

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**

**COPPER BASIN CONSTRUCTION, INC., an)
Idaho Corporation,)**

Petitioner/Appellant,)

vs.)

**KOOTENAI COUNTY, a political)
subdivision of the State of Idaho acting)
through the Kootenai County Board of)
Commissioners; Elmer R. "Rick" Currie,)
Chairman, Richard A. Piazza and W. Todd)
Tondee, Commissioners, in their official)
capacities.)**

Respondents.)

Case No. **CV 2007 3385**

**MEMORANDUM DECISION AND
ORDER ON APPEAL FROM THE
KOOTENAI COUNTY BOARD OF
COMMISSIONERS**

I. BACKGROUND AND PROCEDURAL HISTORY.

Petitioner Copper Basin Construction, Inc. (Copper Basin) appeals from a decision of the Board of Commissioners (Board) denying two of Copper Basin's applications to change the zoning classifications of its real property from Agricultural Suburban to Restricted Residential (Case No. Z-784-06), and from Agricultural to Restricted Residential (Case No. Z-785-06). Petition for Judicial Review, p. 2, ¶¶ 4, 5.

On June 15, 2006, the Board (at the time composed of "Gus" Johnson, Elmer R. Currie and Katie Brodie), in Case No. Z-774-05, approved a zoning change on 149 acres of Copper Basin's land from Industrial to Agricultural Suburban. The Board at that time suggested this land would be a good location to advance affordable work force housing in Kootenai County. A.R. Vol. I, p. 195 (Case No. Z-785-06); Petitioner's

Opening Brief, p. 2. The following day, June 16, 2006, Copper Basin filed these requests to change zone applications from Agricultural Suburban to Restricted Residential in Case No. Z-784-06 (which had just been rezoned the day before from Industrial to Agricultural Suburban), and from Agricultural to Restricted Residential in Case No. Z-785-06. The density of housing involved in these requests is remarkable. These requests would amount to a change from one lot per two acres to 5.28 lots per acre (on the 149-acre parcel this would result in an increase from 74.5 lots which had *just* been approved the day before by the Board in its decision to change from Industrial to Agricultural Suburban, to 786.72 lots), and a change from one lot per five acres to 5.28 lots per acre (on the 139-acre parcel this would result in an increase from 27.8 lots to 733.92 lots). Brief of Respondents, p. 13.

On August 24, 2006, the Kootenai County Planning Commission unanimously recommended approval of both requests. On February 8, 2007, the Board (now composed of Elmer R. Currie, Richard A. Piazza and W. Todd Tondee) held a public hearing on these two cases. At that hearing, the Board voted to continue the public hearing to receive further comment from the Post Falls School District and the East Greenacres Irrigation District. On March 1, 2007, the Board met in continuation of the February 8, 2007, public hearing. After receiving the responses and closing the hearing, the Board unanimously voted to deny both requests by Copper Basin. The Board approved the final Orders of Decision on April 12, 2007, determining: necessity was not demonstrated; the area did not have sufficient density to warrant a Restricted Residential zone and there was no showing that conditions had changed to warrant a change in zoning; Copper Basin had not justified the changes based on advancing the public health, safety, and general welfare; Copper Basin had not demonstrated its

requests would not adversely affect the value and character of adjacent properties or that the property rights of existing residents in the area would be adequately protected; Copper Basin had not provided any information regarding effect on it if the requests were not granted; the changes would not comply with the Comprehensive Plan; and the Board noted the notice requirements for the Planning Commission hearing did not comply with the requirements of Kootenai County Ordinance No. 355. Copper Basin now seeks review of these Orders of Decisions.

Both parties submitted briefing on appeal. Oral argument was held on September 2, 2008, and the appeals were taken under advisement.

II. STANDARD OF REVIEW.

The standard of judicial review in a case involving the Local Land Use Planning Act (LLUPA) provides 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). Instead, 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, 352, 109 P.3d 1091, 1094 (2005).

A county zoning board is treated as an administrative agency for the purposes of judicial review. *Chisholm v. Twin Falls*, 139 Idaho 131, 134, 75 P.3d 185, 188 (2003). “As administrative bodies having expertise in the zoning problems of their jurisdiction, their actions are presumptively valid.” *Gordon Paving Co. v. Blaine County Board of Commissioners*, 98 Idaho 730, 731, 572 P.2d 164, 165 (1977). The reviewing court must limit its review to the factual record compiled in proceedings before the zoning

board. *Bone v. City of Lewiston*, 107 Idaho 844, 847, 693 P.2d 1046, 1049 (1984). The party that attacks a Board's finding must illustrate that the Board erred pursuant to I.C. § 67-5279(3). Under that statute a Board's findings may not: (1) exceed the agency's statutory authority, (2) violate statutory or constitutional provisions, (3) be made upon unlawful procedure, (4) fail to be supported by substantial evidence in the record, or (5) be arbitrary, capricious, or an abuse of discretion, and a substantial right must have been prejudiced. *Bone v. City of Lewiston*, 107 Idaho 844, 847, 693 P.2d 1046, 1049; *Price v. Payette County Board of Commissioners*, 131 Idaho 426, 429, 958 P.2d 583, 587 (1998).

III. ANALYSIS.

This Court finds the Board's decisions are supported by substantial and competent evidence. This Court also finds the Board's decisions were not arbitrary, capricious or an abuse of discretion.

Copper Basin argues the goal of the underlying zone change requests was to provide affordable/work force housing. Petitioner's Opening Brief, p. 7. Copper Basin's goal of providing affordable/work force housing is in accordance with Goal 11 of the Comprehensive Plan. Copper Basin takes issue with Commissioner Richard Piazza's statements, which Copper Basin claims were "in pertinent part based upon information obtained outside the hearing process," that low cost housing should be as close as possible to the businesses residents are employed by and that the Board should look at the housing market and determine if low income housing already exists. *Id.*, p. 10. Copper Basin goes on to state the denial of its applications was "based in large part upon issues that are unrelated to a request for zone change." *Id.* Copper Basin's position that wastewater and sewer issues should have been reserved for the

subdivision process rather than being considered during these applications for zone change. *Id.*, pp. 8-9. Specifically, Copper Basin takes issue with Commissioner Curries' concerns about the aquifer in light of Copper Basin's development likely not being annexed by the City of Post Falls and the sewer system therefore not being operated by a municipality. *Id.*, p. 9; see also, Brief of Respondents, p. 15 (Post Falls Mayor Larkin indicated that the City may not be able or willing to annex the property or take over the wastewater treatment facility. Tr. at 98-101).

Copper Basin argues the Board's denial of its applications is contrary to the decision and unanimous recommendation of the Kootenai County Planning and Zoning Commission, that the decision is not supported by substantial evidence, and that the Board's conclusions of law are in conflict with the record and therefore erroneous. Petitioner's Opening Brief, p. 11. Copper Basin claims the Board erroneously concluded that the proposed change was not in accordance with the Comprehensive Plan and that uncontroverted evidence was presented by Copper Basin refuting the Board's conclusion that Copper Basin had failed to demonstrate prime agricultural land would be protected. *Id.*

The Board responds that it relied on substantial and competent evidence in the record in support of its decision that none of the requirements of the Kootenai County Zoning Ordinance standards for approving a zone change were met. Brief of Respondents, pp. 11-12. The Board points out that it considered public testimony and agency comments regarding the "potential negative effects surrounding the maximum density which would be allowed if the subject property were in the Restricted Residential zone, and the lack of compatibility of the requested zoning with both the zoning and actual uses of property in the vicinity of the subject property." *Id.*, p. 12. The Board

states the surrounding properties are zoned Industrial, Agricultural, Agricultural Suburban and Rural and that Copper Basin was requesting the Board approve “an island of high density residential development in a sea of mostly rural land.” *Id.*, p. 13. The Board argues that in case number Z-784-06 the change requested by Copper Basin would result in maximum density of lots changing from one lot per two acres to 5.28 lots per acre; and in case number Z-785-06 the increase would be from one lot per five acres to 5.28 lots per acre. *Id.* The Board concedes Copper Basin’s stated intent is to create a development of about 700 lots total, and that this number is less than the total of 5.28 lots per acre in the 149 acres in case number Z-784-06 and the 139 acres in case number Z-785-06 (which together would be a total of 1,520.64 lots). *Id.*, pp. 13-14. The Board states county open space requirements and the power line easements through the property make development at the maximum density allowed in Restricted Residential zoning impossible. *Id.*

The Board points the Court to the concerns voiced by agencies and the public at the Board hearing: Idaho Transportation Department expressed concern over traffic; Post Falls Highway District opposed the change, citing concerns over a residential development in an industrial area, *inter alia*; East Greenacres Irrigation District expressed concerns over the proposed wastewater treatment facility; and the City of Post Falls expressed concerns over the impact of approval on its ability to provide sewer services in the area. *Id.*, pp. 14-15. Finally, The Board argues that it considered whether the zone change was in accordance with the Comprehensive Plan and determined that the proposed changes do not meet Goals 1-6, 9, 10, 11-14, or 16-21. *Id.*, pp. 16-18. The Board argues that although *Bone v. City of Lewiston*, 107 Idaho 844, 850, 693 P.2d 1046, 1052 (1984) holds that a land use application need not strictly

comply with a comprehensive plan, *Evans v. Teton County*, 139 Idaho 71, 76, 73 P.3d. 84, 89 (2003) states that the comprehensive plan cannot be ignored in making a decision to approve or deny a request.

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, ___, 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 considering a request for a zoning change, the Board must make specific, written findings of fact and conclusions upon which its decision is based. *Price*, 131 Idaho 426, 431, 958 P.2d 583, 588. In application number Z-785-06, the Board made seventeen findings of fact, addressed each goal of the Comprehensive Plan, and reached the conclusion that Petitioner failed to show that the requested zone change (1) was supported by changed conditions, (2) was justified based on advancing the public health, safety, and general welfare, (3) would not have an adverse effect on the value and character of adjacent properties, (4) was supported by any information regarding the effect of denial of the zone change on Petitioner, (5) would comply with the Comprehensive Plan, and (6) would adequately protect the property rights of existing residents in the area. A.R. Vol. II, p. 381. The Board also noted that the notice requirements for the Planning Commission hearing did not meet the requirements of Kootenai County Ordinance No. 355, although the notice requirements for the Board's hearing did. *Id.* The Boards' conclusions in case No. Z-784-06 are the same as those in case No. Z-785-06. See A.R. Vol. II, pp. 358-59.

As required by *Price*, the Board in these two cases has made specific, written findings of facts and conclusions upon which its decisions were based. Copper Basin has not really gone beyond providing this Court with a conclusory statement that, “Respondents exceeded their statutory authority, engaging in unlawful procedure, and/or was arbitrary, capricious and an abuse of discretion.” See Petitioner’s Opening Brief, p. 11. Copper Basin’s argument that the Board based its denial partially on issues that are unrelated to a zone change contradicts the Kootenai County Ordinance governing requirements for changing the zoning map. See Kootenai County Code, § 9-21-4(G). The Code states that an application must show the effect such a change will have on the Comprehensive Plan. *Id.* It is in its Comprehensive Plan Analysis that the Board considers issues that are arguably also related to the subdivision process, but the fact remains that environmental, transportation, public services and utilities issues are found in the Comprehensive Plan and this necessitates their being discussed at the zone-change juncture by the Board. A.R. Vol. II, pp. 378-381 (Case No. Z-784-06); A.R. Vol. II, pp. 355-58 (Case No. Z-785-06).

A similar argument (that comprehensive plan analysis is appropriate for subdivision approval but not in zoning decisions) was made in an appeal which was decided by this Court on September 4, 2008, in *Brewster v. Kootenai County*, Kootenai Co. Case No. CV 2008 1144. This Court’s analysis was as follows:

The Board candidly notes that “Brewster’s argument that the details of such issues are properly considered in the context of an application for preliminary subdivision approval under the standards set forth in the Subdivision Ordinance, and subsequent final subdivision approval, site disturbance and building permit applications, is well taken.” *Id.*, p. 12. The Board continued: “Nevertheless, whenever an application for a change in zoning requests an increase in density, it is also perfectly appropriate at that time for the Board to consider and determine whether the requested increase in density would have an adverse effect on the public health, safety, and general welfare, and whether the increase in

density would have a negative effect on the value and character of adjacent property.” *Id.* (emphasis in original). This Court agrees for three reasons. First, it is only common sense that the Board should take into consideration such issues of public safety, public health, and effect on adjacent property when considering request for change in zoning that would result in an increase in density. Second, in this case the Board considered these issues because the public input and opposition *concerned these issues*. Public input is what frames some of the issues the Board must decide. The Board would have been derelict in its duties had they *not* discussed these issues that was driven by a great deal of the public’s input. Third, in making its zoning decision, the Board *must* keep in mind its own comprehensive plan. While a zoning ordinance need not strictly conform to the land use designation of a comprehensive plan (*Sprenger, Brubb & Associates, v. City of Hailey*, 127 Idaho 576, 585, 903 P.2d 741, 750 (1995), *citing Balsev v. Kootenai County Board of Commissioners*, 110 Idaho 37, 39, 714 P.2d, 6, 8 (1986)), “...a governing body charged to zone ‘in accordance’ with its comprehensive plan pursuant to I.C. § 67-6511 must make a factual inquiry to determine whether the requested zoning ordinance or amendment reflects the goals of, and takes into account those factors in, the comprehensive plan in light of the later present factual circumstances surrounding the request.” *Id.*, *citing Love v. Board of County Commissioners of Bingham County*, 108 Idaho 728, 730-31, 701 P.2d 1293, 1295-96 (1985), and *Bone v. City of Lewiston*, 107 Idaho 844, 693 P.2d 1046 (1984). Idaho Code § 67-6511 requires the Board, in establishing zoning districts, to ensure those “zoning districts shall be in accordance with the policies set forth in the adopted comprehensive plan.” This Court finds it would be impossible for the Board meet its duty of at least considering its comprehensive plan, without also considering issues of public safety, public health, and effect on adjacent property.

This conclusion is supported by Ziegler, RATHKOPF’S THE LAW OF ZONING AND PLANNING, § 89:4, pp. 89-12 – 89-15.

Zoning restrictions and subdivision requirements both establish standards for the development of property intended to be sold as separate parcels or lots. (footnote citing *Cundiff v. Schmitt Development Co.*, 649 N.E.2d 1068 (Ind.Ct.App. 1st Dist. 1995). These two controls are neither mutually exclusive nor does the exercise of one mandate the use of the other.

Id., pp. 89-12 – 89-13.

Zoning restrictions are principally designed to separate the *uses* to which land in various areas of the community may be put, as well as to regulate *density* of population and the degree of proximity of buildings and structures by prescribing the size of the lots on which permitted uses may be operated and the location of buildings and structures on those lots. Subdivision regulations are employed to ensure that individual lots

intended to be developed for such permitted uses may safely be used for such purposes and that the use of specific parcels as zoned will not impose the burden of expense upon the community or create health or other hazards.

Id., p. 89-13. (italics added). “Zoning is concerned with whether a certain area of the community may be used for a particular purpose” (*Id.*, p. 89-15, n. 6), “while subdivision regulation may often serve to implement zoning restrictions.” *Id.*, p. 89-14. In order to make zoning determinations, the Commissioners must take into account the uses to be made of the land, and take into account the density of which those uses may be made. This Court is unable to see how any set of county commissioners would make those determinations without taking into account public safety, public health, and effect on adjacent property.

Brewster v. Kootenai County, Kootenai Co. Case No. CV 2008 1144, Memorandum Decision and Order on Appeal from the Kootenai County Board of Commissioners, pp. 5-7.

Copper Basin argues Commissioner “...Richard A. Piazza’s comments were in pertinent part based upon information obtained outside the hearing process.” Petitioner’s Opening Brief, p. 10. The comments were that “Right now as I drive by a lot of households for sale, I see price reductions...”, “...it is my opinion that any low cost housing should be as close as possible to the proximity of the businesses the residence are employed with...” *Id.*, citing Tr. Vol. I, pp. 191, 195-96. Copper Basin’s concern about Commissioner Piazza’s statements allegedly being based upon information obtained outside the hearing process do not amount to the Board having engaged in unlawful procedure and, as the Board points out, there is no claim that the Board engaged in any *ex parte* communications. Brief of Respondents, p. 22. Copper Basin points to no other actions of the Board that amount to their having engaged in unlawful procedure. As the Board points out, the Board’s decision was not made in excess of its statutory authority. *Id.*, p. 20. This Court agrees. Kootenai County Code, at Title 9, Chapter 21, governs amendments to zoning regulations. Pursuant to the Code, an

application for a change of classification must show: the date the existing zoning became effective; the changed condition; justification that the change advances the public health, safety, and general welfare; the effect the change will have on the value and character of adjacent property; the effect on the owner if the request is not granted; the effect on the comprehensive plan; and such other information as the hearing body requires. Kootenai County Code § 9-21-4. Each factor was discussed by the Board. See A.R. Vol. II, p. 381 (Case No. Z-784-06), and A.R. Vol. II, pp. 358-359 (Case No. Z-785-06).

Importantly, in addition to failing to show that the Board's findings violated I.C. § 67-5279(3), Copper Basin does not set forth any evidence that a substantial right has been prejudiced such that the Board's zoning decision should be overturned. See *Price*, 131 Idaho 426, 429, 958 P.2d 583, 587. In this regard, Copper Basin states only that, "...there is no basis to support the Order of Decisions published in Case No. Z-784-06 and Case No. Z-785-06 and Petitioner's substantial rights have been affected accordingly." Petitioner's Opening Brief, p. 12. It is also notable that in its Order of Decision, the Board discussed in regard to Case No. Z-785-06 that Copper Basin's application was filed a day after his previous zone change (from Industrial to Agricultural Suburban) was approved. There was clearly no change in conditions in this one-day time period.

While this Court understands Copper Basin's frustration given the fact that an earlier Board of County Commissioners indicated this would be a good location for affordable work-force housing (Petitioner's Opening Brief, p. 7), nothing about that fact causes *this* Board's decision to not be supported by substantial evidence. First of all, that was a different Board. Second, and most importantly, the comment by the prior

Board was just that, a *comment*, not a decision.

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IV. CONCLUSION AND ORDER.

IT IS HEREBY ORDERED, for the reasons set forth above, the Board's denial of the zoning change is **AFFIRMED** in case numbers Z-784-06 and Z-785-06, and Copper Basin's Motion to Set Aside Findings of Fact, Applicable Legal Standards, Comprehensive Plan Analysis, Conclusions of Law and Order of Decision in Case Nos. Z-784-06 and Z-785-06 is **DENIED**. Copper Basin's request for attorney fees (Petition for Judicial Review, p. 5) is **DENIED** as Copper Basin is not the prevailing party.

Entered this 27th day of October, 2008.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of October, 2008, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

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