STATE OF IDAHO)
County of KOOTENAI)ss

FILED_____

AT_____ O'Clock _____M
CLERK OF DISTRICT COURT

_____
Deputy

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

UPPER COLUMBIA CORPORATION OF SEVENTH DAY ADVENTISTS, a Washington Non-profit Corporation, *Petitioner,* vs. **KOOTENAI COUNTY, a political subdivision of the STATE OF IDAHO, acting through the KOOTENAI COUNTY BOARD OF COMMISSIONERS, in their official capacities,** *Respondents*.	Case No. **CV 2005 1270** **ORDER ON PETITION FOR JUDICIAL REVIEW**

I. INTRODUCTION.

This is an appeal from Kootenai County Board of Commissioners' (BOCC) decision denying a Conditional Use Permit (CUP). On April 13, 2004, Petitioner, Upper Columbia Corporation of Seventh Day Adventists (petitioner), sought a CUP in order to remodel and expand its existing Camp MiVoden on Hayden Lake.

On December 22, 2004, the Respondent Board of County Commissioners (BOCC) deliberated on the record in Kootenai County Planning Dept. Case No. C-1099-04 and voted to deny Camp MiVoden's request for a CUP. Based upon these deliberations, the BOCC issued ten pages of written Findings and Conclusions on January 20, 2005. Agency Record, Vol. I, pp. 8-18.

On February 17, 2005, petitioner appealed that administrative decision of the BOCC to this Court. Petitioner claims: 1) the BOCC's decision in denying the CUP is not supported by substantial evidence in the record and the BOCC failed to properly deliberate on the record and failed to make sufficient findings of fact on the record stating their reasons and their basis for denying of the CUP; 2) the BOCC's actions violated petitioner's constitutional and statutory rights and that the BOCC exceeded its authority in issuing its finding, conclusions, and decision, and 3) the BOCC acted arbitrarily and capriciously and as a result, BOCC's denial should be set aside and remanded with instructions for approval. Petitioner's Opening Brief, p. 2.

Extensive briefing was filed by both parities. Oral argument was held on November 10, 2005. The matter is now at issue.

II. STANDARD OF REVIEW.

The standard governing judicial review in a case involving the LLUPA (local Land Use Planning Act) 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). This standard of review applies to both sub-parts A and C in the analysis portion of section III *infra.*

III. ANALYSIS.

A. Did the BOCC exceed its statutory authority in denying the CUP application because the plans "lacked detail" and did not contain "enough specific information" to warrant an approval?

Petitioner claims that in accordance with Kootenai County Hearing Examiner Mr. Gary Young's ruling recommending that the petitioner take certain actions in order to obtain approval of their application request, petitioner filed thousands of comments, expert witness statements, scientific reports, storm water plans, traffic study data, water and sewer feasibility studies, boating plans, weed mitigation plans, site plan diagrams, topographical maps, pictures, and supporting agency comments. Petitioner's Opening Brief, p. 10; Agency Record. Vols. 1-13. Petitioner argues these submissions addressed every conceivable aspect of the project. While the BOCC claim the petitioner's plans lacked detail and were inadequate, the petitioner contends that the commissioners failed to ask them any substantive questions and did not ask petitioner for any additional information. *Id.* p. 11. In doing so, petitioner argues the BOCC failed to afford them any opportunity to respond to questions or to provide additional information, thereby acting in violation of procedural and substantive due process as provided in I.C. §67-5279(3). Petitioner also argues the BOCC exceeded their statutory authority, violated their own statutory provisions and imposed arbitrary and capricious standards not contained in Kootenai County Ordinances. Petitioner's Opening Brief, p. 12; KCZO § 33.19.

Petitioner argues that Kootenai County Zoning Ordinance, Article 33, entitled "conditional use and special notice permit standards" sets forth the standards for CUPs in Kootenai County. Specifically, § 33.19 of that Article

entitled “private resort (nonprofit)” governs the specific details needed for CUP approval of a private, nonprofit resort. Petitioner argues there is no dispute that this section provides the applicable and governing standards, as the BOCC in its decision acknowledged: “section 33.19 outlines the conditional standards that Private Resort (nonprofit) must meet.” Petitioner’s Opening Brief, p. 13, Agency Record Vol. I, p.13, ¶ 3.01. Article 33, § 33.19 reads as follows:

> **Section 33.19 Private Resort (Nonprofit)**
> Zone permitted: agricultural, agricultural suburban, restricted residential, rural, high density residential.
>
> A. Will contain provisions for private, nonprofit, outdoor recreational use which will be limited to, but may include areas for group meetings, boating, camping, swimming, picnicking, and may also include living facilities.
> B. Adequate access and parking will be required
> C. All facilities will be adequately screened from adjacent residential areas.

Petitioner argues that it went well beyond the very limited detail required by § 33.19 and presented considerable amounts of evidence to show that it would comply with all statutory authority. Petitioner contends the BOCC’s statutory authority under § 33.19 is limited to those items listed and that the BOCC lacked the legal authority to deny this application as “lacking enough detail.” Petitioner contends that if BOCC wanted to require additional standards and details, it could amend its Ordinance. Since this has not occurred, petitioner argues the BOCC can only decide petitioner’s application under the standards currently set out in § 33.19. Petitioner’s Opening Brief, p. 14.

In addition, petitioner argues the BOCC’s CUP application form does not require any more detail. Petitioner claims the information the BOCC found was “lacking” is not required as part of the CUP application. *Id.,*p.14; Agency Record Vol. I, p. 232.

Petitioner believes that by rejecting the application because it did not provide information and details which were not required by the Ordinance the BOCC exceeded its authority, imposed vague and unknown standards above those set out in its Ordinance, violated Article 33 of the Ordinance, and acted in an arbitrary and capricious manner. Petitioner claims that by denying their application based on a "lack of detail" the BOCC denial must be overturned. Petitioner's Opening Brief, p.15.

The BOCC argues Kootenai County Ordinance 309, Article 30, Section 30.01, Conditional Use, Subpart B, "Procedures", lays out the *minimum* requirements necessary for approval of a CUP:

> A conditional use shall not be approved unless and until:
> (1) a written application for a conditional Use Permit is submitted indicating the article of this ordinance under which the Conditional Use is sought and stating the ground on which it is required;
> (2) Notice shall be provided as required by the Idaho Code for applications for special use permits;
> (3) The public hearing shall be held. Any party may appear in person, or by agent or by attorney;
> (4) The determination has been made that the granting of the Conditional Use Permit will not adversely affect the public interest.

Respondent's Brief, p. 6, Exhibit B, p. 2. The BOCC argues that just because those *minimum* requirements are met, an approval is not guaranteed. The BOCC claims further clarification and guidance is gained from the CUP application which states:

> PROJECTIVE NARRATIVE: Thoroughly describe the existing situation/operation and what is proposed now and in the future. Explain why you believe the request should be approved, how the proposal meets the applicable county ordinances, and Idaho Code, why it will be in the public interest and how it will not adversely affect neighbors or the public.

Respondent's Brief, p. 6; citing Agency Record, Vol. 1, p. 232. Additionally, the BOCC contend that on the second page of the application the applicant in signing states that he/she understands "additions or modification to the proposal will require another application." *Id.,* p. 6, Agency Record Vol. I, p. 233).

The BOCC argue that while the petitioner places great weight on the limited language contained in the Kootenai County Ordinance 309, Section 33.19, it is clear when taken as a whole, more is required of the applicant than the simple requirements which petitioner argues to the Court. Respondent's Brief, p. 7, Agency Record Vol. II, pp. 348-349.

Idaho Code § 67-6520 allows for the use of hearing examiners by a County. Hearing examiners can either grant, deny, or make recommendations on issues properly before depending upon the local ordinance that establishes the position. Kootenai County Ordinance 286 authorizes the use of hearing examiners. The hearing examiner in this case was not authorized to approve or deny this application. His authority was limited to making recommendations to the BOCC. To the extent that the hearing examiner recommended petitioner undertake certain acts to obtain approval, he was merely making recommendations. The recommendations for the hearing examiner are in no way binding upon the BOCC. This is especially true in situations such as this when the BOCC holds its own public hearing and directly hears evidence. Petitioner's claim that the hearing examiner's recommendations is more than a recommendation is misplaced and not supported by the law.

Nowhere in Kootenai County Ordinance 309, Article 30, § 30.01, or § 33.19, does it say that if you meet or even exceed all the requirements then you

will be granted a CUP. If the BOCC denies the CUP after the minimum requirements have been met, it does not mean the BOCC has necessarily exceeded their statutory authority. It does seem that petitioner did much of what was required of them by ordinance and by statute. However, there is a question of timeliness. Even petitioner recognizes this problem:

> It should be noted that Commissioners Johns and Currie, the only two who heard the testimony and signed the Decision and Order in January, seemed put off by the submissions being delivered to the County just prior to the December 9, 2004, public hearing, even though the County's ordinances permitted such submissions. Tr. P. 141, 142.

Petitioner's Opening Brief, p. 9. Just because petitioner submitted everything it was supposed to, does not mean that the filings were complete or provided enough information to approve the CUP. The deficiencies and the timeliness issue is discussed more fully in part "C" of the analysis below. This court finds that the BOCC did not exceed its statutory authority in denying the CUP application because the plans "lacked detail" and did not contain "enough specific information" to warrant approval.

B. Did the BOCC violate the constitutional and statutory rights of Petitioner by denying a permit based in part upon the tax-exempt status of a religious corporation?

Petitioner claims that BOCC criticized the Camp because it is a tax-exempt nonprofit religious corporation and that this criticism by BOCC is solely because they are Seventh Day Adventists. Petitioner's Opening Brief, p. 15, citing ¶4.06 and 4.08 of the BOCC decision. This Court finds that in ¶ 4.06, the BOCC merely stated the uncontradicted fact that petitioner is a tax-exempt entity and as such is not subject to property tax. In no way does the BOCC relate any

connection between that tax-exempt status and its decision. In ¶ 4.08, the BOCC notes that this proposed project may have some effect on the effectiveness of governmental services, utilities, fire protection and waste disposal, and that "Because of its tax-exempt status, the Camp has not demonstrated its contribution toward ensuring these services are efficient and effective." Agency Record, Vol. I, p. 16. This is not a denial by the BOCC due to petitioner's tax-exempt status. Rather, this is simply the BOCC's concern due to that status. The Court finds no "criticism" of petitioner by the BOCC.

Petitioner argues that BOCC's denial of their application on this basis is unlawful and violates the statutory and constitutional rights and constitutes illegal religious discrimination under the Religious Land Use and Institutionalized Persons Act (RLUIPA). Petitioner's Opening Brief, p. 15. To establish a prima facie case under RLUIPA, petitioner must allege facts sufficient to show that BOCC's conduct: 1) imposes a substantial burden; 2) on the "religious exercise"; 3) of a person, institution or assembly.

Petitioner believes it has proved all three elements are met and, as such, the burden shifts to the government to prove that no violation has occurred. First, petitioner argues that by denying their CUP on the basis of its religious corporation tax-exempt status, the BOCC imposed a substantial burden. Petitioner's Opening Brief, p. 16. Second, petitioner claims the element of "religious exercise" is met because the camp and its personnel regularly practice religious exercise. Petitioner claims that they explain to all their guests that they celebrate the Sabbath from sundown Friday to sundown Saturday and that the camp also has a daily religious workshop schedule and conduct spiritual retreats

and social events. Petitioner's Opening Brief, p. 17. Third, petitioner believes the third element of the prima facie case: "of a person, institution or assembly" is met because not only is the entire Upper Columbia Corporation of Seventh Day Adventist's institution or conference substantially burdened by the BOCC's denial, but individual persons and campers will also suffer. Petitioner contends that if Camp MiVoden is not allowed to expand, then the land will be sold for subdivision development and Camp MiVoden will cease to exist. Petitioner's Opening Brief, p. 19.

The BOCC argue RLUIPA has not been violated. The BOCC believe that the record is void of any evidence that would support a finding that the BOCC placed a substantial burden on petitioner. Respondent's Brief, p. 10. The BOCC argue that Camp MiVoden presently exists as a church camp serving 280 persons at a time, and the denial of this CUP does not in any way affect petitioner's ability to continue this use. *Id.* Respondents argue that MiVoden has failed to show by a preponderance of the evidence that it can no longer conduct its charitable activities or carry out its religious mission in its existing facilities. *Id.*

The BOCC argues petitioner has not shown that their ability to add go-karts, water slides, lakefront condos, additional R.V. hook-ups, miniature golf, skate-board park, BMX race track or an inner tube run to their existing facility will prohibit them from carrying on their religious mission. *Id.* The BOCC believes the petitioner has failed to show that a substantial burden has been placed upon it in such a fashion as to trigger RLUIPA. At most, the BOCC argues the CUP requirements are a mere inconvenience to petitioner and that petitioner has failed to meet their burden under RLUIPA. *Id.*

42 USC § 2000cc is the Religious Land Use and Institutionalized Persons Act (hereinafter RLUIPA). That Act states that no government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on the person, assembly or institution is in furtherance of a compelling governmental interest and is the least restrictive means of compelling that compelling interest.

District court cases interpreting RLUIPA since its enactment delineate the difference between a "substantial burden" on religious exercise as opposed to an "inconvenience" on religious exercise. To meet the "substantial burden" standard, the government conduct being challenged must *actually inhibit* religious activity in a concrete way, and cause more than a mere inconvenience. *Guru Nanak Sikh Society of Yuba City v. County of Sutter,* 326 F. Supp. 2d 1140, 1152 (E.D. Cal. 2003). (italics in original). Thus, for a burden on religion to be substantial, the government regulation must compel action or inaction with respect to the sincerely held belief; mere inconvenience to the religious institution is insufficient. *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996).

This Court finds petitioner has failed to meet the prima facie case under RLUIPA because it has not adequately shown that a "substantial burden" has been placed upon petitioner that would trigger RLUIPA. At most, the CUP requirements are a mere "inconvenience." Camp MiVoden presently exists as a church camp serving 280 persons at a time. The denial of this CUP does not in any way affect petitioner's ability to continue this use, at least in the **short-term**. This denial does not prevent the church from exercising its religion. There is no

credible evidence that the church will no longer be able to conduct charitable activities or carry out its religious mission in its existing facilities.

Regarding the **long-term**, petitioner argues: "…the testimony on the record established without contradiction that the Camp will cease to exist if it is not allowed to expand." Petitioner's Reply Brief, p. 7, citing the testimony of Patti Schulz, Al Crook and Lynn Threadgill, given at hearing. *Id.* n. 3. **First** of all, none of those witnesses individually, nor all their testimony collectively, provide any sort of "fact" that "the Camp will cease to exist if it is not allowed to expand." Crook only said "it will **likely** be sold to investors" "if they are not allowed to expand." (emphasis added). That opinion is simply speculation at this point. The other two witnesses simply discussed the desire to expand in order to continue to provide outreach and service to the community. **Second**, the argument that "the Camp will cease to exist if it is not allowed to expand", is a self-fulfilling prophecy in that only petitioner could control that decision. **Third**, and most important, the argument that "the Camp will cease to exist if it is not allowed to expand" ignores the fact that petitioner can re-apply to the BOCC and, in so doing, cure all the defects the BOCC listed out for them. All the BOCC did was to deny the CUP *on this occasion*. The BOCC had concerns and specified those concerns in its decision on January 20, 2005. Petitioner's argument that "the Camp will cease to exist if it is not allowed to expand" ignores the most important fact that the BOCC listed solutions for petitioner to follow to try and remedy what the BOCC thought was missing the first time around. The BOCC wrote in their January 20, 2005 decision:

> In the event the Applicant should desire to re-apply for this conditional use permit, in order to obtain an approval, it is

recommended the Applicant:

- Provide a comprehensive traffic impact analysis using true peak season traffic counts. This analysis should be provided to the Lake Highway District for their review and recommendations.
- Provide a comprehensive storm water report/map that shows where the various types of storm water control systems will be installed and details why that form of control is best suited for that particular location.
- Identify the reasons the flow rates are considerably higher than the estimated average flow rates for a camp of this type. Provide details as to how those rates can be reduced.
- Provide a timeline phasing plan describing what specific development will be completed in each phase.
- Provide a detailed plan that reflects existing conditions and the changes proposed. The plan should show clearly depict the approximate locations of each proposed cabin, lodges, RV spaces, etc.

Agency Record, Vol. 1, p. 13. The fact that petitioner must re-apply and address these deficiencies is truly nothing more than an "inconvenience." Petitioner has not shown that the government conduct being challenged actually inhibits religious activity in a concrete way and causes more than a mere inconvenience. *Guru Nanak Sikh Society of Yuba City v. County of Sutter,* 326 F. Supp. 2d 1140, 1152 (E.D. Cal. 2003). Petitioner's argument that "the Camp will cease to exist if it is not allowed to expand" essentially asks the Court to assume that the BOCC will refuse all future applications, even if petitioner addresses the concerns listed by the BOCC. The Court simply cannot engage in that assumption. Until petitioner addresses those concerns expressed in writing by the BOCC in their January 20, 2005, decision, petitioner has only experienced an "inconvenience", not a substantial burden on religious exercise.

C. Were the BOCC's Factual Findings and Conclusions supported by substantial evidence in the record? Did the BOCC act arbitrarily and capriciously?

Petitioner argues that BOCC issued several erroneous findings and conclusions. It argues that not only are the BOCC's factual findings and conclusions not supported by any evidence in the record, but it also contends that many findings are actually contradicted by the evidence in the record. Petitioner's Opening Brief, p. 20. For these reasons, petitioner believes that the BOCC's denial should be overturned.

1. Storm water plan.

Petitioner contends it submitted a storm water plan (Storm Water plan Agency Record, Vol. I. pp. 35-67) for the proposed project and any claim by the BOCC that it did not submit one is wrong. Petitioner's Reply Brief, pp. 12-13. Petitioner contends the BOCC denied the CUP application because the report was not submitted, or was not specific enough, or was untimely when in fact the plan was submitted to the Commissioners. *Id.* p. 13.

Petitioner believes that the BOCC's decision must be reversed by this Court as a decision not supported by the evidence and an exercise of authority by BOCC in excess of the ordinance. Further, petitioner argues that the "standard" being applied by BOCC to petitioner's application is arbitrary and capricious as it exists nowhere in the record and was not articulated during the Commissioners' deliberations. *Id.,* p. 12.

The BOCC argues throughout their brief that the primary basis of the denial was the timeliness of many reports being received just prior to the hearing, rather a lack of detail in the plans submitted for the CUP or a lack of approval by agencies charged with the oversight of certain portions for the proposal.

The BOCC claims the "General Storm Water Report" was received by the

Kootenai County Building and Planning Department on December 8, 2004. The final public hearing was held in front of the BOCC on December 9, 2004. Respondent's Brief, p. 11. The BOCC believes the petitioner's late submission of supporting documents is clearly in violation of the notice requirements of the county ordinance and Idaho Code. *Id.*

Additionally, the BOCC argues the report still lacks the requisite specificity to satisfy the agencies charged with the oversight of the particular issues discussed in the reports. The BOCC argues the "General Storm Water Report" submitted December 8, 2004, the day before the public hearing in front of the BOCC, states in its conclusion that:

> This report provides a generalized list of considerations and recommended best management practices to conduct storm water and erosion for the proposed expansion of Camp MiVoden. This guidance should be utilized in the future developments to select and design measures that will adequately protect adjacent properties, nearby surface waters of Hayden Lake and the onsite streams, as well as ground water from the adverse effects of any ground disturbing activities. It is not an all-inclusive list since site specific conditions will require controls that are designed and tailored to meet each unique location and situation. The information presented is intended to be a foundation for the future storm water plans that will be submitted to Kootenai County, as required by Site Disturbance Ordinance No. 283.

Respondent's Brief, p. 12, Agency Record Vol. I, p. 44. This is a very nebulous conclusion. The argument that the report still lacks requisite specificity is supported by substantial competent evidence.

2. Water and Sewer.

Petitioner argues that the Water and Sewer plan was submitted on August 18, 2004, and that the Idaho Department of Environmental Quality (DEQ) and Panhandle Health District (PHD) both had the opportunity to review and comment on the feasibility study by JUB, petitioner's engineering firm. Petitioner

contends these agencies recommended approval of the Camp's application for CUP. Petitioner believes all the evidence before the BOCC clearly and unequivocally indicated their property was suitable to the proposed expansion and that evidence from expert opinions of both professional engineers and private and public agencies support that contention. Petitioner's Opening Brief, pp. 21-24).

The BOCC argue that while the water and sewer system feasibility study was prepared and presumably submitted in August, not the day before the hearing as with the storm water's studies, the feasibility study never met with the approval of either the Idaho Department of Environmental Quality or the Panhandle Health District. Respondent's Brief, p. 12. Also, the study was most recently updated on December 8, 2004, the day before the hearing on this matter. Agency Record Vol. 1, pp. 155-156. The BOCC argue the letters exchanged between JUB and the DEQ and Panhandle Health District clearly show they did not overwhelmingly support the proposed conditional use permit. The BOCC argues there is no conclusive evidence to support whether the DEQ or the PHD supported the proposed CUP. Respondent's Brief, p. 13.

3. Traffic and Transportation.

Petitioner argues that the BOCC findings of fact regarding traffic impacts are clearly erroneous and not supported by the substantial evidence and that this court should reverse the BOCC and remand with instructions to grant petitioner's application. Petitioner's Opening Brief, p. 27.

The BOCC responds that the traffic report was submitted to them on December 8, 2004, one day before the public hearing on December 9, 2004.

Agency Record, Vol. I, p. 63. The BOCC contend that the Commissioners and the public were frustrated with the late filing of the documents because neither the Commissioners nor the public had the opportunity to review them. Respondent's Brief, p. 14. In addition to the tardiness of these reports depriving the public of any meaningful dialogue, the BOCC submit that the responsible agency, the Lake Highway District, was equally deprived and was not given the opportunity to review this traffic plan. *Id.,* p. 15.

Furthermore, the BOCC contend the traffic study performed by petitioner's engineering firm (JUB), is contradicted by BOCC's own expert, and that it is clearly within the BOCC's discretion to weigh the credibility of the evidence presented to it on petitioner's traffic study. By denying the application for the CUP, the BOCC contend that they determined JUB's traffic study was not as persuasive as the testimony presented at the public hearing. Respondent's Brief, p. 16.

4. Analysis.

There are two issues here; 1) specificity and 2) timleness. Those issues are discussed in that order.

The specificity required in a CUP as defined by that statute has been further clarified by the Idaho Courts. In *Johnson v. City of Homedale,* 118 Idaho 285, 796 P.2d 162 (Ct.App. 1990), the court stated:

> From this language (Homedale City Ordinance) **it is clear that an application for a special use permit must include a concept plan and narrative statement to put the public on notice of the effects of the proposed special use.** This notice allows citizens to make informed arguments and objections when a public hearing is held on a proposed land use. Absent these attachments, citizens are left with a dearth of information on whether – and in what regard- to object to the proposal.

(emphasis added). In upholding a denial of a CUP application, the Idaho Supreme Court in *Daley v. Blaine County,* 108 Idaho 614, 701 P.2d 234 (1985) stated:

> A review of the record indicates that the application for the conditional use permit did not contain all necessary building specifications, or the specifications for sewer and water facilities. Thus, the Blaine County Board of Commissioners were merely following the ordinance's directive when the board stated, 'There are serious questions which have been unanswered by the applicant and by the applicant's engineer concerning the location of the well and the required and actual distance between it, the property line and the proposed septic system.' On this basis alone, the Blaine County Board of Commissioners was justified in denying Daley's application for a conditional use permit.

108 Idaho at 616-17, 701 P.2d 236-37. In addition, the CUP application in the present case states:

> For non-residential projects, site design and stormwater management plans, and a 150% stormwater financial guarantee must be submitted with building permit applications. Stormwater plans must be stamped by a design professional and site design plans must be prepared by a landscape designer. For residential projects, the Building Department may require stormwater/site disturbance plans and they should be contacted regarding their requirements.

R. Vol. II, p. 360, Petitioner's Reply Brief, p. 12.

After reviewing the statutes and case law presented to this Court, this Court concludes the BOCC had adequate grounds to deny the CUP. While there was disputed evidence on both sides of this issue, it is not this Court's duty, sitting in its appellate capacity, to weigh the evidence in this matter and re-determine the facts. Again, the standard governing judicial review in a case involving the LLUPA (local Land Use Planning Act) provides that this Court does not substitute its judgment for that of the agency as to the weight of the evidence

presented. 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. *Fisher v. City of Ketchum,* 141 Idaho 349, 109 P.3d 1091.

As to the issue of "timeliness", Idaho Code § 67-6512(b) requires:

> Prior to granting a special use permit, at least one (1) public hearing in which interested person shall have an opportunity to be heard shall be held. **At least fifteen (15) days prior to the hearing, notice of the time and place, and a summary of the proposal shall be published in the official newspaper or paper of general circulation within the jurisdiction.**

(emphasis added). Again, going back to the portion of *Johnson v. City of Homedale,* 118 Idaho 285, 796 P.2d 162 (Ct.App. 1990), which discussed the issue of specificity, the Court of Appeals went on discuss timeliness:

> From this language (Homedale City Ordinance) it is clear that an application for a special use permit must include a concept plan and narrative statement to put the public on notice of the effects of the proposed special use. This notice allows citizens to make informed arguments and objections when a public hearing is held on a proposed land use. Absent these attachments, citizens are left with a dearth of information on whether – and in what regard- to object to the proposal. **Citizens should not be forced to attend a public hearing to find out what a developer proposes to do. That information must be available in advance.**
> In addition, we observe that adequate notice,….is statutorily mandated when zoning authorities are requested to change the authorized use for a particular parcel of property. See Idaho Code…67-6512. Consequently, we believe the concept plan narrative statement must be submitted with the application. It is not sufficient that they be provided at some later date, such as the date of the public hearing itself.

118 Idaho at 287, 796 P.2d at 164. (emphasis added).

While the exact requirements for the submission of materials is not specifically stated in the Kootenai County Zoning Ordinance, Section 3.02, Mandatory Procedures for all hearings, does refer to Idaho Code Title 67. Idaho Code § 67-6512(b) again states in part:

> At least fifteen (15) days prior to the hearing, notice of the time and place, and a summary of the proposal shall be published in the official newspaper or paper of general circulation within the jurisdiction.

In *Fisher v. City of Ketchum,* 141 Idaho 349, 109 P.3d 1091 (2005), the Idaho Supreme Court, in overturning a grant of a CUP stated:

> The Commission's two-step process of "approval with conditions" prior to granting the CUP, nullifies the importance of the statutory public hearing required under Idaho Code § 67-6512(b) * * * **In doing so there is no chance for public comment on the final granting of the CUP.** Idaho Code § 67-6512(e) specifically contemplated that further studies may be ordered but these must be done **prior to** granting the CUP. Again, **the interested parties right to a public hearing is weakened or possibly nullified if those studies are not completed prior to the public hearing.**

109 P.3d at 1097. (emphasis added). While a summary of the proposal was submitted in August 2004, a considerable amount of the proposal in support of the CUP was filed on December 8, 2004, the day before the December 9, 2004, hearing. This certainly did not give the public or the BOCC time to adequately review the material, nor did it give the BOCC time to have their experts look at the agency findings. On the other hand, the BOCC did not issue its written decision until January 20, 2005, approximately 43 days after the reports were filed. It would seem that would be sufficient time for the BOCC to review the reports. However, the problem of the public not having an opportunity to a meaningful public hearing simply cannot be remedied at this point on appeal.

Many people at the December 9, 2004, hearing had concerns about the CUP petition. Carl Benscheidt stated:

> They're going to eliminate 18 parking spaces. And they are still going to allow 500 occupants. Now, we seriously doubt that eliminating 18 parking spaces and allowing500 occupants is going to change the examiners' opinion that it will not conform to the comprehensive plan. Further, the consultant from Walla Walla said the final design is in progress. Which means to us; it's not finished. Again, the consultant from Walla Walla said MiVoden will provide training and leadership skills for adults and children and they do a marvelous job at that. And, that's nice and that's worthwhile. But, gentlemen, that is irrelevant to the issue.

Tr. Vol. I, p. 117, Ll. 13-23. Commissioner Johnson said:

> Camp MiVoden has been in existence since the 1940s. No one argues that the camp has touched many lives and created memories for generations. Before me today is a request almost doubling the capacity of the camp to allow the camp to serve more people and create more memories for future generations. I agree that the camp plays an important role in our community. However, I am not comfortable with the plan as presented. I believe the information submitted does not contain sufficient substance to allow me to make a well-informed decision. Because of the lack of detail, I am left to my own assumptions to draw my own conclusions. I will give some examples. It was stated that the application has reduced the capacity from 600 to 496 but does not mention from what proposed lodging that reduction has taken. He stated that the RV spaces will be reduced to 30 from the original 50, but I don't know where the spaces will remain to be located. The applicant breaks the improvements into phases, but had not anticipated time lines for these improvements. The traffic analysis, based upon traffic count taken October, 2004, clearly is not an accurate representation of traffic during the summer season on the lake. I also have many concerns with the septic system that is proposed and what is exiting right now. Let me again, let me reiterate that I am not opposed to the existence of Camp MiVoden, I am concerned, however the proposal does not contain enough specific information to warrant an approval.

Respondent's Brief, p. 22-23, Tr. Vol. I, pp. 152-153.

These statements and the reasons for denying the CUP application are not arbitrary and capricious. The Commissioners outlined their concerns and

stated clearly the fact that the CUP application was a work in progress and that the public was not afforded a true opportunity to address the application. These reasons alone, under Idaho case law, would be enough to uphold the BOCC's denial of this CUP. The BOCC had many concerns. They outlined those concerns in their January 20, 2005 decision following the hearing. In their decision, the BOCC wrote:

> In the event the Applicant should desire to re-apply for this conditional use permit, in order to obtain an approval, it is recommended the Applicant:
>
> - Provide a comprehensive traffic impact analysis using true peak season traffic counts. This analysis should be provided to the Lake Highway District for their review and recommendations.
> - Provide a comprehensive storm water report/map that shows where the various types of storm water control systems will be installed and details why that form of control is best suited for that particular location.
> - Identify the reasons the flow rates are considerably higher than the estimated average flow rates for a camp of this type. Provide details as to how those rates can be reduced.
> - Provide a timeline phasing plan describing what specific development will be completed in each phase.
> - Provide a detailed plan that reflects existing conditions and the changes proposed. The plan should show clearly depict the approximate locations of each proposed cabin, lodges, RV spaces, etc.

Agency Record, Vol. 1, p. 13. Looking through the record, the Court finds that many of these recommendations have not been satisfied by petitioner. While petitioner may think that these requests have been met or are not "required" in the application for a CUP permit, the BOCC can certainly request further information. The BOCC spelled out why the CUP was denied and gave guidance as to include in the future. The bottom line for this Court is that the BOCC's findings are supported by substantial, competent evidence in the record. The BOCC's decision must be upheld.

The traffic report created by JUB was conducted in October 2004, and is contradicted by Mr. Cecil Hathaway. Tr., Vol. I, pp. 103-105 and Agency Record, Vol. II, pp. 469-472. Hathaway's analysis and critique of the JUB traffic analysis, combined with the real life experience of persons familiar with the area, discredit the JUB study. That, plus the fact that the Lakes Highway District was not given the chance to look at the study were additional reasons, supported by evidence, for the denial of the CUP. Traffic analysis, Agency Record, Vol. I, pp. 68-118.

The Storm Water Report (Agency Record, Vol. I, pp. 35-44), created by JUB, was submitted December 8, 2004. The BOCC felt this report was just a generalized list of considerations and recommended best management practices to conduct storm water erosion for the proposed expansion of Camp MiVoden. This Court agrees. The Commissioners felt that this guidance should be utilized in the future development to select and design measures that will adequately project adjacent properties. Agency Record, Vol. I, p. 44. Because of this generalized list, the BOCC recommended to the petitioner that in future submittals it should provide a comprehensive storm water report/map that shows where the various types of storm water control systems would be installed and details why that form of control is best suited for that particular location. Again, this decision and finding of fact is not clearly erroneous and is supported by substantial, competent evidence in the record.

The time line phasing plan describing development and a detailed plan that reflects the existing conditions and the changes proposed was also recommended by the BOCC in order to obtain an approval in the future. In reviewing the record and looking through the file, the Court does not find where

this was or has been submitted by petitioner. If it is in the record, it is not an unreasonable request and it would be one the BOCC is entitled to make before they grant the CUP.

While the BOCC could have taken a different route and postponed the hearing or asked for more time to review the documents that were presented to them at the last minute, that is not the issue on appeal. The Court simply cannot find the BOCC's decision was arbitrary and capricious and therefore should be overturned. *Fisher, Daley* and *Johnson,* make it clear that the Court on appeal should look at the same record that was before the BOCC. The decision of the BOCC is sustainable, at least on many of the grounds set out in their decision, and due to the "late" submissions of the storm water plan and the traffic plan. This case can be appropriately summed up as it was in *Daley v. Blaine County,* when the Supreme Court stated the Commissioners' conclusions in their decision: "is not clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record and is not arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

The BOCC decision to deny petitioner's CUP was supported by substantial, competent evidence in the record. Additionally, the public did not have adequate time to review the full record submitted to the Commissioners on December 9, 2004.

In upholding a denial of a CUP application, the Idaho Supreme Court in *Daley v. Blaine County,* 108 Idaho 614, 701 P.2d 234 (1985) stated:

> A review of the record indicates that the application for the conditional use permit did not contain all necessary building

> specifications, or the specifications for sewer and water facilities. Thus, the Blaine County Board of Commissioners were merely following the ordinance's directive when the board stated, 'There are serious questions which have been unanswered by the applicant and by the applicant's engineer concerning the location of the well and the required and actual distance between it, the property line and the proposed septic system.' On this basis alone, the Blaine County Board of Commissioners was justified in denying Daley's application for a conditional use permit.

108 Idaho at 616-17, 701 P.2d 236-37. In addition, the CUP application in the present case states:

> For non-residential projects, site design and stormwater management plans, and a 150% stormwater financial guarantee must be submitted with building permit applications. Stormwater plans must be stamped by a design professional and site design plans must be prepared by a landscape designer. For residential projects, the Building Department may require stormwater/site disturbance plans and they should be contacted regarding their requirements.

R. Vol. II, p. 360, Petitioner's Reply Brief, p. 12.

After reviewing the statutes and case law presented to this Court, this Court concludes the BOCC had adequate grounds to deny the CUP. While there was disputed evidence on both sides of this issue, it is not this Court's duty, sitting in its appellate capacity, to weigh the evidence in this matter and re-determine the facts. Again, the standard governing judicial review in a case involving the LLUPA (local Land Use Planning Act) provides that this Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. 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. *Fisher v. City of Ketchum,* 141 Idaho 349, 109 P.3d 1091.

/

/

/

/

/

IV. ORDER.

IT IS HEREBY ORDERED, the January 20, 2005 decision of the respondent Kootenai County Board of Commissioners denial of petitioner's CUP for Camp MiVoden is **AFFIRMED.**

Entered this 30th day of January, 2006.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of January, 2006, 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 #**
Mischelle R. Fulgham	509 363 2478	Brent Featherston	208 263 0400
John A. Cafferty	208 446 1621		

_____
Secretary