



before Hearing Examiner Rebecca Zanetti on December 20, 2007. Zanetti recommended approval with conditions. Findings of Fact, Applicable Legal Standards, Comprehensive Plan Analysis, Conclusions of Law and Findings, Order of Decision and Conditions of Approval, A.R., pp. 1715-1724. This matter then went before the Board of Commissioners (Board) for hearing on January 10, 2008. On January 7, 2008, applicants Tysdals made a request for a public hearing to appeal the conditions Zanetti placed upon approval. The Board granted this request on January 10, 2008. A.R., p. 1727.

Thereafter, applicants withdrew their permit application “to make some changes to our property and our plans and possibly re-apply at a later date.” The public hearing before the Board was cancelled. In December 2008, applicants sent a letter to the County, addressed to John Cafferty at the (then) Kootenai County Legal Services, inquiring whether the operation they sought to engage in on their property would even require a conditional use permit, and, if so, what type of conditional use permit. A.R., pp. 51-52. On April 1, 2009, the County replied via a letter authored by Scott Clark (Clark), the Director of the Building and Planning Department. *Id.*, pp. 81-83. In his letter, Clark wrote:

I have determined, pursuant to section 9-21-7(A) [of the Kootenai County Code], that the contemplated use [of your property] is most similar to, and possibly a lesser form of, a commercial resort. This is because the contemplated use is proposed to be conducted for profit, and because the activities contemplated for the property include recreational and commercial activities similar to those allowed under the performance standards for commercial resorts set forth in section 9-24-5.

*Id.*, p. 82. A Notice of Public Hearing was again issued, with the hearing before the Board to be held on July 9, 2009. The public hearing was rescheduled for August 13, 2009, after the Building and Planning Department discovered two adjacent land-owners

had not received notice. A.R., pp. 1729- 1731. The public hearing was then again rescheduled to September 16, 2009, after the Building and Planning Department noted the parcel information on the notice was incorrect. *Id.*, p. 1732. When the matter came before the Board for public hearing on September 16, 2009, the Board was informed the property at issue had been reduced from 25 to 20 acres because of lot line adjustments. Counsel for the Board informed the Board this change would not constitute a significant change to the application because “the acreage in which the activity is subject to the permit application (inaudible) would not change.” Tr., p. 67, Ll. 11-13. The Board determined that a site visit would be appropriate and visited the property on September 17, 2009, during which the Board conducted sound level tests. A continuation of the September 16, 2009, public hearing was held on October 1, 2009. The Board then voted to approve the CUP by a vote of two to one. The final Order of Decision was signed on November 5, 2009, in a twenty-one page decision by the Board. A.R. Vol. 9, pp. 2030- 2051.

Petitioner SARP timely sought judicial review of the decision, filing their Petition for Review on December 2, 2009, creating this appeal. The extensive administrative record and transcript has been reviewed by this Court. On April 30, 2010, SARP filed “Petitioner’s Brief on Appeal.” On June 4, 2010, the Board filed its “Brief of Respondents.” On July 2, 2010, SARP filed “Petitioner’s Reply Brief.” Oral argument was held in this appeal on November 4, 2010.

## **II. STANDARD OF REVIEW.**

The applicable standard of review is well settled:

The Idaho Administrative Procedures Act (IDAPA) governs the review of local zoning decisions. *Price v. Payette County Bd. of County Comm'rs*, 131 Idaho 426, 429, 958 P.2d 583, 586 (1998). In an appeal from the decision of the district court acting in its appellate capacity under the

IDAPA, the Supreme Court reviews the agency record independently of the district court's decision. *Stevenson v. Blaine Co.*, 134 Idaho 756, 759, 9 P.3d 1222, 1225 (2000). The Court does not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 67-5279(1). The Court defers to the agency's findings of fact unless they are clearly erroneous. *Stevenson*, 134 Idaho at 759, 9 P.3d at 1225. 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 evidence in the record. *Id.*

There is a strong presumption favoring the validity of the actions of zoning boards, which includes the application and interpretation of their own zoning ordinances. *Howard v. Canyon County Bd. of Comm'rs*, 128 Idaho 479, 480, 915 P.2d 709, 711 (1996). The Court defers to the Board's interpretation and application of its zoning ordinance, unless such interpretation or application is capricious, arbitrary or discriminatory. *Rural Kootenai Organization, Inc. v. Board of Comm'rs*, 133 Idaho 833, 842, 993 P.2d 596, 605 (1999).

The Board is treated as an administrative agency for purposes of judicial review. *Stevenson*, 134 Idaho at 759, 9 P.3d at 1225. A Board's zoning decision may only be overturned where its 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; or (e) are arbitrary, capricious, or an abuse of discretion. I.C. §§ 67-5279(3)(a)(e); see also *Payette River Property Owners Ass'n v. Board of Comm'rs of Valley County*, 132 Idaho 551, 554, 976 P.2d 477, 480 (1999). The party attacking a zoning board's action under I.C. § 67-5279(3) must first demonstrate that the zoning board erred in a manner specified in I.C. § 67-5279(3) and must then show that a substantial right of the party has been prejudiced. *Id.*; see also *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998).

*Whitted v. Canyon County Board of Com'rs*, 137 Idaho 118, 121, 44 P.3d 1173, 1176 (2002).

### III. ANALYSIS.

#### **A. Was the Grant of a Conditional Use Permit Beyond the Board's Statutory Authority, Arbitrary and Capricious, and/or Supported by Substantial and Competent Evidence?**

Petitioner SARP argues the applicant's wedding reception facility is a prohibited use in the rural zone. Petitioner's Brief on Appeal, p. 7. And, SARP notes the use

proposed by applicants does not fall within any defined permitted conditional use. *Id.*, p.

8. SARP argues:

If [the proposed use] is not a permitted use, and is expressly defined as a prohibited use (commercial) and does not fall within the definition of any permitted conditional uses allowed by the Kootenai County Code, then the application should have been **denied** outright.

Instead, the Building and Planning Department allowed the Applicant another bite at the apple by classifying their proposed use as a “commercial resort.”

*Id.*, p. 9. (emphasis in original). SARP argues this classification by Clark was arbitrary and capricious because (1) the proposed use as a wedding reception facility is unlike the definition of the term “commercial resort” found in the Kootenai County Code and (2) Clark did not follow the procedure found in § 9-21-7 of the Kootenai County Code for determination of appropriate classification of a new or unlisted form of land use. *Id.*, pp. 11-13. Next, SARP argues the applications submitted themselves constitute a “moving target” and substantial changes had been made following the original application. *Id.*, p. 16. In their Reply Brief, Petitioners further flesh out this argument, stating Kootenai County Code § 9-21-7(A) violates the Due Process and Equal Protection Clauses of the Idaho Constitution and is rendered invalid because it conflicts with I.C. §§ 67-6501 *et seq.* by permitting the County to make an independent determination that a proposed use is “similar to or a lesser form of a conditional use”. Petitioner’s Reply Brief, pp. 3, 6-7. “The problem in this case is that the aggrieved party (i.e., Petitioners) did not have any advanced notice that this use was going to be classified as a ‘similar to or a lesser form’ of a ‘commercial resort.’” *Id.*, p. 7. Finally, SARP argues the Board inappropriately waived codified design standard requirements related to landscaping, paving of driveways, fencing, and parking. Petitioner’s Brief on Appeal, p. 18.

In response, the County argues the Board’s confirmation of Clark’s designation of

the property as fitting within the definition of a “commercial resort” was proper. Brief of Respondents, p. 13. The County states Clark’s analysis in determining the wedding reception facility was similar to, and possibly a lesser form of, a commercial resort is expressly provided for in § 9-21-7 of the Kootenai County Code. *Id.*, p. 15. The County argues:

Subsection (A) of that section states that if a proposed use is found not to correspond exactly with a use specified in the Zoning Ordinance, “[t]he Administrator shall make a determination whether the requested use is similar to or a lesser form of a permitted or conditional use of the particular zone.” If this finding is made, “all performance standards, hearing requirements, and other provisions of this title or any other applicable ordinance shall be met.” K.C.C. § 9-21-7(A). The question is to be referred to the Planning Commission only if the Administrator cannot make that finding and instead finds that it is a new or unlisted use.” *Id.* Because Mr. Clark found that the uses contemplated in the Tysdals’ CUP application were “most similar to, and possibly a lesser form of, a commercial resort, “the provisions regarding referral of the question to the Planning Commission did not apply.

*Id.* (emphasis in original). The Board argues Clark’s findings find ample support in the record, when comparing the proposed activities in the applications with the definition of and minimum standards for a commercial resort. *Id.*

In responding to SARP’s passing mention that no bed and breakfast would be allowed to be operated alongside the wedding reception facility proposed (Petitioner’s Brief on Appeal, p. 11), the Board states the bed and breakfast request was included in the application as a possible future use so that such a use would be permitted as part of the CUP. Brief of Respondents, p. 17. The Board argues:

[C]ommercial resorts are allowed a variety of overnight accommodation options which are much more intensive uses of the property than a B&B. Therefore, B&Bs are among the uses which may be allowed pursuant to a CUP for a commercial resort.

*Id.* The Board urges this Court to find substantial evidence underlying the decisions of the Hearing Officer, Building and Planning Department, and the Board. *Id.*, pp. 18-21.

The Board notes each political subdivision would be able to provide and/or approve necessary services to the property if the CUP were to be approved. *Id.*, p. 19. Each goal of the Comprehensive Plan was addressed by the Board; and the Board did identify potential impacts upon air quality, water quality, and transportation, but the Board determined these could be mitigated via conditions placed upon approval of the CUP. *Id.* Conditions of Approval set forth by the Board in its Order of Decision include: the CUP is limited only to the current owners and is not transferrable to other owners or sites; the project must substantially comply with the Revised Narrative and Project Clarification information and site plans submitted; restroom and septic facilities must be installed prior to start of operations; site improvements shall require a Site Disturbance Permit; sewage disposal shall comply with Panhandle Health District requirements; requirements of Kootenai County Fire and Rescue and the Post Falls Highway District must be conformed to; parking shall not be on-street and must be site-obscured; the number of participants in any event shall not exceed 250, including attendees, food service, speakers, support/crew, etc.; parking spaces shall be limited to 150 as depicted in the site plan; noise leaving the property shall not exceed 70 decibels; outside lighting shall be downward-directed and window lighting at night shall be controlled and reduced through shades, drapes, or blinds; full-scale operations shall be limited to April 1 to November 1 and occasional special events may be allowed where notice to the Building and Planning Department received notice no less than 5 days before the event; hours of operation are limited to 9:00 AM to 10:00 PM, with all noise ceasing at 9:30 PM and all clean-up and break-down completed and all participants gone by 10:00 PM; and the owners shall cause a qualified design professional to evaluate the internal road surface after one year to determine whether paving is recommended or necessary; if pavement

is recommended or necessary, the owners shall obtain site disturbance permits and construct a paved driveway and parking areas. A.R., pp. 2049-2050.

The Board claims SARP's argument with regard to the Board's waiving of design standards related to landscaping, paving of driveways and fencing is misplaced. Brief of Respondents, pp. 21-24. The Board cites §§ 9-23-1(A)(3), 9-24-5(E) in support of its position that waiver of design standards is allowed given the instant facts. *Id.*, p. 22. Paving of the driveway and parking area would have affected the ability of the property to treat storm water runoff and detracted from the rural character of the area according to the county; thus, waiving design standards would impose safeguards to uphold the spirit and intent of the title pursuant to § 9-23-1(A)(3) of the Kootenai County Code and attach reasonable conditions...to mitigate effects on water and air quality" pursuant to § 9-25-5(E) of the Kootenai County Code. *Id.* As listed above, the waiver of design standards dealing with parking was explicitly made a condition of approval by the Board; the applicants would be required to engage a qualified design professional to evaluate the internal road surface after one year to determine whether paving is recommended or necessary; if pavement is recommended or necessary, the applicants must then obtain site disturbance permits and construct a paved driveway and parking areas. A.R., p. 2050.

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 21 findings of fact, addressed each goal of the Comprehensive Plan, provided 8 paragraphs of analysis and reached the conclusion that Applicants' CUP be approved with conditions. A.R., p. 2036-2050.

The Kootenai County Code lists commercial resorts among the conditional uses permitted within the rural zone at Section 9-13-9. It is SARP's contention that a wedding reception facility does not fall within any of the conditional uses listed in the Ordinance and the application should have been denied outright. Petitioner's Brief on Appeal, p. 9. SARP argues Clark's determination that the wedding reception facility falls within the "commercial resort" conditional use category was arbitrary and capricious because the proposed use is "nothing like a 'commercial resort' as that term is defined by the Kootenai County Code." *Id.*, p. 11. A "commercial resort" is defined in the Kootenai County Code as:

**COMMERCIAL RESORT:** A privately owned, outdoor recreation area, operated for profit. A commercial resort may include permanent facilities for overnight or seasonal living, camping areas, recreational vehicle parks, and limited commercial activities associated with convenience goods and services that serve to enhance the primary recreational use or activity.

Kootenai County Code § 9-2-2. The definition is in the first sentence, and examples of what may be a commercial resort are included in the second sentence. According to the first sentence, a commercial resort is: "A privately owned, outdoor recreation area, operated for profit." Applicants' land is "privately owned" and is "operated for profit". The question is whether applicant's land is an "outdoor recreation area". As pointed out by SARP, the term "outdoor recreation area" is not defined by the Kootenai County Code. Petitioner's Brief on Appeal, p. 11. The Kootenai County Code does define "outdoor recreational facility" as:

Areas designed for active recreation, whether publicly or privately owned, including, but not limited to, baseball diamonds, soccer and football fields,

golf courses, tennis courts, swimming pools, racetracks, arenas, and similar places of outdoor assembly, and including private recreational facilities accessory to one-family dwelling properties. Kootenai County Code § 9-2-2. All uses listed as an “outdoor recreational facility” are, not surprisingly, *outdoor* uses.

The problem with Clark’s determination is patently obvious. Clark finds the proposed use of applicant’s barn located on applicant’s land for a wedding reception facility *inside* that barn to be a “commercial resort.” But a “commercial resort” is defined only as an “*outdoor* recreation area”, and none of the examples of an “outdoor recreational facility” are indoor activities.

In *Gardiner v. Boundary County Board of Commissioners*, 148 Idaho 764, \_\_\_\_\_, 229 P.3d 369, 372 (2010), the Idaho Supreme Court determined the language in I.C. § 67-6512(a), of the Local Land Use and Planning Act (LLUPA), is unambiguous. The Court wrote:

Idaho Code § 67-6512(a) provides: “A special use permit may be granted to an applicant if the proposed use is conditionally permitted by the terms of the ordinance.” Specifically, the wording within the statute, “conditionally permitted,” is unambiguous. The statute requires the use, not the permit, to be “conditionally permitted.” Thus, under I.C. § 67-6512(a), a special use permit may be granted for uses prescribed within the Zoning Ordinance...

148 Idaho 764, \_\_\_\_\_, 229 P.3d 369, 372. It follows then that where the Kootenai County Code lists commercial resorts as a conditional use permitted within the Rural Zone, such a use may be permitted within the meaning and requirements of the LLUPA.

The question for this Court becomes whether the contemplated use proposed by the applicants Tysdals falls within the definition of a commercial use. SARP argues the use proposed is not an outdoor recreational use. Petitioner’s Brief on Appeal, p. 11. SARP cites *Gardiner* as being factually identical. Petitioner’s Reply Brief, p. 4. In *Gardiner*, the Supreme Court held Chapter 7, § 1(E) of the Boundary County Zoning

Ordinance was void because it conflicted with I.C. § 67-6512(a):

Section 1(E) states: “Any use not specified in this section as a use by right or conditional use is eligible for consideration as a special use, subject to the provisions of Chapter 13.” In other words, if a particular use is not specified for a specific piece of property as either a use of right to a use permissible under conditions, the owner has carte blanche to seek and possibly obtain any use available under the sun. This is an “anything goes” provision. Chapter 13 contains no provisions either limiting or allowing proposed uses of land located in the County.

148 Idaho 764, \_\_\_, 229 P.3d 369, 372-73. In the instant matter, SARP states the “similar and lesser form of” analysis found in § 9-21-7(A) utilized by Clark amounts to the same “anything goes” provision found invalid by the Supreme Court in *Gardiner*. Petitioner’s Reply Brief, pp. 5-6. SARP argues: “Theoretically, any person could argue that a proposed use is ‘similar to and a lesser form’ of those listed in the section thereby turning 9-21-7A into an ‘anything goes’ provision.” *Id.*, p. 5.

In the Board’s findings of fact, the Board recognized Applicants’ request for a CUP for a commercial resort as “requesting the Commercial Resort classification to hold weddings and special events in a historic barn, and surrounding acreage, in conjunction with a Bed and Breakfast.” A.R., p. 2036.

The Tysdals stated they wanted to offer a beautiful, historic setting for country-style weddings and that the facility would provide multiple indoor/outdoor options for romantic weddings, receptions, and other special events.

*Id.* The problem facing applicants is their own designation of their proposed use as “provid[ing] multiple indoor/outdoor options.” Kootenai County Code § 9-21-7(A) provides for the classification of new and unlisted forms of land uses to be made. That section reads:

The Administrator shall make a determination whether the requested use is similar to or a lesser form of a permitted or conditional use of the particular zone. If an affirmative determination is made, all performance standards, hearing requirements, and other provisions of this title or any

other applicable ordinance shall be met. If determined that the request is a new or unlisted use, the administrator shall refer the question to the planning commission requesting an interpretation as to the zoning classification into which such use should be placed. The referral of the use interpretation question shall be accompanied by a statement of facts, provided by the applicant, listing the nature of the use, including, but not limited to, whether it involves dwelling activity, sales, processing, type of product, storage, and amount or nature thereof, anticipated employment, and the amount of noise, odor, fumes, dust, toxic material, and vibration likely to be generated.

Kootenai County Code § 9-21-7(A). Here, the Board argues Clark properly made the determination that the requested use (a wedding reception/special events facility) is a “similar or lesser form” of a conditional use (commercial resort) of the rural zone. Brief of Respondents, p. 15. SARP argues § 9-21-7(A) violates the LLUPA because the statute does not contemplate an individual making a determination that a proposed use, which is not conditionally permitted by the terms of an ordinance, may nonetheless be permitted if it is similar to or a lesser form of a conditional use in the rural zone.

Petitioner’s Reply Brief, p. 3.

This Court need not reach the question of whether Kootenai County Code § 9-21-7(A) is void for conflicting with the LLUPA. See *Boise v. Bench Sewer District*, 116 Idaho 25, 33, 773 P.2d 642, 650 (1989) (holding a county ordinance cannot conflict with a state statute). There is simply no support for Clark’s contention that an indoor/outdoor wedding reception and special events location is a “similar or lesser use” as compared to a “commercial resort.” There is no substantial evidence of such. Clark reached the conclusion that:

...[R]ather than coming to the conclusion that this is a prohibited use, I have determined, pursuant to section 9-21-7(A), that this contemplated use is most similar to, and possibly a lesser form of, a commercial resort. This is because the contemplated use is proposed to be conducted for profit, and because the activities contemplated for the property include recreational and commercial activities similar to those allowed under the performance standards set forth in section 9-24-5.

A.R., p. 82. Again, there is no substantial evidence to support this conclusion, and this conclusion reached by Clark stands statutory interpretation and logic on their respective heads. **First**, the “contemplated use” in Clark’s conclusion, is an *indoor* wedding facility *inside* a barn. Clark concludes that this *indoor* wedding facility *inside* a barn is “most similar to, and possibly a lesser form of, a commercial resort.” In coming to that conclusion, Clark ignores that a “commercial resort” is *only* an “*outdoor* recreation area.” An *indoor* wedding facility is not “most similar to” an *outdoor* recreation area. It is not similar at all. An indoor wedding facility is the exact opposite of an outdoor recreation area. **Second**, Clark’s conclusion that “contemplated use” of an indoor wedding facility is a “recreational and commercial activit[y] similar to those allowed under the performance standards set forth in section 9-24-5” is equally unsupported. Recreational and commercial activities listed in § 9-24-5 of the Kootenai County Code include: activities compatible with the recreational activities of a resort including outdoor facilities for swimming, boat launching, boat rental, fishing, hunting, camping, picnicking, skiing, snowmobiling, lawn tennis, volleyball, badminton, golf, and horseback riding; and commercial uses including convenience food store, restaurant, bar, retail, fuel service, RV park, motel, hotel, camping facility, laundry facility, retail shops for sporting equipment, souvenirs, and art and handcraft items. Kootenai County Code §§ 9-24-5(A)(1)(b) and (c). The ordinance explicitly lists only *outdoor* recreational activities and commercial services attendant thereto. The Board has not pointed the Court to any support for the proposition that a *facility* providing multiple *indoor* and outdoor options for weddings, receptions, and special events is similar to or lesser than the recreational and commercial activities involved in a commercial resort. The Board simply states:

...[T]he contemplated uses of the property set forth in [Applicants’]

narratives are much lesser in scope than the types of activities (and particularly the types of permissible “limited commercial activities”) which are expressly allowed to be included within a commercial resort operation, as set forth in section 9-24-5 of the Zoning Ordinance.

Brief of Respondents, p. 16. (emphasis in original). This Court finds that the contemplated uses by applicants are *indoor* uses, and thus, are *different* than those set forth in § 9-24-5(A)(1)(b) and (c). At least a portion (if not essentially all) of the weddings, receptions and special events proposed by applicants will take place *indoors*.

**Indoors is different from outdoors.** Also, hosting weddings, receptions and special events for a profit differs greatly from the commercial services supporting outdoor recreational activities identified in Kootenai County Code § 9-24-5(A)(1)(c), which are “convenience food store, restaurant, bar, retail, fuel service, RV park, motel, hotel, camping facility, laundry facility, retail shops for sporting equipment, souvenirs, and art and handcraft items.” **A wedding is different than a convenience food store.**

Having found them to be different, this Court finds Clark’s conclusion that the proposed uses are “most similar to” a commercial resort is wholly unsupported. Since they are completely different, Clark’s secondary conclusion that they are “possibly a lesser form of a commercial resort” is also wholly without merit. A commercial resort, as defined, is only outdoors. If something indoors (a wedding in a barn) is different than something outdoors (a commercial resort), then something indoors (a wedding in a barn) is not “possibly a lesser form of” something outdoors (a commercial resort).

While a very simplistic view of the world could lead someone to conclude that an indoor activity (wedding in a barn) had less impact or is a lesser form of something outdoors because one cannot see what is going on indoors, that interpretation would fall squarely in line with *Gardiner*. To conclude, as perhaps Clark did, that because the weddings are indoors they will have less impact than a commercial resort, which by

definition is outdoors, would be to conclude that *any* indoor activity is an authorized conditional use because it creates less impact than a commercial resort. This would create an “anything goes” provision which is prohibited by *Gardiner*. 148 Idaho 764, 229 P.3d 369, 372-74.

Although Clark had the *authority* to determine whether applicants’ proposed uses were similar to or a lesser form of a commercial resort, his determination is simply wrong. Clark’s determination was wholly unsupported by the evidence. Clark’s determination is not supported by a clear reading of the ordinance. Clark’s determination is not supported by logic. Clark’s incorrect determination must be remanded for referral of the question to the planning commission requesting an interpretation as to the zoning classification into which applicants’ use should be placed.

SARP also takes issue with the Board’s waiver of design standards. Petitioner’s Brief on Appeal, pp. 17 *et seq.*

...[T]he design standards are not merely optional. They are mandatory. The proper course in this instance would have been for the Applicant to apply for a separate variance from the paving requirements set forth in the Design Standards. Instead, the Applicant skipped this procedure altogether (and the necessary findings of hardship that go along with the variance process) by attempting to come through the back door with a “wavier” (sic) request in conjunction with their conditional use application.

*Id.*, p. 20. The Board responds that waiver of the normally-required design standards is permitted under §§ 9-23-1(A)(3) and 9-24-5(E) of the Kootenai County Code. Brief of Respondents, p. 22. As stated above, the Board argues the Board was correct in concluding paving of the driveway and parking area would have affected the ability of the property to treat storm water runoff and detracted from the rural character of the area according to the county; thus, waiving design standards would (a) impose safeguards to uphold the spirit and intent of the title pursuant to § 9-23-1(A)(3) of the

Kootenai County Code and (b) attach reasonable conditions...to mitigate effects on water and air quality” pursuant to § 9-25-5(E) of the Kootenai County Code. *Id.*

As stated by SARP, Kootenai County Code § 9-17-2 applies to all commercial, light industrial and industrial uses and “may also be required as a condition of approval for conditional use permits.” The Board states no variance was requested by applicants because applicants clearly sought a waiver of paving requirements as the requirement would have been an eyesore to the neighborhood and have detracted from the rural farm-feel of the area. Brief of Respondents, p. 23. SARP responds the waiver is merely additional evidence of an arbitrary and capricious decision by the Board. Petitioner’s Reply Brief, pp. 9-12.

Importantly, Kootenai County Ordinance § 9-17 applies to the commercial use being sought in the instant matter, thereby making the design standards mandatory upon applicants. The ordinance requires a landscape plan be submitted prior to issuance of a building or site disturbance permit and a parking and circulation plan be shown on a site plan for review. Kootenai County Code §§ 9-17-4, 9-17-6. The Parking Lot Design Standards section of the ordinance does require “[p]arking areas and access driveways shall be paved with plant mix asphalt concrete or traffic rated concrete unit pavers”; however, the ordinance does not preclude the Board from acting as it did in this case: conditionally approving the CUP and requiring the Applicants to retain a qualified design professional to evaluate the internal road surface after one year to determine whether paving is recommended or necessary, and, if pavement is recommended or necessary, requiring the Applicants to obtain site disturbance permits and construct a paved driveway and parking areas. See A.R., pp. 2049-2050.

**B. Were SARP’s Substantial Rights Prejudiced and is SARP Entitled to Attorney’s Fees Pursuant to I.C. § 12-117?**

SARP identifies the substantial prejudice they suffered as a result of the CUP grant, which “forces an expressly prohibited, non-compatible use upon the local surroundings”, and request attorney’s fees pursuant to I.C. § 12-117(1). *Id.*, pp. 21-22. The Board argues no substantial rights of SARP were prejudiced in this matter because the later-submitted application narrative did not constitute a significant change from the original, but rather merely clarified areas of the earlier narrative, and the later-submitted narrative was provided more than one month prior to hearing before the Board, providing ample time for SARP and others to review and provide verbal or written testimony. Brief of Respondents, pp. 25-27. Further, because commercial resorts are listed among categories of conditional uses permitted in the Rural Zone, the County argues the use contemplated by applicants is actually less intensive than other uses allowed in the rural zone upon grant of a CUP. *Id.*, p. 27. According to the Board, the Board’s imposing conditions of approval to mitigate potential negative impacts on SARP means “the Board did not trample upon the expectations of the neighbors, and certainly did not trample upon any reasonable expectations based on what is actually allowed in the Rural zone, as opposed to any given neighbor’s personal construct of what the ideal ‘rural lifestyle’ is.” *Id.*, p. 28. (emphasis in original). Finally, the Board argues a grant of attorney’s fees to SARP pursuant to I.C. § 12-117 is inappropriate where a Board acted reasonably and fairly in addressing an issue, even if this Court later determines the action involved an erroneous interpretation of a statute or ordinance. *Id.*, pp. 29-30, citing *Payette River Property Owners Assoc. v. Valley County*, 132 Idaho 551, 558, 976 P.2d 477, 484 (1999).

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 Comm'rs of Fremont County*, 143 Idaho 501, 510, 148 P.3d 1247, 1256 (2006). Here, although the application and narratives submitted by applicants evolved over time, it cannot be said that SARP was denied an opportunity to present and/or rebut evidence.

In *Lane Ranch Partnership v. City of Sun Valley*, 145 Idaho 87, 175 P.3d 776 (2007), the Idaho Supreme Court held Lane Ranch's substantial rights were prejudiced by the City's interpretation of its own ordinance. 145 Idaho 87, 91, 175 P.3d 776, 780. The Idaho Supreme Court found Lane Ranch's ability to access their property was impeded and that Lane Ranch was "unable to develop their property for admittedly permissible uses under the applicable OR-1 zoning." *Id.* Because the Idaho Supreme Court found the City of Sun Valley had acted on appeal without a reasonable basis in fact or law, the Idaho Supreme Court granted Lane Ranch attorney's fees under I.C. § 12-117. *Id.* Here, it is possible SARP' substantial rights were prejudiced by the CUP grant. *Cf.*, *Cowan v. Board of Com'rs of Fremont County*, 143 Idaho 501, 148 P.3d 1247 (2006) (Defective meeting notices did not prejudice substantial rights of adjoining landowner); *Noble v. Kootenai County ex rel. Kootenai County Bd. Of Com'rs*, 148 Idaho 937, 231 P.3d 1034 (2010) (Denial of subdivision application did not prejudice landowners' substantial rights, therefore Board's violation of open meeting laws did not require reversal). But unlike *Cowan* or *Noble*, *Lane Ranch* appears to support the proposition that a state agency's misinterpretation of its own laws may prejudice a

party's substantial rights.

Idaho Code § 12-117 states in relevant part that:

- (1) Unless otherwise provided by statute, in any administrative or civil judicial proceeding involving as adverse parties a state agency, a city, a county or other taxing district and a person, the court shall award the prevailing party reasonable attorney's fees, witness fees and reasonable expenses, if the court finds that the party against whom the judgment is rendered acted without a reasonable basis in fact or law.
- (2) If the prevailing party is awarded a partial judgment and the court finds the party against whom partial judgment is rendered acted without a reasonable basis in fact or law, the court shall allow the prevailing party's attorney's fees, witness fees and expenses in an amount which reflects the person's partial recovery...

I.C. § 12-117. This section provides the exclusive basis of an award of attorney fees against a state agency. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 718, 947 P.2d 391 (1997). Where a zoning board erroneously interpreted an ordinance because it had examined that ordinance and determined that a subdivision would be beneficial to the county, the Idaho Supreme Court held that the board acted in a way that fairly and reasonably addressed the issue and that the district court had not erred in denying the plaintiff's request for attorney fees. *Payette River Property Owner's Ass'n v. Board of Comm'rs*, 132 Idaho 551, 976 P.2d 477 (1999). And where a landowner was not the prevailing party, but also did not act without a reasonable basis, neither the board of county commissioners nor the landowner who challenged the issuance of a permit to build a subdivision was entitled to attorney's fees. *Cowan v. Bd. Of Comm'rs*, 143 Idaho 501, 148 P.3d 1247 (2006). Ultimately, where an issue is one of first impression in Idaho, a party is not entitled to attorney's fees. *SE/Z Constr. LLC v. Idaho State University*, 140 Idaho 8, 14, 89 P.3d 848, 854 (2004). And, a party is not entitled to attorney's fees where the opposing party presents a legitimate question for the Court to address. *IHC hospitals, Inc. v. Teton County*, 139 Idaho 188, 191-92, 75 P.3d 119,

1201-02 (2003).

As this is a matter of first impression, the specific interpretation of Kootenai County Code § 9-21-7(A), and the County presented the Court with a reasonable argument for the Board's broad interpretation of "commercial resort" encompassing the Applicants' wedding reception and special events facility, a grant of attorney's fees in this matter is unwarranted.

#### **IV. CONCLUSION AND ORDER.**

For the reasons stated above, this matter must be remanded for proper determination of classification of the new and unlisted use proposed by applicants.

IT IS HEREBY ORDERED this matter is remanded to the Board for proper determination of classification of the new and unlisted use proposed by the applicants.

Entered this 15<sup>th</sup> day of November, 2010.

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John T. Mitchell, District Judge

#### **Certificate of Service**

I certify that on the \_\_\_\_\_ day of November, 2010, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

**Lawyer**  
Michael R. Chapman

**Fax #**  
667-7625

| **Lawyer**  
Patrick M. Braden

**Fax #**  
446-1621

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Jeanne Clausen, Deputy Clerk