STATE OF IDAHO)
County of KOOTENAI)ss

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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

MARVIN ERICKSON and SHARON ERICKSON, husband and wife, *Petitioners,* vs. **KOOTENAI COUNTY, a political subdivision of the STATE OF IDAHO,** *Respondents*.	Case No. **CV 2005 2856** **ORDER ON PETITION FOR JUDICIAL REVIEW**

I. BACKGROUND.

In 2002, Petitioners Ericksons applied to Respondent Kootenai County for a Planned Unit Development (PUD) and a subdivision project known as "Erickson Estates." The subdivision application was filed pursuant to Kootenai County Subdivision Ordinance No. 306 and the PUD application was filed under Kootenai County Zoning Ordinance 309. Affidavit of Marvin Erickson, ¶ ¶ 3, 4. Ericksons application was accepted and deemed complete by the Kootenai County Planning Department. A public hearing for the subdivision and PUD was initially scheduled for March, 2003, but after the application files were stolen from the Planning Department, Erickson had to resubmit his applications and all supporting documentation. *Id.* ¶¶ 6, 7.

The applications were rescheduled for public hearing and presented to Kootenai County Hearing Examiner Gary Young on May 1, 2003. *Id.,* ¶ 8. In his written decision, Hearing Examiner Young identified certain issues that required additional information and recommended that the applications be returned to Ericksons for modification. *Id.*, Exhibit 1. The Hearing Examiner's recommendation was heard by the Kootenai County Board of Commissioners, and on May 28, 2003, the Board signed an Order and Decision returning the subdivision and PUD applications to Ericksons for modification and requesting additional information. The Board did not impose any time limit for the submittal of the additional information. *Id.*, Exhibit 2. In the months following the Board's decision, Ericksons made modifications to the proposed subdivision project and submitted substantial new information to the Planning Department. *Id.*, ¶ 11.

On February 9, 2005, Kootenai County Planning Director Rand Wichman notified Ericksons that their subdivision and PUD applications would be withdrawn unless all the "lacking information be submitted within the next 30 days so that this case may be scheduled for a public hearing before the Hearing Examiner. Affidavit of Scott L. Poorman, Exhibit 3. On February 23, 2005, Ericksons responded to Wichman's letter by submitting a revised plat map (Agency Record, PUD, Vol. I, p. 43, submitted by the County at oral argument), additional documentation in support of the applications and requested additional time to gather the requested information. Affidavit of Scott L. Poorman, Exhibit 4. On March 18, 2005, Planning Director Rand Wichman concluded that adequate information had not been provided as required by the May 28, 2003 Order of Decision, and he terminated the Ericksons subdivision and PUD applications. *Id.*, Ex. 5.

Ericksons filed an administrative appeal of the Planning Director's decision, and the appeal was heard by Hearing Examiner Gary Young on June 16, 2005. Affidavit of Marvin Erickson, ¶ 16. The Hearing Examiner recommended to the Board of Commissioners that the Planning Director's decision be upheld. *Id.,* Exhibit 3. In a written Order dated July 21, 2005, the Board of Commissioners upheld the Planning Director's decision to terminate Ericksons' subdivision and PUD project. *Id.,* Exhibit 4. Erickson filed this petition for judicial review in response to the Board's decision.

II. POSITIONS OF THE PARTIES.

A. Ericksons' Arguments.

Ericksons allege the Kootenai County Planning Director decision to terminate the subdivision and PUD applications was:

1) in violation of constitutional and statutory authority; 2) in excess of the authority granted to the Kootenai County Planning director under Kootenai County Subdivision Ordinance No. 306 and Kootenai County Zoning Ordinance No. 309; 3) made upon unlawful procedure; 4) not supported by substantial evidence on the record as a whole; or 5) arbitrary, capricious, and an abuse of discretion. Memorandum in Support of Petitioners' Motion for Summary Judgment, p. 3.

First, Ericksons contend the Planning Director's decision was in violation of Kootenai County Ordinances and in excess of his authority. *Id.,* at p. 5. Ericksons argue there is no provision in Subdivision Ordinance 306 giving the Planning Director the authority to terminate subdivision applications that have already been heard by the hearing examiner and Board of Commissioners. *Id.* at p. 6. Ericksons claim the role of

the Planning Director is clearly defined under the ordinance and that role is to review applications to determine whether they are complete and applications that are complete are scheduled for a hearing before the hearing examiner. *Id.* Ericksons argue the ordinance does not explain what happens to applications that are not complete, and presumably, Erickson argues, incomplete applications never get scheduled for hearing. *Id.* Ericksons also argue there is no provision in Ordinance 306 giving the Planning Director the authority to impose arbitrary deadlines on subdivisions applicants and that on May 28, 2003 the Kootenai County Board of Commissioners did not impose a time limit or deadline for Erickson to modify the project and submit additional information. *Id.* On the contrary, Petitioners claim, the Board was careful to state that the application should not be rescheduled before the hearing examiner until all information was submitted. *Id.* Ericksons believe that when the Planning Director imposed a 30-day deadline on Ericksons to submit additional information, the Planning Director was acting outside the authority granted to him under the ordinance, and when the Planning Director terminated Ericksons' application, the Planning Director was usurping the ultimate decision-making role vested in the County Commissioners. *Id.* at pp. 6-7.

Second, Ericksons argue, the Planning Director's decision to terminate the Erickson application was arbitrary, capricious, and made upon unlawful procedure. *Id.* Ericksons contend the Board of County Commissioners is a legislative body that has been given the authority under the Local Land Use Planning Act to promulgate land use laws for the health, safety and welfare of the citizens within its jurisdiction. *Id.*, at p. 7. Ericksons argue the Board cannot delegate its substantive law making function under I.C. § 65-6501 to any person or entity and that the Board can only delegate its authority to

carry out the laws it creates. *Id.* Ericksons believe the establishment of time limits within which an applicant is to act or suffer the consequences, amounts to the creation of a statute of limitations and setting such time limits and imposing substantive penalties, and that this is a non-delegable lawmaking function left to the authority of the Board of Commissioners. *Id.* Ericksons contend that the Board could have chosen, but did not choose, to impose a deadline on Ericksons for submission of the additional information. Had it wanted such a deadline imposed, Ericksons argue, it was incumbent upon the Board, and only the Board, to do so. *Id.*, at p. 8. By imposing his own arbitrary 30-day time limit and subsequently terminating the Ericksons' applications, Ericksons believe the Planning Director acted capriciously. *Id*.

Third, Ericksons argue they have had substantial rights prejudiced by the actions of the Planning Director. *Id.* Ericksons claim that in December 2004, while the Erickson applications were still pending, Kootenai County repealed ordinance 306 and adopted a new subdivision ordinance No. 344. *Id.* By terminating the Ericksons' applications pending under Ordinance 306, Ericksons claim the Planning Director deprived Ericksons of their vested rights under that ordinance. *Id.*, at p. 9.

In conclusion, Ericksons argue that neither zoning ordinance 309 nor subdivision Ordinance 306 confers upon the Planning Director the authority to create deadlines, or to impose penalties for failure to meet such deadlines and the Planning director exceeded his authority when he presumed to amend both ordinances to require Ericksons to provide information within his arbitrary 30-day time limit. *Id.* Additionally, Ericksons believe that the unlawful, arbitrary, and capricious actions of the Planning Director deprived

them of substantial vested rights under Ordinance 306 and due process rights guaranteed under the Idaho Constitution. *Id.,* at p. 10.

B. The County's Arguments.

The County believes there is only one issue in this matter and that is whether or not the submissions presented in the new plat are materially different and significantly changed the original submission, the April 29, 2003 PUD plat found at Agency Record, PUD, Vol. 1, p.54. Memorandum in Opposition to Petitioners' Motion for Summary Judgment, p. 4. However, if the changes made were deemed not significant by the Court, the County argues Ericksons did not have an infinite amount of time to correct the errors in the application. *Id.*

The County claims Ericksons' actions resulted in the withdrawal of the earlier PUD application, and not the actions of the Planning and Building Director. *Id.,* at p. 6. In 2003, Ericksons were Proposing a Planned Unit Development and subdivisions encompassing a total acreage of 53.9 acres with 34.6 acres of open space, a total of 44 lots the largest being 29,064 square feet and the smallest lot being 13,252 square feet. *Id.* The PUD and subdivision proposed in 2003 contained water provided by the community system and sewer provided by individual drain fields. *Id.*

The County claims that when Ericksons responded to the issues raised by the Board of Commissioners, they submitted a new subdivision and PUD on March 11, 2005. The County claims the new subdivision and PUD contained a total acreage of 14.18 acres, a lot density of 1.57 acre lots, and a total of 9 lots the largest lot being 112,116 square feet and the smallest lot was 45,892 square feet. *Id.* According to the County the

water was to be provided by individual wells and sewer was to be provided by septic tanks. *Id.* The County argues that in the present case significant changes have been made to the PUD application and that the two applications clearly warrant the resubmittal of a new subdivision and planned unit development. The County argues that Ericksons' claim that it is only "modifying" a subdivision when the change is from 44 lots to 9 lots, changing from a community water system to a private water system, a different road system, and encompasses different properties, is trying even to the most creative imagination. *Id.*, p. 7. The County argues this is a new application, not a modification.

The County believes the determination by the Building and Planning Director, Rand Wichman, that the March 11, 2005 submittals were materially and significantly different that the original 2003 submittals, is clearly supported by the record and only requires common sense to uphold. *Id.* In addition, the County argues the Board of County Commissioners' May 28, 2003 Order of Decision implied a reasonable time within which to comply. *Id.* at p. 8. It is the County's position that the 2003 application was not "terminated" by Planning Director Rand Wichman because Ericksons changed the application to such a significant degree that it had no resemblance to the original application and even if the Court finds Director Wichman terminated the application, his actions were reasonable under the circumstances. *Id.*

The County argues that when an agreement or contract does not specifically lay out a particular time within which performance must be had, a reasonable time will be implied. *Id., citing McFarland v. Joint School District No. 365,* 108 Idaho 519, 512-522, 700 P.2d 141 (Ct. App. 1985). The County concedes the Board of Commissioners' May 2003 decision imposed no specific time limitations. But the County argues that twenty

months is more than a reasonable amount of time to rectify the shortcomings of the application, especially since it only took seven months to go from application to determination the first time. *Id.,* p. 9. In conclusion, the County contends the demise of the Ericksons' PUD and subdivision was a result of the submission of a new and significantly different proposal in 2005. The new proposal was so significantly different from the 2003 proposal that was heard and ruled upon by the Board of County Commissioners that it was necessary, and still is necessary, for this application to go through the present PUD and subdivision process. *Id.* at p. 10. The County argues that even if the application had been terminated by the actions of the Planning Director, these actions were reviewed by a hearing examiner and the Board of County Commissioners which both determined that the new information constituted a new proposal, that a reasonable time had expired from the original May 2003 order, and that the requested and required information has never been submitted. *Id.*

III. ANALYSIS.

A. Was the Planning Director's decision in violation of Kootenai County Ordinances, or was it in excess of the Planning Director's authority?

Kootenai County Subdivision Ordinance No. 306, Article 2.0 defines a specific procedure for processing subdivisions applications. Section 2.01 reads:

> The Planning Director is vested with the duty of administering subdivisions and platting regulations in the unincorporated areas of Kootenai County. If the preliminary plat application is complete (See Appendix A), the Planning Director will place the application on the hearing body's Agenda for the next available regular meeting.

Affidavit of Scott Poorman, Exhibit 1, p. 4. In the Order of Decision regarding the subject Subdivision and PUD, the Board stated in Section 6.2: "this application should

not be re-scheduled for public hearing until all information requested by planning staff has been submitted, reviewed and all public agency comment has been received." Affidavit of Marvin Erickson, Exhibit 1, Section 6.2. It is noted that the request for modification in the Order and Decision did not require additional property be added to the re-submittal or that a number of lots be revised or that the road alignment change.

In Title 10A-2A-1 of the Kootenai County Code (Subdivision Ordinance 309, codified) the Planning director is "vested with the duty of administering subdivisions and platting regulations" and "if the preliminary plat application is complete, the Planning Director will place the application on the hearing bodies agenda." Ericksons argue there is nothing in Subdivision Ordinance 306 which gives the Planning Director the authority to terminate subdivision applications that have already been heard by the hearing examiner and the Board of Commissioners. However, that is not what the Planning Director did in this case. On February 9, 2005, Kootenai County Planning Director Rand Wichman notified Ericksons that their subdivision and PUD applications would be withdrawn unless all "lacking information be submitted within the next 30 days so that this case may be scheduled for a public hearing before the Hearing examiner." Affidavit of Scott L. Poorman, Exhibit 3. On February 23, 2005, Ericksons responded to Wichman's letter by submitting a revised plat map (Agency Record, PUD, Vol. I, p. 43, submitted by the County at oral argument), additional documentation in support of the applications and requested additional time to gather the requested information. *Id.*, Exhibit 4. On March 18, 2005, Wichman concluded that adequate information had not been provided as required by the May 28, 2003 Order of Decision and he terminated the Erickson subdivision and PUD applications. *Id.*, Exhibit 5.

In the March 18, 2005 letter from Wichman to Ericksons' attorney Scott Poorman, Wichman states:

> In lieu of the above information, a revised plat was submitted with your letter of February 23, 2005, followed by a draft Geotechnical Analysis and a stormwater report on a new subdivision design. In addition, photographs and a letter from Mr. Erickson to Mr. Larry Boatwright of the Kootenai County Fire and Rescue were also submitted. This information does not address the matter that was before the Board at the May, 2003 Deliberations meeting, or the items requested by the Board.
>
> While I can understand your client's desire to amend the proposal, based upon the fact that it is materially different than the original plan, includes areas that were not part of the original plat, and contains a different road design, I have determined that the revised plan and the subsequent information to constitute a new application request. This being the case, a new application form, associated fees, and information in compliance with the Subdivision Ordinance No. 344 would need to be submitted before your current request could be considered.
>
> Based upon your lack of submittal of the information required by the Board in their May, 2003 Order of Decision, we are considering Case Nos. S-751P-03 and PUD-044-03 to be withdrawn.

Affidavit of Scott Poorman, Exhibit 5. When the Ericksons first submitted their applications in 2003 and the applications were returned for modification, the Commissioners recommended that the Ericksons undertake the following actions:

- Access and emergency access to site, including easements, exhibits, permits, and grades.
- Road profiles and plans that show the grades and boundaries of the cut and fill slopes.
- Congestive factors – the impact this proposal has on existing and proposed community facilities and services
- Stormwater plan with sufficient detail to demonstrate adequate treatment and erosion/sedimentation control methods.
- The environmental, economic, and social impact to incorporated municipalities adjacent to the proposed development
- Studies adequate to demonstrate the expected or potential impact to water quality and slope stability…
- Proposed water delivery system, storage locations, capacity, and whether or not it is to be several private systems or o12ne public system
- Other items identified by planning staff…

Affidavit of Marvin Erickson, Exhibit 1, p. 79. Much of this information was not provided to the Planning Director, nor was it provided to the Board of commissioners. In addition, not only did Ericksons fail to provide the information that the Board suggested in 2003, the new information they did provide made substantial and major material changes to the original 2003 plan. Cases from other jurisdictions have ruled that substantial changes in the circumstance or conditions affecting the property are sufficient to support a request for a rehearing. In *Russell v. Board of Adjustment of Borough of Tenafly*, N.J.Supr., 31 N.J. 58, 155 A.2d 83 (New Jersey 1959) the Supreme Court of New Jersey found that an applicant's proposal to increase the setback and dimensions of a building was a sufficient change in the conditions surrounding the property to warrant entertainment of a new application for a zoning variance. *In re Taft Corners Associates, Inc.*, 632 A.2d 649, 160 Vt. 583 (Vermont 1993), the Vermont Supreme Court held that lot reconfiguration alone may be an indication of material or substantial change, but must have some significant impact on other criteria (listed in that case by ordinance: air, waste disposal, streams, soil erosion, fire, aesthetics, energy conservation, sewer, water and traffic). 632 A.2d at 653-54, 160 Vt. At 591-93. In *Rocchi v. Zoning Board of Appeals of the Town of Glastonbury,* 157 Conn. 106, 248 A.2d 922 (Conn. 1968), the Supreme Court of Connecticut found that an applicant's proposal to relocate an access road away from a residential area and eliminate 1.3 acres of a landfill disposal area was a sufficient change to justify a rehearing on a request for a zoning ordinance.

Therefore, while the Planning Director may have used the term "withdraw" he stated quite clearly that the information provided was new information, and thus, a new application had to be made. Under Kootenai County Subdivision Ordinance No. 306,

Article 2, it is the Planning Director's responsibility is to review submittals and decide if they are complete or not and then set them for hearing. That would include deciding if a re-submittal has been substantially modified and meets the requirements given in an Order of Decision from the Board.

For the above mentioned reasons the Planning Director's decision was not in violation of Kootenai County Ordinances or in excess of his authority.

B. Was the Planning Director's decision to terminate the Ericksons' applications arbitrary, capricious or made upon unlawful procedure?

The County argues the argument is not over the 30-day time limit imposed by the Planning Director. The Board of County Commissioners' May 2003 decision did not impose any specific time limitations. The County claims the argument between the parties is whether or not more than 20 months is an adequate and reasonable time within which to perform the conditions requested. The Planning Director did "withdraw" the Ericksons' application, but he stated his reasons: 1) the things requested by the Commissioners back in 2003 were still not provided and 2) there were substantial material changes to the original application which made it appropriate for Ericksons to file a new application.

As Hearing Examiner Young stated in his June 28, 2005 letter to the County Commissioners (Affidavit of Marvin Erickson, Exhibit 3) if the Ericksons were to submit the application as originally submitted and adequately addressed the requested information, it should be scheduled for hearing under the ordinance in effect at the time it was initially submitted and given its due process.

Again, the Planning Director, the Hearing Examiner, and the Board of Commissioners do not dwell on the fact that Ericksons did not get their information to the

County within 30 days of asking for it. They repeatedly state that the decision to "withdraw" the application was because the application had been substantially modified and constituted a new application to be reviewed under the current ordinance. Even if the Planning and Zoning Director did terminate the Ericksons' application, the Board of County Commissioners' May 2003 clearly required the requested information be submitted in a reasonable time. Twenty months is more than reasonable to fix any defects in the application. The County has to have a way to do housekeeping on the applications they receive. It is reasonable that applications that are not acted on within a reasonable time would be closed or withdrawn.

As noted by Ericksons, there is no set time for this specific situation. There is a 24-month limitation when you have preliminary approval, but the Ericksons did not have preliminary approval in this case. Memorandum in Support of Petitioners' Motion for Summary Judgment, p. 6. Again, this Court finds that twenty months is a reasonable time to fix any defects.

C. Have substantial rights of Ericksons been prejudiced by the actions of the Planning Director?

As the County has stated, the demise of the Ericksons' PUD and subdivision was a result of the submission of a new and significantly different proposal in 2005. The new proposal was so significantly different from the 2003 proposal that the Board of Commissioners heard and ruled upon that it is necessary for this application to go through the present PUD and subdivision process. There can be no doubt from the record that the major downfall of this application was the lack of information requested by the Commissioners back in 2003 and the new material changes made to the proposal.

Ericksons are correct when they state that there is no provision in the Ordinance

that imposes a deadline on subdivision applicants nor did the Commissioners give Petitioner a time line when they first told the Petitioner to modify the PUD back in 2003. However the 30 day time limit was not what the Planning Director, the Hearing Examiner and the Board of the Commissioners made there ultimate decision on. They made the decision to withdraw the current application because it was still incomplete after 20 months and was substantially different than the original.

IV. CONCLUSION.

This Court concludes the Planning Director's decision was not in violation of Kootenai County Ordinance nor in excess of his authority; that the Planning Director's decision to terminate Ericksons application was not arbitrary, capricious and made upon unlawful procedure; and that the substantial rights of Ericksons have not been prejudiced by the actions of the Planning Director.

However, this Court note, as Hearing Examiner Young stated, that if Ericksons were to resubmit their original application adequately addressing the requested information, it should be scheduled for hearing under the ordinance in effect at the time it was initially submitted and given its due process.

V. ORDER.

IT IS HEREBY ORDERED, the March 18, 2005, decision of Planning Director Rand Wichman which concluded that adequate information had not been provided as required by the May 28, 2003 Order of Decision, and Wichman's decision terminating the Ericksons subdivision and PUD applications; which was affirmed by Hearing

Examiner Gary Young who recommended to the Board of Commissioners that the Planning Director's decision be upheld; which culminated in the written Order dated July 21, 2005, by the Board of Commissioners upholding the Planning Director's decision to terminate Ericksons' subdivision and PUD project; said decision by the Board of Commissioners is **AFFIRMED.**

Entered this 2nd day of July, 2006.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of July, 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 #**
Scott L. Poorman	772-7243
John A. Cafferty	446-1621

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Secretary