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

JOHN BREWSTER, **an individual**,

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 2008 1144**

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

I. BACKGROUND AND PROCEDURAL HISTORY.

Petitioner/appellant John Brewster (Brewster) appeals from a decision of the Kootenai County Board of Commissioners (Board) denying his application to change the zoning classification of his real property from rural to agricultural suburban.

On July 5, 2007, this matter came before Kootenai County Hearing Examiner, Lisa Key (Tr. pp. 1-35), who recommended approval of the zoning change. A.R. (Agency Record) Vol. II, pp. 357-66. When the matter came before the Board for public hearing on September 13, 2007 (Tr. pp. 37-75), the Board determined that a site visit would be appropriate. The Board made a visit to the site on October 23, 2007 (Tr. pp. 77-99), had further deliberations on October 25, 2007 (Tr. pp. 101-109), additional public hearing and deliberations on December 20, 2007 (Tr. pp. 111-136), and on January 17, 2008 (Tr. pp. 138-40), signed the final order denying Brewster's application.

A.R. Vol. II, pp. 421-34. In that Order the Board made it clear they felt there was another reasonable use of the property and necessity was not demonstrated; that the property created a natural buffer between higher and lower density areas on either side of it; and that water and sewer issues made the application not in the best interest of the public. Brewster now seeks review of this decision.

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 Co. Bd. Of Comm'r.,* 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 bd. Of Comm'rs,* 131 Idaho 426, 429, 958 P.2d 583, 587 (1998).

III. ANALYSIS.

A. The Board's Findings Are Supported by Substantial and Competent Evidence.

Brewster argues that in reaching its decision that the zone change was not necessary, was not in the best interest of the public, and was not in accordance with the comprehensive plan, the Board ignored evidence and testimony, created facts to substantiate its decision, and applied incorrect standards and criteria. Appellant's Brief, p. 14. Brewster states that the Board erred in evaluating the densities of lots surrounding his and claims that his property is "an island in a sea of higher density lots." *Id.,* p. 15. Brewster states that the smaller, more dense lots around his own make rezoning of his property appropriate because these nonconforming uses are so pervasive that the character of the neighborhood has changed from the original zoning classification, and that therefore, denying rezoning would result in a spot zone. *Id.* In response to the Board's determination that surrounding densities were a mistake and should not be used as a basis for changing Brewster's zoning, Brewster argues that the Board's reasoning ignores that present factual situation in the area, that the zoning change is in accordance with the comprehensive plan, and that the Board selectively chose which elements of the comprehensive plan they would consider in reaching their decision. *Id.,* p. 16.

The Board argues its decision to deny the zone change was amply supported by evidence in the record. Brief of Respondents, pp. 10-14. The Board states the more

dense lots to the west and northeast of Brewster's property were subdivided before 1973, before the adoption of Kootenai County's original zoning ordinance, and that there was unrefuted testimony that many parcels in the vicinity of the subject area (Brewster's land) were larger than five acres, some much larger than five acres. *Id.,* p. 10, *citing* Tr. p. 41, pp. 59-67*.* The Board goes on to address Brewster's argument that a zoning change would allow him to rid himself of a "squatter" unlawfully occupying Brewster's land, with the simple fact that Brewster can correct this situation at any time, regardless of zoning. *Id.,* p. 11. The Board argued that the Board's finding that timber production (as represented by the timber exemption on Brewster's property by the Kootenai County Assessor), would be a reasonable use of the property, and would provide a better, natural buffer between the Mica Flats and Kidd Island Bay neighborhoods, finds support in the record. *Id., citing* A.R. Vol. I, pp. 80-81; Tr. P. 117, 133-34.

Brewster has argued the environmental issues raised in opposition to his proposed zoning change are more appropriately addressed during consideration of an application for preliminary subdivision approval (Appellant's Brief, p. 17), and the Board notes that "there was unrefuted evidence which indicated Brewster's parcel was moderately steep to very steep in places" (Brief of Respondents, p. 11*, citing* A.R. Vol. I, pp. 6-8, Vol. II, p. 426), and that *at this stage of zoning change hearing,* there was "unrefuted testimony from local residents and from attorney Scott Reed that the Kidd Island Bay area had suffered from multiple septic tank failures which cause pollution to leach into Kidd Island Bay, that this led to the formation of a sewer district in the area, and that this system was over capacity at this time." *Id., citing* Tr. P. 55-70, 120-20. The Board noted testimony from area residents, "…one of whom, Ben Kircher, is the

operations manager for the Kidd Island Bay Lots Sewer District, that they have been able to observe the pattern of runoff from Brewster's property toward existing homes and into Lake Coeur d'Alene, along with stated concerns that such runoff, particularly if it contained sewage, would foul the wells which many Kidd Island by residents depend on for water." *Id.,* pp. 11-12, *citing* A.R. Vol I, p. 180, Tr., pp. 15, 55-70. 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 <u>at that time</u> 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 Balser 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.

Even where there is conflicting evidence before an agency, the agency's factual determinations are binding on the reviewing court as long as they are supported by substantial competent evidence in the record. *Lane Ranch Partnership v. City of Sun Valley,* 144 Idaho 584, 590, 166 P.3d 374, 380 (2007). Substantial and competent evidence is "relevant evidence which a reasonable mind might accept to support a conclusion." *Lamar Corp. v. City of Twin Falls,* 133 Idaho 36, 43, 981 P.2d 1146, 1153 (1999). In the instant case, the Board made seventeen findings of fact, addressed each goal of the Comprehensive Plan, provided four paragraphs of analysis and reached the conclusion that Brewster failed to show that the zone change he proposed: (1) was reasonably necessary, (2) was in the best interest of the public, (3) was warranted by a change in surrounding conditions, (4) would not have a negative effect on adjacent property, (5) would have a negative impact on Brewster if it were denied, and (6) was in conformance with the Comprehensive Plan. A.R. Vol. II, p. 433. 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. The Board has done so in the present case and Brewster has failed to explicitly state which findings of fact were "created, with utter speculation…" *See* Appellant's Brief, p. 14.

Brewster's argument that by not rezoning his property the Board is in effect spot zoning is also misguided. Spot zoning is the reclassification of one or more tracts or lots for a use prohibited by the original zoning ordinance. *Dawson Enterprises, Inc. v. Blaine County,* 98 Idaho 506, 514, 567 P.2d 1257, 1265 (1977). Requests for spot-zoning are generally made to alleviate situations of unnecessary hardship, and if such individual hardship exceptions were routinely granted, the result would be more nonconforming uses which would, in turn, require even more variances. 98 Idaho 506, 515, 567 P.2d 1257, 1266. Because of the very definition of spot zoning, Brewster cannot argue that the result here is *de facto* spot zoning because his property is zoned for uses in accordance with the original zoning ordinance.

B. Brewster's Due Process Rights Were Not Violated by the Site Visit and Transcript of the Site Visit.

Due process issues are generally questions of law and because zoning agency decisions are quasi-judicial, they are subject to due process restraints. *Neighbors for a Healthy Gold Fork v. Valley County,* 145 Idaho 121, ___, 176 P.3d 126, 132 (2007). The Idaho Supreme Court has held that in planning and zoning decisions, due process requires notice of the proceedings, a transcribable verbatim record of the proceedings, specific, written findings of fact, and an opportunity to present and rebut evidence. *Id.; Cowan v. Board of Comm'rs of Fremont County,* 143 Idaho 501, 510, 148 P.3d 1247, 1256 (2006). A transcribable record is indispensible to meaningful judicial review where the issues of notice, the opportunity to present and/or rebut evidence, and questions of

whether the findings of fact are supported by evidence may arise. *Gay v. County Comm'rs,* 103 Idaho 626, 651 P.2d 560 (Ct.App. 1982). But the "verbatim" requirement, that agency transcripts reflect proceedings word for word, is difficult because of the informal, quasi-judicial nature of these proceedings. *Rural Kootenai Organization, Inc. v. Board of Comm'rs,* 133 Idaho 833, 843-844, 993 P.2d 596 (1999). Brewster claims he was deprived of due process rights during the Board's site visit because the Board traveled in one vehicle with its legal counsel and one member of the planning staff, that they were uncertain as to where on the property they were and did not view the majority of the property, and that the audio tape of the visit contained approximately 80 inaudible references. Appellant's Brief, p. 18. Brewster further argues he had no meaningful opportunity to rebut the comments of the planning staff member, Mr. Mussman, that the land was unbuildable. *Id.,* p. 19. The Board argues in reply that Brewster has cited no case authority holding that a governing board must view all of a piece of property that is the subject of a land use application. Brief of Respondents, p. 15.

The Board also cites *Rural Kootenai Organization* for the proposition that a verbatim transcript is not a due process requirement. In *Rural Kootenai Organization,* although the transcribable record at issue in that case was replete with inaudible omissions, the court was still able to determine the basis upon which the planning commission made its recommendation and the Board made its decision from the entire transcript and record. 133 Idaho 833, 844, 993 P.2d 596, 607. Specifically, the Idaho Supreme Court stated that:

> [B]y virtue of careful sequential reading of all the transcripts, from page one of the first proceeding, together with a meticulous review of the minutes of all proceedings, it becomes clear to the reader in most instances the deletions

> were very brief and can be "decoded" either by context, reference to the minutes, reference to written statements of persons speaking, or reference to other documents in the agency record.

133 Idaho 833, 843-44, 993 P.2d 596, 606-07. Brewster asks this Court, despite case law to the contrary, to require the Board to create a verbatim word-for-word transcript of a site visit. In fact, *Rural Kootenai Organization* has done away with the requirement for a verbatim transcript in hearings, and that reasoning should certainly apply to site visits.

Brewster makes the argument that "…neither he nor his representatives were present inside the vehicle when the comments were made [by Musselman regarding the unbuildable nature of the land]." Appellant's Brief, p. 19. Brewster's counsel, at oral argument, acknowledged she was present at the site visit, but that she travelled there in her own car, not with the County Commissioners. As to the statements regarding whether the property was buildable, even Brewster himself states, "[n]oteworthy, is that 13 home sites, which could be allowed under the current zoning designation, would have to be 'clustered' with a conservation design subdivision, just as 33 would on this particular property given the topography of the site." Appellant's Brief, p. 17. Brewster's argument about the impropriety of Mr. Mussman's comments (that the land was unbuildable) is undercut by Brewster's own arguments later in his brief where Brewster acknowledges the problems in building on portions of his property.

Finally, the opportunity to be present at a site view provides opposing parties the opportunity to rebut facts derived from that visit which may bear on the ultimate decision. A view without proper notice to the interested parties by a board considering an appeal from a commission has been held to be a violation of due process. *Eacret v. Bonner County,* 139 Idaho 780, 786-787, 86 P.3d 494, 500-501 (2004). The record does not contain any evidence that the site view was not properly noticed, nor did

Brewster argue that his due process rights were violated via an improperly noticed visit.

C. Brewster's Due Process Rights Were Not Violated by *Ex Parte* Discussions by the Board.

Brewster states that during hearings on the land use, opponents referenced meetings that occurred outside the properly noticed proceedings with the Board. Appellant's Brief, p.19. Yet nowhere in this section of his brief does Brewster cite to any place in the record where opponents discussed such meetings that occurred earlier off the record. *Id.,* pp. 19-20. Brewster claims that the Board never disclosed these extraneous discussions and that his due process rights were violated because he never received any meaningful opportunity to know of or rebut these meetings. *Id.* The Board also correctly noted there is no evidence on the record that the Board had any *ex parte* communications. Brief of Respondents, p. 17. Further, Respondent argues that even where *ex parte* contacts are present, due process requires that they must be disclosed at the public hearing. *Id., citing Eacret,* 139 Idaho 780, 786, 86 P.3d 494, 500.

A local governing body sits in a quasi-judicial capacity when it applies general rules or policies to specific individuals, interests, or situations, and therefore must comply with due process requirements. *Cooper v. Board of County Comm'rs of Ada County,* 101 Idaho 407, 410, 614 P.2d 947, 950 (1980). Brewster has offered no evidence that *ex parte* communication did in fact occur; he states that "[i]t is difficult to ascertain whether the discussions applied to the pending case or to the concerns of the area residents generally." Appellant's Brief, at 19. In *Eacret,* the Court determined that a Commissioner's pre-hearing *ex parte* contacts with an applicant himself regarding the variance at issue revealed a lack of impartiality and denial of an opportunity for opponents to the variance to challenge or answer the *ex parte* evidence. *Eacret,* 139 Idaho 780, 787, 86 P.3d 494, 501. Here, Brewster was present at a public hearing

during reference by opponents to alleged *ex parte* communications; therefore, he had ample opportunity to challenge, answer, or rebut the same. And because the Board set forth its reasoning clearly in its Order containing seventeen findings of fact, addressing each goal of the Comprehensive Plan, providing four paragraphs of analysis and reaching the conclusion, Brewster has failed to demonstrate that the Board relied on any inappropriate *ex parte* communications.

When pressed at oral argument what it was that Brewster claimed was the inappropriate *ex parte* communication, Brewster's counsel claimed that it was an unnamed woman who had multiple prior meetings with two of the Kootenai County Commissioners about the Mica Flats fire protective district. An unnamed woman speaking with two commissioners at a prior time *about an entirely different subject* does not amount to *ex parte* communication about this subject, Brewster's proposed zone change.

D. The Board Did Not Base its Decision on Speculation and Matters Beyond the Scope of the Zone Change Ordinance Requirements.

Brewster argues that the Board considered matters beyond the scope of zone change ordinance requirements. Appellant's brief, p. 20. Brewster states that the Board's considering issues of water, septic, clustering of homes, and other specific development criteria have nothing to do with a zone change. *Id.* As mentioned above, the Board argues that whenever an application for a zone change requests an increase in density, the Board can consider and determine whether the requested increase in density would have an adverse effect on public health, safety, and general welfare along with whether such an increase would have a negative effect on the value and character of adjacent properties. Brief of Respondents, p. 12. The Court above noted that since much of the public input and opposition surrounded such topics, the Board

had no choice but to discuss such matters. But there is a much more practical reason the Board mentioned such issues. It was part of the Board's Comprehensive Plan Analysis, and there is certainly nothing improper with the Board keeping in mind its own Comprehensive Plan when making a zoning decision.

The Board in its Comprehensive Plan Analysis in Brewster's application, specifically stated:

> While the Board recognizes that environmental concerns would be addressed during developmental review, it nevertheless has concerns with respect to the potential effects of the requested zone change on the environment and quality of life in the Kidd Bay and Mica Flats neighborhoods, particularly having to do with the potential effects associated with development of the subject property at a density greater than that allowed under its current zoning.

Agency Record, p. 430, 4.04 Population, Goal 10. It is clear that the Board recognized that the matters it was considering would be addressed during a developmental review, but that it nevertheless reasoned that an increase in density, as was being requested here, would result in impact on the environment and the quality of life in the area. Brewster argues that he was required to present evidence not required by the ordinance, specifically requiring him to "engineer his water and septic systems, road and infrastructure systems, and housing designs at the time of his application for a zone change." Appellant's Brief, p. 22. There is nothing in the Board's decision that indicates that the Board expected Brewster to come in with fully engineered construction plans. Just the opposite, the Board notes: "This determination, however, is not to be construed as prejudicial to any subsequent application concerning the subject property." A.R. Vol. II, p. 433. The Board has set forth its concerns. If Brewster addresses those concerns (and it would be up to Brewster if that means engineered construction plans or something less if Brewster feels it would allay those concerns), then Brewster has been

given a road map by the Commissioners as to a future application. That is certainly still possible. But to claim on appeal that this Board's decision in his case is not supported by substantial competent evidence is simply not possible.

Brewster argues the criteria properly before the Board were whether the amendment was reasonably necessary, whether it was in the best interest of the public, and whether it was in accordance with the comprehensive plan. Appellant's Brief, p. 21. However, the Board did consider the very items Brewster states are beyond the scope pursuant to a "Comprehensive Plan Analysis." A.R. Vol. II, pp. 429 *et seq.*

F. Attorney's Fees.

Brewster states that he is entitled to attorney's fees in the event the Court finds him to be the prevailing party in this matter. Idaho Code § 12-117 states in relevant part that:

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

I.C. § 12-117. This section provides the exclusive basis of an award of attorney fees against a state agency. *State v. Hagerman Water Right Owners, Inc.,* 130 Idaho 718, 947 P.2d 391 (1997). Where a zoning board erroneously interpreted an ordinance because it had examined that ordinance and determined that a subdivision would be beneficial to the county, the Idaho Supreme Court held that the board acted in a way that fairly and reasonably addressed the issue and that the district court had not erred in

denying the plaintiff's request for attorney fees. *Payette River Property Owner's Ass'n v. Board of Comm'rs,* 132 Idaho 551, 976 P.2d 477 (1999).

Brewster argues that the Board's decision in this case was made without reasonable basis in fact or law. Appellant's Brief, p. 24. However, Brewster is not the prevailing party in this matter. Thus, no award of attorney's fees may be made.

IV. CONCLUSION AND ORDER.

IT IS HEREBY ORDERED, for the reasons set forth above, the Board's denial of the zoning change is AFFIRMED, the Brewster's Motion to Remand is DENIED, and Brewster's request for attorney fees is DENIED as Brewster is not the prevailing party.

Entered this 4th day of September, 2008.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of September, 2008, 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 #**
Erika B. Grubbs	(208) 556-0519	Patrick M. Braden	(208) 446-1621

_____
Jeanne Clausen, Deputy Clerk