STATE OF IDAHO)
County of KOOTENAI)ss

FILED_____

AT_____ O'Clock _____M
CLERK OF DISTRICT COURT

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Deputy

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

JERRY JUDD,

Petitioners,

vs.

KOOTENAI COUNTY.

Respondent.

Case No. **CV 2006 5322**

MEMORANDUM DECISION AND ORDER GRANTING ATTORNEY FEES

JAMES WOHRLE and PENNY WOHRLE, husband and wife,

Petitioners,

vs.

KOOTENAI COUNTY.

Respondent.

Case No. **CV 2006 5323**

MEMORANDUM DECISION AND ORDER GRANTING ATTORNEY FEES

I. INTRODUCTION.

Petitioner Judd and petitioners Wohrle sought judicial review of the Kootenai County Board of Commissions' which denied their request for a variance for decks the Petitioners had built on their property. These cases are not consolidated, but oral argument on both were held simultaneously on February 20, 2007, since both dealt with essentially identical facts, and all petitioners were represented by the same attorney.

This Court found that the Board of Commissioners acted in an arbitrary and

capricious manner and abused its discretion in denying said variances. February 26, 2007 Order on Petition for Judicial Review, pp. 1-2. The variance request was remanded back to the Board of Commissions for a hearing on whether the requested variance was the "minimum that will make possible the reasonable use of the land, building or structure", as required under Kootenai County Code §9-23-3 (formally Zoning Ordinance §30.03). *Id.,* p. 2.

Petitioners requested attorney fees under I.C. §12-117, arguing the Board acted without a reasonable basis in fact or law when it denied the Petitioners' variance requests. Respondent opposes the request for attorney fees, asserting the petitioners are not entitled to fees because: 1) the request was not included in the petitioners' briefing, 2) the respondent did not act without a reasonable basis in fact or law and 3) the respondent prevailed in part because the case was remanded to the Board for further findings.

Neither party has requested oral argument on this issue. Accordingly, the issue of costs and attorney fees are at issue.

II. ANALYSIS.

A. PETITIONERS' FAILURE TO INCLUDE A REQUEST FOR ATTORNEY FEES IN THEIR BRIEF IS NOT FATAL TO THEIR CLAIM FOR FEES.

Under most circumstances, parties seeking an award of attorney's fees must assert such claims in their first appellate briefing Under I.A.R. 41(a) and I.A.R. 35(a)(5). Respondent asserts petitioners are not entitled to an award of attorney's fees because they did not comply with Idaho Appellate Rules 41(a) and 35(a)(5). Attorney fees on appeal are not awarded as a matter of right. *Ackerman v. Bonneville County*, 140 Idaho 360, 280 P.3d 897 (2005). Idaho Appellate Rule 41(a) requires the parties to request

attorney fees in their first appellate brief, pursuant to I.A.R. 35(a)(5) and 35(b)(5).

I.A.R. 41(a) provides:

> Any party seeking attorney fees on appeal must assert such a claim as an issue presented on appeal in the first appellate brief filed by such party as provided by Rules 35(a)(5) and 35(b)(5); provided, however, that the Supreme Court may permit a later claim for attorney fees under such conditions as it deems appropriate.

Idaho Appellate Rule 41(a) provides a procedure for requesting attorney fees on appeal, but is not authority alone for awarding fees. *Shawver v. Huckleberry Estates*, 140 Idaho 354, 365, 93 P.3d 685, 696 (2004). Idaho Appellate Rule 35(a)(5) also provides a procedure for requesting attorney fees. That rule requires that "if the appellant is claiming attorney fees on appeal the appellant must so indicate in the division of issues on appeal that appellant is claiming attorney fees and state the basis for the claim". I.A.R. 35(a)(2).

Respondent asserts petitioners are not entitled to an award of attorney fees because they did not follow the procedures outlined in the above rules. These rules appear to require parties to follow the proper procedure and submit their request for attorney fees within their opening appellate briefs. This requirement seems clear from the language in the rules, which state the parties seeking the fees "*must* assert such claim" (I.A.R. 41(a)) and "*must* so indicate" (I.A.R. 35(a)(5)) their request for fees in their appellant brief. (emphasis added). However, I.A.R. 41(a) appears to also allow for leniency toward parties who do not precisely follow the proper procedure by allowing the Court to "permit a later claim for attorney fees under such conditions as it deems appropriate". I.A.R. 41(a). This language appears to give courts some discretion on when to allow attorney fees when the party seeking attorney fees deviates from the procedures outlined in I.A.R. 41(a) and I.A.R. 35(a)(5). It is within this Court's discretion

to permit the petitioners' claim for attorney fees under the condition that such fees were requested in their Petition for Judicial Review. Judd Petition for Judicial Review, p. 5, ¶ 4; Wohrle Petition for Judicial Review, p. 5, ¶ 4. Petitioners did not fail to request attorney fees altogether, but merely failed to insert such request into their appellate briefing. This Court thus finds that under I.A.R. 41(a), that such a procedural oversight amounts to a "condition upon which a latter claim for attorney fees is appropriate". *See* I.A.R. 41(a).

B. IDAHO CODE § 12-117 MANDATES AN AWARD OF REASONABLE ATTORNEY FEES AND EXPENSES TO THE PREVAILING PARTY IF THE COURT FINDS THE PARTY AGAINST WHOM THE JUDGMENT IS RENDERED ACTED WTIHOUT A REASONABLE BASIS IN FACT OR LAW.

Petitioners submit they are entitled to reasonable attorney fees and costs because Kootenai County acted without a reasonable basis in fact or law when it denied petitioners' variances requests. Idaho Code §12-117 governs the awarding of attorney fees in civil actions to which a public entity is a party. It states in part:

> (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.

Idaho Code §12-117(1)-(2). Petitioners cite *Sanders Orchard v. Gem County*, 137 Idaho 695, 52 P.3d 840 (2002), where the Idaho Supreme Court upheld the award of attorneys fees when it found that the Gem County Board of Commissioners had not "pointed to any evidence it considered that would support [its] finding." *Id*. at 703. The

District Court held that the County Board of Commissioners had exceeded its statutory authority and that its findings of fact and conclusions of law were not supported by substantial evidence in the record. The Idaho Supreme Court affirmed the District Court's holding and its award of attorney fees, reasoning that because the Board had not supported its findings with any evidence, the Board acted without a reasonable basis in fact. *Id*.

Petitioners argue the Board acted without a reasonable basis in fact or law when it based its decision to deny the petitioners' variance requests on irrelevant information and came to the conclusion that the requested variances would conflict with the public interest. Petitioners assert that such a finding was not supported by any evidence in the record, and therefore such finding was without a reasonable basis in fact or law.

This Court's decision in *Wohrle* and *Judd* is substantially similar to the district court's holding in *Sanders Orchard*. Here, the Court found that the Kootenai County Board of Commissioners based their findings on an issue that was irrelevant and not supported by any evidence found in the record. The Kootenai County Board of Commissioners denied petitioners' requests finding the variances would conflict with the public interest, although there was no evidence in the record of any public opposition and all adjoining landowners supported the variance request. The Board was also influenced by the fact that petitioners built their decks without first obtaining a building permit, but such permit is not a required by the Kootenai County variance ordinance. These findings would, thus, support a claim of attorney fees under I.C. §12-117.

Respondent argues petitioners are not entitled to attorney fees because this case called for the interpretation of a statute and county ordinance. Therefore, an award of attorney fees under I.C. §12-117 is inappropriate because the Board was asked to

interpret a statute for the first time within the context of the facts of the case. See *Sacred Heart Med. Ctr. v. Boundary County,* 138 Idaho 534, 537, 66 P.3d 238, 241 (2003) (Because the appeal required the Court to interpret [the statute] for the first time within the context of the facts of this case, neither party is awarded fees). Such an award is unwarranted if the court decides that the public entity's error "involved a reasonable, but erroneous, interpretation of an ambiguous statute". *Cox v. State of Idaho ex rel. Dep't of Ins*., 121 Idaho 143, 823 P.2d 177 (Ct.App. 1991). However, if the error involved an erroneous interpretation of an unambiguous statute, then an award of attorney fees may be warranted. *Id*. at 148.

Respondent argues that the language of the statute and county ordinance considered by the Court in making its decisions was broad and left room for the Board's discretion in its decision to grant or deny the variance. Respondent asserts the issue addressed by the Board was "whether a board of county commissioners could deny a variance request on the basis that it would conflict with the public interest to grant the variance request when the [deck] was built without … a building permit", to which there are no Idaho appellate decisions specifically addressing that issue. Memorandum in Opposition to Petitioner's Motion for Attorney Fees, pp.3, 4. Respondent argues an award of attorney fees is therefore inappropriate because the Board's decision was based on an erroneous interpretation of the law and had a reasonable basis in fact.

The statute which the Respondent argues is ambiguous, and was therefore left to the interpretation of the Board, is I.C. §67-6516. That statute states, "A variance shall not be considered a right or special privilege, but may be granted to an applicant only upon a showing of undue hardship because of characteristics of the site and that the variance is not in conflict with the public interest. Prior to granting a variance, notice

and an opportunity to be heard shall be provided to property owners adjoining the parcel under consideration". I.C. §67-6516. This statute requires petitioner show only two things. First, petitioners must show there is undue hardship because of the characteristics of the site, and second, petitioners must show the variance is not in conflict with the public interest.

The Court appreciates respondent's argument that the issue of building a structure without a permit may be in conflict with the public interest is one of first impression. However, the statute is not ambiguous and does not to allow such a broad interpretation of the statute as urged by the Board. There were also other issues addressed by the Board which fell outside the scope of the statute, and therefore, this is not merely an erroneous interpretation of an ambiguous statute. Because there was ample evidence in the record to show that the petitioners had met the two requirements of I.C. §67-6516, the Board acted without a reasonable basis in fact. Furthermore, because the Board had statutes, zoning ordinances, and case law to help guide it in its decision, the Board acted without a reasonable basis in law. For those reasons, petitioners are entitled to fees under I.C. §12-117.

C. THIS COURT HAS DISCRETION TO APPORTION COSTS AND ATTORNEY FEES IN RELATION TO THE RELIEF SOUGHT.

Respondent asks this court to find it prevailed in part because the matter was remanded for further findings regarding whether the variances requested were the minimum necessary to make reasonable use of the property. Idaho Rule of Civil Procedure 54(e)(1) allows the court to award reasonable attorney fees to the prevailing parties as defined in I.R.C.P. 54(d)(1)(B). I.R.C.P. 54(d)(1)(B) states:

> In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the

> respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.

Respondent asserts petitioners are not the prevailing parties in this action because they failed to adequately show that the requested variance was "the minimum that will make possible the reasonable use of the land, building, or structure", as required by the Kootenai County zoning ordinance. Respondent argues that because the Court remanded this issue back to the Board, this Court should find that respondent prevailed in part and apportion any award of costs or fees accordingly. This is a hollow argument. In essence, respondent urges the Court to find that petitioners prevailed in part because the Court remanded the matter back to the Board of County Commissioners. Respondent's argument ignores the fact that the reason the Court remands this case back to the Board of County Commissioners is to have the Commissioners do what they should have done the first time. That is not "prevailing" by the respondent in any way in any part of this dispute.

The only mention of the issue of prevailing party from the petitioners comes from the statement that the "petitioner is clearly the prevailing party in this action and is entitled to an award of all reasonable attorney fees and costs…" Petitioner's Brief in Support of Fees and Costs, p. 3.

The relief sought in the Petition for Judicial Review was:

1. For an Order finding that the decision of Kootenai County denying the petitioner's variance request was arbitrary, capricious and an abuse of discretion; made in violation of the petitioner's statutory and constitutional rights; made upon unlawful procedure; not supported by substantial evidence on the record as a whole; and/or in excess of Kootenai County's statutory and ordinance authority.

2. For an Order remanding petitioner's variance application to Kootenai County and requiring Kootenai County to hear and decide petitioner's application in accordance with Idaho law;

3. For reimbursement of all reasonable attorney fees and costs incurred by the petitioner in the prosecution of this action;

4. For such other relief as the court deems proper.

Petition for Judicial Review, p. 5. When the court compares the final judgment or result of the action in relation to the relief sought by petitioners, it is clear petitioners were the prevailing party in this action. This Court held that there was no indication in the record of a conflict of public interest, that there was a due process violation when the Board deviated from the record, that the Board's decision to deny the variance was arbitrary, capricious and an abuse of discretion, and remanded the case for further proceedings. This is the very relief sought by petitioners in their Petition for Judicial Review. In light of the Court's findings, the petitioners are the prevailing party under I.R.C.P. 54(d)(1)(B) and are therefore entitled to attorney fees.

D. AMOUNT OF ATTORNEY FEES.

Petitioner did a thorough job of explaining the factors of I.R.C.P. 54(e)(3) in the Affidavit of Attorney Fees and Costs filed in each case. The Court finds the A-K factors set forth in I.R.C.P. 54(e)(3) support the attorney fee award requested in each case. The Court finds as to factor "E" the hourly rate of $225.00 per hour to be slightly higher than the normal range of attorney fees charged in the area, and that factor alone would ordinarily result in the downward departure of attorney fees requested to the amount of no more than $200.00 per hour. However, the Court also finds that the explanation of factor "K" (only charging for 6.1 hours of research when 18 hours were incurred) and factor "L" (two cases being tried for essentially the price of one) and the costs savings therein would support an upward departure from the attorney fees claimed. The Court

finds the downward departure of factor “E” is offset by the upward departure of factor “K” and “L”. The Court finds all other factors to be neutral. Accordingly, the Court awards the attorney fees in each case in the amounts requested.

E. COSTS.

Respondent does not object to costs, except to the extent an apportionment is ordered if the Court finds the respondent prevailed in part. Respondent did not prevail in any part. Respondent has no specific objection to the petitioners’ Memorandum of Costs. The Court has reviewed that memorandum, and finds those costs to be appropriate.

III. CONCLUSION AND ORDER.

IT IS HEREBY ORDERED, based on the reasons set forth above, petitioners’ costs are GRANTED as requested: In CV 2006 5323 (Wohrle), costs in the amount of $616.20 are awarded; and in CV 2006 5322 (Judd), costs in the amount of $491.20 are awarded.

IT IS FURTHER ORDERED petitioners’ requests for attorney fees are GRANTED as requested: In CV 2006 5323 (Wohrle), attorney fees in the amount of $6,681.25 are awarded; and in CV 2006 5322 (Judd), attorney fees in the amount of $6,681.25 are awarded. The Court has discretion to grant fees under I.A.R. 41(a) and 35(a)(5) even though the petitioners did not follow the proper briefing procedure. Idaho Code §12-117 gives a statutory basis for fees when the agency’s decision was not reasonably based in law or fact and the petitioners were the prevailing party under I.R.C.P. 54(d)(1)(B).

Entered this 27th day of March, 2007.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of March, 2007, 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 #**
Scott Poorman	772-7243	Patrick M. Braden	446-1621

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Secretary