt that the proximity of the proposed plant to residential neighbors and concerns about health issues were of great import. R. Vol. 6, p. 894. The Commissioner voting against denial recognized the proposed facility was state of the art, that access was appropriate, that Highway Districts look for asphalt product sites, and he noted that the neighbors knew this was a mining zone when they purchased their properties. *Id.* It is clear that all three Board members, facing

conflicting evidence from CDA Paving and its opponents, made factual determinations based on relevant evidence which a reasonable mind might accept to support a conclusion. *See Lamar Corp.,* 133 Idaho 36, 43, 981 P.2d 1146, 1153.

D. Lack of Objection.

One thing is curiously missing in both CDA Paving's arguments that: 1) the site view violated CDA Paving's due process rights by a) not having a transcript of Chairman Currie's visit, b) by going to two other sites that were not mentioned in the record, and c) by not allowing CDA Paving to speak at the July 24, 2008, hearing, and 2) the testimony of Ms. West cannot be substantial competent evidence. There was never an objection made by CDA Paving's counsel to any of this. CDA Paving's counsel never even mentioned any of these problems to the Commissioners. CDA Paving's counsel or representative did not even ask to speak at the July 24, 2008, hearing. Even after that hearing, the Commissioners' decision did not issue for another month. At no time did CDA Paving object, or request reopening of the hearing, supplementation of evidence or argument, nothing. The first time these issues are raised is in this petition for review before this Court. When asked if Ms. West's testimony was objected to by CDA Paving's counsel at the hearing, CDA Paving's counsel told this Court: "Frankly, I'm not sure that the board would know what to do with an objection in that process."

That comment is not supported by the Idaho Administrative Procedure Act, I.C. § 67-5201 et. seq. Idaho Code § 67-5251 discusses evidence, and states: "The presiding officer may exclude evidence that is irrelevant, unduly repetitious, or excludable on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute or recognized in the courts of this state." If the Commissioners can exclude evidence, any party can certainly make an objection.

Indeed, if there is no objection, the agency is required to include the exhibit as part of the record. *Guillard v. Department of Employment,* 100 Idaho 647, 651, 603 P.2d 981, 985 (1979). The Commissioners would have latitude to determine whether to admit hearsay evidence and would thus be free to exclude hearsay evidence. *Higgens v. Larry Miller Subaru-Mitsubishi,* 145 Idaho 1, 5, 175 P. 3d 163, 167 (2007). In that case, the Idaho Supreme Court recently wrote:

> Under the Idaho Administrative Procedure Act, the [Industrial] Commission may exclude evidence that is irrelevant, unduly repetitious, or excludable on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute or recognized in the courts of Idaho. IDAPA 09.01.06.026.13; I.C. § 67-5251. The Commission is not, however, bound by the Idaho Rules of Evidence. *Stolle v. Bennett,* 144 Idaho 44, 49-50, 156 P.3d 545, 550-51 (2007). The Commission has the discretionary power to consider any type of reliable evidence having probative value, even if that evidence is not admissible in a court of law. *Id.* at 50, 156 P.3d at 551. The Commission has the discretion to admit evidence if "it is a type commonly relied upon by prudent persons in the conduct of their affairs." *Id.;* I.C. § 67-5251. This does not mean, however, that the Commission is required to admit such evidence. Rather, the Commission is given latitude to exclude hearsay evidence.
>
> In the instant action, the Commission excluded statements and testimony from Higgins' coworker Grodi because he was not present when Higgins was confronted by West and Newell and any testimony regarding West and Newell's actions would have been hearsay. Given that the Commission is given latitude to determine whether to admit hearsay evidence, the Commission was free to exclude Grodi's statements and testimony.
>
> The Commission also excluded statements from two of Higgins' former customers, which were offered to corroborate Higgins' assertion that she did not violate company policies, on grounds of relevance. The Commission concluded the customers' testimony would be relevant to whether Larry Miller had cause to discharge Higgins but was not relevant to prove why she quit. Given that the focus of the Commission's inquiry was whether Higgins had good cause to quit and not whether Larry Miller had good cause to terminate her, we conclude the Commission properly excluded the witness's statements and testimony.

145 Idaho 1, 5, 175 P. 3d 163, 167.

In its Prayer for Relief, CDA Paving asks this Court "That this matter be

remanded to the Kootenai County Board of Commissioners with direction for the entry of the Order Approving Coeur d'Alene Paving Inc.'s Application for a Special Notice Permit in Case No. SPN08 -0001." Petition for Judicial Review, p. 3. No request is made for a remand. Even if the facts warranted it (they don't), this Court doubts it can even grant the relief CDA Paving requests. The scope of judicial review of administrative decisions is: "If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary." Idaho Code § 67-5279. CDA Paving hasn't even requested a remand, and a remand, in the best circumstances, is all they would be allowed. Instead, CDA Paving wishes this Court to hand them their permit.

Given the requested relief, CDA Paving's failure to make an objection or in any way attempt to put the Commissioners on notice of any perceived unfairness could be viewed as sandbagging. Essentially, CDA Paving is asking for two bites at the same apple. By making no objection before Commissioners, CDA Paving might get its permit approved. If the Commissioners deny the permit, CDA Paving simply takes these perceived deficiencies, of which CDA Paving never breathed a word to the Commissioners, to this Court, hoping for an outright reversal, not just a remand.

No doubt the Commissioners have a duty to give notice of the view. They did that here. The choice to remain silent on the view, the choice to remain silent at the subsequent hearing regarding the view, and then to continue to remain silent until the Commission entered its decision is a choice by the parties. The Commissioners have absolutely no control over what a party fails to do.

E. Miscellaneous.

Regarding previous permits, CDA Paving argues:

> These orders pertained to approvals for Special Notice Permits for Interstate Concrete and Central Premix., competitors of CdA Paving, who were represented, interestingly, by the Wetzels, now counsel for the intervenors. (R. Vol. 5, pg. 0869)

Appellant's Brief, p. 12. That fact is no more "interesting" than the fact that CDA Paving's counsel used to work as counsel for the Kootenai County Board of Commissioners. Who counsel represented on prior occasions is simply not relevant to any issue before the Court.

F. Automatic Approval.

At oral argument, counsel for CDA Paving argued that if a petitioner satisfies the stated criteria, they are entitled to a permit. On February 13, 2009, CDA Paving submitted "Appellant's A[u]gmentation of Briefs," and argues:

> Where Coeur d'Alene Paving met the same standards in the ordinance as its competitors who received permits, and where all ordinance standards for an asphalt batch plant were met, their permits should have been approved.

Appellant's A[u]gmentation of Briefs, p. 3. Essentially, CDA Paving is arguing it is entitled to automatic approval if it meets the minimum standards found in Kootenai County Code regarding an asphalt or concrete batch plant, § 9-24-33. *Id.* CDA Paving refuses to acknowledge that while the standards are the same and the standards pose minimum requirements, the facts of each case differ. No two identical asphalt batch plants will be placed in the identical circumstances within a community. There are different types of batch plants fueled by different fuels, and the batch plants vary in size and in hours of operation. The locations of the plant can be remote, rural or within residential and commercial areas. Nothing about the Kootenai County Code or the Idaho Administrative Procedures Act provides for automatic approval of a permit if certain minimum standards are met.

G. The Remedy.

The Commission ended its decision as follows:

> Considering the residential and commercial growth in close proximity to this request, it seems most likely that the subject property is not a suitable location for an asphalt batch plant. Negative environmental, social and economic impacts cannot be mitigated in this location. The Applicant could apply for an asphalt batch plant in another location where negative environmental, social and economic impacts have the potential to be mitigated.

R. Vol. 6, p. 923. The last sentence sounds severe, and while it certainly is an option that CDA Paving could select another location, there is nothing keeping CDA Paving from re-applying for a permit for this location. This Court's experience is the Kootenai County Board of Commissioners is usually very good about explaining to an applicant where it finds deficiencies. Some of those deficiencies are explicitly stated: the residential and commercial growth in close proximity to the requested site. Implicit is the concern over odor, raised by Ms. West, specifically raised by Commission Chairman Currie of Ms. Piper, and apparently not explained to his satisfaction by Ms. Piper.

This was a two-to-one vote by the Kootenai County Board of Commissioners. CDA Paving's remedy lies with changing the mind of *one* of the other two Commissioners on a new application. This Court has limited review. 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). This Court must defer to the agency's findings of fact unless they are clearly erroneous. 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, 109 P.3d 1091, 1094 (2005). "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 Commissioners.,* 98 Idaho 730, 731, 572 P.2d 164, 165 (1977).

H. Attorney's Fees.

CDA Paving claims it is entitled to attorney's fees pursuant to I.C. § 12-117, in the event the Court finds it is the prevailing party in this matter. CDA Paving is not the prevailing party. The Board has not made a claim for attorney's fees in its brief.

IV. CONCLUSION AND ORDER.

IT IS HEREBY ORDERED, based upon the reasons stated above, the Board's denial of the zoning change is AFFIRMED, CDA Paving's Motion to Remand is DENIED, and CDA Paving's request for attorney fees is DENIED as CDA Paving is not the prevailing party.

Entered this 18th day of February, 2009.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of February, 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 #
Erika B. Grubbs	762-3819	Jethelyn H. Harrington	446-1621
Steven C. Wetzel	664-6741		

_____
Jeanne Clausen, Deputy Clerk