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**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO IN AND FOR THE COUNTY OF BONNER**

**RICHARD NOBLE, ORREN OVERLAND )  
and VIRGINIA OVERLAND, and KENNTH )  
O. LARSON, )**

*Petitioners/Appellants,* )

vs. )

**BONNER COUNTY, a political subdivision )  
of the STATE OF IDAHO, acting through )  
the BONNER COUNTY BOARD OF )  
COMMISSIONERS; LEWIS RICH, )  
Chairman, JOE YOUNG and TODD )  
CROSSETT, COMMISSIONERS, in their )  
official capacities, )**

*Respondents,* )

**MORTON SLOUGH ESTATES, LLC, )**

*Intervenor.* )

Case No. **S CV 2008 1604**

**MEMORANDUM DECISION AND  
ORDER ON ADMINISTRATIVE  
APPEAL OF BONNER COUNTY  
BOARD OF COUNTY  
COMMISSIONERS' DECISION**

**I. PROCEDURAL HISTORY AND BACKGROUND.**

Petitioners appeal from the Bonner County Board of County Commissioners' (Board) decision granting Intervenors' application for conditional use permit for a 33-lot Planned Unit Development (PUD) and preliminary plat known as "The Ledges Over Pend Oreille" (Ledges), located off of Lake Shore Drive in Bonner County, Idaho. On May 20, 2008, the Planning Commission recommended disapproval of conditional use permit for the PUD by a four-to-two vote. Tr. May 20, 2008, p. 55, L. 9 – p. 57, L. 10.

On August 13, 2008, the Board voted two to one approving the conditional use permit for the PUD and preliminary plat. Tr. August 13, 2008, pp. 22, L. 11 – p. 24, L. 5; C-RP pp. 462-79. The proposed PUD is on 370 acres in a rural zone. Phase 1 consist of six lots adjacent to the Morton Slough on the Pend Oreille River and five lots on the bench above the Slough. Phases 2 to 5 consist of 22 lots overlooking the river on benches situated above steep hillsides.

Petitioners Noble, Overland and Larson each filed separate petitions; however, all were later consolidated with Noble's petition. Petitioners appeal the Board's decision, arguing the Board's decision: constituted violations of constitutional and statutory provisions; was made in excess of the Board's statutory authority; was made upon unlawful procedure; was contrary to substantial evidence in the record; and was, as a whole, arbitrary, capricious and an abuse of discretion. Specifically, petitioners argue the danger of wild fires was not properly emphasized in the decision-making process, the Board erred in finding the application provided for proper road access, the Board failed to consider endangerment to the Morton Slough Area in violation of the Comprehensive Plan, the Board failed to consider the risks of landslides in violation of the Comprehensive Plan, and that the Board violated § 12-22 of the Bonner County Code in regards to open space having a functional relationship with future residents.

Petitioners filed their "Opening Brief of Petitioners/Appellants on Petition for Judicial Review" on February 20, 2008. On March 30, 2009, intervenors filed their "Brief of Intervenors in Response to Petitioners' Opening Brief." On April 3, 2009, Respondent Board filed "Respondent's Brief". On April 24, 2009, petitioners filed their "Reply Brief of Petitioners/Appellants on Petition for Judicial Review." On April 30, 2009, the intervenors filed "Intervenor's Augmentation of Brief." Oral argument was

held May 12, 2009. On May 13, 2009, the Board filed its “Amended Respondent’s Augmentation of Brief.” The matter is now at issue.

## II. STANDARD OF REVIEW.

The standard governing judicial review of County Board of Commissioners’ decisions regarding subdivision applications was set forth in *Urrutia v. Blaine County*, 132 Idaho 353, 357, 2 P.3d 738, 742 (2000):

The Idaho Administrative Procedures Act (IDAPA) governs the review of local administrative decisions. *Comer v. County of Twin Falls*, 130 Idaho 433, 437, 942 P.2d 557, 561 (1997). In an appeal from the decision of a district court acting in its appellate capacity under the IDAPA, this Court reviews the agency record independently of the district court’s decision. *Id.*; *Howard v. Canyon County Bd. of Comm’rs*, 128 Idaho 479, 480, 915 P.2d 709, 710 (1996). The Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. I.C. § 67-5279(1). The Court instead defers to the agency’s findings of fact unless they are clearly erroneous. *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998) (citing *South Fork Coalition v. Board of Comm’rs of Bonneville County*, 117 Idaho 857, 860, 792 P.2d 882, 885 (1990)). 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. *Id.* Here, the Board is treated as an administrative agency for purposes of judicial review. See *South Fork*, 117 Idaho at 860, 792 P.2d at 885. The Court may overturn the Board’s decision where the Board’s findings: (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. § 67-5279(3). The party attacking the Board’s decision must first illustrate that the Board erred in a manner specified in I.C. § 67-5279(3), and then that a substantial right has been prejudiced. *Price v. Payette County Bd. of County Comm’rs*, 131 Idaho 426, 429, 958 P.2d 583, 587 (1998). If the Board’s action is not affirmed, “it shall be set aside ... and remanded for further proceedings as necessary.” I.C. § 67-5279(3).

See also, *Neighbors for a Health Gold Fork v. Valley County*, 145 Idaho 121, 126, 176 P.3d 126, 131 (2007); *Lane Ranch Partnership v. City of Sun Valley*, 144 Idaho 584, 588, 166 P.3d 374, 380 (2007); *Lamar Corp. v. City of Twin Falls*, 133 Idaho 36, 43, 981 P.2d 1146, 1153 (1999).

### **III. ANALYSIS.**

This Court finds the Board's eighteen pages of findings in support of its conclusion that the proposed PUD is in accordance with the Bonner County Comprehensive Plan, addressing in relevant part, hazardous areas, community design, land use, special areas or sites, and natural resources (Tr. August 13, 2008, pp. 22, L. 11 – p. 24, L. 5; C-RP pp. 462-79) is supported by substantial competent evidence in the record, and is not clearly erroneous.

#### **A. The Board Properly Considered Evidence of Fire Danger.**

Petitioners' first argument is that while the Board noted the danger of wild fires, it did not properly emphasize those dangers. Opening Brief on Petition for Judicial Review, p. 7. Petitioners point out the concerns held by Idaho Department of Lands' (IDL) Fire Warden Chris Remsen that the topography of areas northwest of Phases 2 to 5 was steep and had slopes upwards of 70 percent. *Id.* Petitioners also point out that Sagle Fire District's Fire Chief Robert Goodyear, at an August 13, 2008, the Board devoted solely to the fire danger issue, reversed his previous opinion regarding access road slopes, mitigation of fire danger through fire sprinkler installation. *Id.*, p. 8. Specifically, petitioners make the following arguments: (1) the International Fire Code (IFC), codified at Idaho Code §§ 41-253 to 41-269, is law in Bonner County and the Board disregarded the Code by voting to approve the PUD; (2) the Board erred in not accepting Chief Goodyear's testimony that any lesser standards than the IFC are not acceptable and his previous acquisition to a higher (more than 10%) road grade and sprinklers as mitigation had been made before the Sagle Fire District had adopted the IFC; (3) Commissioners Young and Rich engaged in improper conduct, relying on information not in the record, because Commissioner Young had contacted Kootenai

County Commissioner Currie to inquire whether Kootenai County had adopted the International Fire Code, and Commissioner Rich had spoken with unnamed commissioners at a Boise meeting where he learned other small counties had not adopted the IFC, and, additionally, Commissioner Rich spoke about his thinking based on his prior experience as a fire district commissioner; (4) the Board failed to properly take into account that excessive grades, dead-end roads, and steep slopes on the property at issue could not properly be mitigated through sprinklers and the Board had erred in accepting Intervenors' position that the IFC did not apply; (5) the IFC and Local Land Use Planning Act (LLUPA) are mandatory and the Board member voting to approve the PUD and preliminary plat willfully and knowingly violated the law; and (6) the Board erred in balancing whether or not to apply the IFC, a statute adopted by the Idaho Legislature and confirmed by the Idaho Attorney General. Opening Brief on Petitioner for Judicial Review, pp. 7-22.

In reply to petitioners' arguments regarding the IFC, intervenors note: "The IFC has been adopted by the State of Idaho as a statewide standard." (citing I.C. § 41-253). Brief of Intervenor, p. 10. Intervenor also note: "Fire Chiefs have authority to enforce the IFC within their jurisdictions." (citing I.C. §§ 41-254(1), 31-1417(9)). *Id.* Intervenor claim the conditions of approval did not allow a lesser standard than the one found in the IFC and the County was not required to have the Fire District sign off on approval of the PUD and preliminary plat. Brief of Intervenor, p. 10. Specifically, Intervenor state Bonner County's private road standards are either consistent with the IFC or permit discretionary variations which are also consistent with variations allowed under the IFC. *Id.*, p. 11. Intervenor claim that because both the IFC and Bonner County land use code state road grades may not exceed 10%, and both provide grades steeper than

10% may be approved by the Fire Chief (IFC) or Bonner County (Bonner County Private Road Standards Manual), the Board properly exercised its discretion in approving a variation from the 10% standard grade. *Id.*, citing C-RP p. 145; IFC § D103.2; C-RP p. 144, IFC § 502.2.7, Exhibit C-1; (Bonner County) Private Road Manual § 2.6A, p. 5.

As argued by Intervenors, the Bonner County Private Road Standards Manual provides variations to grades steeper than 10% “may be approved” by the County where an applicant provides evidence that the steeper grades are necessary and can accommodate fire and emergency vehicles. Private Road Standards Manual, p. 5. Intervenors argue their inability to secure an easement to create a longer and less steep road made the variation necessary. They also argue an alternative to the steep grade was rejected because of visual impacts. Brief of Intervenor, p. 7. Intervenors next state the roadway at issue can accommodate fire and emergency vehicles and point to evidence in the record that, *inter alia*, the roadway was signed off on by a contract engineer and the county engineer, water tender and engines can negotiate grades over 10% but take longer to do so, and emergency vehicles such as ambulances can negotiate 15% grades. *Id.* Regarding the fire chief’s approval of variation from the IFC standards, Intervenors state the fire chief does not have sign-off authority for approval of plat applications and Bonner County has not delegated plat application approval authority to fire districts. *Id.*, pp. 12-13. Intervenors argue that if a county chooses to enforce a fire code, Idaho Statutes require the only fire code a county shall enforce is the IFC. *Id.*, citing I.C. § 41-253(1). Neither the Local Land Use Planning Act nor the Idaho statutes concerning fire districts require fire marshalls or fire chiefs to approve plat applications. *Id.* Bonner County could delegate enforcement of their local land use code by requiring applicants to obtain agency approval of plat applications, but other

than Panhandle Health District, Bonner County has not delegated plat application authority to any other agency, including the fire districts. *Id.* Petitioners point out that at the August 13, 2008, public hearing on this project, Bonner County Deputy Prosecuting Attorney Scott Bauer stated that the IFC applied in Bonner County. Reply Brief on Petition for Judicial Review, p. 15.

Scott Bauer: I've limited my review to this, just to the applicability of the IFC here, and there's no question at all that the IFC has been adopted by the state and that it does apply in Bonner County.

Tr., August 13, 2008, p. 5, LI. 21-23. However, petitioners misleadingly omit the following portions of Bauer's statement that *immediately* follow the portion quoted above by petitioners:

The question is, whether the board of commissioners and – looking in the context of the local land use planning act, is required to impose IFC conditions, if it's their role, if it's the board's role to do it. There's no question that the fire chief, not only has the authority but the duty to enforce the International Fire Code, and the fact of the matter is they're a separate jurisdiction from the Bonner County Board of Commissioners. The standards that are in our code for variance of slope and width are relatively open-ended. The board could, in its' discretion, take the IFC into consideration, and decide maybe that—and historically we haven't applied IFC variance provisions strictly and maybe we should. *It's a discretionary matter though with the board, because the county code has not adopted the International Fire Code.* And the reason that's important is because the local Land Use Planning Act—the Local Land Use Planning Act provides—it hasn't been linked precisely and expressly with the International Fire Code. There's an attorney general opinion out there that linked the International Fire Code with the International Building Code. And it did it in an interesting way. I don't know what I think about that, but the fact of the matter is, we haven't adopted the International Building Code. So that kind of argument's not there. So, we have International Fire Code, it does apply in the county, the authority that has the duty to enforce it is the fire district. Whether they do it, they have access to their own legal counsel through statute, whether they will bring an action to enforce it if they believe that it's in violation, that's their own decision, it's not your decision. \* \* \* *I did a brief review of the AG's opinion and the various acts and I feel like the commissioners, again, could—it's in their discretion to apply the International Fire Code strictly or it's in their discretion to look at all the factors as they bear on our comp plan policies and that.* So, I don't know if that helps too much, but, that's the best I can

do.

Tr., August 13, 2008, p. 6, L. 23 – p. 6, L. 18; p. 7, Ll. 9-13. (italics added). Thus, petitioner's claim that the IFC applies in Bonner County is not supported by the statement of the Board's attorney Scott Bauer. Bauer also furnished a set of provisions from the Bonner County Revised Code which show the "limited circumstances in which fire codes are referenced in the Bonner County Code." Amended Respondent's Augmentation of Brief, pp. 2-4. None of those provisions deal with road grades, and none of those provisions adopts the IFC in its entirety, and none of those provisions discusses whether the fire chief signs off on plat approval. One of the provisions discusses road width, but only as to cul-de-sacs and hammerhead turnarounds, and another provision requires a travelway width of 22 feet on low-volume local roads. *Id.*, pp. 3-4.

Indeed, the only applicable reference to the fire district in the Bonner County Revised Code is at § 12-268, on the Application Process, general provisions. Where an application has been submitted for action, it shall be processed as follows:

(d) When the Planning Director has determined the application is complete and in compliance with this Title, the Planning Director shall send copies of the application to public agencies and entities that may be affected by the proposal, including but not limited to the health district, fire districts, irrigation or drainage districts, sewer and water districts, school districts, solid waste and transportation agencies and fish and wildlife agencies. The agencies shall have thirty (30) days to comment on the application.

BCRC § 12-268(d). Thus, the evidence which was before the Commissioners was that the greater than usual grade was necessary and still accommodated emergency and fire vehicles. Chief Goodyear himself presented conflicting evidence to the Board, but the Board's reliance on his statement that his equipment could traverse a slope greater than 10%, albeit in a less timely fashion, was not clearly erroneous and is supported by

substantial competent evidence in the record. As the Board's actions were within the discretion afforded by the IFC, the Idaho Code, and the Bonner County Revised Code, the Board did not act willfully and knowingly in derogation of the law.

Under both the IFC and the Bonner County Private Road Manual, there is evidence to support the decision to exceed the 10% maximum grade standard because there was a showing of necessity and a showing that emergency vehicles could negotiate the roadway. Chief Goodyear testified his equipment could negotiate the steeper grades, but that it would take more time. Tr. July 23, 2008, p. 17, L. 16 – p. 18, L. 14.

Similarly, the additional access issue was addressed by Intervenors who argue construction of multiple fire apparatus roads is desirable, but not mandatory for plat approval. Brief of Intervenor, p. 7. It is important to note that with respect to the access-road, dead-end, and turning radius requirements, all of which are found in Appendix D, Fire Apparatus Access Roads, to the IFC, the Code states, "The provisions contained in this appendix are not mandatory unless specifically referenced in the adopting ordinance." Idaho Code § 41-253 adopts the 2000 edition, with appendices, and later published editions adopted by the fire marshal. I.C. § 41-253(1). To the extent that Appendix D has been "specifically" adopted (and the provisions in the Appendix are certainly not "specifically referenced" in the adopting statute), Intervenors' argument as to the exception to the additional access where all dwelling units are equipped with an approved automatic sprinkler system is sound. The Board conditionally approved the PUD in part upon all dwellings having approved sprinkler systems. In so doing, the Board recognized the mitigation offered by Intervenors negates the requirement for access from two directions. The IFC specifically allows this

exception:

Exceptions: Where there are more than 30 dwelling units on a single public or private fire apparatus access road and all dwelling units are equipped with an approved automatic sprinkler system in accordance with [sprinkler design specifications] access from two directions shall not be required.

Brief of Intervenor, p. 12, citing IFC § D107.1(1), Exhibit C-4. The IFC also allows for discretion as to road width if the road is 750 feet or more and dead-ends. *Id.*, citing IFC § D103.4, Exhibit C-2. The County standards also allow discretion in roadway design where the topography is restrictive. Private Road Manual § 2.6, pp. 5-6.

Pertaining to the Attorney General's letter, it is important to note that opinions of the attorney general are entitled to deference, but are "considered advisory and not binding on the courts." *Holly Care Center v. State, Dept. of Employment*, 110 Idaho 76, 82, 714 P.2d 45, 51 (1986). Ultimately, the Board's actions, although not favorable to petitioners, were nevertheless in compliance with the IFC, Idaho laws, and the Bonner County Revised Code.

As to petitioners' due process argument regarding discussions disclosed by Commissioners Young and Rich, Intervenor's argue the contacts were *de minimus*, were fully disclosed, and the two Commissioners involved were not biased. Brief of Intervenor, p. 16. Further, Intervenor's point out the Board's discussions Commissioners Young and Rich had with other county commissioners regarding the IFC and with residents of other counties regarding defensible space demonstrate the Commissioners in fact considered thoroughly all evidence regarding fire danger:

Indeed, the record as a whole clearly shows that the commissioners carefully and fully considered the evidence of fire danger and roadway impairment.

Brief of Intervenor, p. 17.

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, 127, 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 Comm'rs of Fremont County*, 143 Idaho 501, 510, 148 P.3d 1247, 1256 (2006). A local governing body sits in a quasi-judicial capacity when it applies general rules or policies to specific individuals, interests, or situations, and therefore must comply with due process requirements. *Cooper v. Board of County Comm'rs of Ada County*, 101 Idaho 407, 410, 614 P.2d 947, 950 (1980). In *Eacret v. Bonner County*, 139 Idaho 780, 86 P.3d 494 (2004), the Idaho Supreme Court determined that a Commissioner's pre-hearing *ex parte* contacts with an applicant himself regarding the variance at issue revealed a lack of impartiality and denial of an opportunity for opponents to the variance to challenge or answer the *ex parte* evidence. *Eacret*, 139 Idaho at 787, 86 P.3d at 501. The requirement that any *ex parte* communication be disclosed and include a "general description of the communication" has been met here. See *Eacret*, 139 Idaho 780, 786, 86 P.3d 494, 500 (quoting *Idaho Historic Preservation Council v. City Council of City of Boise*, 134 Idaho 651, 656, 8 P.3d 646, 651 (2000)). *Idaho Historic Preservation Council* involved *ex parte* contacts violative of procedural due process where members of the City Council received phone calls from concerned citizens. 134 Idaho 651, 654, 8 P.3d 646, 649. The Idaho Supreme Court determined due process requirements were not met because the callers' names and identifying information were not disclosed, nor was the nature of the discussions revealed. 134

Idaho 651, 656, 8 .3d 646, 651. It is unclear whether petitioners were present at the public hearing during reference by the Commissioners to the alleged *ex parte* communications, but they argue there was no “invitation from Chairman Rich for further testimony countering what he had said.” Opening Brief on Petition for Judicial Review, p. 15. Nevertheless, the alleged *ex parte* contacts in this case differ greatly from those in *Eacret* and those in *Idaho Historic Preservation Council*. Here, the *ex parte* contacts were not with proponents of change, but with relatively disinterested persons. None of the *ex parte* contacts dealt directly with this application: 1) Commissioner Young and Commissioner Rich had discussions with other county commissioners were about whether their counties have or should adopt the IFC, and 2) Commissioner Rich’s discussions in the past with residents in another fire district about why they failed to maintain defensible space around their large homes in the woods. The *ex parte* contacts amounted to investigation of the merits or demerits of a proposed change (adoption of the IFC), and the occurrence and nature of the contacts were disclosed on the record. See *Tierney v. Duris*, 21 Or.App. 613, 536 P.2d 435, 443 (1975). Despite having had discussions with other commissioners and certain homeowners, there is only evidence on the record that Commissioner Rich, in the discussions leading up to the vote, spoke of his having spoken with homeowners in the Northside Fire District who had no defensible space; his concern about wildfire danger was had ample opportunity to challenge, answer, or rebut the same. And because the Board set forth its reasoning clearly in its Order containing 17 findings of fact, addressing each goal of the Comprehensive Plan, providing four paragraphs of analysis and reaching the conclusion, petitioner has failed to demonstrate that the Board relied on any inappropriate *ex parte* communications.

## **B. The Board Properly Considered Access to Lakeshore Drive.**

Petitioners argue the Bonner County Public Road Standards require a 60-foot easement for developer to build a public road or where a road will be turned over to the county for maintenance, and Blue Dog Road, the road providing access to Lakeshore Drive, an existing public right-of-way, is only 50 feet in width. Reply Brief on Petition for Judicial Review, pp. 3-12. Therefore, petitioners argue there is no proper public road access to the PUD site. *Id.*, pp. 10-11. Intervenors respond Blue Dog Road will be extended to provide legal access to Lake Shore Drive, and the 60-foot right-of-way requirement does not apply as Blue Dog road is not a new road, but is an existing road dedicated to the public and legally recorded. Brief of Intervenor, p. 18.

The Bonner County Revised Code states, in relevant part:

All proposed lots less than five (5) acres gross shall have direct frontage on, and direct access to, a public right of way. Cluster lots less than five (5) acres gross in a conservation subdivision within the Rural, Agricultural/Forestry, and Forestry districts are exempt from this requirement. Right of way offered for dedication in any zoning district shall be developed with a road constructed to the standards set forth in title 2 of this code. Such road may be maintained privately or by a public highway agency.

BCRC § 12-624(d). Here, the Board found that access to the site is via Lakeshore Drive, and access to all for the proposed lots would be by construction of a new interior private road system. Decision Letter, R. p. 463. In its Decision Letter, the Board requires the following plat note:

The roads within this subdivision are private, and have not been constructed to county standards for maintenance. These roads shall be maintained at the sole expense of the property owners until such time as it is constructed to county standards for maintenance at no expense to the taxpayers and is dedicated to the public system by the lot owners and accepted into the county's maintenance system by the Bonner County Board of Commissioners.

Decision Letter, R., p. 476. As a specific plat condition, the Board wrote:

Prior to final plat recording for each phase, all roads within the respective phase of the subdivision shall meet the latest private road standards for a low volume "C" road, consistent with Title 12, Appendix A, Bonner County Revised Code, with variations to standards as approved at Condition A-6 [relating to the maximum road grade and access to lots less than 5 acres in size]. The road improvements shall be constructed and certified in writing by a professional engineer as complete, in accordance with the private road standards and variations, as approved, prior to recording the plat. Two copies of the engineer-certified final road construction report and as-builts, pursuant to Section 3.9 of Appendix A, shall be submitted to the Planning Department prior to final plat approval. The private easements serving the subdivision shall be dedicated to the homeowners association on the final plat, to the satisfaction of the Bonner County Planning Department. The final plat shall indicate all cut and/or fill slope easements based on the as-built drawings.

Decision Letter, A.R., p. 477. The Board and petitioners disagree as to whether the proposed roads would meet the low volume "C" road standards. Petitioners' Opening Brief on Petition for Judicial Review, p. 4; Respondent's Brief, pp. 3-5. At issue is whether ten vehicle trips per household would exceed the 200 vehicle trips per day maximum found in the Road Standards manual. *Id.* Both parties agree that 22 lots in phases 1 through 5 would exceed this maximum by 10%. *Id.* But, as the Board goes on to argue, the Bonner County revised Code permits for variations of minimum development standards, and the Board in its Decision Letter specifically conditioned plat approval upon all private roads meeting the private road standards for a low volume "C" road. Respondent's Brief, p. 5.

Intervenors' counsel noted at oral argument that this is a "rural district" pursuant to Bonner County Revised Code § 12-821 (attached to Intervenor's Augmentation of Brief). The Board's August 18, 2008, approval letter indicates it is pursuant to Section 12-821. R. p. 464. Under that section, all that is needed is "legal access" which is defined as: "A public or recorded private thoroughfare which affords a primary means of access to adjoining properties." BCRC § 12-202(g) (attached to Intervenor's

Augmentation of Brief). Petitioners seem to be confusing the applicant/Intervenor's ability to improve an existing public right of way with the criteria for acceptance for a new public road dedication. This Court finds intervenors have "legal access", and that the Board's findings in that regard (R. pp. 463, 465) are supported by substantial competent evidence.

**C. The Board Properly Considered Danger to the Morton Slough Area, Landslides, and Unused Spaces in Light of the Comprehensive Plan.**

Petitioners argue the Board failed to comply with the Bonner County Comprehensive Plan in not properly considering adverse impacts on the Morton Slough Management Area, dangers of landslides, and unused open spaces on the site at issue. Opening Brief on Petition for Judicial Review, pp. 24- 29. Intervenor's reply that the Board properly considered each in turn. Brief of Intervenor's, pp. 19-21. First, the Board received and reviewed a letter from the Idaho Department of Fish and Game concerning fish and wildlife and imposed all eleven recommendations of the Department in its Decision Letter. See A.R., p. 475. Second, the Board relied on substantial evidence in the record in concluding the PUD site was not dangerously unstable and prone to mass landslides. See A.R., p. 468. Finally, the Board relied on the Department of Fish and Game's recommendation to cluster homes and maximize open space in determining that the open space bears a functional relationship with the residents in the PUD. See A.R. p. 412. In the Board's discussion prior to approval, Commissioner Young stated:

And that's why we've been supportive, especially on new land use codes, Planned Unit Developments, because it gives twice as much common area and more protection to wildlife corridors and all those kinds of things. So, there's actually less density and more open space left over in a PUD than in a standard five acre subdivision, which they could do also....I like the Planned Unit Development concept a lot better, because I think you're using the land, or designing it—the future development so what the land is on the ground, not just saying, hey, I got this much space and I just cut it all up, like the Rathdrum aquifer again.

August 13, 2008, Tr., p. 19.

### III. CONCLUSION AND ORDER.

The Board made eighteen pages of findings in support of its conclusion that the proposed PUD is in accordance with the Bonner County Comprehensive Plan, addressing in relevant part, hazardous areas, community design, land use, special areas or sites, and natural resources. Tr. August 13, 2008, pp. 22, L. 11 – p. 24, L. 5; C-RP pp. 462-79. 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, 588, 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). Here, there is ample evidence in the record which a reasonable mind might accept to support the conclusion that the conditional approval of the PUD and preliminary plat is appropriate.

**IT IS HEREBY ORDERED** the decision of the Bonner County Board of County Commissioner's approval of the Conditional Use Permit for a Small-Scale Planned Unit Development – File C889-07 and The Ledges Over Pend Oreille, Preliminary Plat – File S1509-07, is AFFIRMED, and the Petitioners' Petition for Judicial Review is DENIED.

Entered this 14<sup>th</sup> day of July, 2009.

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John T. Mitchell, District Judge

#### Certificate of Service

I certify that on the \_\_\_\_\_ day of July, 2009, a true copy of the foregoing was mailed

postage prepaid or was sent by interoffice mail or facsimile to each of the following:

<u>Lawyer</u>	<u>Fax #</u>
Scott W. Reed	208 765-5117
William M. Berg	208 263-7557

<u>Lawyer</u>	<u>Fax #</u>
Scott Bauer	208 263-6726

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Deputy Clerk